PART V

Downloaded from www.waitangitribunal.govt.nz

TE UREWERA

PRE-PUBLICATION

PART V

WAI 894

WAITANGI TRIBUNAL REPORT 2014

National Library of New Zealand Cataloguing-in-Publication Data

A catalogue record for this book is available from the National Library of New Zealand

ISBN 978-0-908810-81-9

Published 2012 by the Waitangi Tribunal, Wellington, New Zealand

Printed by the Waitangi Tribunal, Wellington, New Zealand

16 15 14 13 12 5 4 3 2 1

Set in Adobe Minion Pro and Cronos Pro Opticals

Downloaded from www.waitangitribunal.govt.nz

CONTENTS

Preface ix

Letter of transmittal xi

Chapter 20: Waikaremoana: The Sea of Rippling Waters 1
20.1 Introduction 1
20.2 Issues for Tribunal determination 4
20.3 Key facts 4
20.4 The essence of the difference between the parties 18
20.4.1 What were the origins of the contest between Maori and the Crown over ownership of lakes? 18
20.4.2 What was the Crown's response to the Maori claims for legal ownership of the lake? 20
20.4.3 What were the effects of the Crown's denial of Maori ownership for 36 years? . . 21
20.4.4 Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954? 23
20.4.5 Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results? 23
(1) Claims about the fairness of the terms of the 1971 lease 24
(2) Claims in relation to the Lake Waikaremoana Act 1971 and the vesting of the lakebed in the Maori trust boards 25
20.4.6 What role have Maori played in the management of the lake after entering into the lease? 26
20.5 What were the origins of the contest between Maori and the Crown over ownership of lakes? 29
20.5.1 Introduction 30
20.5.2 Maori relationships with Lake Waikaremoana 30
20.5.3 The beginning of the Crown–Maori contest over Lake Waikaremoana 39
20.5.4 Maori attempts to reassert control over the lake: dialogue, 1903–05 44
20.5.5 The general contest between Maori and the Crown for ownership and control of lakes 49
20.5.6 Waikaremoana leaders go to Parliament to bring the lake into the UDNR 54
20.5.7 What was the consequence of Parliament's rejection of the petition? 57
20.6 What Was the Crown's response to the Maori claim for legal ownership of Lake Waikaremoana? 59

20.6.1 Introduction . . . 63
20.6.2 Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case? . . . 64
(1) Withholding the survey plan . . . 64
(2) What was the legal basis of the Crown's claim to own Lake Waikaremoana, and what was its strategy to secure that ownership? . . . 69
(3) The Crown's proposal for a special court . . . 75
(4) Why did the Crown not appear at the 1918 hearing to present its case? . . . 78
20.6.3 Why was the Crown's appeal not heard for 26 years? . . . 82
(1) The Crown's argument that there was no deliberate strategy to delay hearing of the appeal . . . 82
(2) What does the evidence show for the 1920s? . . . 85
(3) What does the evidence show for the 1930s? . . . 89
(4) What does the evidence show for the period 1940–44? . . . 95
(5) Our conclusions about who was responsible for the delays . . . 101
20.6.4 An 'entirely predictable' result? What is the significance of the Crown's loss in the Native Appellate Court in 1944? . . . 102
20.6.5 Why did the Crown refuse to accept the Appellate Court's decision, and wait another 10 years before finally accepting Maori ownership of the lake? . . . 113
20.7 What were the effects of the Crown's denial of Maori ownership for 36 years? . . . 127
20.7.1 Introduction . . . 127
20.7.2 The Crown continues to use the lake for tourism as if it were the legal owner . . . 128
20.7.3 The Crown's use of the lake for hydroelectricity . . . 130
20.7.4 What were the effects of the Crown's management of lake levels? . . . 136
(1) Natural lake levels, 1921–45 . . . 136
(2) Dynamic and dramatic fluctuations in lake levels, 1946–65 . . . 137
20.8 Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954? . . . 145
20.8.1 Introduction . . . 147
20.8.2 First serious engagement: negotiations with Peter Fraser in 1949 . . . 148
20.8.3 Re-engagement between the Crown and Maori, 1957–61 . . . 152
(1) Attempts to engage with Corbett and the Holland Government . . . 152
(2) Engagement between the Maori owners and the second Labour Government, 1958–60 . . . 158
(3) The culmination of these negotiations: the Maori owners reject the Crown's offer, 1961 . . . 176
20.8.4 Negotiations in deadlock, 1962–66 . . . 184
(1) More of the same: a 'new' offer in 1962 . . . 184
(2) Negotiations in deadlock, 1962–66 . . . 187
20.8.5 Negotiation of a settlement, 1967–70 . . . 197
(1) The deadlock is broken, November 1967 . . . 197

(2) The Government gets a special valuation, December 1967 – November 1968 201
20.8.6 Our conclusions as to why it took the Crown so long to negotiate an agreement with the owners of Lake Waikaremoana 209
20.9 Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results? 211
20.9.1 Introduction 214
20.9.2 The 1968 valuation 215
(1) The use of 'European ideas of property' to the exclusion of Maori values . 215
(2) The exclusion of hydroelectricity from the valuation. 216
(3) The possible under-valuing of the submerged bed. 218
(4) The exclusion of improvements from the Crown's purchase offer 220
(5) An unexpected consequence of the Government valuation: the first rates demand and the question of who would pay the rates 221
20.9.3 Negotiating the rent and the terms of the lease 221
20.9.4 A risk of unravelling: from agreement to legislation, May 1970 – December 1971. 228
(1) Who was responsible for the switch from a Waikaremoana board to tribal boards, and the vesting of legal ownership in those boards? 229
(2) A final opportunity for dissent: the Maori Affairs Select Committee's investigation, November 1971 241
(3) Would a Maori Land Court hearing have exposed that some owners (perhaps many) did not intend to divest themselves of their legal ownership as part of the lease agreement? 245
20.9.5 What adjustments have been made since 1971, and with what results? 259
(1) Lease variations 259
(2) Negotiations and agreement about hydroelectricity in the 1990s. 263
20.9.6 Our conclusions about the 1971 lease 268
20.10 What role have Maori played in the management of Lake Waikaremoana after entering into the lease? The claims of Nga Rauru o Nga Potiki and Ngati Ruapani 271
20.10.1 Introduction 274
20.10.2 Differing opinions among the claimants. 275
20.10.3 The management of lake levels. 277
(1) From sole management to dual management: the Electricity Department and the Te Urewera National Park Board, 1965 to 1980. 278
(2) Regulated management, 1981–86. 283
(3) New management and regulatory regimes 285
(4) Electricorp and the resource consents process 287
(5) What have been the effects for the claimants? 295
20.10.4 Pollution and contamination 298
(1) Exotic weeds. 300
(2) Pollution by sewage. 302

(3) Giardia 308
(4) What have been or could be the effects for the claimants? 309
20.10.5 Questions of authority 311
(1) Formal representation and co-management: a lost opportunity 312
(2) 'Working in' with park boards: how successful was this strategy for Maori influence on the management of Lake Waikaremoana? 313
(3) The Aniwaniwa model at Lake Waikaremoana: 'our relationship with DOC is getting better all the time, but of course there's still room for improvement' 318
(4) Managing Lake Waikaremoana for electricity: from NZED to Genesis 329
20.11 Treaty analysis and findings 334
20.11.1 An overview of the contest between Maori and the Crown over the lake 334
20.11.2 The contest between Maori and the Crown over ownership of lakes, and the Crown's reponse to the Maori claim for legal ownership of Lake Waikaremoana 337
(1) The Crown's failure to provide for a title that recognised tribal kaitiakitanga and tino rangatiratanga over the taonga, Lake Waikaremoana 337
(2) he contest for title to Lake Waikaremoana in the courts 340
20.11.3 The negotiation of the 1971 lease 345
20.11.4 Hydroelectricity 348
(1) The Crown's failure to pay for the use of Lake Waikaremoana for hydroelectricity 348
(2) The modification and control of Lake Waikaremoana for hydroelectricity 350
20.11.5 The validation of the lease by the Lake Waikaremoana Act 352
20.11.6 Management and governance of Lake Waikaremoana under the 1971 lease 352

Appendix: Maps 357
Location map 358
Lake Waikaremoana 359
Waikaremoana hydro scheme 360

PREFACE

This is part v of a pre-publication version of the *Te Urewera* report and constitutes chapter 20 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.

Downloaded from www.waitangitribunal.govt.nz

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

The Waitangi Tribunal
141 The Terrace
WELLINGTON

12 December 2014

Tena koe e te Minita hou e noho mai na i runga i tera taumata tikeitike, e mihi whakaiti ana matou ki a koe.

This is the fifth part of our report on Te Urewera claims, which is being released in pre-publication form. It deals with Treaty claims in respect of Lake Waikaremoana, lodged by Tuhoe, Ngati Ruapani, Ngati Kahungunu, Ngai Tamaterangi, and various associated groups and individuals. These important claims were the subject of extensive evidence and submission from both the Crown and the claimants, which required a lengthy response on our part in order to determine all the matters of alleged breach and prejudice.

Lake Waikaremoana is a taonga of immense importance to the claimant groups. They have an ancient connection with this lake, which their tradition says was created by their ancestress, Haumapuhia. Over generations they forged associations with every part of the lake and their histories have been recorded in names all along its shores and headlands and in long-remembered traditions. The waters of the lake are still used in rituals and for healing and it is an economic resource providing traditional food to them. In all these things, the iwi are kaitiaki of Waikaremoana, its guardians or custodians. They possessed the lake, exercising exclusive rights to it; they are thus also its owners. And they exercised tino rangatiratanga – full authority – over Waikaremoana at the time of the Treaty of Waitangi in 1840.

Today, they are still its owners and its kaitiaki, but their authority is a pale shadow of what it once was. In earlier parts of this report we found that the peoples of Waikaremoana suffered military invasion and destruction of their villages by Crown forces, displacement from their homes, and the loss by 1930 of nearly all their lands to the south and the north of the lake in circumstances that reflect no credit upon the Crown. They were reduced to a dire and lasting poverty. Despite these circumstances, and the limitations of the law – which recognised only individual title in the land beneath the waters of the lake, not tribal rights in a taonga waterway – they tried to protect their rights to the lake, and the lake itself.

But their dispute with the Crown would prove a long and difficult one. Those who were able to achieve recognition as owners by the Native Land Court had to endure contest by the Crown for no less than 41 years (1913 to 1954) before it would accept Maori ownership,

rather than its own. Certainly the Crown had the right to appeal the Native Land Court's decision in 1918, but not to procrastinate and delay the hearing of its appeal, as it did in the 1930s and early 1940s. Even after the Crown finally appeared in the Native Appellate Court in 1944 to prosecute its appeal against the decision of the Land Court, and lost its appeal, it would not concede Maori ownership, or embark on negotiations with the owners with any real commitment to reaching a solution. So for 17 more years iwi leaders had to contest with the Crown before an agreement could be reached in 1971, by which the Crown leased the lake from its Maori owners and began to pay for its use (but backdated only to 1967).

From that year on, the Crown has paid for the use of Lake Waikaremoana as the 'jewel in the crown' of the Te Urewera National Park (the legal status of which has changed recently). But for half a century after the Native Land Court first recognised Maori ownership of Lake Waikaremoana in 1918, the Crown used the lake without permission or payment, ignoring the authority of its tribal custodians. Further, the Crown has never paid for using this taonga to generate electricity, or for substantially damaging and modifying the taonga for that purpose. Nor did it provide the kaitiaki with an appropriate role in governance and management of their taonga when the lake was leased for the national park.

In this part of our report, we make findings of Treaty breach arising from the Crown–Maori contest over Lake Waikaremoana, which have resulted in prejudice to the claimants.

Our first finding of Treaty breach is that the Crown failed to provide for legal recognition of the people's relationship with their taonga the lake, through a community title specific to a taonga waterway, that is, a form of title that recognised their tribal kaitiakitanga and tino rangatiratanga. The Land Court, in accordance with the native land legislation, instead individualised title to the lakebed.

Our second finding of Treaty breach is that, in the 1930s and early 1940s, the Crown:

- negated the increasingly urgent attempts of the Maori owners and the Appellate Court to get it either to prosecute its appeal, or give it up; and
- unfairly discriminated between tribes when it accepted and settled other Maori lake claims (including Taupo and the Rotorua lakes) by negotiation in the 1920s yet persisted in its Waikaremoana appeal.

Justice delayed was justice denied; the Crown's delays effectively denied Maori access to the courts. The Crown in fact subverted the legal process. In the meantime, the Crown continued to use the lake as if it was the owner, and its actions were prejudicial to the mana, the tino rangatiratanga, and the economic well-being of the Maori owners.

Our third finding is that the Crown breached the Treaty when it acted in an unprincipled and unfair manner after the decision of the Maori Appellate Court went against it in 1944. The Crown continued to deny Maori ownership for a further 10 years yet failed to take the necessary action in the mainstream courts (from 1944 to 1947 and 1950 to 1954) that would

have settled the matter. It did so, in our view, because it was unlikely to win. Prime Minister and Minister of Maori Affairs Peter Fraser showed the way when he said in 1947 that the Government must accept the Appellate Court's decision and negotiate with the owners. Even so, he did not do this until 1949, and lost office before he could take matters very far. Overall, the Crown's conduct from 1944 to 1954 breached the standards of active protection and good faith required of a Treaty partner. The Maori owners of Lake Waikaremoana were prejudiced because the Crown prevented the Maori Land Court from completing their titles, and denied their mana, tino rangatiratanga, and their legal ownership of the lake. They were denied the rights of owners, including any economic benefit, while the Crown continued to control and use their property throughout this period without permission or payment.

We do accept the Crown's argument that – for the most part – no Treaty breaches arise from the negotiation of the 1971 lease. The Crown's conduct from 1967 to 1971 was generally honourable and Treaty-consistent. The owners' representatives, who had the benefit of legal advice, were fully consulted about the draft lease and the legislation, which they played a large part in shaping and improving. But there were two exceptions, which are the subject of our fourth and fifth findings.

Our fourth finding is that the Crown breached Treaty principles when it insisted that rents would be backdated only to 1967. This reversed its previous understanding with the owners that the Crown would pay for its past use of the lake, and was fundamentally unfair to them. In doing so, the Crown went beyond any reasonable or Treaty-consistent compromise, taking advantage of the uneven playing field on which the parties were negotiating to insist on the point. The claimants were prejudiced by the Crown's continued use of their property (from 1954 to 1967) without permission or payment.

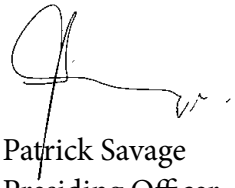
Our fifth finding is that the Crown acted inconsistently with the plain meaning of article 2 and the principle of active protection when it refused to include payment for use of the lake for hydroelectricity in the negotiations for the 1971 lease. The claimants had been seeking such a payment ever since negotiations opened in 1949, and – under the Treaty guarantee of their property rights and their full, exclusive, and undisturbed possession of their taonga – they were entitled to it. If the Crown had to interfere with those rights in the national interest, the least it should have done was to have paid for it. The claimants were prejudiced economically by the Crown's refusal to do so, and their mana and tino rangatiratanga were infringed.

Our sixth finding is that the Crown also breached the Treaty in 1946 when it modified and permanently lowered Lake Waikaremoana without consulting the kaitiaki or compensating them for the immense damage to their taonga. Prejudice to the claimants has been significant and long-term. Foreshore erosion is evident to this day.

Finally, our seventh finding is that the Crown failed to give effect to the principles of partnership and Maori autonomy in its governance and management arrangements for Lake Waikaremoana during its lease to the Crown for the national park. The claimants have been prejudiced by having to 'work in' with processes controlled by others, seeking to exercise some influence and not always succeeding. As a result, they have been unable to prevent such prejudicial effects as the pumping of untreated or partially treated sewage into their taonga. The situation has been mitigated to an extent since 1999 by the Aniwaniwa cooperative or consultative system of management, but it is under-funded, insecure, and limited to management in the field. And partnership mechanisms were not established to include Genesis or other bodies which make decisions about the lake. We found that the Ngati Ruapani, Nga Rauru o Nga Potiki, and Ngai Tamaterangi claimants have been prejudiced by these actions of the Crown.

The late Sir Rodney Gallen, who had a long association with Waikaremoana kaumatua, concluded his evidence to us with these words: 'The history of the relationship of the Crown to the people of Waikaremoana has been a sorry one for a very long time.' He expressed the hope that the Crown's 'partial and inadequate' attempt to provide redress in 1971 would not stand as its final act. We are of the same view.

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.

Downloaded from www.waitangitribunal.govt.nz

CHAPTER 20

WAIKAREMOANA: THE SEA OF RIPPLING WATERS

20.1 Introduction

Lake Waikaremoana is a taonga of immense importance to Tuhoe, Ngati Ruapani, and Ngati Kahungunu (including Ngai Tamaterangi) claimants. In their tradition, the lake was formed as their ancestress Haumapuhia struggled fiercely to escape the wrath of her father Maahu, whom she had offended. Transformed into a taniwha, she thrashed about as she tried to reach the ocean, agitating the waters. Because of this, according to one tradition, the name Waikaremoana – sea of rippling waters – was given. Over many generations, tribal histories and occupation have been recorded in long-remembered traditions and in names all along the shores of the lake, its streams and springs. The waters of the lake have been used in rituals and for healing. Its birds and eels and shellfish have provided food. And before the Crown's wars of the early 1860s spread across the North Island, the peoples of Waikaremoana lived at their lake in many pa and kainga.

Since 1840, as we have found earlier in this report, those peoples have had an often unhappy relationship with the Crown. The remoteness of their lake in steep hill country did not protect them. The Crown launched harsh and unjustified military operations into upper Wairoa and Waikaremoana between December 1865 and April 1866, and further unprovoked attacks followed at Waikaremoana towards the end of the Crown's war against Te Kooti (see chapters 5 and 6). In the wake of war, destruction of their villages, and disruption of their communities, Tuhoe, Ngati Ruapani, and Ngati Kahungunu lost the four southern blocks, which bordered the lake to the south-east, to the Crown by 1877. The large Waikaremoana block, north of the lake, was later acquired by the Crown in the course of its Urewera Consolidation Scheme. We have been very critical of the circumstances in which these lands both north and south of the lake were alienated from their owners (see chapters 7 and 14). By 1930 Waikaremoana peoples retained only 4.3 per cent of the land they had held in 1875, and those who remained were living in poverty. They were, by then, already facing a further drawn-out contest with the Crown over their lake, which is the subject of this chapter.

The ownership of Waikaremoana was the subject of a legal battle between these claimants and the Crown, one of the longest in New Zealand's legal history (from 1913 to 1954). While

the title was in dispute, the Crown used the lake as if it was a Crown possession, and in particular modified and used it for hydroelectricity. Once the claimants had finally obtained their legal title in 1954, there was another long contest before the Crown agreed to formalise its use of the lake in the national park in 1971 by means of a lease. Yet the contest did not end there. Some of the claimants in our inquiry argued that the Crown's management of the lake since that time has fallen far short of what was agreed in 1971. They believed that the Crown as lessee has degraded their taonga when the intention was to preserve the ancestral waters for all time in their natural state.

Thus, the claimants raised many grievances in our inquiry. They argued that the Crown as their Treaty partner should never have contested their title in the courts. Further, they maintained that the Crown should have accepted the decision of the Native Land Court in 1918 or – at the latest – the decision of the Native Appellate Court in 1944 that Maori, not the Crown, owned Lake Waikaremoana. The claimants also argued that the Crown should have agreed to lease the lake sooner, and that it should not have treated the lake as its own possession (right up to 1971) without permission or payment to the true owners. They castigated the Crown for lowering the lake and damaging their taonga in 1946, and for not paying them for the use of the water for electricity generation. The eventual lease in 1971, they added, was unfair because the Crown only backdated its payment to 1967 when it had been using the lake for much longer in violation of their rights.

Some claimants also criticised the Crown's actions after entering into the lease, arguing that the lake was not cared for in the appropriate way as part of the national park. In particular, they pointed to the ongoing harm of lowered lake levels, the alleged pollution of their taonga with human waste, and other ways in which they believed the Department of Conservation had failed as lessee. These particular claim issues were not supported by the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards. This highlights a division in the claimant community that is relevant to their claims, stemming in part from the decision in 1971 to transfer ownership of the leased lake from the individual owners named by the court to the tribal trust boards. Some claimants argued that the Crown was responsible for this transfer, and that it breached Treaty principles.

There was also some division between Tuhoe, Ngati Ruapani, and Ngati Kahungunu as to who has rights in the lake. In 1917, the Native Land Court found that 'each of the 3 contending parties has some ancestral rights to this region', and recognised all three in its award of title.[1] In our view, the evidence before this Tribunal shows that this aspect of the Native Land Court's decision was justified, and we accept that all three groups are entitled to bring claims about Waikaremoana against the Crown. Otherwise, their differences on this matter are not for us to consider because they do not concern actions of the Crown and are not the subject of claims before us.

1. Wairoa Native Land Court, Minute Book 29, 3 August 1917, fol 78 (Richard Renata Niania, brief of evidence, 22 November 2004 (doc 138), app 3, p 121)

In this chapter of our report, we have used the collective term 'Maori owners' to refer to these three groups, and also to the individuals (and their descendants) whose ownership was declared by the Land Court in 1918 and confirmed by the Appellate Court in the 1940s. From 1971–73 onwards, when the lakebed was transferred to the two trust boards, we use the collective term 'claimants' to reflect the fact that the modern grievances about the lake and its management belong to those claimant communities who chose to put them before us and not necessarily to its legal owners. In a very important sense, all the tribal beneficiaries of the trust boards shared in the ownership of the lake, but its ownership at law was vested in the boards.

The Crown made no concessions of Treaty breach in respect of the Lake Waikaremoana claims. In its view, it was entitled to appeal the Native Land Court's decision in 1918, which – at the time – the Crown simply considered was wrong. Further, while the Crown accepted a share of responsibility for the long delay before its appeal was heard, Crown counsel argued that the claimants bore some of the responsibility for the delay, and that no lasting prejudice was caused.

The Crown also maintained that the 1971 lease was fair and in accordance with Treaty principles, and that the Maori owners of the lake were not entitled to be paid for the use of water (whether for electricity or otherwise). This is because water cannot be owned, in the Crown's submission. Aside from electricity, therefore, the Crown understood the negotiated settlement of 1971 to have disposed of all outstanding issues about its past use of Lake Waikaremoana, including use of the lake for the national park. The owners had the benefit of legal advice during the negotiations and made an informed and reasonable compromise when they agreed that the rent would only be backdated to 1967. In respect of the vesting of the bed in the trust boards as a result of the Lake Waikaremoana Act 1971, the Crown's position was that Parliament simply gave effect to the owners' wishes as conveyed by their appointed representatives. The transfer of title was not the Crown's decision.

The Crown also denied that there have been any Treaty breaches or breaches of its responsibilities as lessee following the 1971 lease agreement. The Department of Conservation, in the Crown's view, has managed the lake appropriately as part of the national park. The Crown admitted that the main damage occurred to the lake in 1946, when it was permanently lowered for hydroelectricity purposes, but argued that the generation of power was necessary in the national interest, and that current effects are managed and mitigated under the Resource Management Act 1991.

Overall, the Crown considered that it has met its Treaty obligations to the claimants in respect of Lake Waikaremoana, especially as a result of its negotiation of a lease agreement that allowed them to retain ownership of their taonga and to secure a financial return, while the lake was cared for and shared with the nation in the national park. We will explore the Crown's position further below.

We turn next to set out the key issues raised by the Lake Waikaremoana claims, which are the subject of our analysis and findings in this chapter.

20.2 Issues for Tribunal Determination

In order to determine whether the claims about Lake Waikaremoana are well-founded, the Tribunal must consider the following issues:

- What were the origins of the contest between Maori and the Crown over ownership of lakes?
- What was the Crown's response to the Maori claims for legal ownership of Lake Waikaremoana?
- What were the effects of the Crown's denial of Maori ownership for 36 years?
- Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954?
- Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results?
- What role have Maori played in the management of the lake since entering into the lease?

We turn now to outline some of the key facts that underlie our later analysis of these issues.

20.3 Key Facts

In this section, we set out a timeline of key facts and events covering the period from 1896 to 2000, for the assistance of readers.

1896: Parliament enacted the Urewera District Native Reserve Act. The northern shores of Lake Waikaremoana formed the southern boundary of the reserve. The lake itself was left outside the Urewera District Native Reserve (UDNR).

1897: The first of many annual releases of trout ova into Lake Waikaremoana took place under acclimatisation society rules and regulations.

1898: The Government established an imported game reserve at Waikaremoana, which included the whole of the lake and part of the Waikaremoana block.

1903: The Tourist and Health Resorts Department opened Lake House, which (along with a Government launch and later a motor camp) began the Government's tourism enterprise at Lake Waikaremoana.

An order in council prohibited hunting of native as well as imported game in the Waikaremoana game reserve. A planned exemption for local Maori was removed at the last minute on the advice of the Department of Tourist and Health Resorts.

1904: The first serious investigation began of Lake Waikaremoana and the upper Waikaretaheke River catchment for hydroelectricity purposes. It was determined that there was 1420 feet of fall[2] in the space of four miles.

1905: Te Reneti Hawira met with the manager of Lake House and wrote to Native Minister Carroll, objecting to Pakeha fishing in the lake without permission, and stating that the Government did not own the lake. (This letter was preceded by an undated meeting between Carroll and Hori Wharerangi on the same issue.) The Minister rejected these representations, and refused further requests that the Government pay for its tourists' use of Lake Waikaremoana.

1912: The Court of Appeal delivered its decision in the Rotorua lakes case, *Tamihana Korokai v Solicitor-General*,[3] which found (in brief) that the Native Land Court had jurisdiction to hear Maori lake claims and determine whether Maori had title to lakebeds.

Waikaremoana leader Hurae Puketapu and 84 others petitioned Parliament to change the boundary of the UDNR and include Lake Waikaremoana inside the reserve.

1913: In response to Puketapu's petition, the Native Affairs Committee reported that Maori had not exhausted their legal remedy. Rawaho Winitana, Mei Erueti, and Matamua Whakamoe then filed a claim with the Native Land Court for ownership of Lake Waikaremoana.

1914: Ngati Kahungunu leaders filed a claim with the Native Land Court for ownership of Lake Waikaremoana.

1915: Maori applicants obtained a plan of the lake from the Survey Office and submitted it to the Native Land Court. The first hearing of the Lake Waikaremoana case was held in August, with Judge Jones presiding. There was no appearance from the Crown. The court sent the plan to the Survey Office after the hearing.

1916: The second Native Land Court hearing was held in August, with Judge Jones presiding. There was no appearance from the Crown. On the advice of the Crown Law Office, the plan of the lake was withheld before the hearing. Judge Jones decided to proceed regardless.

1917: On the advice of the Crown Law Office, the Government proposed a special sitting of all the judges of the Native Land Court to determine in principle whether Maori or the Crown owned the beds of navigable lakes. The Chief Judge agreed and scheduled a hearing for January 1918. In the meantime, the Native Land Court held its third

2. 'Fall' is the vertical drop which, in combination with the amount of water flow, determines the amount of power that can be generated.

3. *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321

Waikaremoana hearing in July and August, with Judge Gilfedder presiding. Although the Government again withheld the plan, the Court proceeded. At this hearing, the Court made an interlocutory decision as to which Maori applicants owned the lake and therefore should contest title with the Crown at the special sitting. In August the Court approved lists of individuals from Tuhoe, Ngati Ruapani, and Ngati Kahungunu as owners of Lake Waikaremoana.

Due to scheduling conflicts, the Chief Judge decided in November to cancel the special sitting. He advised judges that the lake cases would need to proceed in the usual way.

The Government surveyed Lake Waikaremoana for the purposes of establishing a hydroelectricity scheme. This was the first proposal from within government to drive a tunnel though the natural barrier of the lake (which was eventually carried out during the Kaitawa phase of the Waikaremoana scheme).

1918: The fourth and final Native Land Court hearing of the Lake Waikaremoana case took place in May and June, with Judge Gilfedder presiding. There was no appearance from the Crown. The Court finalised its orders on 6 June. Freehold orders were made in the names of 182 Tuhoe and Ngati Ruapani individuals (395 shares) and 92 Ngati Kahungunu individuals (132 shares), comprising 20 lists of owners. In some lists children or descendants of certain owners were explicitly included, but not individually listed. The Crown appealed the Court's decision on 28 June. Eleven other appeals were also filed against the decision, eight by Ngati Ruapani (seeking the removal of Ngati Kahungunu individuals from the lists) and three by Ngati Kahungunu.

The Government approved a long-term plan to develop a Waikaremoana power scheme, including control of lake levels by sealing leaks in the lakebed and using a tunnel through the lake's natural dam, but deferred it until after the construction of the Napier–Gisborne railway (see appendix for map of the scheme).

1920: With the support of the Government, the Wairoa Electric Power Board initiated a small, temporary power scheme at Tuai (completed in 1923).

1921: The Solicitor-General applied for the Crown's appeal to be heard before the Maori appeals, to which the other appellants agreed. The Native Appellate Court scheduled the Crown's appeal for hearing in August but the Government then sought an adjournment at Apirana Ngata's request, so as not to interrupt the Urewera Consolidation Scheme hui planned for that month (see chapter 14). In return, Ngata agreed that the appeal should not proceed in 1922–23, while the Attorney-General was overseas.

The Crown and Te Arawa negotiated a settlement of the Rotorua lakes claim, which was given effect by legislation the following year. Section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922 declared that the beds

and the right to use the waters of 14 Rotorua lakes were 'the property of the Crown, freed and discharged from the Native customary title, if any'. It also provided that the Governor could reserve to Te Arawa any portion of the lake bed or any part of the foreshore that was Crown land. Unalienated islands were reserved to Te Arawa. Te Arawa fishing rights in respect of indigenous fish were reserved to them, though such fish could not be sold. An annuity of £6000 was payable from 1 April 1924. Provision was made to establish the Arawa District Trust Board, to administer the annuity and any other funds held by it for the benefit of 'members of the Arawa Tribe or their descendants'.

1924: The Crown applied for its Waikaremoana appeal to be heard but could not proceed because the Maori owners were unable to get legal representation.

1925: The Crown applied for its Waikaremoana appeal to be heard but the Chief Judge was unable to arrange a fixture with a suitable number of Appellate Court judges.

1926: The Crown agreed to Ngata's request that no fixture be made until the Maori owners could get legal representation (their lawyer having just been appointed Chief Justice).

The Crown and Ngati Tuwharetoa negotiated a settlement of the Lake Taupo claim, which was given effect by section 14(1) of the Native Land Amendment and Native Land Claims Adjustment Act 1926. This section declared the beds of Lake Taupo and the Waikato River (from the lake mouth to Huka Falls), together with the right to use their respective waters, to be 'the property of the Crown, freed and discharged from the Native customary title (if any) or any other Native freehold title thereto'. Maori were guaranteed access to the lake and their fishing rights to indigenous species were reserved to them – though they could not sell their fish. The Act provided for the establishment of the Tuwharetoa Trust Board to administer the funds paid by the Crown in respect of Tuwharetoa's rights to the bed of the lake: that is, a £3000 annuity, and half of all revenue above this value derived from camping fees, licence fees, and fines levied for breaches of the fishing regulations.

Work began on the Tuai phase of the Waikaremoana power scheme, using the fall between Lake Kaitawa and the Whakamarino Flat (which was flooded to create an artificial lake, Lake Whakamarino). This part of the scheme was completed in 1929.

1929: The Native Land Court found in favour of the Maori applicants for the ownership of Lake Omapere in Northland. The Crown appealed this decision.

1932: Waipatu Winitana and Ngati Ruapani wrote to the Native Minister asking for information about the Lake Waikaremoana case and for 50 free fishing licences, because no compensation had been paid for the lake.

1934: The Native Appellate Court approached the Native Minister for the Crown to bring on its Waikaremoana appeal.

1935: The Crown Law Office sought a decision from the Government as to whether or not to proceed with the Waikaremoana appeal.

Five Maori leaders of 'the Wairoa district' wrote to the Prime Minister, asking that the Crown either prosecute its appeal or acknowledge their ownership of the lake.

The Public Works Department began excavating test tunnels and exploratory shafts near the lake for the Kaitawa (upper) phase of the Waikaremoana power scheme, but decided in 1936 to proceed with the Piripaua (lower) phase first.

1937: Prime Minister Michael Joseph Savage decided that a fixture for hearing the Crown's appeal should be sought, but none was applied for.

1938: Whena Matamua wrote to the Government, requesting information regarding the monies received by the Crown for fishing and other uses of the lake. The Government declined to send this information.

A petition from Ngati Ruapani asked the Government to confirm and 'make permanent' their title to the lake. The Government replied that it was considering whether or not to proceed with its appeal.

Work began on the Piripaua (lower) phase of the Waikaremoana power development scheme, using the fall between Lake Whakamarino and the lower courses of the Waikaretaheke River. This part of the scheme was completed in 1943.

1939: The Chief Judge approached the Government and proposed to schedule a hearing of its appeal in April. The Government replied that the Crown Law Office was unable to proceed due to other urgent state matters.

Waikaremoana leaders wrote to Apirana Ngata, asking for his help. The Prime Minister responded to Ngata that the appeal could not proceed because the Solicitor-General was too busy.

The Waikaremoana owners engaged a lawyer (M H Hampson), who asked the Crown to agree that its appeal should be struck out for non-prosecution. The Crown refused. Hampson died soon after and the Maori owners were again without counsel.

1941: The Government approved the construction of a tunnel at Lake Waikaremoana for the Kaitawa phase of the Waikaremoana power scheme. Work did not begin until 1943.

1943: The communities of owners held a large hui at Lake Waikaremoana and agreed to hire a new lawyer and to apply to the Native Appellate Court for the appeals to be heard. In response, the Prime Minister agreed to proceed with the Crown's appeal as soon as possible. The respective lawyers (Prendeville for the Crown and S A Wiren for the owners) agreed to proceed in October or November but a hearing was scheduled for March 1944, to proceed in tandem with the Whanganui River case.

An order in council was issued in May under the Public Works Act 1928, authorising works necessary for the use of Lake Waikaremoana for hydroelectricity. Work began on the Kaitawa (upper) phase of the Waikaremoana scheme, with construction

of the tunnel beginning in December. Tunnelling through the broken rock of the natural dam took almost four years. In the meantime, the Piripaua phase was completed in 1943 and the Piripaua power station was opened.

1944: The Crown sought an adjournment sine die but it was not granted. The Native Appellate Court heard the Crown's Waikaremoana appeal and dismissed it on 20 September. The Solicitor-General then advised the Lands and Survey Department not to release any Lake Waikaremoana plan to the Native Land Court, so as to prevent the finalising of freehold orders. In the meantime, Supreme Court proceedings were planned by the Crown Law Office but not initiated. The Crown had 10 years in which to challenge the Native Appellate Court's decision under section 51(1) of the Native Land Act 1931, which provided: 'No order made with respect to Native land by the Court or the Appellate Court shall, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than ten years after the date of the order.'

1946: The Government installed temporary siphons over the top of the natural dam at Te Wharawhara Bay to increase the supply of water to the Tuai and Piripaua stations. Using these siphons, Lake Waikaremoana was lowered for the first time in what would turn out to be a permanent lowering of lake levels for the purpose of electricity generation.

Ten of the 11 Maori appeals were heard (all but one of the original appellants were dead by this time).

1947: The Government began construction of the tunnel intake on the lakebed at Te Kowhai Bay. The Government also extended the temporary siphons to a greater depth.

Prime Minister Peter Fraser resolved that the Crown should purchase Lake Waikaremoana as soon as the Maori appeals were settled, but this was not acted upon.

The Native Appellate Court heard the eleventh Maori appeal (that sought to have any Tuhoe owners without Ruapani ancestry removed from the lists). This appeal was allowed and seven owners were removed. The Ngati Ruapani appeals were dismissed. Four Ngati Kahungunu names were added to the lists of owners.

Overall, the Native Appellate Court's changes increased the number of lists of owners from 20 to 22, although only four names were actually added.

1948: Construction of the tunnel intake was completed, the Kaitawa power station was opened, and the Government began constructing a sealing blanket to seal the natural leaks in the lakebed. When the sealing blanket was finished (which took until 1955), the Government's 1918 plan for the Waikaremoana power scheme was completed.

1949: The Maori owners approached Prime Minister Fraser, seeking an arrangement with the Government in connection with the future use of the lake for hydroelectricity,

fishing, and tourism. They wanted a tribal annuity in return for the use of their lake. Although Fraser met with delegations of owners and told them that he was not in favour of further litigation, there were difficulties in reaching agreement about the lake's value and the question of an outright sale. Not much progress had been made when a change of government at the end of the year brought the negotiations to an end.

The Supreme Court decision in the Whanganui River case *The King v Morison*[4] found that the Court did not need to decide the effect of riparian titles on the ownership of the riverbed, because the Crown had acquired all navigable riverbeds through the Coal-mines Act Amendment Act 1903. To avoid the costs of appeals to the Court of Appeal and Privy Council, the Crown and Whanganui tribes agreed to the appointment of a special commission of inquiry into the title of the bed of the Whanganui River.

1950: The new National Government decided not to continue Fraser's negotiations but instead to await the outcome of the Whanganui River commission of inquiry. In the meantime, the Maori Land Court asked the chief surveyor at Gisborne for the compiled plan of Lake Waikaremoana so that it could complete the freehold titles. At that point, the Government decided to take action in the Supreme Court to quash the Native Appellate Court's 1944 decision. The Department of Lands and Survey withheld the compiled plan from the Maori Land Court. But no actual proceedings were initiated in the Supreme Court (probably because the Whanganui River commission's findings were unfavourable to the Crown's case).

1951: Special legislation referred the Whanganui River case to the Court of Appeal.

1952: The Government began work on building permanent siphons to replace its temporary ones (which was completed in 1955). Three four-foot diameter pipes were installed over the top of the natural dam at Te Wharawhara, extending 100 metres under water from the lake shore.

1953: In February, the Solicitor-General advised the Government that the Crown's ability to seek writs in the Supreme Court would expire on 20 September 1954. The Government decided to await the outcome of the Whanganui River case in the Court of Appeal before making a decision whether or not to proceed. In October, it withdrew its appeal of the Native Land Court's Lake Omapere decision.

1954: The Court of Appeal's decision in the Whanganui River case was issued in July. In September, the Maori Affairs Department advised its Minister that the practical effects of allowing Maori 'to retain the benefit of their declared ownership of the bed' of Lake Waikaremoana 'might not be so very great'. Cabinet then decided on 13 September that no action would be taken in the Supreme Court. In October, the

4. *The King v Morison and Another* [1950] NZLR 247

Government lifted its ban on supplying the Maori Land Court with the plan so that the title could be completed for registration, which duly happened.

1957: Maori leaders approached the Government, seeking an annuity of £4500 for past and present use of Lake Waikaremoana, to be paid to a Waikaremoana Maori Trust Board. Government departments then debated how much should be paid and on what basis – in particular, whether the Crown still considered that it needed to own the bed of the lake. In the meantime, the Holland Government was defeated in the November general election, replaced by the second Labour Government under Walter Nash, who became Prime Minister and Minister of Maori Affairs.

1958: Officials advised ministers that the Government did not need to buy the lakebed for either electricity or national park purposes, and that no compensation was owed for past use of (or damage to) Lake Waikaremoana. The Maori owners, on the other hand, approached Eruera Tirikatene and Nash, seeking the Crown's agreement to an arrangement for its use of the lake. A petition on behalf of Ngati Ruapani, Tuhoe, and Ngati Kahungunu was sent to the Prime Minister in May. In response, officials calculated that fishing revenues would only justify an annuity of £500.

1959: Nash advised the Maori owners that the Government was having difficulty finding a basis for negotiation, and had not yet decided whether to purchase the lake. Behind the scenes, Nash insisted that officials come up with a Crown offer of 'compensation'. Still convinced that the Government did not really need to own the lake, Lands and Survey agreed with Treasury that a lump sum offer of £10,000 could be made. In the meantime, Nash met with a delegation of owners, who requested an annuity of £5000 or a lump sum of £100,000, to be administered by a Maori trust board. These figures included payment for past use of the lake. The Prime Minister responded that this was not reasonable and the Maori Land Court might have to be asked to determine a fair compensation. Nash then sent officials back to the drawing board to come up with a higher counter-offer than £10,000. Lands and Survey proposed a lump sum of £25,000, partly because there was a new appreciation that lowering Lake Waikaremoana had created a permanent ring of dry Maori-owned land around the lake. This was now believed to pose a significant problem for the national park authorities, in that users accessing the lake or building amenities on its shores could be liable for trespass. Nash met with the owners again in December but advised that the Crown did not yet have an answer for them. He invited representatives to meet him in Wellington in February 1960.

1960: No further meetings took place between the Government and the Maori owners, for reasons that are unclear. The Labour Government lost office in the November general election, replaced by Keith Holyoake's National Government.

1961: Lands and Survey advised the new Government that it was important for the Crown to purchase the bed of Lake Waikaremoana for the national park. It recommended purchase at £25,000, including a payment for past use dating back to 1947. Cabinet agreed after a further approach from a delegation of Maori owners, led by Sir Turi Carroll. In July, the Minister of Maori Affairs, Ralph Hanan, offered a £25,000 lump sum for the purchase of the lakebed, the islands in the lake, and Ngati Ruapani's Waikaremoana block reserves. This was explained to the owners as £10,000 (capitalising fishing revenues) plus £2000 (for the islands and reserves) plus £13,000 for past use. A hui of the Maori owners rejected this offer in August. They were adamant that they would not sell their reserves but did reduce their requested annuity to £3250 (representing a capital value of £65,000).

1962: The Government rejected the Maori owners' counter-offer, although it did accept that the reserves could not be purchased as part of an arrangement for the lake. Instead, it increased its lump sum offer to £28,000, confined to the lake and its islands. In May, Wiren met with Hanan and said that he was prepared to advise the owners to compromise at an annuity of £2500 a year, but any lower would make it not worthwhile establishing a trust board. The owners rejected the Government's offer in June, insisting on an annual payment to a trust board (preferably by a lease) at a higher capital value. In response, the Government refused to change its offer but left it open, also rejecting officials' proposals that it should acquire the lake by compulsion.

1963: The owners' lawyer, S A Wiren, met with the Minister of Maori Affairs for further discussions but no progress was made. Hanan insisted that the only basis on which the Government would consider an annuity would be at 5 per cent of its offer of £28,000, and for a finite period. The owners were not prepared to make a counter-offer for an annuity on these terms.

1964: The Te Urewera National Park Board and the National Parks Authority pressed the Government to purchase the lake and reserves as soon as possible.

1965: The Government reopened negotiations with the Maori owners, requesting a counter-offer to its 1962 proposal (a lump sum of £28,000). The owners refused, awaiting a shift in the Crown's opposition to an annual payment. The Lands and Survey Department was willing to move on this point, proposing a new offer of either a lump sum of £30,000 or an annity of £1500. Treasury agreed that an annuity could be paid as a last resort.

Completion of the national grid brought drastic draw-downs of Lake Waikaremoana to an end and enabled the Government to maintain the lake within a more stable regime of lake levels from then on.

1966: The Maori Affairs Department proposed that the Board of Maori Affairs summon a meeting of assembled owners to consider a Crown purchase offer for £30,000. The

board approved the proposal, which held a £1500 annuity in reserve as a concession if the owners insisted on an annual payment. Also, the Government was prepared to agree that the owners could invest the lump sum for administration by a trust board, and to go up to £35,000 on the day if necessary. Opposition members of Parliament attended the meeting of owners in November and advised that the Government's offer was far too low: the lake was worth six figures. It soon emerged at the meeting that the owners would not accept less than £60,000 to £80,000, and that they were determined to maintain an ongoing connection to their lake. They formally rejected the Government's offer and appointed a committee to negotiate.

1967: The committee of owners sought help from the member for Southern Maori, Whetu Tirikatene-Sullivan, who facilitated a meeting in November with the new Minister of Lands, Duncan MacIntyre, and senior officials. The deputation put the owners' proposal of how to break the deadlock in negotiations: a special commission of inquiry, consisting of Crown and owner representatives with a judge as chair, should set the value of 'compensation' for the lake. MacIntyre agreed to a special tribunal, although not necessarily to that composition of it, and suggested a special Government Valuation as a starting point. Officials then met with the Valuer-General in December to establish parameters for the special Government Valuation.

1968: As part of the preparations for the special valuation, legal advice was obtained that Maori owned the lake water but that the value of its use for hydroelectricity should not be included in the valuation. When the Government formally commissioned the valuation, it specified (among other things) that it should not include any value in the use of water for electricity. The valuation was delayed, partly because of the need to survey and define the legal limits of the (now dry) lake shore. The pre-1946 mean annual maximum of 2020 feet was taken as the limit of the Maori owners' property. The valuation was then completed in October. It gave the value of Lake Waikaremoana as $147,000, consisting of $73,000 for the marketable exposed lakebed, $70,000 for the submerged bed, and $4000 for buildings and improvements on the bed. The Lands and Survey Department recommended that the Government should now offer the special Government Valuation as a lump sum price, or as instalments over 10 years (with interest), or as the basis of an annuity, or as the basis for rental in a perpetual lease. These options were put to Cabinet through MacIntyre as Minister of Lands.

1969: Cabinet authorised MacIntyre to buy Lake Waikaremoana for $143,000 (excluding the value of improvements), with capacity to go up by 15 per cent if necessary. The payment would be spread over 10 years with interest at 5 per cent. A meeting of assembled owners took place on 26 September to consider this offer. Senior officials told the owners that the Crown's intention was to preserve the lake as part of the

national park for all time. The owners voted to reject the Government's offer in favour of a lease for 50 years with a perpetual right of renewal, backdated to 1957, with rent reviews every 10 years and a rental at 6 per cent of Government Valuation. They also elected a committee to negotiate terms with the Government. The owners' proposal was referred to MacIntyre, who agreed to the idea of a perpetual lease – but not necessarily on the terms offered. In December, Cabinet approved his recommendation that the Government should negotiate a perpetual lease, backdated to 1967 and with rentals fixed at 5 per cent of Government Valuation (to be reviewed every 10 years). Cabinet also authorised a compromise on the rent (to go up to 5.5 per cent), and approved validating any lease by special legislation.

1970: Senior officials met with the committee of owners in May to negotiate the terms of a lease. They agreed that the rental would be set at 5.5 per cent, backdated only to 1967, and that the Crown would pay the rent to a special trust board (the 'May Agreement').

The New Zealand Electricity Department, the Te Urewera National Park Board, and the Nature Conservation Council negotiated a 'Gentleman's Agreement' that Lake Waikaremoana would be kept between 1994 and 2004 feet. If it rose to 2006 feet, discharge of water was mandatory.

1971: The Health Department threatened to close Lake House because it was discharging raw sewage into Lake Waikaremoana. A pumping station to a soaking area was the proposed remedy but it was not built.

The May 1970 agreement between the Crown and the owners' committee resulted first in a lease (signed by MacIntyre and the owners' committee in August) and then in validating legislation (the Lake Waikaremoana Act 1971) in December. The facts as to how the terms of the lease and Act were developed and agreed are disputed by the parties and will be discussed in section 20.9. Here, we summarise the terms of the lease and the Act.

The Lake Waikaremoana lease, 21 August 1971: The Crown leased the lake (including the islands, except for Patekaha) for national park purposes for a period of 50 years (with a perpetual right of renewal). Rent was set at 5.5 per cent of $143,000, backdated to 1 July 1967. The rent would be reviewed every 10 years. If the lessor and lessee could not agree on a new rental value, it would be decided by arbitration. The lessor and the owners of the Waikaremoana reserves were guaranteed access to the lake waters and to the Wairoa–Rotorua road. The lease was to have no effect until validated by legislation, and the rent would be paid to the Maori Trustee until legislation directed otherwise.

The Lake Waikaremoana Act 1971: the Act validated the lease but its terms were particularly controversial in our inquiry (for a summary, see box).

The Lake Waikaremoana Act 1971

Long title: 'An Act to validate the lease to the Crown of Lake Waikaremoana, and to provide for the administration of the rental therefrom by certain Maori Trust Boards'.

Section 3: The lease was declared 'a valid and effectual lease . . . as if it had been granted in due form by the Maori Trustee pursuant to a duly confirmed resolution of a meeting of assembled owners under Part 23 of the Maori Affairs Act 1953'. Any extension or variation of the lease was to be effected in the manner specified by section 116 of the Land Transfer Act 1952.

Section 4: The District Land Registrar was authorised and directed to register the lease under the Land Transfer Act, even though its form did not conform to the requirements of that Act.

Section 5: The Tuhoe Maori Trust Board was renamed the Tuhoe-Waikaremoana Maori Trust Board.

Section 6: The Wairoa Maori Trust Board was renamed the Wairoa-Waikaremoana Maori Trust Board.

Section 7: Of the 22 lists of owners approved by the Native Land Court, 14 were declared to be Ngati Kahungunu lists, and 8 were declared to be Tuhoe lists.

Section 8: As soon as practicable after the passage of the Act, a list of the owners of Lake Waikaremoana would be displayed at the Gisborne, Rotorua, Wairoa, and Whakatane Maori Affairs offices, and the Tuai and Ruatahuna post offices. The list would be divided into two 'portions': those whose interests were derived from the original Ngati Kahungunu lists; and those whose interests were derived from the original Tuhoe lists.

Section 9: Any person named in the list had six months to write to the Registrar from the date of its publication, requiring that his or her name be moved from one 'portion' to the other. After the six-month period, the Registrar would compile and certify an amended list.

Section 10: The persons named in the Ngati Kahungunu portion of the list would become beneficiaries of the Wairoa Waikaremoana Maori Trust Board, along with their descendants.

Section 11: The persons named in the Tuhoe portion of the list would become beneficiaries of the Tuhoe Waikaremoana Maori Trust Board, along with their descendants.

Section 12: Pending provision by regulations under the Maori Trust Boards Act, the Governor-General could appoint three additional members to each of the boards to represent the additional beneficiaries.

Section 13: After compiling the final list of owners, the Registrar would calculate the aggregate share of each of the two groups of owners. The Registrar would then make an order vesting Lake Waikaremoana in the two trust boards for 'an estate of freehold in fee simple' as tenants in common, according to their shares. The order would have effect as if it were an order of the Maori Land Court. The District Land Registrar was authorised and directed to register it under the Land Transfer Act.

Section 14: The rent would be paid to the two boards in accordance with their respective shares in the lake. The rent would constitute an asset of the boards for the purposes of section 24 of the Maori Trust Boards Act. Until the boards' shares were determined, the rent would continue to be paid to the Maori Trustee.

1972: The Registrar completed the work of dividing the owners between the two trust boards and vested the lakebed in the boards as tenants in common, with 148,000 shares in the Wairoa Waikaremoana Maori Trust Board and 387,000 shares in the Tuhoe Waikaremoana Maori Trust Board.

Lake House was closed but the government-run motor camp continued to discharge effluent into Lake Waikaremoana. John Rangihau proposed a Maori tourism development to replace Lake House but this was ultimately rejected.

1977: After the 10-yearly rent review, the rental value was increased to $430,000, with the new rent set at $23,650 per annum.

1979: The Government's proposal to carry out additional sealing of leaks in the lakebed resulted in widespread opposition, including from local Maori. It also resulted in an application by the Te Urewera National Park Board to the Hawke's Bay Catchment Board to regulate the levels of Lake Waikaremoana.

Construction began on a new sewerage system for the Government's motor camp (completed in 1980).

1980: The catchment board's special tribunal altered the 'Gentleman's Agreement': the Ministry of Energy was required to operate within limits of 1992 and 2002 feet, with mandatory discharge at 2004 feet.

1981: The Te Urewera National Park Board was replaced by the East Coast National Parks and Reserves Board. The Lands and Survey Department became the manager of the national park and the leased lake.

1986: The Hawke's Bay Catchment Board reset the management regime for lake levels at 1994 and 2004 feet.

1987: The Conservation Act 1987 was enacted: the Department of Conservation (DOC) would replace Lands and Survey as manager of the national park and Lake Waikaremoana.

The Electricity Division of the Ministry of Energy became a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).

1988: The second 10-yearly rent review set the lake's rental value at $1,412,180, with the rent set at $77,669 per annum, backdated to 1 July 1987.

The Crown's Waikaremoana power scheme was transferred to ECNZ.

1993: The Crown sought an easement for its structures (and access to them) on the Maori-owned lakebed, to clarify ECNZ's position and the legality of what was transferred to ECNZ in 1988.

1994: DOC staff worked with the Waikaremoana Maori Komiti and a Ruatahuna committee to establish the Aniwaniwa model of consultative 'joint' management for the southern part of the national park, including Lake Waikaremoana.

1995: The two Maori trust boards began proceedings in the Maori Land Court, claiming that the Crown was in breach of the 1971 lease by allowing the hydroelectricity structures to be on the bed of the lake, and allowing ECNZ to trespass on the lake. These proceedings resulted in a mediation, which began in December (completed in 1997).

ECNZ established a Working Party to carry out the necessary consultation and negotiations for obtaining RMA resource consents for its Waikaremoana power scheme.

1996: The trust boards began negotiations with ECNZ for an arrangement over easements and use of the lake for hydroelectricity.

Government plans to split up ECNZ and privatise the Waikaremoana power stations were put on hold as a result of the coalition agreement with New Zealand First.

1997: The Crown and the trust boards signed a variation of the lease, specifying that the Crown could not sub-lease for electricity purposes.

1998: The Government resumed plans to privatise the Waikaremoana power stations. The two trust boards formed a consortium to bid for these stations.

The trust boards and ECNZ reached an agreement in principle: the trust boards would grant a 100-year easement to ECNZ in relation to the structures on the lake in return for a licensing regime (involving undisclosed fees).

Nga Tamariki o Te Kohu occupied lakeside land, arguing that they were re-entering the lease because DOC had mismanaged the lake and was in violation of the lease. After discussions with the Government, Nga Tamariki o Te Kohu agreed to give up the occupation in return for a special ministerial inquiry into their grievances about DOC's management of the lake and the Crown's conduct as lessee. The Ministers of the Environment and Maori Affairs appointed the Maori Trustee, John Paki, and a solicitor, J K Guthrie, to hold the inquiry, which delivered its report in August.

The Hawke's Bay Regional Council granted ECNZ 41 resource consents to operate the Waikaremoana power scheme, subject to numerous conditions, for a period of 35 years.

The third 10-yearly rent review increased the rental value to $2,251,000, with an annual rent of $123,805, backdated to 1 July 1997.

1999: ECNZ and the trust boards signed a deed establishing a licensing regime for Lake Waikaremoana, the substance of which has been kept confidential.

The Government sold Contact Energy and split ECNZ into three State-owned enterprises: Genesis, Meridian, and Mighty River Power.

2000: The new, Labour-led Government cancelled the plan to privatise the Waikaremoana power stations and transferred them to Genesis Energy.

20.4 The Essence of the Difference between the Parties

In this section, we summarise the key differences between the parties' arguments. Those arguments will be explained in greater detail in the later analysis sections; here, we convey the essence of the dispute between the claimants and the Crown.

20.4.1 What were the origins of the contest between Maori and the Crown over ownership of lakes?

The claimants stated that New Zealand 'does not provide a system of recognition of ownership to water'. But 'Urewera Maori, including Ruapani, have rights akin to ownership in the Waikaremoana water system'. The Crown's failure to 'recognise and preserve to Maori the ownership of their water' is an alleged Treaty breach.[5] The claimants maintained that they have 'property rights in the water', which they said have been recognised in law, and that the Crown neither acknowledged those rights nor paid for the use of their water.[6] Claimant counsel stressed the legal opinion (obtained in the 1960s as part of the valuation exercise) that Maori owned the water as well as the bed of Lake Waikaremoana.[7] Counsel for the Wai 144 Ngati Ruapani claimants submitted: 'Ruapani argue that their rights to the water, if rendered in terms of property law, ought to be ownership'. In particular, Ngati Ruapani relied on the findings of the Waitangi Tribunal about ownership of water in its *Te Ika Whenua Rivers Report*.[8]

The claimants also argued that the Crown 'was opposed to any suggestion of a Maori title to the beds of large navigable lakes', including Taupo, Rotorua, Waikaremoana, and Wairarapa.[9] Rather, the Crown believed that it should be 'the owner of all lakes in New Zealand'.[10] This somewhat 'nebulous (even subconscious) imperative' drove all Crown offi-

5. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68
6. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146
7. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 129
8. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68
9. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 37
10. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 37

cials, the claimants asserted, despite there being no support for it in English common law. Counsel for the Wai 945 Ngati Ruapani claimants pointed to *Halsbury's Laws of England*, which stated that the 'soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown.'[11]

In general, the claimants argued, the Crown's motivation was to prevent Maori obtaining freehold titles to lakes, so as to protect settler interests of fishing, navigation, and other uses of lakes.[12] In the more particular case of Lake Waikaremoana, the immediate cause of the contest between the Crown and Maori was the Government's establishment of Lake House, its stocking of the lake with trout, and the establishment of a tourist recreational fishery; these were the 'catalyst' for the long-running legal contest that ensued over the ownership of Lake Waikaremoana. But the claimants also argued that the Government's interest in the lake for hydroelectricity was an important factor behind the scenes.[13]

Crown counsel did not address the origins of the contest in New Zealand for ownership of lakes, except to make the general point that the Crown 'assumed' it owned the lakebed, and there was nothing 'improper for it to have contested the important issue of title to the lake.'[14] The Crown relied on *Halsbury's Laws of England* to argue that riparian owners have certain incidental rights but flowing water 'is not, at common law, the subject of property or capable of being granted to anybody'.[15] Water, counsel said, 'is unowned at common law', and '[t]he owners of the Waikaremoana lakebed have no special rights to the waters of the lake.'[16] Because of this, 'there is no corresponding duty on the Crown to protect that right.'[17] On the specific origins of the contest over Lake Waikaremoana, the Crown did not accept that the establishment of Lake House and tourist fishing resulted in conflict or Maori opposition, although it noted a sharp divergence of views at the time between the Minister and Maori leaders over whether the use of the lake in these ways was appropriate.[18] The Crown 'considered in good faith that title to the lakebed did not reside with tangata whenua'; in hindsight, it should have consulted the lake's owners first before introducing tourism and making use of the lake.[19]

11. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 37
12. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 37
13. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 40–41
14. Crown counsel, closing submissions (doc N20), topic 28, pp 5–6
15. Crown counsel, closing submissions (doc N20), topic 28, p 25
16. Crown counsel, closing submissions (doc N 20), topic 28, pp 3, 25
17. Crown counsel, closing submissions (doc N20), topic 28, p 26
18. Crown counsel, closing submissions (doc N20), topic 28, pp 19–20
19. Crown counsel, closing submissions (doc N20), topic 28, p 20

20.4.2 What was the Crown's response to the Maori claims for legal ownership of the lake?

According to the claimants, article 2 of the Treaty required the Crown actively to protect Maori property rights and taonga, but the Crown – in breach of the Treaty – has instead denied, opposed, and sought to defeat their legal ownership of Lake Waikaremoana.

In brief, the claimants argued that the Crown should never have opposed their claim in the Native Land Court in the first place: 'In terms of the Treaty, the Crown should not have been an active ligitant attempting to defeat Maori title to the lake.'[20] The Rotorua case *Tamihana Korokai* settled the law for New Zealand in 1912: the Native Land Court had jurisdiction to decide Maori lake claims, and the law should then have been left to take its course in the case of Lake Waikaremoana. Instead, the Crown continued to oppose the Native Land Court hearing lake claims or granting freehold title to lakes.[21]

Having decided to oppose Maori title in the Native Land Court, the Crown then showed bad faith by trying to thwart and impede the hearing,[22] and by appealing the Court's decision without having appeared and argued its case.[23] At the very least, the Treaty required the Crown to accept the Court's decision in 1918 instead of continuing to oppose Maori ownership for several decades.[24] The claimants also argued that the Crown was fighting a losing battle, which it insisted on fighting long after 'the point was settled in favour of Maori both in the ordinary courts and in the Maori Land Court'.[25] The Crown's Waikaremoana appeal obviously 'lacked substantive merit' by the time it was heard in 1944.[26] Further, from 1924, when the Crown recognised Te Arawa's title to lakes (or the need to extinguish that title), the Crown had 'no business attempting to assert a title to the lake when, at law, it knew that it had not acquired title [as it had at Rotorua] and that therefore the title must have remained Maori customary title, in respect of which only Maori could claim ownership.'[27]

In the claimants' view, there are also serious Treaty issues about the long, 26-year delay in hearing the Crown's appeal ('surely a New Zealand record'[28]). In their submission, the delay was mainly the result of the Crown's vacillation, mismanagement, and its reluctance to have the appeal heard. At times, the Crown actively resisted prosecuting its appeal.[29] This unconscionable delay was then exacerbated by the Crown's refusal to accept the Native Appellate Court's decision for a further 10 years (until 1954), while it contemplated proceedings in the

20. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 68–69
21. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 37–40
22. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 41–42
23. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119, 130–131
24. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 37–40, 46–48
25. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 39, pp 37–40, 46–48
26. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 47
27. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 68
28. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 68
29. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 169–171, 176; counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 42–45, 47, 49; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145

Supreme Court to quash the decision. This additional delay and denial of title was in itself a Treaty breach. In the claimants' submission, the appropriate time for that kind of judicial review had been back in 1918, when the Native Land Court first exercised its jurisdiction.[30] 'Justice delayed', said the claimants, 'is justice denied'.[31] In their view, they had been denied due process and a path to establish their legal rights for decades, in violation of the Treaty, Magna Carta, and the rights of British subjects.[32]

Crown counsel, on the other hand, argued that the Crown was entitled to contest such an important issue as the ownership of Lake Waikaremoana in the courts, including by way of appealing the Native Land Court's 1918 decision. Crown counsel accepted that some of the delays in hearing the appeal could be attributed to the Crown, but maintained that there was no bad faith or deliberate policy of delay. Some of the postponements were to accommodate the claimants when they were unable to proceed. Between 1918 and 1944, the Crown honestly 'considered that it would overturn the title to the Waikaremoana lakebed granted by the Native Land Court'. Until 1954, when any further appeal was abandoned, the Crown assumed that it owned the lake. This assumption did not change, we were told, until after the Crown's abandonment of any possibility of further litigation.[33]

20.4.3 What were the effects of the Crown's denial of Maori ownership for 36 years?

According to the Crown, there were virtually no consequences from its long denial that Maori owned Lake Waikaremoana. Ultimately, it did not prevent Maori from obtaining legal ownership of the lake; in other words, Maori won. Further, the Crown argued that its activities 'on the lake, and therefore on Maori land' – stocking the lake with fish and running a tourism enterprise (including boating) – caused no harmful or prejudicial effects for Maori. In hindsight, the Crown accepted that it should have consulted the Maori owners, but argued that Maori either wanted these things (Tuhoe had requested trout) or benefited from them in some way.[34] Thus, any prejudice from the long delay in hearing the Crown's appeal was 'minimal'.[35]

Further, the Crown accepted that it modified the lakebed for electricity purposes during the time that ownership was still disputed, and introduced a management regime which permanently lowered the lake. Crown counsel acknowledged that this had some harmful effects on the lake, mostly in terms of fisheries and shoreline erosion. But the Crown's argu-

30. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 223–225; counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 48–51
31. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 177–178
32. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 175–192; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 128–133; counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 47–48
33. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 4–6, 20
34. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 4–5, 19–20
35. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 5

ment was that it did not need to rely on its (assumed) ownership because its actions were authorised by an order in council under the public works legislation, and would thus have taken place no matter who owned the lakebed. In the 1950s, a consensus emerged among government departments that the electricity structures were 'too trivial' an infringement to require compensation. Also, any outstanding issue in this respect, in the Crown's view, was settled when the Crown leased the lake for a backdated rental in 1971.[36]

The claimants, on the other hand, maintained that they suffered significant prejudice as a result of the Crown's long denial of their just rights and title. Counsel for Wai 36 Tuhoe argued that the Crown's actions had the effect of 'preventing Tuhoe from obtaining a full economic return from its asset'.[37] Similarly, counsel for the Wai 621 Ngati Kahungunu claimants argued that 'the Crown's unwillingness to accept Maori ownership of the lake meant that the Maori owners were entirely excluded in the management of the lake' from 1918 until 1971, while 'the Crown and others trespassed, gained economic benefit, and modified the environment in and around the lake'.[38] Counsel submitted:

> such dishonourable Crown conduct has denied to owners the economic, cultural and political leverage that would have been theirs since June 17 1918. Indeed it locked their asset up and left them with little choice but to make it available for national park purposes in 1971.[39]

Claimant counsel argued that some kind of joint venture, lease, or easement would have allowed both the Crown and the owners to benefit from the lake's use for electricity (if their ownership had been recognised at the time).[40] Even if the Crown could argue 'necessity' in its use of the lake for electricity or tourism, 'if the Crown was prepared to actively breach the [Treaty] right of undisturbed possession of the lake . . . then it should have paid for it'.[41]

Also, the claimants argued that the Crown's hydroelectricity scheme caused lasting damage to the lake and its environs; this could not have happened if Maori ownership had been recognised and respected, at least not without some form of compensation.[42] In the claimants' view, the Treaty required the Crown to respect (and compensate for) more than just its usurpation of their English-style property rights. The Privy Council decision in *Amodu Tijani*[43] showed what was required of the Crown at the time: to recognise the unique nature of a cultural or spiritual treasure and the customary law pertaining to it, and to compensate for any infringement of the spiritual relationship with that treasure or taonga. The Treaty

36. Crown counsel, closing submissions (doc N20), topic 28, pp 4–7, 12–17
37. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 72
38. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 130
39. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 133
40. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 133; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 72–73
41. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73
42. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 48–49
43. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399

also required the Crown to compensate the peoples of Waikaremoana for any damage done to their 'mother' the lake.[44]

20.4.4 Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954?

In the claimants' view, their title to the lake continued to remain in limbo from 1946 to 1971 because the Crown pursued a strategy of overturning their title in the courts (until 1954). Also, it 'aggressively pursued' a campaign to extinguish their rights by means of purchasing the lake. In the meantime, the Crown continued to use the lake as it had before 1946, without permission or payment. To add insult to injury, the claimants argued that the Crown was determined to buy the lake at an extremely low price; it refused to value the lake properly or act consistently with the ways in which it had settled other lake claims. The Crown's efforts to justify its low offers were seen as nothing short of 'ludicrous', and its approach to the negotiations was described as 'dogmatic'. The Crown's determination to purchase Lake Waikaremoana, however, ran into the claimants' equal determination not to sell their taonga. The claimants submitted that they wanted a tribal annuity so that they could maintain their connections in the long-term, both with the lake and each other. But the Crown was not prepared to raise its price or to compromise until the late 1960s, when the consequence of the exposed lakebed for national park users came to be considered urgent. Ultimately, in the claimants' view, it was not until the Crown was prepared to agree to an independent valuation and to a lease that there was a breakthrough in this long, debilitating deadlock.[45]

Crown counsel noted that there had been 'lengthy negotiations between 1949 and 1969' but otherwise made no submissions on this particular issue. In the Crown's view, it all turned out well in the end with a fully consensual lease, fair terms, and no Treaty breach.[46]

20.4.5 Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results?

The claimants and the Crown were sharply divided on this issue, and there were also some disagreements among the various claimant iwi.

44. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 175–202
45. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 50; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 69–71; counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b), p 13; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 71–74
46. Crown counsel, closing submissions (doc N20), topic 28, pp 7–9

(1) *Claims about the fairness of the terms of the 1971 lease*

The first set of issues relates to the Crown and claimants' dispute as to whether the 1971 lease agreement was a fair one.

The Wai 36 Tuhoe claimants argued that 'the rental under the lease was not fair and consistent with the Treaty' for two reasons: first, the Crown wrongly refused to pay them for the modification and use of their lake for hydroelectricity between 1945 and 1998; and, secondly, the Crown refused to backdate the lease earlier than 1967. The result of the latter point, they told us, was that the Crown 'has never paid for the use of the lake for scenic and conservation purposes and as part of the National Park prior to 1967'.[47]

Counsel for Wai 144 Ngati Ruapani made a similar submission: 'In terms of compensation, Ngati Ruapani seek payment for the Crown's use of the lake between 1945 and 1998 for hydroelectric purposes, in addition to "back rental" accrued before 1967 as compensation for the Crown's effective control and use of Lake Waikaremoana for scenic and conservation purposes and as part of the National Park'.[48] The justification for this argument was that the 'terms and rental of the lease were not fair and consistent with Treaty principles, as after the many years of stalled negotiations, the lease settlement was simply based on the existing value of the Lake and no acknowledgement of past use or damage'.[49] According to counsel for Wai 945 Ngati Ruapani, the Government was able to get away with this because it failed to carry out the owners' request that the valuation be settled by an independent commission of inquiry.[50]

The Wai 621 Ngati Kahungunu claimants agreed that there should have been a 'back payment' to cover use of the lake's water for electricity and its bed for hydroelectric structures.[51] At the very least, in their view, the rental should have been backdated to 1954, when the Crown abandoned litigation and accepted Maori ownership of the lake.[52]

In the Crown's submission, the 1971 lease should be regarded as a full and final settlement of all matters raised during the lengthy negotiations leading up to it. The terms of the lease were arrived at by reasonable compromises on both sides, and settled by the free and informed consent of the owners' representatives, who were 'ably represented throughout the negotiations by experienced counsel'.[53] In the Crown's view, the outcome was fair to both sides, and the lease 'constituted a comprehensive settlement of lake issues, including that of the Crown's lake use prior to 1971'.[54]

47. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146
48. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 155
49. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 73
50. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 50–51
51. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 134
52. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 129
53. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9
54. Crown counsel, closing submissions (doc N20), topic 28, p 2

In respect of hydroelectricity, the Crown also argued that there are no ownership rights in water and the claimants were not entitled to payment for the use of the lake's water.[55] Under the public works legislation, compensation was only payable where land was taken or damage was done to property. In the Crown's submission:

> Compensation for previous use was considered extensively during the negotiations that led to the lease after being raised by the owners as an issue. The Crown formed the view that 'It can be argued that payment for past use, injurious affection etc, is unreal as the Maori owners have sustained negligible loss from such past use'. The Crown considers that insufficient evidence has been presented to the Tribunal concerning past use of, or injurious affection to, land that leads the Crown to change these views. . . .
>
> All relevant issues including that of past use were considered in negotiations. Options considered included outright purchase, purchase with annuity, and lease in perpetuity. The eventual vehicle of a lease with annual rentals arose out of negotiations that considered the issues raised here. There is no outstanding issue concerning lakebed use prior to 1971, and no further payment for the use of the lakebed prior to 1971 is warranted.[56]

In respect of adjustments or alterations since 1971, the Crown argued that the Maori owners have secured a substantial benefit since 1971 (backdated to 1967), that it has never defaulted on its legal obligations, that the rent reviews have been carried out and the rentals have always been agreed between the parties, and that there is no Treaty breach associated with the operation of the lease.[57] The claimants made no submissions about post-1971 adjustments (including those made to the rent) or the Crown's performance as lessee, except in respect of environmental management, as we shall set out in section 20.4.6.

(2) *Claims in relation to the Lake Waikaremoana Act 1971 and the vesting of the lakebed in the Maori trust boards*

There was disagreement among the claimants as to whether the Lake Waikaremoana Act 1971 represented a fair and faithful 'validation' of the lease and the May 1970 agreement.

In the view of the trust board claimants (the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants), the Act simply gave effect to the wishes of the Maori owners at the time. Any disagreement, in their view, has arisen much later.[58] The Crown shared this view, and argued that it had no responsibility for the main point in contention: the transfer of legal ownership from individual owners to the Tuhoe–Waikaremoana and Wairoa–Waikaremoana Maori Trust Boards.[59] In particular, Crown counsel suggested that the idea of vesting the

55. Crown counsel, closing submissions (doc N20), topic 28, pp 3, 25–26
56. Crown counsel, closing submissions (doc N20), topic 28, p 12
57. Crown counsel, closing submissions (doc N20), topic 28, pp 11, 13
58. Counsel for the Wai 36 Tuhoe claimants, submissions by way of reply, 9 July 2005 (doc N31), pp 30–31; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 127–128, 134
59. Crown counsel, closing submissions (doc N20), topic 28, pp 9–11

lakebed in the boards came from the owners themselves and was agreed to by the owners' committee and a meeting of owners. The proposal may not have been fully understood by all owners at the time but the Act gave effect to the owners' express wishes. The owners were consulted and agreed to the legislation, and there was 'no dissent or complaint from any lake owner'.[60] The Crown concluded: 'There was no reason why the Crown should have done anything in respect of the lease other than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill'.[61]

The Nga Rauru o Nga Potiki and Ngati Ruapani claimants took a different view. They argued that the lease agreement was for a trust board to administer the rental; it was not supposed to have resulted in a transfer of legal ownership to the existing Maori trust boards or a general fund for the benefit of all the boards' beneficiaries.[62] The fact that this could happen, in their submission, arose because the Crown failed to give proper effect to the agreement, and because it used validating legislation to subvert the owners' legal protections. Such protections included Maori Land Court vetting and confirmation of the lease.[63] The result, in these claimants' view, was that they lost ownership of their taonga, and have seen its control and benefits vested in others.[64]

20.4.6 What role have Maori played in the management of the lake after entering into the lease?

One of the claimants' key concerns has been to assure the 'ecological future' of the lake.[65] In their view, this ought to have been assured by their leasing the lake for national park purposes, because the National Parks Act 1952 required the Crown to preserve parks as far as possible 'in their natural state', to preserve native species, to eradicate introduced species, and to maintain 'the Park's value of soil, water and forest conservation'.[66] In the Nga Rauru o Nga Potiki claimants' submission, the Crown has failed to do these things in its capacity as lessee.[67] Counsel for the Wai 144 Ngati Ruapani claimants suggested further that DOC has failed in its duty to care for the environment at Waikaremoana.[68] The lake has been used for hydroelectricity and its shores have been used to accommodate growing numbers of visitors: these uses, the claimants said, have resulted in ecological damage, pollution, and unauthorised building. Some of the damage done by hydroelectricity predated the lease but

60. Crown counsel, closing submissions (doc N20), topic 28, p 11
61. Crown counsel, closing submissions (doc N20), topic 28, p 11
62. Counsel for the Wai 144 Ngati Ruapani claimants, closing submissions (doc N19), pp 68–70
63. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219
64. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 210–213
65. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 202
66. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220
67. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 220–222
68. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply (doc N30), p 49

has had ongoing effects, which have not been remedied.[69] The long-term contamination of the lake with sewage was particularly offensive to the claimants.[70]

In the claimants' view, ongoing damage has been permitted because they have been excluded from any say in the management of the lake and its levels for electricity purposes.[71] They argued that they have also been excluded from DOC's management of the lake, even though its management plan requires it to consult with the lake's owners through the trust boards:

> This obligation has been the subject of much criticism in the inquiry both with respect to allegations of the total absence of any consultation on key issues relating to the future use of the Lake and also with respect to ongoing operational matters that are already set into place.[72]

We received a very different set of submissions from the Wai 36 Tuhoe claimants and from the Crown.

Although the Wai 36 Tuhoe claimants shared some concerns about ecological harm to the lake from its use for hydroelectricity,[73] they chose not to raise issues about its post-1971 management in our inquiry:

> Since the enactment of the Lake Waikaremoana Act 1971 the ownership of Lake Waikaremoana has been vested in the two Trust Boards and the relationship between the Trust Boards and the Crown has been governed by the terms of the Lease Agreement set out in the schedule to the Act. The Trust Boards have separately addressed issues directly with the Crown in relation to the lease and have not pursued lease issues before this Tribunal (aside from issues of payments for use of the lake).[74]

Similarly, counsel for the Wai 621 Ngati Kahungunu claimants also made no submissions about environmental issues or the management of the lake after the signing of the lease.[75]

Crown counsel submitted that it is really internal issues that are at play in concerns about management and consultation. While, admittedly, the 1998 occupation arose from concern that DOC only consulted the trust boards, the Crown's view is that this was an internal matter for the boards and their beneficiaries to resolve. In the meantime, DOC had satisfied its obligations by consulting the owners (that is, the boards).[76] Nonetheless, the 1998 ministerial inquiry recommended the negotiation of a formal management agreement between tangata

69. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 220–222, 226–227; see also
70. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 66–67; app A, pp 96–99, 105–106
71. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 229–230
72. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 236
73. Counsel for Wai 36 Tuhoe, closing submissions, pt B, 31 May 2005 (doc N8(a)), pp 147–148
74. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 194
75. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1); counsel for Wai 621 Ngati Kahungunu, submissions by way of reply (doc N29)
76. Crown counsel, closing submissions (doc N20), topic 33, p 13

whenua, the boards, and DOC, to accord '"tangata whenua a more inclusive and transparent role in issues relating to the management of the leased area at Lake Waikaremoana than at present"'.[77] In the Crown's view, this proved unnecessary because 'what was and remains in place gives effect to the inquiry's recommendation', and the local people were satisfied.[78] Further, the Crown submitted that any pollution of the lake was not necessarily the result of its actions (or inaction), and that it has taken 'substantial steps to address and redress' pollution, including that from sewerage.[79] But it is not possible to keep an environment with campers and visitors entirely pollution-free.[80] The Wai 945 Ngati Ruapani claimants appear to agree that the Crown has taken substantial steps to address sewage issues since 1979 and that consultation with local groups has improved since 2000.[81]

In respect of managing the lake for electricity (which is outside DOC's control), the Crown's submission is that Electricorp and its successor, Genesis, have consulted a 'range of Urewera Maori groups and individuals'.[82] The Crown accepts that hydroelectricity has had a significant ecological impact on the lake, especially in terms of fisheries and shoreline erosion.[83] Nonetheless, Crown counsel submitted that the effects are now managed appropriately under the Resource Management Act, by Genesis working with local groups 'to manage environmental and cultural issues'.[84] For the period before the Resource Management Act, the Crown submits:

> 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.[85]

In other words, the Crown's view is that harm to Lake Waikaremoana was justified by the national benefits of an increased electricity supply. Clearly, this was not a view shared by the claimants.

We next turn turn to our analysis of these issues, beginning with the origins of the contest between Maori and the Crown over ownership of the lake.

77. Crown counsel, closing submissions (doc N20), topic 33, p 13
78. Crown counsel, closing submissions (doc N20), topic 33, p 13
79. Crown counsel, closing submissions (doc N20), topic 29, pp 42, 45–48
80. Crown counsel, closing submissions (doc N20), topic 29, p 46
81. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 56–58
82. Crown counsel, closing submissions (doc N20), topic 33, p 13; Topic 28, p 2
83. Crown counsel, closing submissions (doc N20), topic 28, pp 13–17
84. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 17
85. Crown counsel, closing submissions (doc N20), topic 28, p 17

20.5 What Were the Origins of the Contest between Maori and the Crown over Ownership of Lakes?

Summary answer: *Lake Waikaremoana is a taonga of immense importance to Ngati Ruapani, Tuhoe, and Ngati Kahungunu. Kaumatua and kuia explained how the lake was created by their tipuna, Maahu, and his daughter, Haumapuhia, and how they have been its kaitiaki (custodians) for many generations. They explained the spiritual and cultural significance of the lake, and also its economic importance to them as a source of sustenance. The Crown's interest in Lake Waikaremoana mainly dates from the first decade of the twentieth century, when it established a tourism enterprise there and ascertained the potential of the lake and its outflowing waters for hydroelectricity. The Crown–Maori contest over Lake Waikaremoana began in that decade, as a result of the Crown's introduction of tourists who used it for boating and fishing. Each side tried to control the other's use of the lake. The Crown made trout fishing subject to acclimatisation society rules, while hunting was banned by order in council. Senior Waikaremoana leader Hori Whararangi met with Native Minister Carroll to discuss ownership of the lake and payment for its use. Te Reneti Hawira also raised these matters directly with the manager of Lake House and then with Carroll in 1905, but was rebuffed. The Crown refused to accept Maori ownership of or authority over Lake Waikaremoana at that time, but did not try to enforce its restrictions on hunting and fishing other than by persuasion. Neither side was prepared to push the contest to the point of open conflict.*

At this point, the Crown–Maori contest over Lake Waikaremoana intersected with a similar contest at Rotorua. As a matter of context, the Crown had accepted Maori ownership of the Wairarapa lakes in the nineteenth century and obtained them by gift in 1896, and it had also accepted Maori ownership of Lake Horowhenua in 1905. Te Arawa's ownership of the important Rotorua lakes, however, was contested by the Crown in the 1910s, resulting in a Native Land Court claim and a case stated to the Court of Appeal. In 1912, the landmark judgment Tamihana Korokai v Solicitor-General *decided that the Lake Rotorua case must be allowed to proceed in the Native Land Court: 'What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court.' In theory, this cleared the way for the Native Land Court to hear and determine all lake claims.*

In the same year (1912), Waikaremoana leader Hurae Puketapu petitioned Parliament to add Lake Waikaremoana to the Urewera District Native Reserve, where it would be subject to the control of committees provided for by the UDNR *Act. The Native Affairs Committee declined to make a recommendation, stating that the petitioners had not exhausted their legal remedy. By this, the committee apparently meant that the petitioners should seek a title from the Native Land Court. With growing Pakeha interest in the lake as a scenic reserve or for hydroelectric development, a Native Land Court claim was indeed filed in 1913 by Rawaho*

Winitana, Mei Erueti, and Matamua Whakamoe. Ngati Kahungunu lodged their own claim in 1914.

Thus, one consequence of Parliament's rejection of the petition (and of the remedy it identified) was that Lake Waikaremoana would become subject to the only title available under the native land laws: individual ownership of undivided shares. Had a special taonga title or community title been available, much future grief could have been avoided.

20.5.1 Introduction

In this section, we discuss the origins of the contest between Maori and the Crown over ownership of Lake Waikaremoana. After the armed conflict of 1869 to 1871 (see chapters 5–7), the Crown established its control of the southern shores of the lake by building an armed constabulary outpost at Onepoto, and then by its purchase of the four southern blocks. But the restoration of peace in 1871 made the redoubt unnecessary and it was later abandoned. At first, this left the Government with little interest in the remote lake or its environs. No settlers arrived to set up claims or establish interests that needed protection. Instead, a forestry reserve was created on the Crown's lands to the south of the lake. Maori retained the land on the northern shores, which became part of the Urewera District Native Reserve in 1896.

Lake Waikaremoana was an ancestral taonga of great significance to Ngati Ruapani, Tuhoe, and Ngati Kahungunu. That did not change. But on the Crown's side, the lake came to be seen (by the early 1900s) as vital to the Government's interests in tourism and hydroelectricity. In the first decade of the twentieth century, therefore, Crown and Maori clashed about the lake for the first time since 1871. This time, they contested each other's claims to authority over the lake, its fisheries, its birdlife, and its waters. The result was that Ngati Ruapani and Tuhoe made a claim for legal ownership of Lake Waikaremoana, lodged with the Native Land Court in 1913. Ngati Kahungunu filed counter-claims in 1914. We consider these Land Court claims in the next section. In this section, we are concerned with the events that pushed tribal leaders to lodge these claims with a court to which Tuhoe and Ngati Ruapani had previously been adamantly opposed.

20.5.2 Maori relationships with Lake Waikaremoana

Our starting point is the relationship of the people with their taonga. The Nga Rauru o Nga Potiki claimants explained it in this way:

> The conception of Maori, which has been detailed extensively by a number of witnesses, was that the 'sea of rippling waters; Waikaremoana Whanaunga Kore' existed and was used, managed, conserved and controlled in a holistic way. It was also a taonga, extending far

beyond protection of site-specific fisheries and watering holes, and is guaranteed as such by the Treaty. It has, in the context of these hearings, been referred to as the source of life, the Koka (mother) of the peoples of Waikaremoana. It is the home of Haumapuhia, who is the revered ancestress of many of the hapu who are nurtured by the cherishing waters of Waikaremoana.[86]

The essence of this relationship today is captured in a waiata, composed by Tom Winitana in January 2003, which we reproduce here:

Ka makere mai matau i te awhi a te Tupuna nei a Hinepukohu
Ka tiro atu ki nga Wai Hikuhiku o Waikaremoana
Mohio katoa matau kei to paihere matau ki nga wai e kore nei e tae ate patu
Kia Hinepukohu te tupuna me to timatatanga hoki a Papatuanuku
Ko nga wairua kei te paihere

Ka titiro ki te ngahere e heke rano mai ki te wai ke ki te hoki i te kakariki
O nga rakau e whakaora ana i nga hau a Tawhiri Matea e kore nei e mate
Hei whakanga mo tatau, mohio katoa matau he uri katoa nga rakau nei kia matau
Kei te paihere wairua katoa matau kia matau

O matau whanaungatanga ki nga Ika a Tangaroa e whakapai i te wai hei oranga

Mo te Katoa, he oko horoi mo nga Tipuna

He hono Wairua matau kia matau
Nga Manu katoa a Tane a whakakiki nei te ngahere kia ratau waiata ka riro ko
ratau ano hei kawe i nga kakano ki tawhiti
Ko o matau Wairua kei te honohono ia matau

Ko te Tangata ka whawha mai ke reweke renei
I nga mahi tukuiho ki o matau uri
Kei te raweke i te aona nga Atua Maori i hanga
Koinei nei te tino putake ake o nga mahi a matau te Maori
Ko matau hoki nga Kaitiaki mai rano i te timatatanga mo nga uri whakaheke

When I unfold myself from the warm embrace of
my Founding Ancestress Hinepukohukohu
I gaze at the sparkling waters of Waikaremoana
And I know that I am inextricably tied
To the glistening waters
And to my Founding Ancestress

86. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p184

And to my Earth Mother Papatuanuku
Because of my wairua base

And when I look at the green forests that stretch down to the Waters edge
And see the continuous green mixing
With the neverending blue
I know that all these trees are my brothers and my sisters
And I am tied to them by my wairua connection
My relationship with the fish
And all that lives in the lake
Where my forbears bathed are also part of
My wairua link
And all the birds that reside in the
Evergreen forests are also tied to me
Because of the wairua link

And whoever destroys that or interferes with it,
Interferes with the very essence of

Who and what I am.[87]

The claimants presented us with this waiata as part of their submissions in reply to the Crown, which had not – they felt – fully understood their role as kaitiaki of the lake and its environs, and the central importance of the lake to their cultural and spiritual well-being. They are the guardians of the mauri or life-force of the lake, its waters, and its aquatic species. The evidence of James Waiwai, Lorna Taylor, Paringamai o Te Tau Winitana, Neuton Lambert, and many other speakers shows they take this responsibility extremely seriously. The English word used by Pari Winitana was 'custodians'. Their duty is 'to the past and the future generations to protect their heritage.'[88] Rahui (bans on the use of a resource or a place) were a common way in which kaitiaki cared for the lake, its resources, and its people. Neuton Lambert told us: 'Each whanau had kaitiaki who had a specific role. Each whanau obviously had their pakeke, who gave advice. They in turn talked with the other pakeke, because they would need consensus to put a rahui on a certain place.'[89] Their rights or authority as kaitiaki are sourced to whakapapa and whanaungatanga, and thus to their kin relationships with tipuna and with taonga (the lake and its aquatic life).

Dr Rangimarie Pere expressed the relationship in these words:

87. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), pp 4–5. The waiata is recorded as the composition of Tom Winitana, dated January 2003.
88. Paringamai o Te Tau Winitana, brief of evidence, undated (doc H24), p 19
89. Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), p 5

> Ki o matau koroua kuia he mauri to nga mea katoa, he mana ahua ake to nga mea katoa. Ina hoki i roto i nga pouhere korero tuku iho ki a matau i Waikaremoana nei – a waha, a ringaringa hoki, mo nga tau e hia mano – ka noho tatau hei whanaunga ki te nuku o te aorangi. Ano ko te kohu a to matau tipuna a Hinepukohurangi e toro ana ki tawhiti, kaore he tino wehenga. Ko matau a Waikaremoana, ko matau nga rakau o te wao tapu nui a Tane raua ko Hinewao. Ko nga ahuatanga ka pa ki a ratau, ka pa mai ano ki a matau.[90]

> 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. Like the far reaching wisps of Hinepukohurangi we are inseparable, there are no boundaries. We are the 'sea of rippling waters', we are the great trees of Tane and Hinewao's forest. What happens to them, happens to us.[91]

And Pari Winitana told us:

> I am Pari Winitana. I was born in Waikaremoana, live here, went to school here, I breathe the breeze of wind that comes from the Lake, I feel my ancestors, I can feel their hurt, their cries of despair. Our ancestors are looking at us, nga hapu toru Ngati Hinekura, Te Whanaupani, Ruapani ki Waikaremoana. They are waiting for a wake up call. I have worked, slept, cried, ate, partied, hunted and had korero with my ancestors. I have lived through them. If it wasn't for my ancestors, I would not have survived.[92]

Many who lived near the lake spoke in this way.

Foremost among the tipuna associated with the lake are Maahu and Haumapuhia. Many witnesses spoke of these tipuna. From traditions as recorded by Elsdon Best, Tama Nikora described how the lake was created:

> The origin of Waikaremoana is explained in the story of Haumapuhia. Maahu married Kau-ariki and had a daughter called Haumapuhia. Their home was at Waikotikoti at Wairau-moana. One evening, Maahu sent Hau to fetch water from Te Puna-a-Taupara (the spring of Taupara). That child would not go, and Maahu himself had to go. When Hau arrived after him, her father was so enraged, he drowned Haumapuhia in the Puna-a-Taupara. Haumapuhia thereupon changed into a taniwha or monster of the fierceful tuoro type. She struggled with great fury below the land, broke open the land and punched out the arms of Waikaremoana in search of an outlet to the ocean. She punched to the west to reach Herehere-taua – hence the Whanganui arm. She punched to the east – hence the

90. Dr Rangimarie Pere, brief of evidence, 18 October 2004 (doc H41), p 5
91. Dr Rangimarie Pere, brief of evidence (English translation), 18 October 2004 (doc H41(a)), p 5
92. Paringamai o Te Tau Winitana, brief of evidence (doc H24), pp 17–18

> Whanganui-o-parua arm. Eventually, Haumapuhia entered by the subterranean passages at Te Wha-ngaromanga, to reach Waikare-taheke. When she emerged to daylight, she was changed to stone, and she still lies there with her head to the ground, and her thighs pointing upwards. These are the explanations of the ancestors for Waikaremoana. The source or *te tino* of Waikaremoana is Te Puna-a-Taupara. It was when Haumapuhia thrashed forth with her hands and feet that the waters were disturbed and that is why it was given the name, Wai-kare-moana, because of the disturbance of those waters.[93]

There are other traditions about how the lake received its name. Des Renata of Ngati Ruapani spoke of his ancestor Ruapani, who was raised by his grandparents at Turanganui-a-Kiwa. When Ruapani was a young man, he travelled inland with his grandfather Tahunga-ehe-nui-a-tara, a tohunga, to set his boundaries and 'put in place his area of authority'. At the lake, they met Maahu, who received them as honoured guests. He told them of the tragedy of losing his daughter Haumapuhia in the act of forming the lake. But after Tahunga had spoken about their mission, Maahu became nervous that he might lose his home (at the place now called Wairaumoana) to such a high born rangatira as Ruapani.[94] Ruapani detected his fear, and replied: 'Kati-ra kua maku nga rekereke i nga wai karekare o tenei moana' (it is enough that my heels are made wet by the rippling waters of this sea).[95]

Maahu's people noticed that Ruapani had called the lake a moana (sea) rather than a lake. But Maahu deeply regretted having spoken about his daughter's forming the lake to a chief of such mana as Ruapani, and he feared spiritual retribution. After the party had departed, Maahu sent a messenger after them to accept the name Ruapani had given the lake. This was his attempt to atone for his hara (sin) in having seemed to elevate himself above Ruapani; he gave to Ruapani the honour of naming the lake that Maahu's daughter had formed 'in the hope that perhaps by doing that he could redeem himself'. Tahunga, pleased, gave his mihi to those across the lake for honouring the words of his mokopuna.[96]

Dr Robert Wiri, drawing on the oral history research of Timoti Karetu in the 1970s, explained the local tradition as to how the new body of water, along with the outflowing Waikaretaheke River, became a valuable food source:

> Then Haumapuhia tried to escape by the east, from this attempt she formed the inlet known as Te Whanganui-o-Parua. Her final attempt to escape was by Te Wharawhara, this place is near Onepoto. While she was here, she could hear the waves of the sea breaking in the east, and she tried to reach there while it was still dark. However while she was emerging from Te Whangaromanga she was struck by the sun's rays. Because of that, Haumapuhia wailed aloud, and her voice was heard by her father. Upon that, the old man felt sorry for

93. Tama Nikora, 'Waikaremoana', October 2004 (doc H25), pp 4–5
94. Desmond Renata, brief of evidence, 15 October 2014 (doc H49), paras 5.1, 8.1, 8.18–23
95. Renata, brief of evidence (doc H49), para 8.23
96. Renata, brief of evidence (doc H49), paras 8.24–8.25, 8.27–8.29, 8.33–8.34

> his daughter, and sent some food for her. That food included the korokoro or lamprey fish, the kokopu, the koiro or conger eel, and tuna or fresh water eel for his daughter, but the koiro would not face the fresh water and the tuna could not pass the Waiau river. Some of the other food sent by that old man included shellfish, and the shells of that food can still be found at that locality today. Haumapuhia was transformed into a rock upon the rising of the sun, and, the waters from Waikaremoana flow above her, as she lies beneath the Waikaretaheke River.[97]

These traditions, argued Tama Nikora, showed his tipuna understood how water flowed underground at Te Wharawhara and into the Waikaretaheke River.[98] About half of the time, water also spilled into the river over the rim of the lake at Te Wharawhara. The resulting flows were sufficient for eels and possibly for other fish in the lake to migrate to and from the sea.[99] Elsdon Best visited Te Wharawhara with Tutakangahau in 1896, at a season when the lake was low and water only passed through the 'subterranean passages' to the river. He described the 'hoarse rumbling far below'.[100] Haumapuhia was later buried by a landslide during hydroelectric development, 'so that she can no longer be seen', just before the diversion of the Waikaretaheke River away from 'the rocky path where Hau-Mapuhia lay'.[101] Lorna Taylor told us:

> The mauri of our moana has been totally disturbed. Waikaretaheke once flowed as a raging torrent from its outlet at Waikaremoana but with the advent of developments like the hydro its outlet has been replaced with a concrete canal which is dry most of the time.
>
> Sometimes the waters are released and it becomes a raging torrent again, I often wonder how this is affecting Haumapuhia our taniwha who protects our most precious taonga. We grew up with the knowledge that she is up the Waikaretaheke and we wonder how the management regimes are affecting her kainga. Mum told us that you could hear her wailing. I have not heard her. I wonder if she is still there.[102]

There are differing views of the importance of Lake Waikaremoana as a food source for Maori. According to some documentary sources, eels were scarce in the lake and may have

97. Robert Wiri, '"Te Wai-kaukau o Nga Matua Tipuna": Myths, Realities, and the Determination of Mana Whenua in the Waikaremoana District', MA thesis in Maori Studies, Auckland University, March 1994 (doc A35), p 75

98. Nikora, 'Waikaremoana' (doc H25), p 121

99. 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 15

100. Elsdon Best, *Waikare-moana, the Sea of the Rippling Waters: The Lake, the Land, the Legends: With a Tramp through Tuhoe Land* (Wellington: Government Printer, 1897), p 37 (quoted in Nikora, 'Waikaremoana' (doc H25), pp 121–122)

101. Rodney Gallen and Allan North, *A Souvenir Booklet of Waikaremoana, Wairau-moana, Waikare-iti: A Concise History of the Lakes, the People and the Land* (Hamilton: Te Urewera National Park Board, 1977), p 5

102. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 13

lived too deep to form part of the Maori food supply. Some even claim that there were no eels in the lake at all. As we shall see later in the chapter, one of the Crown's negotiating points in its efforts to acquire the lake was that no significant fishery existed there, other than introduced trout and one 'minor' native species.[103] The issue is complicated by the fact that the kainga around the northern shores of the lake were vacated as a result of Government pressure, following the completion of the Urewera consolidation scheme (see chapter 16, section 16.6.2). Inevitably, the more accessible fisheries of the upper Waikaretaheke Valley increased in importance when local communities relocated there to live permanently. Much of the tangata whenua evidence we received was about the rivers and waterways of the Waikaretaheke catchment.

But the lake remained an important source of fish and birds, especially ducks, for these communities during the 1930s and 1940s. Lorna Taylor told us how her father 'custom made 10 foot long heavy duty spears to catch the eels in Lake Waikaremoana.'[104] Eeling in the lake had a long history for her whanau, and also for other whanau living at Te Waimako. Trout from the lake, as well as eels from the lake and rivers, were an important part of the family diet when she was growing up.[105] Mrs Rangi Paku, who grew up at Tuai in the 1940s and early 1950s, said that her whanau ate 'trout by the galore.'[106] Kuini Te Iwa Beattie recalled that a trout fishing line was one of her grandfather's treasured possessions.[107] Neuton Lambert's evidence was that the rare eels caught in the lake in the 1980s were over 60 or 70 years old, long predating the hydro works. This confirmed his kuia's stories about catching eels in the lake in the first decade of the twentieth century.[108] Charles Manahi Cotter told us that freshwater shellfish were abundant in the lake before the Second World War.[109]

Birding was also a vital part of the customary economy. Waterfowl at Lake Waikaremoana and Lake Waikareiti were a seasonal resource. Whio or blue ducks were traditionally important, which is a matter of significance to Hirini Paine and the Wai 795 claimants.[110] Gladys Colquhoun observed that titi (mutton birds) used to be taken at certain times of year.[111]

The importance of Lake Waikaremoana for the claimants as a food source is also recorded in documentary sources, certainly before their relocation southwards in the 1930s and the modification of the lake for hydroelectricity in the 1940s. Elsdon Best identified kokopu,

103. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 49–53
104. Taylor, brief of evidence (doc H17), p 7
105. Taylor, brief of evidence (doc H17), pp 6–7
106. Rangi Paku, brief of evidence, 18 October 2004 (doc H37), p 3
107. Kuini Te Iwa Beattie, brief of evidence, 18 October 2004 (doc H38), p 3
108. Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), p 6
109. Charles Manahi Cotter, brief of evidence, 22 November 2004 (doc I25), p 14
110. Hirini Paine, amended statement of claim, 28 March 2002 (paper 1.31(d) (quoted in Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 28)
111. Gladys Colquhoun, brief of evidence, 15 October 2004 (doc H55), p 4

called maehe at Lake Waikaremoana, as an important indigenous resource. Rangimarie Pere's grandfather, Harry Lambert, recorded in his diary in 1923 that kokopu were known as maehe in the lake.[112] Best wrote in 1896, just before trout (which predated on kokopu) were about to be introduced:

> Then [we moved] on across the rippling waters to Wai-kopiro, another ancient settlement, with its wooded spurs and shrubs of many shades. At this place a small rivulet trickles down a rock-face into the lake, and these waters are said to possess some strange properties (*he wai kakara*, scented waters), for at certain seasons the little maehe fish come in myriads to drink these waters as they flow down the rock into the lake, at which times they are taken in great numbers by the Natives. This maehe, a small species of kokopu, is said to be the only fish in the lake, together with the koura, or fresh-water crayfish. Some Natives say that eels are also to be found, but that they have been introduced in late times from the Waikaretaheke River.[113]

There were also large numbers of shellfish, including freshwater mussels, which were part of the local diet. William Colenso, one of the earliest Pakeha visitors to Lake Waikaremoana and therefore an important manuhiri (guest), was fed on freshwater mussels 'of a good size' in 1841. In the 1940s, when the Government lowered the lake for the first time, thousands of shellfish were found decomposing around the lake shores.[114] Colenso also observed that petrels were harvested at the lake.[115] In Elsdon Best's account, titi (muttonbirds) were once taken from the lake cliffs, but predation by rats had largely wiped out the lake's titi population by the 1890s.[116] On the other hand, trout soon became a major component of the local diet after its introduction in the 1890s, much to the lamentation of rangers and officials. There was also a large population of waterfowl, hunted for food and feathers. Brad Coombes noted: 'Native ducks, especially in their juvenile state, were a key component of the Maori diet at Waikaremoana and Waikareiti.'[117] The evidence is also clear that there was an eel population, possibly quite small, which Maori – as kaitiaki – may have introduced by hand from the Waikaretaheke River. According to Garth Cant's research team,[118] native

112. Pere, brief of evidence (English translation) (doc H41(a)), pp 7, 9

113. Elsdon Best, *Waikare-moana the Sea of Rippling Waters: The Lake; the Land; the Legends with a Tramp through Tuhoe Land*, p 35

114. Walzl, 'Waikaremoana' (doc A73), p 361

115. Cathy Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Centuries' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A52), p 16; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 49–50

116. Best, *Waikare-moana the Sea of Rippling Waters*, pp 32–33

117. Brad Coombes, 'Making "scenes of nature and sport" – Resource and Wildlife Management in Te Urewera, 1895–1954', May 2003 (doc A121), p 187

118. The team consisted of Dr Garth Cant, Dr Robin Hodge, Dr Vaughan Wood, and Leanne Boulton, who jointly prepared the report 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera' (doc D1).

species still present in the lake include koaro (maehe), bullies, smelt (introduced in 1948), and two species of eels 'in low densities.'[119] As we shall see, the Government was aware in the early 1900s – at the time when its contest with Maori began for control of the lake – that the lake was an important food resource for the local communities.

This evidence is important because of debates, discussed later in this chapter, about the effects of hydroelectric works on the lake and its aquatic life, the economic or commercial value of the lake to Maori and to the Crown, and questions of compensation, economic loss, and prejudice.

But, as the claimants explained, the lake was much more than a component of their traditional economy. Water from certain places at the lake was used for rituals, spiritual cleansing, and also for rongoa (healing). The lake was central to their tribal identity. Dr Pere began her korero about the lake as follows:

> No Waikaremoana Whanaunga Kore
> He Atua!
> He Tangata!
> 'Waikaremoana whanaunga kore' tenei matau ou Hapu, te tu whakamihi ki a koe, te wai ahuru, te wai kaukau, te wai whakaora, whakamahea ia a matau.[120]
>
> Waikaremoana Whanaunga Kore
> The sea of rippling waters who is beholden to no one
> Behold a God/dess!
> Behold a Mortal!
> 'The Sea of Rippling Waters, who is beholden to no one', we your people conceived from the womb, salute, for you are the cherishing waters, the bathing waters, the healing waters, the waters that cleanse and clear us.[121]

Drawing together the threads of kaitiakitanga, and of reciprocal caring for the mauri of the lake and of the people, Lorna Taylor explained how the relationship with the lake is seen today:

> Our waters have a healing energy. We use our wai as a spiritual cleanser and there is a particular part of the lake that I know of that was used for these purposes.
>
> Our wai cleanses the whenua when the rain falls and it tells us when one of ours is about to pass away. We use the wai for rongoa and in our kai.
>
> Successive Government action has led to contamination of our waters, controlling and changing the flows, and opening Waikaremoana up for general public usage has introduced

119. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 49–50
120. Dr Rangimarie Pere, brief of evidence (doc H41), p 4
121. Dr Rangimarie Pere, brief of evidence (English translation), 18 October 2004 (doc H41(a)), p 4

boats, weeds, giardia, and cryptosporidium. The uncorrupted relationship we once had is under constant threat as people that are not of its water violate our mauri life force.

The kinship we have with the elements is essential to maintain balance and harmony. The idea that you only take enough for that meal, and to return your first catch to the water was practised by our father as he gathered kai for his whanau and is integral to this notion of balance and harmony.

Our kinship tie to the whenua has been eroded for we no longer have kainga around Lake Waikaremoana and there is a deep sense of grief as our links to our ancestors are clouded with the pain of confiscation and denial.[122]

In Mrs Taylor's view, the richness of Tuhoe culture, te mana motuhake o Tuhoe, and an entire way of life has been 'systematically eroded' at Lake Waikaremoana, to the great prejudice of all affected whanau.[123]

We shall return to these claims later in this chapter.

20.5.3 The beginning of the Crown–Maori contest over Lake Waikaremoana

In 1894, during Premier Seddon and James Carroll's visit to Te Urewera (see chapter 9), Carroll selected the Whaitiri Headland as a suitable site for a government lodging house or hostel at the lake. Thus, as Tony Walzl points out, the Government was already planning its own tourism venture at the lake, even before the 1895 agreement.[124] As we discussed earlier in the report, the introduction of tourism to Te Urewera was one of the Government's objectives in negotiating this agreement. The Te Urewera delegation agreed to roads, and – from the documentary sources – sought the introduction of English fish and birds to attract tourists and to increase their own food supplies. Although there is disagreement from some claimants that their tipuna really did ask for this, one result was the introduction of trout to Lake Waikaremoana in 1896 or 1897. For many years afterwards, fresh ova continued to be released so as to maintain or build up the trout population in the lake. Claimant counsel pointed out that the wording of the 1895–96 agreement was clearly intended to provide for the peoples of Te Urewera, not the Government, to control and manage the introduction of exotic fish in their waters. Instead, the Government acted directly and without further consultation, although there was evidence of some local Maori support.

The selection of a site for a future government lodge in 1894 and the ongoing releases of trout from 1897 marked the Government's first steps towards active involvement in tourism at the lake. Opossums and deer were also released at Lake Waikaremoana in 1898 and 1899 respectively with a view to future hunting and trapping. At the same time, the Crown land

122. Taylor, brief of evidence (doc H17), pp 13–14
123. Taylor, brief of evidence (doc H17), p 14
124. Tony Walzl, 'Waikaremoana: Tourism, Conservation, and Hydro-electricity (1870–1970)'(commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), p 46

bounding the lake to the south (almost 17,000 acres) was set aside as two forest reserves in the 1890s. Mr Walzl suggests that the goal was primarily 'protection forest' to conserve waterways, although there was some thought of scenery preservation so as to maintain its value for tourism.[125] Waterfowl, such as swans and new duck species, were also introduced around this time, although we do not know exactly when or how that happened.

A key point is that these events in the 1890s set the stage for confrontation in the next decade, because the creation of reserves and the introduction of birds and fish by the acclimatisation societies also introduced new forms of authority and law at the lake. The societies were fostered by the Government, which gave them financial assistance and passed laws to protect new species until they became fully established. Because the mechanism for introducing trout was an acclimatisation society, the trout fishery at Waikaremoana was 'viewed as an acclimatisation fishery, subject to the rules and regulations which had been developed over the previous 30 years of acclimatisation in New Zealand'.[126] Until 1901, Waikaremoana was part of the Hawkes Bay acclimatisation district and operated under regulations published in 1895, which provided for the issuing of licences and the periods when trout could be taken. Walzl comments that it is unlikely Tuhoe in 1895–96 intended to agree that such limitations would be placed on what was supposed to be an additional food source for them (as well as a tourist attraction).[127] The same situation applied to introduced birds – under acclimatisation rules, Maori would not be allowed unrestricted access to this food source either.[128]

It must be noted, however, that the lake itself and the lands to the south were outside the Urewera District Native Reserve (UDNR) as established in 1896, and presumably outside the terms of the agreement upon which it was based. We have no evidence as to why the lake was left out when the boundaries of the reserve were drawn up in 1895. Cathy Marr commented: 'Presumably this was because the Government regarded it as a large navigable waterway where the Crown could assert ownership.'[129] That may be so but there is no evidence that the matter was discussed with the Te Urewera delegation, or that they agreed to the exclusion of the lake. The point was not raised, perhaps, because Hori Wharerangi and the Waikaremoana people tried to withdraw the rest of their lands from the UDNR soon afterwards, at the Te Waimako hearing of the Urewera commission in 1899. They were concerned – with good cause, as it turned out – that they would lose their lands if the commission was allowed to investigate titles.[130]

In the meantime, the Government had established a game reserve at Waikaremoana in 1898. In May of that year, the Lands Department approached the Native Minister, James

125. Walzl, 'Waikaremoana' (doc A73), pp 49, 55–57
126. Walzl, 'Waikaremoana' (doc A73), p 61
127. Walzl, 'Waikaremoana' (doc A73), pp 61–62
128. Walzl, 'Waikaremoana' (doc A73), p 61
129. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana region' (doc A52), p 284
130. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana region' (doc A52), pp 286–287

Carroll, with a suggestion that all shooting of newly introduced deer and birds should be banned at Waikaremoana.[131] Carroll agreed that it was 'highly desirable that shooting should not be allowed in that part of the country'.[132] On 17 June 1898, 40,000 acres of 'land' was brought under the Animals Protection Act 1880 as a protected reserve for imported game. As well as the lake itself, this reserve included part of the Waikaremoana block on its northern shores. Walzl commented that there was no evidence of consultation with local Maori, with the owners of affected land (who were also local Maori), and no effort by the Government to assess the likely effects on them. If such consultation had taken place, he argued, officials 'might have been informed' that a protected game reserve was contrary to the 1895–96 agreement. The introduced 'English birds' were supposed to create a new food supply for the peoples of Te Urewera. Walzl also notes that this was the first step in a series of acclimatisation measures after 1900 that increasingly put official limits on Maori hunting and fishing at Waikaremoana.[133]

Thus, the 1895–96 agreement was implemented in such a way that conflict arose in the decade after 1900 between anglers, wildlife officials, and the peoples of Waikaremoana over access to trout and introduced game birds. This process was exacerbated from 1901 by the creation of the Department of Tourist and Health Resorts. In essence, this new department marked the Government's 'nationalisation of tourism'.[134] There had been a private tourism venture at Onepoto since the 1870s. A tourist lodge apparently survived there until 1900, although nothing much is known about it. Private excursion trips had been very small scale, due to the difficulty of getting to the lake and – once there – the 'uncertainty of obtaining canoes on hire to explore the shores of the lake'.[135] This all changed after the new department established its tourist lodge, Lake House, in 1903. Before that, closed seasons for kereru and even the creation of the imported game reserve had had little impact, because there were so few Pakeha in the area and virtually no official attention. Lake House brought a significant influx of Pakeha tourists to the lake, and for a purpose that encouraged them to use it for fishing and (later) shooting.[136]

In part, changes came about because the Tourist Department moved quickly to establish itself as the sole government agency in charge of the lake and its environs, and to ensure that tourism interests were the primary consideration in government policy about the region. In 1902, construction began on Lake House, and plans were in train to establish a Government launch on the lake.[137] As part of establishing a thriving tourism venture, officials decided that the 1898 imported game reserve did not suffice to protect the tourists' experience of

131. Walzl, 'Waikaremoana' (doc A73), pp 64–65
132. Carroll, minute, 11 May 1898 (Walzl, 'Waikaremoana' (doc A73), p 65);
133. Walzl, 'Waikaremoana' (doc A73), p 65
134. Walzl, 'Waikaremoana' (doc A73), p 75
135. R C L Reay to Native Minister, 24 July 1889 (Walzl, 'Waikaremoana' (doc A73), pp 36–38)
136. Walzl, 'Waikaremoana' (doc A73), pp 69–70
137. Walzl, 'Waikaremoana' (doc A73), pp 75–76

wilderness – the ban on hunting needed to be extended to native birds as well. Officials were also concerned about the effect that a large number of tourists with guns might have on native species.[138] But Maori interests were considered too. The Department's superintendent, Thomas Donne, had second thoughts about the proposal and on 25 September 1902 advised his Minister, Sir Joseph Ward:

> Upon further consideration I find that if this were done it would probably cause discontent amongst the Urewera natives, as it would restrict their food supplies. If the matter has not yet been in any way dealt with will you kindly consider whether the prohibition to take or kill native game or birds should apply to all persons other than natives. The bird life at Waikaremoana provides a great charm, and I am afraid that when that Lake becomes a regular tourist resort there will be great destruction of birds unless such a proceeding is made illegal.[139]

In the meantime, the department had already put its 'sanctuary'[140] proposal to Native Minister Carroll, who responded on 26 September:

> I believe in protecting both imported and native game in this 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 right to kill game for food. I can however regulate them under their own act which will serve the purpose just the same.[141]

It seems therefore that Carroll intended that Maori should be exempt from prohibitions on killing both imported and native game at Waikaremoana, and that he may have thought, given the political realities, this would best be achieved by a regulation under the UDNRA, rather than the Animals Protection Acts.[142] If so, he evidently backed down.

The Minister of Tourist and Health Resorts, Joseph Ward, initially approved a draft order in council under the Animals Protection Act 1880 with the following provision:

> 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

138. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 159, 160, 163–164

139. Superintendent, Tourist and Health Resorts, to Minister, 25 September 1902 (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 160)

140. Donne to Minister, Tourist Department, 15 September 1902 (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 159)

141. Native Minister, minute on memorandum of 15 September 1902 to Minister of Tourist and Health Resorts (Walzl, 'Waikaremoana' (doc A73), p 102); 'Lake Waikaremoana: History of Surrounding Lands', 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)

142. Coombes pointed out that Carroll must have intended to issue a regulation under section 24(4) of the UDNR Act (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 159).

> taking or killing, within the said area, native game and native birds, for food supplies, in accordance with native customs and usages.[143]

Before the draft order in council was finalised, however, the Tourist Department received the first of what would become a series of damning but ill-informed reports about Maori hunting for food at Lake Waikaremoana. On 15 April 1903, the department's senior inspector, Frederick Moorhouse, objected to the exemption :

> The natives of this district have the right to take and kill native birds for food supplies, and if this is allowed to continue, there will not be any birds left to protect. I was informed, when at Waikaremoana, that the natives are in the habit of catching the young duck flappers in hundreds and preserving them for use during the winter months.[144]

As soon as he received this report, Donne ordered the exemption removed 'despite Carroll's earlier advice'.[145] Cabinet must have approved this change because the order in council was gazetted in July 1903 without the exemption.[146]

Coombes and Walzl are both critical of this action, and we will discuss its significance further in chapter 21. Here, we note that the Tourist and Health Resorts Department continued to extend its power in the district. In 1907, the Rotorua acclimatisation society was brought under the direct control of the department. The following year, the territories of the Wairoa acclimatisation society (including Waikaremoana), along with its fish and game responsibilities, came under the department's control.[147] In 1908, the Government also placed the forest reserves to the south of the lake (almost 17,000 acres) under the direct control of the department. As Walzl noted, these events showed that the Government saw the lake primarily as a tourist resort.[148] This primacy was not seriously challenged until hydroelectricity became the Government's overriding use for the lake, later in the century.

Quite apart from its consolidation of administrative control over the region, the Tourist and Health Resorts Department had also finished establishing its beachhead, Lake House, in 1903. In the 1903/04 year, 279 visitors came to stay at Lake House. By early 1904, the Government's motor launch was operating on the lake, which resulted in visitors staying longer. In the 1904/05 year, there were 314 visitors. The Government's hope of attracting overseas tourists was disappointed but the number of local visitors grew slowly, although with fluctuations. It was still relatively difficult for tourists to get to the lake (and to get anywhere else afterwards).[149] These were not large numbers of people in absolute terms, but

143. Draft proclamation, April 1903 (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 161)
144. F Moorhouse, inspector, to Superintendent of Tourist and Health Resorts, 25 April 1903 (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 162
145. Coombes, 'Making "scenes of nature and sport"' (doc A121), p 162
146. Coombes, 'Making "scenes of nature and sport"' (doc A121), p 162
147. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 112–114
148. Walzl, 'Waikaremoana' (doc A73), p 83
149. Walzl, 'Waikaremoana' (doc A73), pp 76, 82–86

even so they may have outnumbered local Maori in the holiday season. The Maori population at the lake around this time was about 200 people (of whom 40–50 were permanent inhabitants of the lakeside kainga).[150] Thus, there was a new and unprecedented influx of lake-users, seemingly brought in by the Government and protected by it, with different values and interests from Maori in regard to the lake and its aquatic life. Also, the manager of Lake House was made a ranger in 1903 to 'see that the law is given effect to'.[151]

Unsurprisingly, this new presence in their district provoked a serious response from Waikaremoana Maori leaders. Walzl suggests that it was not until the establishment of Lake House, and the introduction of a significant number of tourists each year, that the official restrictions on Maori access to game began to bite. Maori hunting, trapping, and fishing came under increasing 'official observation and scrutiny'. As a result, 'criticism of local Maori and intervention attempts began'.[152] More even than paper proclamations and official licensing regimes and hunting bans, tourists precipitated a direct contest between the Crown and Maori for control of Lake Waikaremoana in the decade after 1903.

20.5.4 Maori attempts to reassert control over the lake: dialogue, 1903–05

At first, there was a little tension between the Lake House manager, John Ward, and local Maori leaders, but nothing too serious. Lake House provided employment in terms of tree-cutting and other work, and also acted as a source of medical supplies. Ward sometimes loaned the Government's launch to Maori for their use.[153] It was a priority for the Government to maintain good relations. Superintendent Donne reminded Ward in 1904 that his Maori neighbours could be 'a source of great assistance or nuisance' and it was 'not desirable to have them as our enemies'.[154] But nothing could disguise the fact that the Government was now claiming authority over the lake, sending its people onto the lake to fish or visit whatever spots they chose, and providing them with a boat to do so. As will be recalled, Patekaha Island was a wahi tapu and burial place of great importance to Ngati Ruapani. There were many other wahi tapu around the lake.

Two years or so after the establishment of Lake House and the introduction of a Government launch and tourist trout-fishing, Maori sought to reassert their control over the lake and its fisheries. At some point before April 1905, Hori Wharerangi, the Tuhoe and Ngati Ruapani leader who had represented Waikaremoana in the 1895 negotiations with

150. Walzl, 'Waikaremoana' (doc A73), p 150
151. Donne, 'Department of Tourist and Health Resorts, Second Annual Report', 1 May 1903, AJHR, 1903, H-2, p xi (Walzl, 'Waikaremoana' (doc A73), p 103)
152. Walzl, 'Waikaremoana' (doc A73), p 87
153. Walzl, 'Waikaremoana' (doc A73), pp 78–81
154. Donne to Ward, 15 February 1904 (Walzl, 'Waikaremoana' (doc A73), p 81)

Seddon,[155] went to Wellington to meet with the Native Minister about this matter. We do not know any details other than that the meeting was reported to have taken place.[156]

Then, in April 1905, it was followed up by local representations to the manager at Lake House. As a result of a meeting there between Ward and Te Reneti Hawira on 11 April 1905, a second approach was made to Native Minister Carroll – this time, in the form of a letter from Hawira, composed at the end of the meeting. Ward forwarded Hawira's letter to the Tourist Department, which sent it on to Carroll, along with Ward's covering letter and his transcript of the meeting.[157]

Hawira's letter to the Minister, as translated by Ward, stated:

> I wish to point out to you about the fish of Waikaremoana, that the coming of the Europeans (Foreigners to the Lake Water) for the purpose of fishing may cease. They, (the Pakeha foreigners), have no jurisdiction over this Lake (Waikaremoana). The Lake is not the government's – you understood this (the Lake was not the government's) through the interview Hori Whare Rangi had with you (on this same matter) in Wellington. And so I say, let the foreign (Pakehas) cease catching fish (in Waikaremoana).[158]

In a covering letter to his superiors at the Tourist Department, Ward commented that he placed no weight on Te Reneti's 'commands' to halt tourists from fishing in the lake, nor on what he considered 'Hori Whare Rangi's deeper and probably more to be dreaded schemes to stop Trout fishing in Lake Waikaremoana – or its Tributary streams'. In his view, Tuhoe would soon be distracted by something else, but in the meantime the trout fishery was a 'Stalking Horse to obtain other and more valuable favours from the Government'.[159]

In addition to translating Hawira's letter, Ward provided a transcript in English of his meeting with the chief, in which they debated the ownership, control, and use of Lake Waikaremoana. This debate illuminates the different positions of the Crown and Maori as at 1905, and we reproduce it in full (see Box).

Hawira's position was that the lake belonged to the Maori people of the Waikaremoana district, and that the people had not consented to Pakeha fishing in the lake. His 'command' to Ward was that Ward must put a stop to tourists' fishing, although the manager himself was allowed to continue fishing to feed the visitors at Lake House. Ward's response was that the lake was 'free to all good men', whether Pakeha or Maori, and that 'no one has the power, you or me, or even the Government to stop people going on it'. Also, he conceded

155. Binney, 'Encircled Lands', pt 2 (doc A15), p 190
156. Walzl, 'Waikaremoana' (doc A73), p 95
157. Walzl, 'Waikaremoana' (doc A73), pp 93–96
158. Te Reneti Hawira to Native Minister, 11 April 1905 (Walzl, comp, supporting documents to 'Waikaremoana' (doc A73(d)), p 2207
159. Ward to Acting Superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), p 96)

that Hawira would have a point if the tourists were catching 'Maori fish', but trout 'are not your fish' and had been imported by Pakeha at great expense.[160]

Hawira's response was that it made no difference which fish were being caught because no one 'has any right on Waikaremoana Lake' unless 'the Maoris of the Lake . . . consent for them to go on it'. Ward replied that this was 'too absurd for me to listen to', but asked if any of the tourists interfered with or damaged Maori property or plantations. Hawira reassured Ward that there had been nothing like that, but persisted in his demand that the manager prevent any more visitors from fishing on the lake. Ward warned Hawira that 'if you or your young men stop these Pakehas from fishing, you or your young men will be fighting with the Law'.[161] He advised Hawira to take the matter up directly with the Government, which was when it was revealed that Hori Wharerangi had already met with Carroll and explained the people's concerns about the fishing – presumably without success, hence the direct approach to Ward.[162] The end result was the letter from Hawira to Carroll on 11 April 1905, quoted above.

The Debate between John Ward and Te Reneti Hawira at Lake House, 11 April 1905

Te Reneti: Friend Ward. I have a word to say to you.

Ward: Yes – Then say on my friend.

Te Reneti: My word (Command) is that all fishing in Waikaremoana shall cease. I don't object to you fishing for 'The House' (Te Whare) but I won't consent to other Pakehas fishing.

Ward: Indeed! Why are you of this mind now Reneti?

Te Reneti: Because the Lake is mine. And I (us all, the Maoris of the Lake District) never gave my consent to have these Pakehas (Europeans from Beyond the Lake) fishing in my Lake.

Ward: But friend Reneti, the fish these Pakehas catch in Waikaremoana are not your fish, they, (the Pakeha), paid a lot of money to have them brought from England to New Zealand and paid men big salaries to get them (the fish) up to the Lake, and have their eggs Hatched, then watch the eggs hatch out young fish, and grow into Big Trout. Don't you know that?

Te Reneti: Yes, I know that. But of what moment is it? (E aha kei ena?)

Ward: Oh! It's got a lot to do with it. If the fish these Pakehas catch in the Lake here were Maori fish, there would be a cause (or reason, He Putaki) for what you are now telling me! But they are not Maori Fish!

160. Ward to Acting Superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), pp 94–95)

161. Ward to Acting Superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), p 95)

162. Ward to Acting Superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), p 95)

Te Reneti: Never mind that. (Haunga Ena) My word (Command) to you is that you tell all the Pakehas (Europeans) that come to your House (Lake House) to cease fishing in Waikaremoana.

Ward: Reneti! I cannot or won't tell my visitors that. They would not believe me only laugh at me.

Te Reneti: No! They would not. You tell them and stop them!

Ward: But listen Reneti. Have you thought how foolish this work is going to prove to you? Don't you think the Lake is free to all good men – Pakehas or Maoris – and therefore no one has the power, you, or me, or even the Government to stop people going on it (The Lake) if they desire to do so?

Te Reneti – No one has any right on Waikaremoana Lake without I, (ergo the Maoris of the Lake), consent for them to go on it!

Ward: Now you are talking too absurd for me to listen to you Reneti. Let the talk cease. I won't tell my visitors not to go on the Lake for it is free to all men. Nor will I tell them not to catch the European fish (Trout) and if you or your young men stop these Pakehas from fishing, you or your young men will be fighting with the Law! And you know, Reneti, only a foolish ignorant common person does that. Never a gentlemen like you (He rangatira hoki pena me koe). Tell me this though, do any of these fisherman interfere with or damage your property or plantations at Te Mokau, Te Hopuruahine or elsewhere?

Te Reneti: No, not at all.

Ward: I am pleased to hear that. If it is done at any time, let me know at once and who does it, and I'll get them (the people who wrought the damage) to pay you.

Te Reneti: There has been no work like that. It's only the fishing that must stop.

Ward: I cannot or won't interfere as I have already told you. What is the use of coming to me about this matter? Why won't some of you go to Wellington or write to the Government?

Te Reneti: George Heavenly House (Hori Whare Rangi) has been to Wellington and explained this thing (the fishing) to the Government (to the Honorable the Native Minister).

Ward: Well then Reneti, if the Honorable the Native Minister knows about this thing (the Trout fishing), why do you come to me? The Minister told George his (the Minister's) intentions I presume.

Te Reneti: Yes Perhaps! But I want you to stop Europeans fishing on the Lake.

Ward: Friend! I have already told you I can't or won't stop people who come to the House here (Lake House) from fishing so do not ask me. You must get the Government to do that.

Te Reneti: That is well! So I will, can you give me (the use of) a Room to write a letter to the Honorable the Native Minister?

Ward: Certainly Reneti, come into my office and write your letter.

Source: Ward to Acting Superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(d)), pp 2202–2206)

The Department of Tourist and Health Resorts forwarded Hawira's letter and Ward's report to Native Minister Carroll, commenting:

> The Natives are asking that fishing for trout by Europeans in Lake Waikaremoana be prohibited. The request of course is ridiculous. Half the lake-shore is Crown land, and one of the chief attractions of the Lake is the sport to be obtained by angling.[163]

According to Walzl, Carroll's reaction in May 1905 was brief and to the point: 'There is nothing in the objection.'[164] This is presumably what he had told Hori Wharerangi as well. The Government's formal response to Hawira was left to the Tourist Department and was equally brief, simply stating that 'your objection to Europeans catching fish in Lake Waikare-moana cannot be entertained.'[165]

Hawira's response to Carroll is important because it further clarified the Maori position in 1905; it also sheds light on the present claims brought to the Tribunal. Essentially – the Government and the western economy having arrived at the lake in a very material way – the people's response was that the lake was their economic asset, not the Government's, and that the Government should not use it without their permission and without paying for it.[166] As Tama Nikora explained to the Tribunal, this has always been the view of the Wai 36 Tuhoe claimants and it is still very much their position today.[167]

Hawira's letter to Carroll of 27 August 1905, as translated by officials, stated:

> Friend. I have received your letter in reply to mine wanting to stop the Pakehas from coming to catch fish, because this Lake does not belong to the Government, well your reply was that the Government could not consider my application.
>
> Friend, let the answer to my letter be clear, because I do not consent to their coming here and catching the fish, but payment must be made to me, then I will consent because I say positively that the Government did not purchase this Lake; enough then of that.
>
> O Friend, I object also to the steamer [the Government's launch] which absorbs the moneys derived from this Lake, my objection to the steamer is the same as that concerning the fishing, free use is made of my Lake, and I get no benefit therefrom, that is why I say that they must be sent back.[168]

163. Acting Superintendent to Acting Minister of Tourist and Health Resorts, 28 April 1905 (Walzl, 'Waikaremoana' (doc A73), p 97)
164. Walzl, 'Waikaremoana' (doc A73), p 97
165. Acting Superintendent to Reneti Hawira, 2 June 1905 (Walzl, 'Waikaremoana' (doc A73), p 97)
166. Walzl, 'Waikaremoana' (doc A73), pp 97–98
167. Nikora, 'Waikaremoana' (doc H25), p 135
168. Reneti Hawira to Native Minister, 27 August 1905 (Walzl, comp, supporting papers to 'Waikaremoana' (A73(d)), p 2196)

Ward's translation was more expressive: the Government's launch was 'eating the Riches of the Lake the same as the Fishing is', yet paying nothing for the privilege.[169]

The question for the Government, which seems never to have doubted that it had right on its side, was whether or not the views represented by Te Reneti Hawira and Hori Wharerangi might result in some kind of physical challenge to fishing and boating on the lake. On 1 September 1905, Superintendent Donne advised Ward to ignore the presumably 'harmless' opposition: 'I do not think it is worth while taking any notice of the old Maori. I presume he is quite harmless, and not likely to interfere with either visitors, the launch or boats?'[170]

From the evidence available to us, Donne's instruction to Ward was the end of this particular exchange between the people of the lake and the Government, presumably because tribal leaders were not prepared to resort to the kind of physical interference that the Tourist Department feared. Instead, there were three new developments. First, the focus of the local Crown-Maori dialogue changed in 1906 from Maori objections to Government use of the lake to Crown objections about Maori use of the lake. Secondly, the attention of tribal leaders was diverted temporarily to the second Urewera commission and the ownership of the Waikaremoana block. And, thirdly, Maori gave up on Ward and Carroll and chose a new arena for their challenge to the Crown about the lake: Parliament and the courts.

It was at this point, when the Waikaremoana people resorted to Parliament and the courts, that the broader issue of the ownership of all lakes came into play. We turn next to provide a brief context for the Crown's approach to Maori ownership of lakes at the time. This helps to explain why officials such as Ward and Donne, and even Native Minister Carroll, simply ignored Maori assertions that ownership and control of Lake Waikaremoana rested with them, so long as 'Maori fish' were not at issue.

20.5.5 The general contest between Maori and the Crown for ownership and control of lakes

Whether the Crown or Maori owned lakes was a strongly contested issue in the first half of the twentieth century. In the nineteenth century, however, the Crown's position was ambivalent. According to Ben White, the Government usually transacted with Maori when it wanted or needed to acquire a particular lake, no matter what was asserted in theory about the legal situation. Maori, for their part, were often content to allow Pakeha use of lakes, so

169. Reneti Hawira to Native Minister, 27 August 1905 (Walzl, comp, supporting papers to 'Waikaremoana' (A73(d)), p 2199); Walzl, 'Waikaremoana' (A73), pp 97–98

170. Donne to Ward, 1 September 1905 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(d)), p 2198)

long as it did not interfere with their own use or certain conditions were adhered to.[171] Mr White commented:

> But in the nineteenth century there were many instances when the Crown acknowledged Maori as the owners of lakes. It would seem that the Crown tacitly assumed the ownership of lakes but acknowledged the existence of Maori rights when it felt that it had no choice. When the Native Land Court investigated the title of lakes Rotorua and Rotoiti, it was told that had the Crown asserted in the 1880s that the lakes were not Maori property, a situation would have arisen that would have been more serious than the Waitara affair. Judge Acheson made a similar point in his decision as to the ownership of Lake Omapere. He considered that had the Crown stated that it intended to claim the ownership of the lakes during the negotiations surrounding the Treaty of Waitangi, Nga Puhi most certainly would not have signed. It would seem that at times the Crown did not challenge the rights of Maori to lakes because it was anxious to maintain the peace and secure Maori support for colonial rule.[172]

In the period before the Native Land Court was established, the Crown had sole power to purchase land from Maori for settlement. As the Tribunal has found in several reports, the Crown's pre-1865 purchases often covered vast acreages and were inadequate in conveying precisely what was being acquired or what Maori rights were being extinguished. Some deeds of sale did specify that lakes were included in what the Crown was buying, but others did not. Nonetheless, the Crown maintained that its pre-1865 purchases extinguished any Maori claims to lakes in the purchased blocks.[173]

In the Native Land Court era that followed, the Crown acted inconsistently. Sometimes, it argued that Maori rights in lakes were confined to fishing, and at other times it recognised full Maori ownership rights by negotiating for their purchase. The Crown tended to accept Maori customary ownership of small lakes as a matter of course, but it often asserted that the Crown owned large, navigable lakes. Ben White suggested that when the Crown contested Maori customary title to lakes in the late nineteenth century, it usually did so on the common law argument that it had acquired riparian lands (and so owned to the centre line, *ad medium filum aquae*), rather than making a prerogative claim to the public ownership of lakes.[174] In fact, at common law, he stated, the prerogative rights of the Crown do not extend to lakes, whether or not they are navigable. But in New Zealand, there was a widespread belief among nineteenth-century politicians and officials that the Crown should be

171. White, 'Inland Waterways: Lakes' (doc A113), pp 252–256
172. White, 'Inland Waterways: Lakes' (doc A113), p 253
173. White, 'Inland Waterways: Lakes' (doc A113), pp 253–255; Secretary for Maori Affairs to Minister of Maori Affairs, 10 September 1954, 'Lake Waikaremoana' (Tony Walzl, comp, supporting papers to 'Waikaremoana', various dates (doc A73(c)), p 1287)
174. White, 'Inland Waterways: Lakes' (doc A113), pp 68, 252–256

the owner of all colonial waterways, so that 'it could act as a trustee to ensure that the public enjoyed rights of navigation, bathing, and fishing'.[175]

Yet however the Crown argued its claim to lakes, it did so on the basis of the English common law position that there is a separation between the ownership of the bed of a lake and its waters. What was at stake, in legal terms, was not ownership of a lake itself, but simply of its bed – the land beneath the waters. Water, according to common law, could not be owned. Thus a lake could not be owned.

The most important case in the nineteenth-century Native Land Court era is the Wairarapa lakes, where the primary issue was the right to open the lakes to the sea in order to prevent flooding of adjacent settler farms. In 1876, the Crown attempted to purchase individual interests in the lakes before title was decided in the Native Land Court. In purchasing these interests, officials were unsure whether the Government was extinguishing rights to the lakebed or just fishing interests. When tribal leaders petitioned Parliament in 1876 in protest against the alleged purchases, a select committee recommended that title to the lakes be investigated by the Native Land Court. The Waitangi Tribunal explained what happened next in its *Wairarapa ki Tararua Report*:

> In January 1881, [Crown purchase agent Edward] Maunsell applied to have the Crown's interests in the lakes defined under the provisions of the Native Land Act 1873, section 107 of which empowered the Native Land Court to investigate and finalise incomplete Crown purchases. But, before the land court could investigate, the lakes' owners sought a Supreme Court ruling on whether the land court had authority to determine title to the bed of the Wairarapa lakes (which comprised the Wairarapa Moana block), as no rights of ownership to lake beds existed in Maori custom.
>
> The Supreme Court ruled that it could not make a finding on the matter of whether Maori, by customary rights, owned the soil beneath the lakes. Instead, Justice Richmond referred the matter to the Native Land Court. However, he found that, supposing that such rights did not exist – and hence Maori did not own the lake beds – 'there seems to be no reason why the Native Land Court should not issue certificates of title to rights of fishing as tenements distinct from the right to the soil, which would then be in the Crown'.[176]

The Supreme Court's decision was not appealed and the Native Land Court proceeded to award title to the lakebeds in 1882 and 1883, awarding the Crown 17 of 139 undivided shares on the basis of its 1876 purchase from several chiefs of their 'rights and interests of any kind whatsoever which we claim to have in such Lakes'.[177] The Court issued a certificate of title to the Crown and the individual Maori owners as tenants in common in 1883. After further

175. White, 'Inland Waterways: Lakes' (doc A113), p 252

176. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 657

177. This transaction was known as 'Hiko's sale'; it is discussed in the Tribunal's *Wairarapa ki Tararua Report*, vol 2, pp 655–656.

efforts to buy up individual interests, ongoing struggles with local authorities about opening the lake to the sea, and a commission of inquiry, the Crown finally acquired the lake by 'gift' in 1896. In return, the Crown covered the owners' extensive legal expenses (of £2000) and promised 'ample' land in exchange.[178]

In the 1880s and 1890s, therefore, the Crown appeared to have accepted the Native Land Court's jurisdiction to investigate Maori claims to lakes, and the joint Crown–Maori ownership of the Wairarapa lakes that resulted from the Court's inquiry. On the other hand, it had effectively won the Wairarapa contest by obtaining full control and ownership of the lake by means of a 'gift'. In 1897, the year after the gift, Lake Waikareiti in our inquiry district came before the Court. As we discussed in chapter 10, this taonga (some 948 acres in size) was located in the Waipaoa block, to the east of Lake Waikaremoana. The Crown secured part of the lake for survey costs in 1889 when the Waipaoa block was first heard and partitioned by the Native Land Court.[179] It then purchased individual interests in the remainder of Waipaoa and obtained the rest of the lake when its interests were partitioned out in 1903. The Crown was interested in this lake for scenic preservation and tourism purposes, and so moved to acquire it as a priority along with the surrounding lands (see chapter 10). There was no legal protection for the taonga Lake Waikareiti from a process which allowed the Crown to target it when locating its purchased interests on the ground.

In 1896, the same year that the Crown acquired the Wairarapa lakes, it did not contest the Court's reservation of Lake Horowhenua for its Maori owners, despite the Crown having acquired land around this lake. In 1897, the question of Lake Horowhenua was brought before Parliament. That lake, just a little larger than Waikareiti, was situated in the lower North Island. After the establishment of Levin, settlers wanted the Crown to buy the lake for a public reserve. Questioned in Parliament about this in 1897, the Government stated that it was willing to purchase the lake. From 1903, the new Tourist Department began work to acquire the lake as a scenic reserve but the Government had rejected the idea of a compulsory acquisition by 1905. In that year, the very year that Carroll, Ward, and Donne so confidently denied that Maori could own Lake Waikaremoana, Carroll and Seddon negotiated with Lake Horowhenua's Maori owners to permit public use of their lake.[180] But Ben White said that questions of whether the public could be stopped from fishing, whether Maori needed a licence to fish for trout, and whether they had ever or still owned the lake, remained in dispute in the decade after 1905.[181]

Fishing, especially trout fishing, became a major issue during this period, replacing drainage of lakes and flooding as the Crown's main concern. For Waikaremoana, the most relevant example was the Rotorua lakes, where trout fishing, Maori fishing rights, and the

178. Waitangi Tribunal, *The Wairarapa Ki Tararua Report*, vol 2, pp 657–673

179. Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913'(commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), pp 2–3

180. White, 'Inland Waterways: Lakes' (doc A 113), p 71

181. White, 'Inland Waterways: Lakes' (doc A113), pp 73–77

ambitions of the new Tourist Department resulted in a significant Maori counter-challenge to the Government.

According to Ben White, Rotorua tribes first discovered that the Crown claimed ownership of their lakes in 1906, when Premier Seddon announced it at an unveiling, leaving his audience (and his interpreter, Gilbert Mair) astounded. As at Waikaremoana, a 'tacit assertion of ownership' had already occurred in the form of increasing control of or interference with Lake Rotorua and its fisheries. In the 1880s, trout were established in the lakes and rivers. By the first decade of the twentieth century, the Government was operating a tourist launch service on Lake Rotorua, charging fees of other boat operators, and enforcing fishing licence regulations. It was also preparing for a direct showdown with Te Arawa over the ownership of the lakes. In 1908, a prosecution was allowed to go ahead: the Reverend Manihera Tumatahi was fined £5 for fishing without a licence. There was another high-profile prosecution in 1913.[182]

Te Arawa complained to the Stout–Ngata commission and to Parliament in 1908, with the result that special legislation was passed to give them 20 cheap fishing licences.[183] In 1909, as will be recalled from chapter 10, the Liberal Government overhauled the nineteenth-century native land legislation and passed a new Native Land Act. The 1909 Act was partly the work of the new Solicitor-General, John Salmond. According to Salmond's biographer, the Solicitor-General was responsible, 'presumably on the instruction of Ministers', for 'a battery of privative and other clauses aimed at making Maori assertions of customary title non-justiciable against the Crown.'[184] We will consider these clauses in more detail in section 20.6.2(2). Here, we note that they were designed partly in anticipation of Te Arawa's Native Land Court claim for ownership of the Rotorua lakes. This claim was duly lodged in 1910, creating something of a crisis for the Government.[185]

The Crown responded initially by withholding a survey plan and thus preventing the Native Land Court from sitting. Te Arawa took their case to the Supreme Court in 1912. It was referred on to the Court of Appeal, which delivered its famous judgment in *Tamihana Korokai v Solicitor-General* in July 1912. The Court of Appeal's decision was that the Te Arawa claim must be allowed to proceed in the Native Land Court: 'What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court.'[186] Although the Solicitor-General publicly refused to accept that the Court of Appeal had responded properly to the Crown's case, its decision cleared the way for the Native Land Court to hear the Rotorua claims and any other lake claims.[187]

182. White, 'Inland Waterways: Lakes' (doc A113), pp 103–106
183. White, 'Inland Waterways: Lakes' (doc A113), p 106
184. Alex Frame, *Salmond: Southern Jurist* (Wellington: Victoria University Press, 1995), pp 112–113
185. Frame, *Salmond*, pp 112–116; White, 'Inland Waterways: Lakes' (doc A113), pp 106–107
186. White, 'Inland Waterways: Lakes' (doc A113), p 108; see also pp 107–109
187. Frame, *Salmond*, pp 116–118

In sum, there were strong assertions of Maori ownership of their lakes throughout these years. The Supreme Court's 1912 decision was that the Native Land Court could and must ascertain Native title to the bed of Lake Rotorua. The Crown itself accepted the Wairarapa lakes as a gift and negotiated with the Maori owners of various lakes in which it became interested, and to that extent recognised their rights. There was a basic cultural and legal tension between the relationship of Maori with lakes that were their taonga, and introduced common law which distinguished between lake beds, that could be owned, and lake water, which could not. And in colonial New Zealand, the law of the colonists prevailed. It was not inevitable that it would do so, however, as we will see below, in the case of Lake Omapere.

20.5.6 Waikaremoana leaders go to Parliament to bring the lake into the UDNR

By 1906, the Government had dismissed Maori claims to the ownership and control of Lake Waikaremoana and its fisheries as 'absurd' and 'ridiculous'. Although no concerted justification was given, officials referred to arguments that the Crown owned the riparian land on the southern lake shores, that the lake was a public space, that the trout fishery had been introduced by Pakeha, and that there were specific laws governing fishing and hunting at the lake which Maori as well as Pakeha had to obey. This latter point became the focus of growing pressure on Maori communities at Lake Waikaremoana, which continued to exercise their customary hunting and fishing rights under the closer scrutiny of Lake House, its visitors, and Tourist Department rangers. In 1903, as we noted, the manager of Lake House was made an honorary ranger. This appointment was supplemented by that of W A Neale, who became forest and game ranger for the Waikaremoana district in 1905.[188]

Neale led mounting criticism of Maori fishing and hunting at the lake. In terms of fishing, he complained to Superintendent Donne in March 1906 that the sport fishery was damaged because Maori ignored the closed season. While Pakeha had to pay for licences:

> Uriweras claim the other side of the Lake and say they can kill fish all the year round. It is our policy to keep in with our Aboriginal brother and have no friction, yet it is hard lines to pay a heavy fishing licence and know they are killing fish wholesale during the close months. My son and self do our best to stop it this side of the Lake but we are powerless to do anything on the other side.[189]

Neale's criticism was echoed in 1910, when the *Wairoa Guardian* condemned the 'wholesale destruction of fish that is going on at the present time and has been going on for years, and the rangers are powerless to stop it'.[190] This article showed how the public perceived Maori fishing and hunting, reflecting a clash of values between those who saw fishing as

188. Coombes, 'Making "scenes of nature and sport"' (doc A121), p 98
189. Neale to Donne, 5 March 1906 (Walzl, 'Waikaremoana' (doc A73), p 99)
190. *Wairoa Guardian*, 19 August 1910 (Walzl, 'Waikaremoana' (doc A73), p 99)

a sport and wanted to enforce a regime designed to preserve trout for that purpose, and Maori who fished for food at the customary times in their customary waterways.[191] Maori were seen as 'poaching' trout at the Waikaremoana spawning grounds. 'Is it any wonder that enthusiastic sportsmen are disgusted?', the newspaper inquired. Maori flouted the law because the Native Minister's consent was needed to prosecute them, and Carroll 'will not sanction proceedings against his own kinsmen'. It was also 'well known' that Maori were shooting birds out of season, and quite probably doing the same to deer. This, of course, referred to 'seasons' as prescribed by statute.[192]

Thus, in the first decade of the twentieth century, there were contests about use of the lake and about fishing. Maori objected to the Government launch being on the lake without payment, and to Pakeha fishing without permission. Local Pakeha, on the other hand, objected to Maori disobeying the acclimatisation regulations, fishing out of season, and 'poaching' trout without licences. Each side wanted to control and regulate the other's fishing and use of the lake.

In 1910, the Lake House manager advised the Government that Maori were indeed poaching deer and trout, while W A Neale sent telegrams and letters about their shooting of pigeons and ducks on the lake. Neale approached the police but was advised by the local constable that he could not take proceedings without the consent of the Native Minister. As Coombes notes, this deference to the Minister was a matter of policy rather than law.[193] Neale was outraged, commenting: 'This I take it is a farce pure and simple.' Maori hunting for food, in or out of season, without licences, was:

> enough to sicken any man whose heart is in sport and the protection of game. Why proclaim the Lake a Sanctuary; why go to all the trouble and expense of liberating Deer, Duck and Pheasants and Trout to feed those natives who recognise no Law, save that that nature gave them, viz, the stomach – and when that calls season or no season all is kai? I know full well that Government does not wish to come to loggerheads with these natives, and some persuasive means ought to be employed to stop this illict shooting and poaching of trout.[194]

The Government's response to these and ongoing reports from Lake Waikaremoana (including in 1914) was that 'extreme measures' should not be taken. Instead, Maori should be advised that their actions were illegal, and officials should 'dissuade' them from hunting.[195] As Walzl put it, 'the usual proposal was to try persuasion and resist any desire to use enforcement'.[196] Coombes suggests that this kind of pressure on Waikaremoana Maori to

191. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 164–167, 189–191
192. *Wairoa Guardian*, 19 August 1910 A73, p 99 (Walzl, 'Waikaremoana' (doc A73), pp 99–100)
193. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 99, 189–193
194. Neale to Robieson, 9 June 1910 (Walzl, 'Waikaremoana' (doc A73), p 105)
195. General Manager of Tourist and Health Resorts to C Dale, 8 August 1914 (Coombes, 'Making "scenes of nature and sport"' (doc A121), p 193); see also pp 189–193; Walzl, 'Waikaremoana' (doc A73), pp 102–107
196. Walzl, 'Waikaremoana' (doc A73), p 107

stop 'poaching' intensified from 1910.[197] Maori who lived at Waikaremoana (whether all-year round or seasonally) came under pressure from officials to buy licences for trout fishing and to stop hunting waterfowl altogether.

As we have discussed, the Crown also asserted its ownership of the lake in no uncertain terms. Attempts at dialogue with local Crown representatives and with Carroll had failed. Neither side was willing to push the dispute to extremes: the Government was not willing to risk any prosecutions, and Maori leaders were not prepared to actively resist Pakeha fishing or boating on the lake. Instead, Waikaremoana leader Hurae Puketapu petitioned Parliament in 1912. His petition contained 84 other signatures. According to the brief official description, the petitioners were '[p]raying for an inquiry with regard to the boundary of the Waikaremoana Lake'.[198] At the opening of the Native Land Court hearing in 1915, Rawaho Winitana clarified that the intent of the petition was 'to alter the boundary of the lake set up in 1896 to include it within Urewera Native Reserve'.[199] It can be reasonably assumed that this was an effort both to preserve Maori ownership of the lake and to bring it under the authority of the UDNR General Committee, which had recently (if belatedly) been established in 1909.

After investigating the petition, the chair of the Native Affairs Committee reported in August 1913 that, 'as the petitioners have not exhausted their legal remedy, the Committee has no recommendation to make with regard to this petition'.[200] As Ben White commented: 'Presumably the committee meant that the petitioners could pursue a claim to the lake through the Native Land Court.'[201] This meant that the hope of the petitioners that the lake could be protected inside the UDNR and brought under the authority of its committees was thwarted.

In September 1913, presumably in response to the Native Affairs Committee's recommendation, Rawaho Winitana, Mei Erueti, and Matamua Whakamoe filed a claim with the Court for ownership of Lake Waikaremoana.[202] The hearings of that claim, and others filed subsequently, would begin in 1915. We discuss the hearings in the next section.

In Tony Walzl's view, there was also a link between this application and 'rising calls' to take land from the Waikaremoana block for a scenic reserve on the lake's northern shores.[203] In particular, the 1913 Forestry Commission recommended reserving 'all the land from the

197. Coombes, 'Making "scenes of nature and sport"' (doc A121), pp 189–193
198. 'Reports of the Native Affairs Committee', AJHR, 1913, I-3, p 10
199. Wairoa Native Land Court, Minute Book 25, 18 August 1915, fol 47; Emma Stevens, 'Report on the History of the Title to the Lake-bed of Lake Waikaremoana and Lake Waikareiti' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A85), p 10
200. AJHR, 1913, I-3, p 10
201. White, 'Inland Waterways: Lakes' (doc A113), p 138
202. Wiri, 'Te Wai-kaukau o Nga Matua Tipuna' (doc A35), p 302
203. Walzl, 'Waikaremoana' (doc A73), pp 135–137

water to the skyline' for scenic and water conservation purposes.[204] Although the commission's report and lobbying by chambers of commerce was focused on taking the bush (from shore to skyline) and not the lake itself, this was not how Maori understood it. On 30 August 1913, Eria Raukura had written to Prime Minister Massey, objecting to Lake Waikaremoana becoming a scenic reserve under (as they had heard) the control of the Wairoa County Council. Prime Minister Massey wrote back advising that their views would be given careful consideration – Walzl suggests that the Government may not have picked up on their misunderstanding that the lake was to be included in the proposed scenic reserve.[205]

The Government's interest in the lake for hydroelectricity may also have influenced the Maori decision to seek a legal title through the court at this time:

> by 1913 there had been a similar rise in calls from Hawkes Bay and East Coast local bodies for the government to initiate a hydro-electric scheme focused on the storage capacity of Lake Waikaremoana. This campaign had begun initially in 1910 and had continued to the point that Government engineers were at the Lake in 1912 preparing a report on the potential for electricity generation.[206]

Maori may have been aware of this as another potential risk to their control and use of their lake.[207]

20.5.7 What was the consequence of Parliament's rejection of the petition?

By the end of 1913, Waikaremoana leaders' attempt to have their lake protected inside the UDNR had failed. In addition to Crown use of the lake for tourism and the imposition of hunting and fishing restrictions, there seemed to be a risk that the lake might be taken for scenic or hydroelectricity purposes. According to the Native Affairs Committee, the petitioners had a legal remedy available to them: to apply for a legal title through the Native Land Court. This would give their rights some recognition and provide protection in the courts.

The consequence of applying for such a title would inevitably be a transformation of the basis on which the Maori people possessed and related to their taonga, Lake Waikaremoana. In 1913, when they applied to the court, the title on offer remained limited in the ways which we have explained in Chapter 10. A court hearing would result in a legal title vested in the individuals who had convinced both the Maori leaders compiling the lists of owners and the court (which had to approve the lists) of their customary interests. We have already pointed

204. E Phillips Turner, 'Report of the Royal Commission on Forestry', 31 May 1913, AJHR, 1913, C-12, p xix; Walzl, 'Waikaremoana' (doc A73), p 134

205. Walzl, 'Waikaremoana' (doc A73), pp 126–136

206. Walzl, 'Waikaremoana' (doc A73), p 137

207. See also Wairoa Native Land Court, Minute Book 29, 3 August 1917, fol 78 (Niania, brief of evidence (doc I38), app 3, p 121).

out the severe consequences of this form of title earlier in the report (see Chapter 10). There was no escape from this individualisation of title in 1913 but some of its effects could be counteracted later if the individual owners chose to set up an incorporation. Incorporations, however, were not well-understood outside the East Coast and were rare at this time.[208]

It should be noted, however, that, in real terms, the UDNR no longer promised the protection it once had. By 1912–13, the Urewera Commissions had not produced the hoped-for hapu or community titles, and the Native Land Court's jurisdiction had been reintroduced to the reserve. Further, the promised General Committee had not been established until recently and was already at risk because of the Government's wish to circumvent its sole authority to approve sales, so that the Crown could buy land freely in the reserve. As we explained in Chapter 13, Crown purchase of undivided, individual interests was about to occur, breaching earlier promises, Treaty principles, and the law itself.

Given the fate of the Waikaremoana block in the 1920s, acquired by the Crown through consolidation of the scattered interests it had purchased in the reserve (even though no Waikaremoana interests had been sold), the lake may have been *more* vulnerable rather than less if it had been placed inside the reserve in 1913.

But this was not apparent to the Waikaremoana petitioners in 1912–13; they understood the creation of the UDNR to have protected their lands and resources from alienation, and to have placed their lands under the authority and management of elected committees. With the denial of their petition, the only way of securing any legal recognition and protection of their rights to the lake was to obtain individualised title to the lakebed under the native land laws. Under English law, titles derived from the Crown were usually limited to the beds of waterways and not the water above the beds. The native land laws would transform customary rights in a taonga, to which its peoples related through whakapapa and tikanga, substituting individual court-awarded shares in a piece of land. This was the inevitable consequence of the need in 1913 to protect Lake Waikaremoana within the settler state's legal system.

As we shall see later in the chapter, however, this legal change in title did not take place until the 1950s. By the time the transformation of title took effect in 1954, the Crown was no longer willing to pursue the predatory purchase of individual interests that had marked earlier times. Thus, in the 1950s and 1960s community leaders were still able to speak for their people in respect of negotiations about the lake. But the persistence of community control at a practical level did not mean that there was any recognition of kaitiakitanga, or provision for its exercise, in the Pakeha legal system. The new form of title did not allow them to continue to possess or control their taonga as a water system, whole and undivided, or to make full use of their lake in the economy. The title available under the land laws in 1913 (and finally conferred in 1954) was something significantly less than that which they

208. See Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 777–781

had possessed in 1840. We discuss in section 20.11 whether this was consistent with the Treaty guarantees.

But all this lay in the future. There was to be a long battle before Maori could secure legal title to their lake. We turn next to consider the Crown's response in 1913–18 to the Maori claim for legal ownership of Lake Waikaremoana.

20.6 What Was the Crown's Response to the Maori Claim for Legal Ownership of Lake Waikaremoana?

Summary answer: *From 1915 to 1954, the Crown denied the Maori claim for legal ownership of Lake Waikaremoana, and resisted that claim by almost all means available to it. According to Crown counsel, it did so because it 'assumed' it owned the lake. In 1954, the very last date at which the Crown could still challenge Maori ownership of Lake Waikaremoana in the courts, it finally decided that 'the Maoris are to be permitted to retain the benefit of their declared ownership of the bed', as the Maori Affairs Department put it at the time.*

In the claimants' view, the Crown:

(a) wrongly contested their title,

(b) tried to prevent the Native Land Court from sitting,

(c) failed to attend the Court and present its case,

(d) wrongly appealed the Court's decision,

(e) was largely responsible for an unconscionable 26-year delay in the hearing of its appeal,

(f) persisted with its appeal long after the issue had been settled elsewhere in favour of Maori,

(g) tried to prevent the Appellate Court from proceeding in 1944, and

(h) wrongly refused to accept the Appellate Court's decision for a further 10 years.

We have structured our discussion of these claims around four key sub-questions.

i. Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case?

At the first Native Land Court hearing in 1915, the applicants submitted a plan of Lake Waikaremoana that they had obtained from the Government, and which Judge Jones accepted as a sufficient plan for the purpose of hearing their claim. When the Court sent the plan to the Survey Office at the end of the first hearing, it was then withheld on the advice of the Crown Law Office so as to prevent further sittings. Judge Jones, however, decided in 1916 that the approved plan need not be present in Court for the hearing to proceed. A stalemate persisted for the rest of the hearings, with the Government refusing to supply the plan and the Court sitting regardless.

The Solicitor-General's view was that Maori customary title existed only to the extent that the Treaty had been recognised in the Native Land Acts as a source of legal title.

Neither the Treaty nor the Acts, in his view, had been intended to recognise Maori title to large inland waterways – that is, their beds – because that would be fatal to public interests in navigation and fishing. Thus, such waterways belonged to the Crown. Further, he argued that the most Maori could have held by custom was fishing rights and not rights in the bed of a lake. By 1917, Solicitor-General Salmond hoped that this question of Crown or Maori ownership of large, navigable lakes could be decided in principle by a sitting of all the Native Land Court judges. The Chief Judge agreed at first to this proposal but it proved impossible to schedule, and thus he directed the judges at the end of 1917 to proceed with their hearings in the usual way. In the meantime, Judge Gilfedder had made interlocutory orders vesting the lake bed in 274 individuals of Tuhoe, Ngati Ruapani, and Ngati Kahungunu descent. These orders were finalised in 1918, after allowing time for the Crown to appear and present its case.

The Crown never appeared at any of the Waikaremoana hearings between 1915 and 1918. For the most part, this was because the Solicitor-General was attempting to prevent individual judges from deciding lake titles until the issue could be settled in principle for all lakes. When this strategy failed at the end of 1917, the Crown still did not appear at the final Waikaremoana hearing in May and June of 1918, despite a stated intention to do so. From the evidence available to us, neither the Lands Department nor the Crown Law Office was aware of the hearing until too late. In our view, there was either an unexplained breakdown in communication, possibly due to negligence on someone's part, or there was a misunderstanding by the court as to whether the Solicitor-General required notice in advance of a hearing or after final orders had been made. Regardless, there is no evidence of bad faith by the Crown in failing to appear at the 1918 hearing. The Crown filed its appeal on 28 June 1918.

ii. Why was the Crown's appeal not heard for 26 years?

The Crown argued in our inquiry that there was no deliberate policy to delay the appeal. The unavailability of lawyers or judges, the Depression, and a long period when Maori were without counsel, all contributed, and the Crown was not guilty of bad faith. The claimants, on the other hand, argued that the Crown was responsible for the delay, whether deliberately or as a result of vacillation. In our view, the truth lies somewhere between the two. In the early 1920s, in particular, the Crown did try to prosecute its appeal but agreed to have it postponed to accommodate the needs of the UCS, the unavailability of lawyers on one side or the other, and Court scheduling problems. After it had settled the Rotorua and Taupo lake claims by 1926, however, the Crown stopped trying to get its appeal heard and was satisfied with the status quo. A Crown Law Office explanation in 1939 was that the Maori respondents had been without counsel and wanted to put the hearing off during the Depression, and that it had heard nothing about

Waikaremoana between 1931 and 1939. The documentary sources, however, show that both Waikaremoana leaders and the Native Appellate Court made ever more urgent approaches to the Crown during that period. Maori leaders in particular tried to get the Crown to prosecute or abandon its appeal – preferably to abandon it and recognise them as the lake's legal owners. While there was debate within government as to what to do, the outcome was that the Crown did nothing, leaving its appeal on the books and negating all attempts to get it heard.

In 1939, the Crown refused a request from the Maori owners to agree to dismissal for non-prosecution. In 1943, when the owners could again afford counsel, the Government agreed that the appeal should proceed – but tried to have it adjourned sine die in 1944 because it was still not ready to proceed. On the other hand, the Crown rejected advice that it should negotiate a settlement or legislate a solution at that time. Ultimately, the Appellate Court agreed that the Crown should have more time to prepare but refused a sine die adjournment, and it dismissed the Crown's appeal later in September 1944.

Thus, we accept that the delays in the early 1920s were not the responsibility of the Crown, and that the Crown was right not to insist on prosecuting the appeal during the Depression. Also, we accept that the Government had other priorities during the Second World War, of course, but the Native Appellate Court was right to insist that this long-outstanding matter of national importance be finally settled. Ultimately, although there may not have been a deliberate policy to delay the appeal, that was in fact the practical effect of the Crown's refusal in the 1930s and early 1940s to either prosecute or give up its appeal, despite repeated requests from the Maori respondents and the Native Appellate Court that it do so.

iii. What is the significance of the Crown's loss in the Native Appellate Court in 1944?

According to the claimants, the Crown's loss in the Appellate Court was 'entirely predictable', and it should have abandoned its appeal long before 1944. In support of this contention, the claimants argued:

- *that the jurisdiction of the Native Land Court had been settled in* Tamihana Korokai *in 1912, and it was pointless for Solicitor-General Cornish to argue, as he did in 1944, that the Court had no jurisdiction to make its 1918 orders for Lake Waikaremoana;*
- *that Salmond's arguments about ownership of lakes had been presented fully to the Native Land Court in the Lake Omapere case, and that Judge Acheson's 1929 decision had shown that these arguments could not succeed in the Native Land Court; and*
- *that the Crown had negotiated settlements for the Rotorua lakes and Lake Taupo in the 1920s, and thus recognised Maori title to lakes (even if only to extinguish it).*

In our view, there is some merit to these points, although the Crown had appealed the Omapere decision (which appeal was withdrawn in 1953). In our inquiry, the Crown did

not respond to the claimants' arguments, simply stating that it was entitled to contest such an important matter as the ownership of Lake Waikaremoana in the courts. We note that the Native Appellate Court did, as the claimants put it, give the Crown's arguments in the Waikaremoana case 'very short shrift'. The Crown Law Office at the time was certainly aware of inconsistencies in how the Crown had dealt with lake claims in the past, noting the 'purchase' of Lake Wairarapa and part of Lake Tarawera, as well as the Rotorua and Taupo negotiated settlements. Faced with a definite fixture for Waikaremoana in 1944, the Solicitor-General recommended seeking an adjournment so that a settlement could be negotiated. The Government did not accept this advice and the appeal went ahead. But there is no indication that the Crown Law Office considered the case unwinnable or that the Crown was acting in bad faith.

iv. Why did the Crown refuse to accept the Appellate Court's decision, and wait another 10 years before finally accepting Maori ownership?

The Native Appellate Court's decision did not end the Crown's procrastination over Waikaremoana litigation. For a further 10 years, it contemplated trying to overturn the decision in the general courts. It could not procrastinate for longer because, under section 51 of the Native Land Act 1931, Native Appellate Court orders could not be quashed 'by any Court in any proceedings instituted more than 10 years after the date of the order'. The Crown Law Office went ahead and prepared an application for prohibition to the Supreme Court but it was never filed. From 1947, Prime Minister Fraser preferred to negotiate a purchase, and went so far as telling the Maori owners in 1949 that he was not in favour of further litigation and 'would ask the Government to accept the decision of the Maori Appellate Court'. The owners understood this as a commitment not to proceed in the courts, but discussions were interrupted by the 1949 election of a new National Government.

Officials were waiting in any case for the outcome of Whanganui River litigation. The new Government agreed in 1950 to await the decision of the Whanganui River commission. When the Maori Land Court sought the official plan of Lake Waikaremoana in June 1950 so as to have the titles completed and registered, the Government withheld the plan to prevent the Court from acting. It also decided to proceed immediately with litigation but then changed its mind due to the unfavourable findings of the Whanganui River commission. Rather than accepting those findings, the Goverment referred the Whanganui River case to the Court of Appeal by special legislation in 1951. The Court of Appeal heard this case in 1953 but did not issue its judgment until July 1954, when it too found against the Crown (except on the application of the ad medium filum rule to the bed of the Whanganui River, about which it sought more information). This outcome was not encouraging for the likely success of any Waikaremoana litigation. On the advice

of the Maori Affairs Department, Cabinet decided in September 1954 that the practical risk to the Crown of Maori ownership of Lake Waikaremoana was minimal, because the owners were unlikely to be able to sustain an action for trespass and damages against the Crown for its hydroelectric scheme. Thus, the 10-year deadline for litigation in the Waikaremoana case was allowed to pass without action. The Maori Land Court was then supplied with the plan so that the titles could be registered.

It is difficult if not impossible to see any kind of principled behaviour by the Crown towards the Maori owners of Lake Waikaremoana during this period. Rather than withholding the plan from the Maori Land Court indefinitely, the Crown should either have proceeded immediately in the Supreme Court in 1950 or abandoned its litigation option. To make the Maori owners wait another four years on the Whanganui River litigation, in which they were not involved and over which they had no control, and then to decide at the very last minute that Maori ownership of Lake Waikaremoana was of little practical importance to the Crown's interests anyway, was indefensible behaviour.

In 1957, the Maori owners' lawyer wrote to the Government on their behalf, setting out their anger and grief at how they had been treated by the Crown. In their view, the Crown had taken advantage of the Native Land Act to postpone dealing with them for a whole decade, while wrongly withholding the plan from the Court and preventing them from getting their legal title. In 1949, they understood the Prime Minister to have assured them that the Government would accept the judgment of two courts, both against the Crown, yet instead it had persistently disregarded their ownership and used their lake for electricity and tourism without payment or permission. 'We submit', they wrote, 'it is clearly improper that the rights of citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded.'

20.6.1 Introduction

In 1913, Ngati Ruapani and Tuhoe leaders filed a claim with the Native Land Court for the ownership of Lake Waikaremoana. In 1914, Ngati Kahungunu leaders also filed claims with the Court. For 41 years, from 1913 to 1954, the Crown denied these claims and actively opposed the granting of title to Lake Waikaremoana to Maori. Its initial response was to try to prevent the Native Land Court from sitting, by withholding the requisite plan and, instead, seeking a special sitting of the whole Native Land Court bench to determine whether Maori could own the beds of navigable lakes. When this failed, and the Native Land Court ruled in favour of the Maori applicants in 1918, the Crown appealed the Court's decision. For reasons that we will examine shortly, the appeal was not heard until 1944, when the Native Appellate Court confirmed the original decision. The Crown then continued to withhold the necessary plans so as to prevent the issuing of title, and kept open its

option of challenging the Appellate Court's decision in the Supreme Court. It was not until the very final moment, in 1954, when the statutory time period for a Supreme Court action expired, that the Crown finally admitted Maori ownership of Lake Waikaremoana.

The claimants' key arguments are that the Crown wrongly and deliberately delayed the hearing of its own appeal for 26 years, and that it should never have lodged an appeal or attempted to actively defeat Maori title in the first place. Instead, the Crown should have protected Maori title, at the very least from the point at which it was confirmed by the Native Land Court in 1918.[209] The Crown's position is that it was entitled to contest such an important matter as the ownership of Lake Waikaremoana. Also, its view is that the Crown had no deliberate strategy to delay the hearing of its appeal; rather, the appeal was delayed for a number of reasons, including requests from the Maori parties, who suffered no prejudice in any case since their title was ultimately confirmed.[210]

In order to address the parties' arguments on these matters, we have structured this section around the following questions:

- Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case? (Section 20.6.2.)
- Why was the Crown's appeal not heard for 26 years? (Section 20.6.3.)
- What is the significance of the Crown's loss in the Native Appellate Court in 1944? (Section 20.6.4.)
- Why did the Crown refuse to accept the Appellate Court's decision, and wait another 10 years before finally accepting Maori ownership? (Section 20.6.5.)

20.6.2 Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case?

(1) *Withholding the survey plan*

In 1913, when the first Waikaremoana application was lodged, the court warned the Maori applicants that 'it would not be possible to proceed with the case in the absence of a plan or sketch plan duly approved'.[211] In 1915, the court was able to begin its hearings because the claimants had secured their own map from the Lands Department. It later emerged that officials had provided the plan, not realising that it was to be used in a court hearing, and they denied that it was a proper, approved plan for such a purpose.[212] The Crown, as we

209. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145
210. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 4–5
211. Wairoa Native Land Court, Minute Book 27, 21 August 1916, fol 284 (Niania, brief of evidence (doc 138), app 3, p 107)
212. Chief Surveyor to Under-Secretary for Lands, 8 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 268)

noted above, had earlier withheld an approved plan of Lake Rotorua in order to prevent the Native Land Court from hearing Te Arawa's claim.

The base map for the Waikaremoana plan appears to have been the topographical map of the UDNR prepared in 1895, 'showing all the shore of the lake'. This plan had been approved by the Chief Surveyor at the time and deposited in the office. The Chief Surveyor reported in 1916:

> Some time in the first half of last year [1915], a Native applied for a copy of the portion showing the Lake and an enlarged plan on 40 chains scale was made for him and for which he paid the fee demanded.
>
> This plan found its way to the Native Land Court and I believe was for the purpose of illustrating a claim to the waters of the Lake, of which however, we never heard definitely. The Court evidently impounded the plan and returned it to us, and we gave it a Native plan number and have since retained it in the office. Strictly speaking, it is not a Native Land Court plan as it bears no imprint of the Court's approval or recognition and as before stated is merely an enlarged copy of a Government Topographical plan in no ways different from the information appearing on all published lithos.[213]

Judge Jones decided that the plan supplied by the applicants met the necessary requirements, and so the Native Land Court sat to hear their claims in August 1915. The issue of the Crown's claim was raised on the very first day by J H Mitchell, who represented some of the Ngati Kahungunu applicants. Rawaho Winitana, who was leading the Tuhoe and Ngati Ruapani case, submitted:

> The Government say the lake belongs to them. Suggest the Court has jurisdiction. I say we retain our rights to the lake.[214]

The Crown was not represented at this hearing. Judge Jones ruled:

> The Court holds that it has jurisdiction to hear matter unless it is prohibited by Proclamation, it is Crown Land, is taken under Public Works Act or a title has already issued. None of these things as far as the Court is aware has happened. Under these circumstances the Court will proceed but some question may arise as to the question of whether the Native custom and usage applies to the bed of the lake. This is of course open for evidence to be given upon.[215]

213. Chief Surveyor to Under-Secretary for Lands, 8 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 268)

214. Wairoa Native Land Court, Minute Book 25, 18 August 1915, fol 47 (Niania, brief of evidence (doc 138), app 3, p 101)

215. Wairoa Native Land Court, Minute Book 25, 18 August 1915, fol 47 (Niania, brief of evidence (doc 138), app 3, p 101)

After this initial decision to proceed, the court heard evidence which mainly focused on the question of a boundary between Tuhoe and Ngati Kahungunu. The hearing was brief. The court adjourned on 21 August 1915 and it did not sit again for a year.[216]

When the court resumed its hearing in August 1916, Judge Jones noted that time was limited and the question of jurisdiction had to be settled at some point. His view was that the court should proceed and determine which of the claimants were entitled to pursue the argument with the Crown.[217] First, however, the court had to decide whether it could proceed in the absence of the previously submitted sketch plan, which the Government was now refusing to give up. Judge Jones told the parties:

> The Court said that up to the present it had not been able to obtain the sketch plan that was before it last year . . . The Court at the conclusion of its sitting [in 1915] returned the plan to the Survey Office for safe custody and the public convenience expecting it would be returned . . . Although two telegrams have been sent and ample time allowed the sketch has not been sent and from correspondence perused by the Court it appears it is being retained at any rate for the present because the Crown has some claim to the lake and the department has been advised to withhold it. The Crown of course has a right to appear and substantiate before the Court any claim it may have and the possibility of such a claim was mentioned at the first setting up of cases and it is still hoped that the Crown will see that its claim, whatever it is, is properly placed before the Court before its final adjudication is made out. The Court altogether dissents from the view which is apparently held that the Crown can by withholding the sketch debar the Court from exercising its jurisdiction. Any attempt to prevent the claimants from exercising their right to plead their claims before the Court must have express statutory authority and this Court does not think that Rules of Court 20 and 21 are sufficient. The Court and the Natives having done their best to have the sketch here, the Court must proceed with the case.[218]

From the documents supplied to the Tribunal by Tony Walzl, it appears that the Napier office wired head office on 7 August 1916, advising that Judge Jones wanted the plan 'used . . . last year' to be sent to him, and asking what action to take. The Lands and Survey head office asked the Solicitor-General for advice.[219] On 8 August 1916, in the telegram quoted earlier, the Chief Surveyor explained how the plan used by the court the year before had been acquired by the Maori claimants, and that it was not '[s]trictly speaking' a proper

216. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 15–16

217. Grant Young and Michael Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands', report commissioned by the Crown Forestry Rental Trust, July 2003 (doc A129), p 146

218. Wairoa Native Land Court, Minute Book 27, 21 August 1916, fol 286 (Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), pp 146–147)

219. Lands Department, Napier office, to Under-Secretary for Lands, 7 August 1916; Under-Secretary, minute, 7 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 269)

Native Land Court plan, although the department had given it a native plan number when the court 'returned it to us' after the 1915 hearing.[220]

The Solicitor-General wrote to both the Lands Department and the Chief Judge on 10 August 1916. He advised the Under-Secretary for Lands that 'the proper course is to refuse in the meantime to supply any plan of the Lake until definite information has been obtained as to the nature of these proceedings and the course which the Native Land Court proposes to take'. The Crown was interested because of its ownership of the southern shores, as well as its general interest in Maori lake claims. One purpose of the rule about plans, the Solicitor-General advised, was to 'enable the Crown to protect its interests by obtaining due notice of the nature and scope of all claims to customary land'. He also noted that he had written to the Chief Judge for more information.[221] On the basis of this letter, the Napier office was ordered not to supply the plan for the meantime.[222]

In his letter to the Chief Judge, the Solicitor-General expressed surprise to learn that a plan was required 'in connection with some application for investigation of title to the Lake'. If that was so, then he noted the Crown's interest in the proceedings, both on the general question of whether Maori had proprietary interests in lakes, and also on the specific question of 'the precise boundaries of the title acquired by the Crown to the land on one side of the lake'. In other words, Salmond implied that the Crown might raise the *ad medium filum* question in the Waikaremoana case. He also questioned how the Native Land Court could be sitting without a plan duly approved by the Chief Surveyor. Salmond asked the Chief Judge to explain 'the exact nature of the proceedings before Judge Jones and the course which he proposes to take'. In the meantime, the plan would be withheld until 'more definite information has been obtained as to the present position'.[223]

It was this correspondence which led Judge Jones to state in court that the Crown was attempting to prevent his sitting by withholding the plan.[224] The judge strongly disagreed that the 1915 plan was not a duly approved plan. As noted earlier, it had been approved by the Chief Surveyor as a topographical plan but not as a separate and specific plan for hearing title to Lake Waikaremoana. Judge Jones advised the Chief Judge that the plan had been 'approved and supplied by the Chief Surveyor [to the Maori applicants] and accepted by the Court as sufficient for the purpose'. The Maori application and the court sitting had been 'notified in the ordinary way'. Although the judge was keeping an open mind as to the

220. Chief Surveyor to Under-Secretary for Lands, 8 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 268)

221. Solicitor-General to Under-Secretary for Lands, 10 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 264)

222. Under-Secretary for Lands to Chief Surveyor, Napier, 10 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 263)

223. Solicitor-General to Chief Judge, 10 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 261–262)

224. Chief Judge to Judge Jones, 15 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 260)

court's jurisdiction, 'up to the present nothing has been shown to the Court which would deprive the Natives of their statutory right to have their claim heard by it'.[225] In the belief that the absence of the plan was not a bar to continuing (since there had been an approved plan when the court started), Judge Jones refused to stop the 1916 hearing, and his explanation was forwarded to the Solicitor-General.[226]

From the above correspondence, we take it that the Solicitor-General had been unaware of the Waikaremoana case, despite it having been notified in what Judge Jones called 'the ordinary way'. Salmond attempted to withhold the survey plan so as to stop the court from sitting until the Crown had full information and was in a position to protect its interests, but failed in this attempt because the court proceeded anyway. Even so, the 1916 hearing was relatively brief. It was adjourned on 26 August.[227] In her report on the lake, Ms Emma Stevens noted that the Crown elected not to be represented at this hearing, for reasons that she had been unable to discover.[228] It appears from the documentary sources provided by Mr Walzl that the Solicitor-General was not aware in time that the court was sitting.

The question then became: what would the Crown do when the inquiry resumed in 1917? In April of that year, when Judge Jones was unavailable to sit, the Ngati Kahungunu applicants asked for the case to be delayed until he could preside over it. Kaho Hapi and 41 others, 'who are descendants of Ruapani and members of the Tuhoe tribe' and the 'permanent residents of Waikaremoana', petitioned the Native Minister for the case to proceed as scheduled before a new judge. They pointed out that the case had already been going on for a number of years, that elderly kaumatua witnesses were dying, that the evidence had been recorded in the minute books, and that attention was turning to the First World War. They asked for the Native Minister to instruct the judge to ensure the case was completed in 1917.[229] This was to be the first of many appeals to the Crown over the years to help bring the Maori title claim to finality. In fact, the Chief Judge decided that the Waikaremoana case should proceed before Judge Gilfedder.[230]

In May 1917, noting that the case was about to come before the Native Land Court again, the Lands Department Under-Secretary asked his Minister for 'the Solicitor General to be

225. Judge Jones to Chief Judge, 12 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 256)

226. Chief Judge to Solicitor-General, 16 August 1916, on Judge Jones to Chief Judge, 12 August 1916 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 257)

227. The 1916 hearing opened at Wairoa on 16 August 1916. The first two days were occupied in deciding whether the hearing should go ahead, because the court had very few days available, and whether the hearing should be held at Wairoa or Frasertown. On 17 August, the hearing was adjourned to Frasertown. It resumed on 21 August, at which point Judge Jones explained that the court could not obtain the 1915 plan but would continue in any case. The court heard evidence for five days (21–25 August). Then, on 26 August, the judge explained that the court would have to adjourn. See Niania, brief of evidence (doc I38), app 3, pp 106–120.

228. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 17–18

229. Kaho Hapi and 41 others to Native Minister, 19 April 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 241)

230. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 18

again communicated with in order that such steps as are necessary may be taken to protect the Crown's interests'.[231] In response, the Solicitor-General set out (for the first time) the legal basis of the Crown's claim to own the bed of Lake Waikaremoana, and a strategy for how to secure that ownership in the wake of the Court of Appeal's decision in *Tamihana Korokai v Solicitor-General*. We turn next to explain this important development.

(2) *What was the legal basis of the Crown's claim to own Lake Waikaremoana, and what was its strategy to secure that ownership?*

The legal basis for the Crown's claim to be the owner of Lake Waikaremoana (and of Lake Rotorua) should be understood against the background of the long-standing concern of the Solicitor-General, Sir John Salmond, to protect public rights to fishing, navigation, and other uses by ensuring that Maori could not be granted freehold titles to the beds of inland waterways, or foreshores and tidal waters, by the Native Land Court.[232]

As we discussed earlier, Salmond had drafted 'privative clauses' in the Native Land Act 1909 – that is, clauses which rendered customary rights in land unenforceable against the Crown – to meet just such a case as the Maori claim to Lake Waikaremoana. At the time, the focus had been on Lake Rotorua (which was to come before the general courts in the 1912 case of *Tamihana Korokai v Solicitor-General*).[233] The Attorney-General, Sir John Findlay, explained in Parliament that the purpose of the clauses was to settle the uncertainty created by an 1894 case, *Nireaha Tamaki v Baker*.[234] In that case, the Privy Council had 'reversed a decision of the New Zealand Court of Appeal that: "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony"'.[235] But though Salmond drafted the privative provisions of the 1909 Act with the intention of mitigating the effect of the Privy Council's decision, the meaning of the provisions soon proved to be contentious.

In brief, section 84 provided that – unless otherwise expressly provided in any other Act – Maori customary title was not 'available or enforceable' against the Crown by any proceedings in any Court or in any other manner. Section 85 stated that the Governor could proclaim that any land vested in the Crown was free from Maori customary title, and all Courts and proceedings would have to accept this as 'conclusive proof of the fact so proclaimed'. Section 87 prevented any Crown grant or Crown transaction from being questioned or invalidated on the grounds that Maori customary title had not been properly extinguished. And section 100 allowed the Crown, by Order in Council, to prohibit the Native Land Court

231. Assistant Under-Secretary to Acting Minister of Lands, 23 May 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 240)
232. Frame, *Salmond*, p 119
233. *Tamihana Korokai v Solicitor-General* (1912) 15 GLR 95; Frame, *Salmond*, pp 116–118
234. *Nireaha Tamaki v Baker* (1894) 12 NZLR 483; Frame, *Salmond*, pp 112–113
235. Frame, *Salmond*, p 113

or Appellate Court from ascertaining title to 'any area of customary land' or making freehold orders for it.

The 'Privative Clauses' of the Native Land Act 1909

Clause 84: Save so far as otherwise expressly provided in any other Act[,] the Native customary title to land shall not be available or enforceable against His Majesty the King by any proceedings in any Court or in any other manner.

Clause 85: A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed.

Clause 87: The Native customary title shall for all purposes be deemed to have been lawfully extinguished in respect of all land which during the period of ten years immediately preceding the commencement of this Act has been continuously in the possession of the Crown, whether through its tenants, or otherwise howsoever, as being Crown land free from the Native customary title.

Clause 100: In respect of any area of customary land the Governor may, at any time and for any reason which he thinks fit, by Order in Council prohibit the Native Land Court or the Appellate Court from proceeding to ascertain the title to that land or to make a freehold order in respect thereof; and no freehold order made in breach of any such prohibition shall be of any force or effect.

In Salmond's view one of the purposes of the provisions was to enable the Crown to prevent Maori from obtaining Native Land Court freehold titles to inland waterways (as well as foreshores and tidal waters). He meant, of course, the beds of such waterways (or the beds of 'waters' – the alternative term he used), reflecting the common law presumption that only beds (land under lakes) could be owned. It was 'quite out of the question', he wrote in 1914, 'to allow freehold titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole European population from all rights of fishing, navigation and other use now enjoyed by them.'[236] His aim was not to defeat Maori claims altogether but to divert them from the courts to Parliament. He did not intend to stop the courts from investigating Maori claims to customary title, nor from declaring that customary title was established, but to render that title unable to be upheld by a court against the Crown. It would then be left 'to the Natives to claim from Parliament such fair compensation as they may be thought entitled to for the destruction of any rights or privileges pos-

236. Salmond to Attorney-General, 1 August 1914 (Frame, *Salmond*, p 119)

sessed by them'.[237] In Alex Frame's view, Salmond saw Parliament as a safer 'tribunal' for Maori than the courts.[238]

Salmond's opening gambit in the Rotorua Native Land Court claim – to withhold the survey plan – resulted in a case stated to the Supreme Court (which was then removed to the Court of Appeal). Salmond hoped that the Court of Appeal would declare that even if customary ownership of the lakes was possible and was established in this case, section 84 of the 1909 Act prevented it being asserted against the Crown. He was to be disappointed. The Court of Appeal's decision was summarised in the case reporter's headnote as follows:

> The Native Land Court has jurisdiction to entertain and determine a claim by Natives to be owners of land claimed by the Crown, and to determine such a claim by an order binding the Crown, unless its power to do is brought to an end by a Proclamation under section 85 of the Native Land Act, 1909, or some such similar statutory provision, or the Crown shows title to the land. The mere assertion by the Attorney-General or the Solicitor-General that the land is Crown land is of no validity; the Crown must either prove the Proclamation or its title to the land.
>
> It is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is Native customary land or not, and in ascertaining this it may determine whether or not the Maoris were the owners of the bed of any lake or part thereof according to Native custom, or whether they had and have merely a right to fish in its waters.[239]

In the Solicitor-General's view, the decision in *Tamihana Korokai* settled nothing because the Court had completely misunderstood the purpose of the provisions in question. Before leaving for London in 1912 to represent the Crown in a Privy Council case, Salmond instructed that a section 100 order in council should be prepared for the Rotorua case, prohibiting the Native Land Court from investigating the title and making freehold orders. It was to be issued, he advised, only if the court determined that, by Maori custom, the Rotorua lakes were the subject of proprietary rights that would justify the award of a freehold title. But while the Solicitor-General was away, the new Reform Government under Prime Minister William Massey agreed in 1913 to Maori requests that sections 84 and 100 should be repealed.[240] Frame suggests that the Government was 'making a virtue out of necessity', given the Court of Appeal's 'resounding' rejection of the Crown's case in 1912, and taking the opportunity to embarrass the opposition Liberal party which had introduced the measures in 1909.[241]

237. Salmond to Attorney-General, 1 August 1914 (Frame, *Salmond*, p 119)
238. Frame, *Salmond*, pp 114–115
239. Case reporter's headnote, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321
240. This was achieved in the Native Land Amendment Act 1913. See Frame, *Salmond*, pp 116–122.
241. Frame, *Salmond*, p 121

Native Minister Herries explained to Parliament that 'in 1909 we were drawing the bow a little too tight – we were giving more power to the Crown than we ought'. In what he called a 'great concession to the Natives', the Government decided to repeal 'some of those obnoxious sections in regard to the rights of the Crown'. Maori thus had restored to them 'a perfect right now – they were barred before – of having the matter [claims to lake beds] tested, as the Treaty of Waitangi said they ought to have, in the Native Land Courts of the Dominion'.[242] This was an important development for the Lake Waikaremoana case, and the question of how the Crown would deal with it.

When he returned to New Zealand, Salmond tried, without success, to persuade the Government to re-enact section 100.[243] In 1917, therefore, when the question of Lake Waikaremoana came to him for advice as to the Crown's legal position, he lamented that it was no longer an option to simply stop the Native Land Court from deciding the case. He also had to explain (or explain away) the consequences of the Court of Appeal's decision in *Tamihana Korokai*. Within these parameters, Salmond set out his advice as to what the Crown's position should be in both the Rotorua and Waikaremoana cases. This explanation was, as we noted above, the first time that the Crown set out the legal bases on which it claimed to be the owner of Lake Waikaremoana.[244] We therefore set it out in some detail.

In Salmond's view, the Crown had to accept that Maori customary title was not limited to dry land but included small areas of land covered by water. His view was that 'small unnavigable streams, lagoons, and other waters were undoubtedly merely appurtenant to the adjoining land and subject to customary title'. Such waters could thus be included in freehold orders issued by the Land Court to Maori owners. But this did not mean that all waters were subject to native title. The Supreme Court in *Waipapakura v Hempton*[245] found that the tidal waters of New Zealand 'are not and never have been Native customary land'. 'There is a great deal to be said', argued Salmond, 'in favour of the view that the non-tidal but navigable waters of the Dominion are equally excepted from Native title.' He suggested that Maori customary title existed at law only so far as the Treaty of Waitangi had been 'recognised and validated as a ground of legal title' by the native land laws. The extent of customary title depended on 'the true construction of that Treaty and of the validating legislation'.[246]

On this approach to the law and the Treaty, the question of whether there was a native title to lakebeds depended on 'the expressed or implied intention of the grantor, namely the Crown and Parliament'. The Supreme Court had found that 'the grantor' had not intended

242. Herries, 28 November 1913, NZPD, 1913, vol 167, p 389 (Frame, *Salmond*, p 120)

243. Frame, *Salmond*, pp 121–122

244. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 229–234)

245. *Waipapakura v Hempton* (1914) 33 NZLR 1065. For a brief account of Salmond's arguments in this case, and the Supreme Court's decision, see Frame, *Salmond*, pp 105–106.

246. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 230–231)

to include harbours, foreshores, and tidal rivers, even though neither the Treaty nor the native land laws expressly excepted them. The ground for this was that 'it would be unreasonable to presume an intention on the part of the Crown and the Legislature to destroy the public rights of navigation and access to the sea'.[247] Even if Maori customary title to Wellington harbour, for example, could be proven to have existed, 'this customary ownership has acquired no legal recognition or validity and no freehold order could be obtained in respect of such waters'.[248] Salmond concluded:

> I think that on a reasonable interpretation of the Treaty of Waitangi and the subsequent legislation a similar principle is to be applied to inland navigable waters. It is unreasonable to suppose that this Treaty or legislation was intended to vest Lake Taupo or Lake Rotorua or Lake Wakatipu in the Natives as the exclusive owners thereof to the destruction of the interests of the Crown and the public in the navigation of such waters. No such claim could have been in the mind either of the Natives or of the Crown or of Parliament.[249]

Salmond found support for this contention in *Mueller v Taupiri Coal Mines Company*,[250] in which the Court of Appeal held that 'the public interest of *de facto* navigation was sufficient to limit a Crown grant to the edge of the Waikato River'. The same must apply, he reasoned, to a Crown grant bounded by a large, navigable lake. The next logical step, as he saw it, was to apply this reasoning to the 'grant' implied in the Treaty and the native land laws:

> If this is so with a Crown grant I think that it is reasonable to apply the same principle to the statutory grant involved in the Treaty of Waitangi and the Native land legislation. I am of opinion therefore that the Native customary title must on the true construction of that Treaty and legislation exclude not only tidal waters as already decided by the Supreme Court in *Waipapakura v Hempton* but also inland navigable waters.[251]

The reservation of navigable waters for the public was thus an implied or presumed intention of the Crown when it entered into the Treaty and when Parliament enacted the native land laws. The question of fact for the courts to decide, therefore, was 'whether the waters claimed are so extensive and so useful for the purposes of navigation as reasonably to support the presumption that these waters were reserved in the grant'.[252] In Salmond's view, this

247. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 231)
248. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 231–232)
249. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 232)
250. *Mueller v Taupiri Coal Mines Company Ltd* (1900) 20 NZLR 89 (CA)
251. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 232)
252. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 233)

was the question that the Court of Appeal had already decided for the Waikato River. There should be 'no difficulty in applying it to lakes as well as to rivers':

> In small lakes or streams the public interest is either non-existent or is so small as not to be a sufficient basis for reading any implied reservation into the grant. With large lakes and rivers the opposite is the case. No hard and fast rule can be laid down. Every claim by the Natives to inland waters must be treated on its merits. Therefore in the Rotorua case the Court of Appeal refused to express any opinion leaving it to be decided on the facts by the Native Land Court.[253]

Thus, Salmond argued that the true construction of *Tamihana Korokai v Solicitor-General* was not simply that the Native Land Court should decide whether customary title existed to a particular lake. Even if such title existed (as for harbours), it could not prevail over the implied or presumed reservation of navigable waters for the Crown in the Treaty and the Native Land Acts. Instead, the Native Land Court should decide whether the lake in question was sufficiently large and navigable to have been implicitly reserved for the Crown in the Treaty.

If this argument failed, Salmond had another – and possibly preferred – argument ready. The Crown's 'alternative contention', he said, quite independent of his 'implied reservation' argument, was that Maori custom did not give an 'absolute right of ownership in extensive bodies of inland navigable waters but merely rights of fishery which would not serve as a basis for a freehold order'.[254] While this was a question of fact which had to be tested by the Native Land Court, Salmond commented: 'It is difficult to believe, however, that Native custom recognised Lake Taupo or Lake Wakatipu as the subject of exclusive rights of absolute ownership of the same nature as in the case of the adjoining land.'[255] Thus, the Crown might not need to 'rely on any presumed reservation of navigable waters'. What he feared, however, was that the Native Land Court would simply 'assume that all waters are the subject of Native title and then to proceed upon that assumption to make freehold orders in favour of the [Maori] proprietors of the adjoining land'.[256]

Thus, Salmond arrived at two key conclusions: the first was that each judge in the Native Land Court cases for Rotorua and Waikaremoana should determine whether the particular lake was of such size and importance that it had been implicitly reserved for the public in the Treaty and the native land laws; and the second was that – before such determinations

253. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 233)
254. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 233–234)
255. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 234)
256. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 234)

took place – a specially constituted court should decide in principle whether Maori custom recognised ownership of large inland waterways or merely rights of fishery. This became the Crown's strategy for how to apply *Tamihana Korokai* to the Waikaremoana and other lake cases, given that the former statutory power to simply stop the court from hearing the claims had been repealed by Parliament.[257]

(3) *The Crown's proposal for a special court*

On 11 June 1917, Salmond advised the Lands Department that, in light of *Tamihana Korokai* and the repeal of section 100, the Crown had no choice but to allow the Rotorua and Waikaremoana cases to be heard and decided by the Native Land Court. The Crown, he argued, should be present and represented in these cases, so as to 'dispute the right of the Natives' and assert the right of the Crown. Nonetheless, he argued that the question was too important to be left to individual judges to decide. Instead, he suggested that the 'preliminary question as to whether freehold orders can be made at all' should be put to a special sitting of the whole Native Land Court bench, presided over by the Chief Judge. If the question was decided against the Crown, the individual cases could then proceed – but an arrangement should then be made with the court to allow the Crown time to negotiate a deal for compensation before freehold titles were actually issued.[258] In other words, he hoped that even if Maori won the right to seek and be granted freehold orders, the Crown might yet prevent the issue of titles to successful claimants by persuading them to accept compensation for their rights.

This advice was forwarded to the Minister of Lands on 12 June 1917, seeking authority to employ counsel at the special hearing, and the proposed course of action was approved by the Minister.[259] As a result, the Lands Department tried to put a stop to the Court acting in the meantime by once again withholding the Waikaremoana survey plan.[260] (This tactic failed and the court again proceeded in the absence of a plan.) In July 1917, the Chief Judge agreed to the Government's proposal for a sitting of the full bench of the Native Land Court, and notified the district judges accordingly.

In these circumstances, the Native Land Court began its third sitting for Lake Waikaremoana at Frasertown on 24 July 1917, with Judge Gilfedder presiding. The judge read out a telegram from the Chief Judge:

257. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 229–234)

258. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 229–230)

259. Under-Secretary to Acting Minister of Lands, 12 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), pp 225–226)

260. Department of Lands, Head Office, to Napier office, 14 June 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 223)

> Ownership of Lakes. Setting up special court of all the Judges to decide whether Maoris or Crown own the Lakes. If decided the Maoris are the owners then each Court can ascertain individual owners. When do you think Natives in your district will be ready to have the law points argued.[261]

This matter was put to the parties, who objected to any delay: they had already made arrangements to stay at Frasertown for the hearing; the case had been outstanding for two years; and if 'the owners are ascertained then we will know who should fight the Crown'. The claimants asked for an interlocutory order as to which of them owned the lake. That way, only the correct owners would bear the expense and responsibility of fighting it out with the Crown, and – if they won – the order could then be made final. Judge Gilfedder accepted this argument and decided to carry on with the hearing for that reason.[262]

On 31 July 1917, Gilfedder delivered his interim decision, stating that those who had ancestral and occupation rights to the lands surrounding the lake 'should be considered to be best entitled to the Lake':

> The Court therefore considers that each of the three contending parties [Ngati Ruapani, Tuhoe, and Ngati Kahungunu] has some ancestral right to this region and that the extent of areas must depend on occupation. Lists of names and evidence of occupation will be received and heard and an interlocutory judgment will be given, to be made final if it is ascertained that the lake belongs to the Maoris and not to the Crown.[263]

The remainder of the 1917 hearing was spent arriving at lists of owners, and the court adjourned on 23 August.[264]

The Solicitor-General took great exception to Judge Gilfedder's decision. On 13 September 1917, he wrote to the Native Affairs Department about the Crown's proposal to have the question of Crown ownership dealt with at a special hearing of the Native Land Court bench. He wrote:

> It has not been found possible, however, to induce Judge Gilfedder to co-operate in this matter. He has recently heard the application and given an interlocutory decision in favour of certain Natives as being the Natives entitled to Lake Waikare-Moana if that Lake is Native Land. He has left open for argument and decision on the making of a final freehold order the question whether the Lake is Native Land or not. He does not propose, however, to have

261. Wairoa Native Land Court, Minute Book 29, 24 July 1917, fol 18 (Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), p 152)

262. Wairoa Native Land Court, Minute Book 29, 24 July 1917, fol 18 (Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), pp 152–153)

263. Wairoa Native Land Court, Minute Book 29, 3 August 1917, fols 78–79 (Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), pp 165–166)

264. Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), pp 166–180

> this matter decided, except of course on appeal, by any Judges other than himself. No notice of the interlocutory decision was given by the Judge or Registrar to the Crown. It is feared that a similar course may be taken on the making of the final order in which case the Crown may be deprived of its right of appeal by not knowing of the matter until it is too late.[265]

Salmond asked the Native under-secretary if he could secure authorisation from his Minister to approach Judge Gilfedder and ask him to ensure that the Crown Law Office was notified promptly 'if any further order is made', so that the Crown would have opportunity 'by way of appeal to protect the rights of the Crown'.[266] The Minister authorised his under-secretary to instruct Judge Gilfedder accordingly, and it seems that separate communications were sent to Judge Gilfedder and to the Tairawhiti Land Court on 18 September 1917.[267]

Salmond's complaint, however, misrepresented what Judge Gilfedder had done. In fact, the judge did not propose to decide the matter himself in the usual manner, but to await the outcome of the special sitting as to whether Maori title existed to navigable lakes. The Chief Judge had decided to go ahead with the special sitting. He had consulted 'the wishes of representative Natives', the Solicitor-General, and the lawyers (presumably engaged by the Rotorua and Waikaremoana peoples) Earl and Skerrett, and then arranged for the special sitting to be held in January 1918.[268]

It was not until after the 1917 Waikaremoana hearing that this arrangement for a special sitting collapsed. On 14 November 1917, the Chief Judge advised his bench that Earl was no longer available in January 1918 and had asked for the hearing to be held in March 1918. This was simply impossible because of the timetable of court and Maori Land Board work: the only time the entire bench could assemble was in January. That being the case, Skerrett withdrew from the arrangement, submitting to the Chief Judge that 'the Natives have the right to present to the Court evidence of their "Takes" and obtain the Court's decision in the usual way subject to appeal afterwards'. The Chief Judge notified the judges: 'That being his wish I feel I ought to comply with it and so the cases will have to go on in the usual way.'[269]

Chief Judge Jackson Palmer explained the Solicitor-General's response to the new situation:

> The Solicitor General has intimated to me that the Crown is not interested in the litigation between the Natives as to which of them, if any, are entitled to the Lakes. The Crown's

265. Solicitor-General to Under-Secretary of Native Affairs, 13 September 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1170)

266. Solicitor-General to Under-Secretary of Native Affairs, 13 September 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1170–1171)

267. Various minutes on coversheet for Solicitor-General to Under-Secretary of Native Affairs, 13 September 1917, ACIH 16036 W2459/36 MA 5/13/78 pt 1, Archives New Zealand, Wellington

268. Chief Judge, circular to judges, 14 November 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1169)

269. Chief Judge, circular to judges, 14 November 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1169)

> interest is only centred on the question as to whether the Natives or the Crown are the owners. He claims that the Crown owns the Lakes and he will in all cases defend the Crown's right. He requires therefore, when the 'Takes' of the Natives are settled by the Court, to be notified, and he will then appear before the Court and produce the Crown's case so that the matter may go to appeal in the usual way.[270]

The Chief Judge thus cancelled the special sitting and the Native Land Court judges were instructed to proceed as usual.

(4) *Why did the Crown not appear at the 1918 hearing to present its case?*

Thus, the Crown had failed to appear at the Waikaremoana hearings in 1915 and 1916 because, it was claimed, the Solicitor-General had not had sufficient notice of those hearings. In 1916, the Government's response was to try to prevent the hearing by withholding the survey plan. In 1917, the Crown was not represented either. This time, the Solicitor-General had a great deal of notice but expected the hearing not to take place, because the Chief Judge had accepted his proposal to refer the matter to a special sitting of the whole bench. Again, the survey plan was withheld so as to prevent the court from sitting – and, again, that stratagem failed.

By the time the Native Land Court resumed hearing the Waikaremoana case in 1918, it had already reached the stage referred to by the Solicitor-General above. That is, an interlocutory decision had been made as to which Maori groups were entitled to the lake, and lists of owners had been considered, and relative shares allotted to those whose names were admitted. It was now time for the Crown to appear and present its case. The Solicitor-General was well aware that this stage had been reached, and had indeed been very critical of Judge Gilfedder for proceeding so far in 1917. But when the Court sat again in May 1918, the Crown was not present.

On 17 May 1918, Judge Gilfedder:

> intimated that the project to set up a special tribunal to settle a legal question as to whether the Lakes belonged to the Natives or to the Crown had ended in smoke. The case of Rotorua Lake seemed as far off decision as ever and in any case the position of Waikaremoana was not on all fours with Rotorua.[271]

The Court decided to postpone finalising its orders for a week, stating that this would be the last opportunity for objections to be raised. At the same time it noted that the Crown had failed to appear at any of the Lake hearings since 1916:

---

270. Chief Judge, circular to judges, 14 November 1917 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1169)

271. Wairoa Native Land Court, Minute Book 29, 17 May 1918, fol 234 (Niania, brief of evidence (doc 138), app 3, p 130)

> This day week will be fixed for hearing any objections to making an order final as the matter cannot be hung up indefinitely. The investigation was begun in 1916 and continued in 1917 and now we are nearly half through 1918. The officers of the Crown have had ample opportunity if they thought fit to oppose the application of the Natives.[272]

The following week, on 24 May 1918, no one from the Crown appeared. The lists were considered again, and names and shares read out by the clerk of the court. The court then held the matter over for a further two weeks, before returning to the lists again on 6 June. Despite the two-week delay, no Crown counsel appeared. So, on 6 June 1918, duplicate names were removed from the lists, some shares were adjusted, lists were either passed or (in a couple of cases), deferred, and the Court made final orders.[273] The outcome was that 20 lists of owners were passed, with 132 shares for 92 Ngati Kahungunu owners, and 395 shares for 182 Tuhoe and Ngati Ruapani owners.[274]

Why did the Crown not appear? On 10 June 1918 the court registrar advised the Native Department under-secretary that, with reference to his memorandum of 18 September 1917, Judge Gilfedder had 'delivered final Judgement herein' at Wairoa on 7 June.[275] The following day, 11 June 1918, the head of the Lands Department wrote to the Chief Judge, stating that it had:

> unofficially come to my knowledge that certain orders have been made by Judge Gilfedder in respect of the bed of the Lake, but as no official intimation has been given to this Department of the case being brought before the Court, I am not aware either of the nature of the orders alleged to have been made by the Judge or the authority under which they may have been made. I shall be glad to receive definite information on these points as soon as possible, and also to receive such comments as you may desire to make respecting the fail-

272. Wairoa Native Land Court, Minute Book 29, 17 May 1918, fol 234 (Niania, brief of evidence (doc 138), app 3, p 130)

273. Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), p 180

274. These figures have been calculated from the annotated 1971 lists given in the following source: J Rangihau and 'other owners in title to Lake Waikaremoana' to the Minister of Maori Affairs and the Lake Waikaremoana Committee, 21 August 1971. Compiling owner totals from the court's 1917-18 minutes is no easy task. Wiren gave a total figure of 284 owners for the 1918 orders (Wiren to Minister of Maori Affairs 18 April 1957 (Walzl, comp. papers in support of 'Waikaremoana', doc A 73 (c)), pp. 1283-1284); our calculated total is 274. The 1971 lists which Rangihau et al had had prepared comprised lists of the original owners and shares 'in accordance with lists passed by the Court' on 6 June 1918, but incorporated amendments made by the Native Appellate Court on 22 April and 10 September 1947, which have not been included here, and by the court on 10 March 1950. (Tony Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1297–1315) The 1950 changes saw four owners added to one list, after an individual petition to Parliament resulted in a section in the Maori Purposes Act 1948 empowering the Native Land Court to inquire into the matters raised in the petition and to include issue of a named individual as owners, if it was found they had rights. The main reason why the 1918 owner totals are markedly lower than the 1971 totals is because in 1918 children or descendants of owners in various lists were explicitly included, but they were not individually named and numbered till 1971.

275. H Carr, Registrar, to Native under-secretary, 10 June 1918, ACIH 16036, W2459/36 MA 5/13/78 pt 1, Archives New Zealand, Wellington

> ure of the Registrar of the Court to notify this Department of the date and place of the hearing of the case. A special request that the Registrars of Native Land Courts should notify this Department in writing under Rule 14 of all cases which directly or indirectly affect the Crown's title, was made to the Under Secretary, Native Department, on 4th September 1916.[276]

This request was met with silence. It was not answered until a month later on 13 July 1918, when the Chief Judge advised the under-secretary that he had not replied earlier 'owing to absence from Wellington'. He added: 'you will no doubt know by this time that many appeals have been lodged including one by the Attorney-General on behalf of the Crown'.[277] Indeed, the Crown had filed an appeal against the decision on 28 June 1918.[278] Thus, the Chief Judge made no response to the Lands Department's request for an explanation, perhaps thinking it unnecessary to answer since the Crown had already filed an appeal anyway.

The claimants in our inquiry have been critical of the Crown for failing to appear in the Native Land Court hearings, and for lodging an appeal despite not having prosecuted a claim in the lower court. This was the first abuse of 'due legal process', it was felt, in the Crown's long and improper attempt to defeat Maori legal title to Lake Waikaremoana. How could the Crown refuse to accept the court's decision when it had never appeared, presented any arguments, or given the Court any opportunity to consider its case when coming to a decision?[279] These are not new criticisms. When the Crown's appeal was heard in 1944, counsel for the Maori owners, Mr Wiren, accused the Crown of trifling with the court and making a mockery of his clients. He read out passages from the original hearing, at which the Crown had failed to attend or present its argument over several years, and submitted that if the Crown had appeared then and stated its rights, it would have saved a lot of trouble and expense.[280]

In our inquiry, a key grievance for the Wai 621 Ngati Kahungunu claimants was the Crown's denial of their ownership of the lake from 1918 onwards. Counsel submitted that the Crown failed to represent itself at the hearings from 1915 to 1918, despite the advice of the Solicitor-General. This was very significant given the Crown's appeal of a decision in proceedings in which it had had ample opportunity to appear but had elected not to. In the claimants' view, this calls into question the Crown's 'bona fides' in appealing the decision in 1918, especially in light of the Crown's failure to prosecute its appeal for decades.[281]

---

276. Under-Secretary for Lands to Chief Judge, 11 June 1918 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 215)

277. Chief Judge to under-secretary, Lands Department, 13 July 1918, ACIH 16036 W2459/36 MA 15/13/78 pt 1, Archives New Zealand, Wellington

278. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 22

279. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 7, 118–119

280. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 4–6

281. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 7, 118–119, 128–133

We will deal with the failure to prosecute the appeal in the next section. But there seems to us no doubt that the Crown was determined to prevent the peoples of Lake Waikaremoana from obtaining a legal title to their lake from 1915 to 1918. In the Crown's view, such lake claims should be settled politically by compensation, in order to ensure public 'rights' of fishing and navigation. Legally, the Crown intended to argue either that lakes were an exception to the 'grant' of native title by the Treaty and the native land laws, or that Maori custom did not recognise any right in navigable lakes other than that of fishing. But these arguments were never tested in the Waikaremoana case because the Crown's proposal of a special court 'ended in smoke', and the Crown opted not to attend the 1916 or 1917 hearings but instead to try to prevent them by withholding the requisite plan.

The key question is why – these various strategies having failed – the Crown did not attend the 1918 hearing. From the evidence available to us, it appears that the Crown's failure to attend this hearing may have been the result of miscommunication, or of misunderstanding. The judge adjourned the hearing twice (for a week and then again for another two weeks), evidently to allow the Crown to attend. But for some reason the Registrar or the Native Department failed to notify the Lands Department or the Solicitor-General, either before or during the hearing.

This breakdown in communications is unexplained. It may have been a simple omission or the result of negligence. But it is possible, alternatively, that the court interpreted various statements it had received on the matter to mean that the Solicitor-General should be advised when (not before) the court had made final orders. We refer to the Chief Judge's circular to the judges of 14 November 1917, and to the Solicitor-General's wording of his request to the Native under-secretary, and the subsequent letters sent to the court. Certainly the court registrar did notify the under-secretary promptly of the court's final orders.[282] We do not know how to interpret the Chief Judge's silence in response to the pointed questions put to him subsequently by the head of the Lands Department. We conclude, however, that in this particular matter of the Crown's non-appearance at the lake title investigation in mid-1918, there is no evidence of bad faith on its part.

A further argument raised by counsel for the Wai 621 Ngati Kahungunu claimants was that the Crown breached '[c]ivil procedural law extant at the time' by lodging an appeal without first seeking leave: 'only parties participating in Court of 1st instance have an appeal as of right'.[283] But the provisions in force for the Native Appellate Court, contained in section 48 of the Native Land Act 1909, allowed 'any party to the proceeding in which the order is made, or . . . any person bound by the order or interested therein' to file an appeal within

282. It is possible that the registrar also notified the Crown Law Office, but the only letter we have located is that to the Native under-secretary.

283. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119

six weeks of the order appealed from. Leave was only required to appeal provisional or preliminary decisions.[284]

Claimant counsel went on to argue that a pattern had been established by 1918 which, in conjunction with the Crown's failure to prosecute its appeal for 26 years, showed that the Crown was treating both the court and the Maori owners with contempt.[285] We turn next to the vexed question of why the Crown's appeal was not heard for such a long period of time. This was one of the most contested issues between the Crown and claimants in our inquiry into Lake Waikaremoana claims.

20.6.3 Why was the Crown's appeal not heard for 26 years?

(1) *The Crown's argument that there was no deliberate strategy to delay hearing of the appeal*

In his report for the Tribunal, Tony Walzl commented:

> Although it seems astounding that a delay occurred of more than 25 years between the 1918 decision and the hearing of appeals, there is nothing recorded in files which specifically suggests that such delay was deliberate Crown policy. Instead, a variety of reasons appear to account for the lapse of time from 1918 to 1944. The need to settle title of the Urewera lands through consolidation, which took place during the early 1920s through to 1925, seems to have impacted on the ability of the owners to deal with the Lake appeal at that time. Following this, the non-availability of senior Crown Law lawyers often featured as the reason for delaying planned appeal hearings. Similarly, at times it was the unavailability of Land Court judges which caused a difficulty in setting a hearing date. There is also evidence that the owners suffered from the difficulty of getting suitable counsel to act on their behalf. From the late 1920s through into the 1930s part of the problem was that the owners could not afford to hire a suitable legal representative. Yet another cause which affected both the Crown and the owners, was that counsel who had been identified to represent the parties would be appointed to the bench and would therefore not be available for the case.[286]

In Crown counsel's submission, we should accept this conclusion on the part of Mr Walzl. Crown counsel suggested that it was an 'over-simplification' to say that the Crown failed to advance its appeal, thus resulting in a 26-year delay (as Emma Stevens argued in her report for the claimants). Reasons for delays included:

- 'consensual adjournments to consider the Urewera consolidation scheme';
- from 1926 to 1939 'Waikaremoana Maori had no legal representative with whom an appeal could be arranged';
- the Depression;

284. Native Land Act 1909, ss 48–49
285. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119
286. Walzl, 'Waikaremoana' (doc A73), p 321

- Crown lawyers' unavailability; and
- court scheduling difficulties.

In the Crown's submission, the Government 'cannot be held responsible for all the delays'. In particular, the Crown relied on Mr Walzl's evidence that there is nothing to suggest a deliberate policy on the part of the Crown to delay the appeal.[287] Hence, the Crown was not guilty of bad faith.[288]

We note, however, that three other important points emerge from Mr Walzl's evidence, which the Crown has not cited.

The first is that Mr Walzl identified 'an underlying feeling of reluctance by Crown officials to pursue the appeal as a matter of high priority'. If settling the lakebed title had been necessary to any of the Crown's priority activities, then 'it is likely matters would have been resolved earlier'.[289] The Crown's most important interests at Lake Waikaremoana by the 1920s and 1930s – forest preservation and hydroelectricity – were not seen as dependent on getting the lakebed title resolved. In terms of forest, the Crown obtained ownership of the Waikaremoana block in the 1920s through the UCS (see chapter 14). In terms of hydroelectricity, Walzl commented: 'it is a tempting assumption to draw that the Crown delayed the hearing of the lakebed to allow its planned hydro-electricity scheme at Waikaremoana to progress and be completed' but 'there is no evidence found to date which specifically supports this thesis'. The Crown continued with its hydro development and public works 'under the belief that the 1903 water power legislation gave it unmitigated right to use the water in the Lake for the purposes of the generation of electricity, and the Public Works legislation gave it authority to undertake any work that was viewed as being in the public interest'. While the early phases of the hydro scheme impacted on some Maori lands, there was no effect on the lakebed itself until round about the time that the appeal was heard in the 1940s.[290]

The second point is that settling claims about other waterways, especially Taupo and Rotorua, was a much higher priority for the Government; anything which might impact negatively on that (such as a Maori win in Court in the Waikaremoana appeal) was not something that the Crown was likely to prioritise. Other unsettled claims, such as the Whanganui River, had a similar effect on the Waikaremoana case – and continued to affect the settling of it even after the Crown's appeal was heard, according to Mr Walzl.[291]

Mr Walzl's third point is that while the Crown may not have had a deliberate strategy of delaying its appeal, nor were officials and ministers prepared to give up the Crown's claim to Lake Waikaremoana. Maori attempts to have the appeal dismissed as lapsed, or requests that the Crown abandon or give up its appeal, were always rejected. Even after Maori won

287. Crown counsel, closing submissions (doc N20), topic 28, p 4
288. Crown counsel, closing submissions (doc N20), topic 28, p 5
289. Walzl, 'Waikaremoana' (doc A73), p 322
290. Walzl, 'Waikaremoana' (doc A73), p 323
291. Walzl, 'Waikaremoana' (doc A73), p 322; see also p 314

the appeal in 1944, the Crown continued to refuse to acknowledge their ownership of the lake. The Crown's stance, Walzl notes, was sometimes based 'on a belief that there was little substance to the [Maori] claim being made to Lake Waikaremoana.'[292]

Based in part on Mr Walzl's evidence, the claimants took a very different view of the delay from that of the Crown. In their view, the Crown had actively obstructed their article 3 right to have their title decided by the courts for over a quarter of a century. This was held to be a 'flagrant example of the common law principle of "justice delayed is justice denied"'.[293] The Wai 36 Tuhoe claimants argued that 'the delay was intended by the Crown'.[294] Counsel for Nga Rauru o Nga Potiki suggested that the delay was largely due to 'vacillation on the part of the Crown' and 'the government's failure to have the case proceed'.[295] In particular, they cited a comment by the Chief Judge in 1944 that 'it was up to the Crown in the past 26 years to initiate proceedings but the Crown had had no excuse for not having done so'.[296]

Counsel for the Wai 945 Ngati Ruapani claimants made detailed submissions. He accepted that the long delay was '[t]o some extent . . . caused by bad luck and obviously cannot wholly be blamed on the Crown. However Crown policy definitely played a role.'[297] In his submission, the Crown 'deliberately prolonged the hearing of its appeal'.[298] It did so to suit its negotiations over other lakes in the 1920s, and then actively obstructed the Waikaremoana Maori owners when they sought to have the appeal heard in the 1930s. The Government's success in delaying the appeal reflected its influence or control over the administrative question of when the Appellate Court would set the case down for hearing. Further, the Crown took advantage of Maori inability to participate and thus delayed the hearing, instead of assisting the Waikaremoana owners when it became clear that they could not afford counsel. In the Wai 945 Ngati Ruapani claimants' view, these Crown actions are particularly serious because there was obviously no merit to the Crown's appeal, and in the meantime it continued to use and manage the lake as if it were the owner.[299]

Given the great disparity between the claimant and Crown positions, we turn next to consider in detail what the evidence shows for the 26-year period in which the Crown's appeal was delayed. As the Wai 36 Tuhoe claimants put it, this may well be 'a New Zealand record for the delay in determination of an appeal.'[300]

292. Walzl, 'Waikaremoana' (doc A73), p 323
293. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 128
294. Counsel for Wai 36 Tuhoe, closing submissions (doc N8), p 69
295. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 169, 170
296. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 173
297. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 43
298. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 51
299. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 43–46
300. Counsel for Wai 36 Tuhoe, closing submissions (doc N8), p 68

(2) *What does the evidence show for the 1920s?*

We begin with the Crown Law Office's official explanation in 1939 for the delay in hearing the appeal. Mr Walzl relied heavily on this document for his account of the delay in the 1920s.[301] In response to an application from Maori to strike out the appeal for want of prosecution, an (unnamed) Crown solicitor provided a formal explanation for the delay in hearing the appeal, setting out the details as he understood them:

- 1921: a sitting of the Appellate Court was scheduled to take place at Wairoa in June 1921 at the request of the Crown. The Solicitor-General applied for the Crown's appeal to be heard at Wellington in advance of the Maori owners' appeals. A conference of owners agreed and the hearing of the Crown's appeal was set down for 16 August 1921.[302] Apirana Ngata then sent a telegram to the Attorney-General on 3 August 1921, asking that the appeal be adjourned sine die.[303] The Appellate Court granted the adjournment. In return, Ngata appears to have agreed with the Attorney-General that the case 'would not come on in 1922–23' during the latter's absence overseas.[304]
- 1924: the Crown was now ready again to proceed with the appeal. Attorney-General Bell arranged with Mr Myers KC to appear on behalf of the Crown. In March 1924, the Crown applied to the Chief Judge to arrange a suitable fixture but this proved to be impossible, because the Maori owners were having difficulty in arranging legal representation. Eventually, the owners briefed Mr Skerrett KC to appear for them.[305]
- 1925: several attempts were made to arrange a date for a hearing but the Chief Judge wanted the Appellate Court to consist of as many Native Land Court judges as possible. It proved impossible to arrange a time that suited all the judges and counsel concerned.[306]
- 1926: Skerrett was appointed Chief Justice 'and this left the Natives again without Counsel'. Ngata asked that no fixture be made until Maori could arrange suitable legal representation. The Crown solicitor writing the 1939 report commented: 'Apparently no action was taken by the Natives in this respect and the Crown waited to hear from them.'[307]

---

301. Walzl, 'Waikaremoana' (doc A73), pp 312–313
302. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 476)
303. As readers will recall, the August hearing date would have interfered with the Tauarau hui of 1–25 August 1921, at which the attendance of the Maori owners was crucial for making decisions about the UCS (see chapter 14), hence Ngata sought this adjournment.
304. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 476)
305. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 476–477)
306. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 477)
307. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 477)

- 1929: the Crown lost its counsel when Myers was appointed Chief Justice. This was also the year in which the Depression began. In 1929 and 1930, Ngata tried to 'see whether the Natives could arrange to go on' but finally, in 1931, he told the Crown Law Office that 'owing to the depression, the Natives concerned had no moneys available to pay law costs and that the case had better stand over until conditions improved'. In the meantime, the Crown had appealed the Lake Omapere decision in 1929 (see box). This appeal was held over until the Crown could prosecute the Waikaremoana appeal.[308]

This official account of the delays in the 1920s indicates that the Crown did attempt to have its appeal heard in 1921, 1924, and 1925. After that, it seemed that the inability of the Maori owners to afford a lawyer had put the appeal on hold. In our view, Crown counsel is correct to note the importance of the scheduling problem (which prevented the hearing in 1925, when both sides had counsel) and the loss of key lawyers on both sides after that time.[309]

Changing Context in the 1920s: The Settlement of the Rotorua and Taupo Lake Claims and the Native Land Court's Omapere Decision

In 1918, the Native Land Court began to investigate the titles of Lake Rotorua and Lake Rotoiti. Earl represented the Maori applicants and Prendeville appeared for the Crown. Once these two lakes had been dealt with, Te Arawa planned to file claims for the other Rotorua lakes. In November 1918, just days after the first hearing, the presiding Judge, T W Wilson, died of influenza. Although fixtures were proposed for 1919 and 1920, the Crown appears to have prevented these from taking place. Eventually, the Government was successful in persuading Te Arawa to negotiate an out-of-court settlement by somewhat dubious tactics, including a threat to take the lakebeds by compulsion. Assisted by Sir Apirana Ngata, Te Arawa – evidently nervous of the looming costs of further litigation – negotiated a settlement in 1921. For Attorney-General Bell, the basis of the settlement was 'that we did not admit you had anything to sell and therefore we had nothing to buy'.

But if that were so, why did the Crown need to settle at all? The simple answer is that it feared it would lose in court. Te Arawa had mounted a strong case to support their claim that they 'held and exercised exclusive proprietary rights in the lakes', and Solicitor-General Salmond was anxious to avoid an outcome in which 'the Natives should be permanently recognised as the owners of the navigable waters of the Dominion', as he put it. The Crown was also determined not to admit that it was buying the lake bed from Maori.

308. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 477)

309. Crown counsel, closing submissions (doc N20), topic 28, p 4

It agreed instead to make an annual payment of £6000 to a tribal trust board, to give Te Arawa 40 trout fishing licences per year at a 'nominal' charge, and to guarantee indigenous fishing rights. The settlement was given effect by legislation in 1922, which declared that the lakebeds and the right to use the waters were 'the property of the Crown, freed and discharged from the Native customary title, if any'. The wording of this statute was intended to reflect the Crown's view (above) that Maori had nothing to sell and the Crown nothing to buy. The annuity was not indexed to inflation and there was no provision for reviews or increases.

Source: Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998 (doc A113)), pp 112–123

In 1926, a similar agreement was concluded with Ngati Tuwharetoa over Lake Taupo and its tributaries. The Government undertook to pay £3000 per annum to a tribal trust board. If fishing revenues exceeded that amount, one-half of the excess would be paid to the board. Further, Tuwharetoa received 50 free fishing licences per year. Legislation in 1926 gave effect to these arrangements and declared that the beds of Lake Taupo and the Waikato River (to the Huka Falls), 'together with the right to use the respective waters', were the property of the Crown, freed and discharged from native title, if any. Ngati Tuwharetoa understood this as an agreement about fishing rights. In the 1940s (and afterwards), the tribe challenged the Crown about its use of Lake Taupo for hydroelectricity, without their consent or paying them compensation.

Source: Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1303–1326

A landmark decision was given by Judge F O V Acheson in the Lake Omapere case in 1929, after Maori claims to the lake, first filed in 1913, were finally heard. The Crown contested these claims, arguing that Maori custom did not recognise ownership of lake beds, and therefore the beds of lakes belonged to the Crown, and also (as a fall back position) that the Crown owned part of the lakebed by virtue of its acquisition of lands adjoining the lake. Judge Acheson found that Maori use and occupation of the lake had been continuous since 1840, and that the lake was incontrovertibly Maori customary land. In particular he stated that 'Maori custom and usage recognised full ownership of lakes themselves'. In his memorable phrase: 'The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain.' In parts of the country with which the judge was most familiar, 'it was taken for granted that the lakes were tribal property'. Moreover native title to Lake Omapere had not been legally extinguished. The Judge's decision placed considerable weight on the importance of the Treaty of Waitangi. The parties to the Treaty, he said, 'certainly intended

it to protect the right of the Ngapuhis to their whole tribal territory' and such territory necessarily included Lake Omapere.

Source: Ben White, *Inland Waterways:Lakes*, pp 225–239; Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, Minute Book 11, fols 259–263, 265–266, 271–273, 276 (Waitangi Tribunal, *Te Whanganui-a-Orotu Report* (1995, reprinted Wellington: GP Publications, 1997), pp 201–203

In his report, Mr Walzl does not comment on these delays in the 1920s, other than to point out the poverty of Waikaremoana Maori communities in both decades. It meant that 'the inability of the owners to afford counsel must have remained a serious restriction against the appeal being heard.'[310] This difficulty was clearly a very real one for the owners. Writing in 1971 about his work researching owners' lists for the lake lease, Tama Nikora observed:

> I have worked on this problem on a voluntary basis at some cost to myself because of my deep sympathy for the Waikaremoana people. In defending their case for title in the past they starved in order to raise sufficient funds to pay solicitor's fees.[311]

Emma Stevens stated that the Attorney-General in the early 1920s, Sir Francis Bell, considered it very important that the appeal be hard fought and well argued because Gilfedder's decision was a 'peculiarly dangerous one'.[312] The delay in 1921–22 was sought by Ngata to facilitate the UCS. As we discussed in chapter 14, the Government agreed to this delay because it hoped to acquire the lakebed as part of the UCS arrangements for the Waikaremoana block, or – if this were not the case – because acquiring the northern foreshore would strengthen its claim to the lake when its appeal was finally heard. Although Commissioner Knight did propose giving the owners a guarantee that the Waikaremoana arrangements would not affect the outcome in the lake case, no such guarantee appears to have been made (see chapter 14).

Nonetheless, the Crown was keen to continue with its appeal after Sir Francis Bell's return from overseas. In 1924, the Crown solicitor at Gisborne employed a local Maori interpreter to research the facts about fishing and boating on the lake, and Maori uses of the lake. The Government was intent on prosecuting its appeal as soon as practicable, and it tried to arrange a fixture in 1925 (though without success).[313] We do not accept the claimants' argu-

310. Walzl, 'Waikaremoana' (doc A73), p 313
311. Tama Nikora to Sir Turi Carroll, 23 August 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1296)
312. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 24
313. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 24–25

ment that the Crown's negotiations over the Rotorua and Taupo lakes discouraged it from having the Waikaremoana appeal heard.[314] The Crown was most active in trying to get the appeal heard during the period of those negotiations (1921 to 1926). But the Crown, having successfully negotiated the Rotorua and Taupo lake settlements, and having lost the Lake Omapere case in 1929, seemed content with the status quo from 1926 onwards. Sir Francis Bell advised the Prime Minister in 1926 that a political settlement of the Taupo claim 'would practically dispose of the necessity for argument in the long pending appeal in the case of Lake Waikaremoana.'[315] This was a remarkable about-face. Based on the Crown solicitor's account in 1939 and the other evidence available to the Tribunal, it is fair to conclude that the Crown did nothing after 1926 to prosecute its appeal.

In the claimants' view, the Crown's settlement with Te Arawa and Tuwharetoa and its loss in the Omapere case in 1929 ought to have had the opposite result: it ought to have underlined the futility of continuing to deny Maori ownership of lakes. By 1929, in light of *Tamihana Korokai*, the Waikaremoana decision, and now the Omapere decision, it was past time for the Crown to have given up this litigation.[316]

(3) *What does the evidence show for the 1930s?*

From 1931 to 1939, according to the Crown solicitor's account, 'nothing further was heard by the Crown in respect of Waikaremoana.'[317] In Tony Walzl's evidence, this was not the case and the situation changed markedly in the 1930s. He points to a sustained effort on the part of the Maori owners to get the appeal either heard or dismissed so as to finalise their title. Their efforts were complemented by those of the Native Appellate Court, which became increasingly concerned about the Crown's outstanding appeal.

In 1932, Waipatu Winitana wrote to the Native Minister on behalf of Ngati Ruapani, seeking 'information in regard to our Waikaremoana lake case' and asking for 50 free fishing licences 'in view of the fact that no compensation has been paid to us in regard to our lake.'[318] This was an appeal for the Government to consider a political settlement along the lines of those negotiated for Lake Taupo and the Rotorua lakes in the 1920s.

Although this approach was unsuccessful, the Native Appellate Court intervened in 1934 to try to get the Crown to prosecute its appeals. As far as we know, this was at the court's own initiative and not in response to an application by the Maori owners. The Chief Judge wrote to the Native Minister, observing that the Waikaremoana and Omapere appeals had been delayed by the Crown's negotiations with other Maori groups, and by the Maori

314. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 43–44; see also Walzl, 'Waikaremoana' (doc A73), pp 314, 322

315. Bell to Prime Minister, 9 March 1926 (White, 'Inland Waterways: Lakes' (doc A113), p 178)

316. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 38–40, 46–47

317. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 477

318. Waipatu Winitana to Native Minister, 7 January 1932 (Walzl, 'Waikaremoana' (doc A73), p 314)

owners' difficulty in 'finding the necessary costs to carry the matter to the Privy Council as the Supreme Court has suggested may be necessary'. Also, the Chief Judge suggested, the Waikaremoana and Omapere owners probably hoped for a settlement like those achieved for the Rotorua, Taupo, and Wairarapa lakes. But the situation must now be resolved:

> The appeals, however have stood over so long that it is desirable that some finality should be reached with regard to them and I would be glad to know if there is any reason why the hearing of them by the Native Appellate Court should not be proceeded with after reasonable notice to the Crown and the Maoris interested.[319]

The Native Department consulted the Crown Law Office. The Crown lawyer who had conducted the Rotorua lakes case, Mr Prendeville, researched the matter and reported to the Solicitor-General on 27 November 1934. He outlined the history of Maori claims to lakes and rivers, as well as the particular circumstances for Waikaremoana, the Whanganui River, and Lake Tarawera.[320] Prendeville concluded:

> The main issue therefore is whether the natives own the lakes under the Treaty of Waitangi and subsequent statutory provisions providing for the issue of the statutory title to other customary lands after investigation by the Native Land Court or whether the large lakes like tidal waters and enclosed areas of the sea remain vested in the Crown. The theory that a lake is land covered by water and therefore capable of private ownership, it is contended for the Crown, is a principle of law based on Roman Law and was not a principle known to the Maori. In most cases a further problem arises as to the rights of riparian owners. In respect of many lakes, particularly Waikaremoana, the Crown is the owner of nearly all the land along the border of the lake, and if the ordinary principle of ad medium filum applies a large proportion of the lakes would follow the riparian ownership. Foreseeing this and other similar difficulties, Sir John Salmond when drafting the Native Land Act 1909 provided in section 100 that the Governor-in-Council might prohibit the Native Land Court from proceeding to ascertain the title of any customary land if he thought fit, and section 85 that a proclamation by the Governor that any land vested in His Majesty is free from any native customary title shall be accepted as a conclusive proof of the fact so proclaimed. Section 100 was however repealed in 1913. As any Court proceedings for determining the questions in issue will be both long and expensive and as the Government has already settled by compromise Rotorua District and Taupo, it is a question of policy whether the same proceeding should not be followed in the case of other lakes like Waikaremoana that must essentially be owned and controlled by the Crown.[321]

319. Chief Judge Jones to Native Minister, 2 March 1934 (Walzl, 'Waikaremoana' (doc A73), p 314)
320. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 26–27
321. Prendeville to Solicitor-General, 27 November 1934 (Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 27)

In other words, Prendeville suggested that long and expensive litigation should be avoided and the claims 'settled by compromise', as had been the case for Rotorua and Taupo, but that this was a policy call. As a bottom line, and as was constantly argued within government, the ultimate result needed to be Crown ownership and control of major waterways. Everyone seemed to share this belief, in the Crown Law Office as in other government departments. While Salmond's ideas continued to dominate, there was also now reliance on the position created by the UCS, where the Crown had become the riparian owner of almost the whole of the lake's shores.

In February 1935, Prendeville's report was forwarded to the Attorney-General and the Native Minister. Solicitor-General Cornish had already met with the Attorney-General and received approval to go ahead with the appeals if Cornish 'thought it desirable to do so'. Clearly, this was not Cornish's preferred approach. There were other considerations than the 'purely legal', including matters of policy, and he put the matter to Ministers in writing and sought a formal decision from them as to whether the appeals should be prosecuted.[322] Cornish noted that the Crown could simply continue with the status quo: 'The matter, can, of course, stand over further as it has done in the past, and I do not think that the Native Land Court would take the responsibility of dismissing the appeals for want of prosecution.' But Cornish advised Ministers to make a decision whether to 'go on with the appeals' or abandon them. If the Government did give up the appeals, it could still legislate a solution. Sir Francis Bell had been consulted. His opinion was that the Crown should prosecute the appeals. The Crown 'would be in no worse a position for purposes of legislation after a decision (even though adverse) of the Appellate Court than it is now'.[323] According to Ben White, Cornish's legislative solution was the 'possibility of passing special legislation vesting all navigable lakes in the Crown – in much the same fashion as the Coal Mines Legislation had in respect to rivers'.[324]

Although we have no direct evidence as to what decision was made, practically speaking the outcome was that the Crown did nothing. It did not prosecute the appeal, it did not seek to negotiate a compromise with Maori, and it did not legislate to establish its ownership of all navigable lakes (which could have involved many more compensation claims). The safety net for the Crown, of course, was Cornish's advice that the Native Appellate Court would not take responsibility on its own for dismissing the appeals if they were not prosecuted. This meant that, in many ways, the status quo of leaving the appeals on the books and taking no other action was the safest and certainly the easiest option for the Crown. In our view, this was a cynical approach. In the claimants' submissions, however, the Appellate Court's management of this case was seen as 'feeble and far too deferential towards the gov-

322. Solicitor-General to Attorney-General and Native Minister, 15 February 1935 (Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 27–28)

323. Solicitor-General to Attorney-General and Native Minister, 15 February 1935 (Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 27)

324. White, 'Inland Waterways: Lakes' (doc 113), p 163

ernment of the day'. In their view, the court ought to have set the case down for hearing and then struck it out for non-prosecution. The Government should not have been able to rely on the court simply continuing to wait until it was convenient for the Crown to prosecute the appeal.[325] In any case, nothing concrete eventuated from the Chief Judge's approach to the Native Minister in 1934.

This was still the situation in November 1935, when five Maori leaders – Te Hata Tipoki, Patu Te Rito, Sidney Whaanga Christy, Tiaki Mitira, and Turi Carroll – wrote on behalf of the 'Maoris of the Wairoa district' to Prime Minister Forbes and Finance Minister Coates. This was the claimants' second high-level approach in the 1930s, following that of Waipatu Winitana and Ngati Ruapani in 1932. One of the Wairoa community's concerns was the lake:

> The Native Land Court has heard the claims of the Maori claimants to the bed of the Waikaremoana lake and awarded the same to the Maoris. The Crown has appealed against this award. During the depression, we did not desire to press this matter, but now that the Dominion appears to be emerging from the worst aspects of its difficulties, we desire to remind the Government of this claim and to ask that the Crown take the necessary steps to prosecute its appeal before the Native Appellate Court or alternatively that the Crown acknowledge the title of the Natives to the bed of the Lake.[326]

Researchers in our inquiry did not uncover a response from these Ministers to the Wairoa leaders, but the status quo continued through 1935 and 1936. The Crown neither sought a fixture to prosecute its appeal nor abandoned its appeal and acknowledged Maori title to the lake. The change of government at the end of 1935, when the first Labour Government took office, had an impact. Prime Minister Michael Joseph Savage (who was also Native Minister) met with the Attorney-General in 1937 and 'agreed that steps should be taken to have a fixture made for the Hearing of the Appeal'.[327] Once again, however, nothing happened. In 1938, in response to a petition from Ngati Ruapani, the new Native Department under-secretary reminded his Minister that this meeting had taken place: 'Nothing has been done so far as I am aware', he wrote, to carry out this course of action.[328]

There were two approaches from the Maori owners in 1938. First, on 15 April, Whena Matamua, secretary of the Ruapani Maori Labour Party Committee, wrote to the Minister of Internal Affairs requesting information as to:

- fishing licence fees for the lake;
- profits from the government launch and boat hire fees on the lake;

325. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 45

326. Te Hata Tipoki, Patu Te Rito, Sidney Whaanga Christy, Tiaki Mitira, and Turi Carroll to Forbes and Coates, 16 September 1935 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(d)), p 2015)

327. Under-Secretary, Native Department, to Acting Native Minister, 29 June 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1150)

328. Under-Secretary, Native Department, to Acting Native Minister, 29 June 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1150)

- profits from private launch and boat hire fees on the lake;
- profits from Lake House;
- opossum licence fees for the area around the lake; and
- deer licence fees for the area around the lake.[329]

The view within government was that no information should be provided lest it be used to support the Maori claim to ownership of the lake. Also, the Native Department was concerned that even supplying the information might be taken as an admission of Maori ownership.[330]

Secondly, in June 1938, a petition from 104 signatories, identifying themselves as Ngati Ruapani 'who are resident at Waikaremoana', was sent to Prime Minister Savage. The petitioners asked the Government to 'make permanent' the Maori title to the lake.[331] The Native Department interpreted this as a request to either prosecute or withdraw the Crown's appeal.[332] As noted above, the Under-Secretary reminded his Minister that a decision had been made to proceed with the appeal back in 1937, but nothing had been done.[333] A response was sent to Karu Rangihau and the other petitioners, to the effect that the Government was considering whether or not to proceed with its appeal, and that a decision would be made shortly. Again, nothing came of this.[334]

In February 1939, it was once again the turn of the Chief Judge to approach the Crown. In a memorandum to the under-secretary, he said that he was 'anxious' to see the Crown's appeal prosecuted because the other (Maori) appeals against the 1918 decision also remained unresolved. Chief Judge Jones proposed to set down a special sitting at Wellington in April 1939 with a full bench, 'if the Minister approves'. He noted that the matter of the Crown's appeal had been brought before the Native Minister 'some time ago' but that nothing definite had resulted. He also sought a swift decision so that as much public notice as possible could be given.[335] The under-secretary consulted his counterpart in the Lands Department in March 1939, asking if there would be any objection to the appeal proceeding. The Lands Department consulted Solicitor-General Cornish, whose answer was that he planned to appear in this case himself but could not do so for 'some months to come', so the matter should be stood down in the meantime.[336]

329. Walzl, 'Waikaremoana' (doc A73), p 315
330. Walzl, 'Waikaremoana' (doc A73), p 316
331. Karu Rangihau and others to Prime Minister, 13 June 1938 (Walzl, 'Waikaremoana' (doc A73), p 317)
332. Walzl, 'Waikaremoana' (doc A73), p 317
333. Under-Secretary, Native Department, to Acting Native Minister, 29 June 1938 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1150)
334. Walzl, 'Waikaremoana' (doc A73), p 317
335. Chief Judge Jones to Under-Secretary, Native Department, 8 February 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1149)
336. Under-Secretary, Native Affairs, to Under-Secretary for Lands, 20 March 1939 (Walzl, 'Waikaremoana' (doc A73), p 317)

The Chief Judge accepted that no hearing could take place in April or May 1939 but he continued to pursue the matter. The Solicitor-General's response was that 'no blame for the delay in hearing could be placed on the Chief Judge as [he] had mentioned it on many occasions'. Although Cornish promised to speak to the Attorney-General, he advised Chief Judge Jones in May 1939 that 'urgent state matters' meant that there was little chance of the Crown being able to deal with the appeal.[337]

In early June 1939, Waikaremoana Maori leaders wrote to their Member of Parliament, Sir Apirana Ngata, seeking advice and trying once again to get some progress in this matter. Savage responded to Ngata that the appeal could not be heard at present because the Solicitor-General was not available.[338]

By this time, the Maori owners had exhausted their extra-legal options. They had sent petitions and letters to Prime Ministers and Ministers from 1932 to 1939 without result. They had sought the assistance of their Member of Parliament, again without result. They had put it to the Crown that it must either prosecute its appeal or confirm their title, with the hope that the Crown would agree to drop the appeal and negotiate a settlement with them. None of these strategies had worked. Despite the privations that would result from litigation, they now had no choice but to go back to court.

As a result, the Waikaremoana owners engaged a lawyer, M H Hampson, who wrote to the Solicitor-General on 20 June 1939. Hampson hoped the Crown would agree that 'after 21 years [the appeal] can reasonably be said to have lapsed for want of prosecution'. Hampson proposed to apply to the Appellate Court to strike out the appeal.[339] It was in response to this letter that a Crown solicitor prepared the document cited earlier, outlining the official view of the delay. According to this solicitor, '[n]othing further was heard by the Crown in respect of Waikaremoana' between 1931, when the Crown agreed to wait during the Depression, and March 1939, when the Chief Judge sought to set down a fixture. Also, there had been no lawyer for the owners with whom the Crown could arrange a fixture ever since 1926.[340] The Crown solicitor concluded: 'In view of the foregoing I cannot see how you can claim that the Appeal has lapsed for want of prosecution by the Crown and I am directed to state that the Crown will oppose any application to strike out the appeal.'[341]

We are surprised that the Crown Law Office claimed to have heard nothing about Waikaremoana between 1931 and 1939. The evidence is very clearly to the contrary. Either the Maori owners or the Chief Judge had kept the appeal before the Crown from 1934 to

337. Chief Judge Jones, memorandum, 30 May 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1146)

338. Walzl, 'Waikaremoana' (doc A73), p 318

339. Hampson to Solicitor-General, 20 June 1939 (Walzl, 'Waikaremoana' (doc A73), p 318)

340. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 477)

341. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 478)

1939 without result. In any case, the Maori owners' solicitor, Mr Hampson, died soon after and they were once again without counsel.[342] A Crown Law Office memorandum noted in 1944: 'On his death the appeal was again left in abeyance.'[343]

In our view, it was the Crown's responsibility to either prosecute or abandon its appeal. We accept that costs posed a serious problem for the Maori owners, especially during the Depression, and the Crown cannot be criticised for agreeing to postpone its appeal during such a serious economic crisis. As counsel for Nga Rauru observed, the 'Maori contribution to the delays was largely based on the difficulties of mounting an appeal during the disruption of the consolidations [a reference to the UCS] or on their inability to afford suitable counsel to represent their interests'.[344] Yet the financial situation during the Depression was such that we do not blame the Crown for not assisting the respondents with their costs at that time. As far as we are aware, the Depression era was the only period in which the owners' inability to proceed due to costs was raised directly with the Government. And the owners only sought a delay for that reason during the Depression – afterwards, as Wiren pointed out in the Appellate Court, Maori would have engaged counsel if the Crown had done its part and sought a fixture.

We note, too, that the Crown made no effort whatsoever to have its appeal prosecuted from 1926 to 1939 (and beyond, as we shall see in the next section). While the unavailability of lawyers and Court scheduling problems were an issue in the early 1920s, the Crown could not really rely on this as an explanation for not proceeding or otherwise resolving matters in the 1930s. It is correct to say, as the Crown solicitor did in 1939, that there was no lawyer for Crown counsel to communicate with, but it was not the case (as he also said) that the Crown had heard nothing of Waikaremoana from 1931 to 1939. From 1932 (and more particularly from 1934 onwards), there were approaches to the Crown from both the Maori owners and the Appellate Court. In particular, the owners wanted the Crown to prosecute or abandon its appeal – preferably to abandon it and recognise them as the legal owners of Lake Waikaremoana. It is not the responsibility of respondents to try to force appellants to prosecute their appeal. The Crown's response throughout the 1930s was to do nothing: to leave its appeal on the books, comfortable in the belief that the Court would not dismiss it for want of prosecution. While it is not always possible to pinpoint where or how the decision was made each time, the Government did not progress its appeal in the 1930s and negated all attempts to get it to do so.

(4) *What does the evidence show for the period 1940–44?*

According to Mr Walzl, the loss of their lawyer (Hampson) and a chronic lack of funds prevented Maori from pressing the Crown or court further in respect of the lake, from 1940

342. Walzl, 'Waikaremoana' (doc A73), p 319

343. Prendeville to Solicitor-General, 24 February 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1127

344. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 176

to 1943.[345] During that period, the Crown for its part still made no attempt to seek a fixture for the appeal. Thus, the Crown took advantage of this four-year period, when the Maori owners ceased to press it, to keep the appeal on the books without prosecuting it. No work was done on the appeal. The Crown was no readier to proceed at the Appellate Court hearing in 1944 than it had been in 1939. Although Solicitor-General Cornish tried to persuade the Maori owners in 1944 that the Crown was not treating them and their rights with contempt, his argument was not a convincing one.

The Maori owners took up the issue again in May 1943. A 'very big hui' was called at the lake. Bob Tutako, who chaired this hui, reported:

> people from Ruatoki, Whakatane & Opotiki & Ruatahuna who represent Tuhoe tribe were present headed by a man named [Takarua] Tamarau. Ngatikahungunu, Tamaterangi were also represented by a very big crowd headed by Rev. Huata & Peta Hema. The Waikaremoana people (which is the home people) represent Ngati Ruapani; well over 300 people assembled there.[346]

It was agreed at the hui to write to the Chief Judge and ask for a time suitable to the Crown so that all the appeals could finally be resolved. Lawyers' fees were inevitably discussed.[347] Before Tutako even wrote the letter, however, the Prime Minister had apparently heard about the resolutions passed at the hui and agreed that the Crown would 'proceed with the appeal as soon as possible'. As a result, Tutako's letter was about *when* rather than *whether* a fixture could be arranged.[348]

Tutako's letter to the Chief Judge was followed up on 31 May 1943 by an approach to Eruera Tirikatene, member of Parliament, seeking advice. This letter was sent in the name of Manakore Tamihana, and it asked whether the time was right to raise the Treaty of Waitangi. As the first Ratana member of Parliament, this query would have had great import for Tirikatene. It was made in connection with the lake, which had, the owners said, still not been settled since 1917, 'but now we are working again to regain Waikaremoana'. The estimated cost to the people in legal fees would be between £300 and £400 – some had already donated towards the cost but others were waiting for advice (from Tirikatene) as to whether this was the right time to proceed under the banner of the Treaty. Tirikatene forwarded this letter to the Native Minister.[349]

---

345. Walzl, 'Waikaremoana' (doc A73), p 331
346. Bob Tutako to Chief Judge, 24 May 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1139)
347. Bob Tutako to Chief Judge, 24 May 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1139–1140)
348. Bob Tutako to Chief Judge, 24 May 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1140)
349. Tamihana to Tirikatene, 31 May 1943 (Walzl, 'Waikaremoana' (doc A73), p 332)

We have no information as to what advice Tirikatene gave but some of the Maori owners had already engaged S A Wiren as their lawyer. By late June 1943, Wiren had met with Prendeville of the Crown Law Office and agreed that the appeal would be heard in October or November 1943. It was at this point that there was a new development : the Waikaremoana appeal became bound up with the Crown's Whanganui River appeal, which was to influence the Crown's position on Lake Waikaremoana for the next decade. On 14 October 1943, the Chief Judge held a chambers conference in Wellington with Wiren, Prendeville, and D G B Morison (who represented the Whanganui River people). Prendeville explained that the Crown Law Office was very busy with important war activities and would prefer the Whanganui River appeal to be delayed. But the Chief Judge scheduled hearing of both appeals to begin on 27 March 1944.[350]

At last, after a decade of effort from 1934 to 1943, the Maori owners and the Court had succeeded in getting the Crown to agree to a hearing date. Now that this fixture had been set, the Government – for the first time since 1926 – began to seriously consider whether or not to go ahead with the appeal. H G R Mason, the Native Minister, suggested to Savage that it would be cheaper and easier to negotiate a settlement than fight the appeals :

> In each case I imagine the Maoris to believe that fabulous sums are involved, but in my opinion compensation cannot be large and the cost and work of litigation is out of proportion to the values involved. If there is an intention of trying to settle Maori claims in the near future it might save much work and bother if early action to that end could be authorised.[351]

As far as we can tell, though, nothing definite happened until the Crown Law Office received formal notification of the hearing on 21 February 1944.[352] At that point, Prendeville wrote a memorandum for the Solicitor-General, explaining that the Crown had been inconsistent in its approach to lake titles in the past. It had purchased Lake Wairarapa from Maori in the 1880s, he said. Later, it had purchased part of Lake Tarawera. By legislation it had declared Lake Horowhenua to be a 'Native Reserve'.[353] And in more recent times 'there have been the compromise settlements of the Arawa Lakes and Taupo'. On the other hand, the evidence on record for the two claims (Lake Waikaremoana and Whanganui River) was not,

350. 'Wanganui River and Waikaremoana Lake Appeals', minute, Chief Judge's office, 14 October 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1134)

351. Native Minister to Prime Minister, 29 October 1943 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1133)

352. Walzl, 'Waikaremoana' (doc A73), p 333

353. Prendeville was mistaken about Lake Horowhenua, which by legislation had been declared a Public Reserve, albeit one in which certain Maori rights were recognised and provided for – but he was not mistaken in the sense that the Crown had been inconsistent, since it had accepted Maori ownership of this lake in 1905 and negotiated with its owners.

Lake Rotoaira

In 1944, Prendeville's memorandum to the Solicitor-General pointed out that the Crown had acted inconsistently in respect of how it had treated Maori lake claims. He did not mention Lake Rotoaira in his account, but perhaps he should have done. Lake Rotoaira is a taonga of Ngati Tuwharetoa, who applied to the Native Land Court for legal ownership in 1937. The Crown appeared at the December 1937 hearing and opposed the claim, arguing that Maori custom did not recognise ownership of lake beds, and that Lake Rotoaira belonged to the Crown 'as an attribute of sovereignty' and because the Crown had purchased land abutting the lake. After a number of adjournments, the Crown withdrew its objection to the application in September 1943. Crown counsel 'put on record that such action should not be taken as a precedent in respect of the beds of inland waters'. In 1954, when Lake Rotoaira was again before the court, the Crown repeated that its non-objection was specific to Rotoaira and was not an acknowledgement that lakebeds were customary land.

Thus, the Crown had withdrawn its objection to Maori ownership of Lake Rotoaira in 1943, the year before it proceeded with its Waikaremoana appeal.

Souce: Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2012), vol 3, pp 1006-1007

he felt, 'very convincing either way'. Detailed research was necessary but could not be done in time for a March 1944 hearing.[354]

In light of all this, Prendeville suggested that the Crown had three options:

- to 'compromise the claims in the same manner as the Rotorua and Taupo claims were settled, i.e. by an annual payment thereby leaving the issue still at large';
- to pass legislation immediately, declaring that all lakes, rivers, and mud flats, 'unless expressly granted by the Crown, are and have always been vested in the Crown since 1840'; and
- to go on with the appeals – in which case, if the Crown lost it would have no choice but to 'purchase the interests of the Natives in order to retain control of the lake and the [Whanganui] river'.[355]

354. Prendeville to Solicitor-General, 24 February 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1127–1128)

355. Prendeville to Solicitor-General, 24 February 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1128)

After considering this advice, Solicitor-General Cornish thought that the Crown should delay any hearing of the appeals and negotiate a settlement. He advised the Attorney-General and Native Minister accordingly:

> I think the best course is to adjourn these hearings till the end of the war, in the hope that a settlement may be effected in the meantime. The fact is that the increase of work caused by war conditions makes it impossible to give the necessary preparation to the cases.[356]

Thus, both the Native Minister and the Solicitor-General thought it was better to negotiate a settlement rather than have the appeals heard. But the Government seemed unable to make a decision. We have no information as to why that was the case. Thus, on 6 March 1944, with the hearing only three weeks away, Prendeville wrote urgently to the Department of Lands and Survey that he still had no instructions from the Crown. The Native Appellate Court judges would be assembling, and representatives of the Maori claimants would also be coming to Wellington. The court would likely only agree to an adjournment if there was 'a definite undertaking by the Government that the adjournment is for the purpose of negotiating a settlement'.[357]

We have no information as to exactly what the Crown decided, except insofar as it can be inferred from Cornish's letter to the Chief Judge on 22 March 1944, five days before the hearing was due to start. He advised Chief Judge Shepherd that the Crown had intended to proceed with the appeals at the special sitting on 27 March but was unable to do so, due to 'exceptional pressure of work', aggravated by the illness of one Crown solicitor and the death of another. A 'great deal of research work' was still needed, and there was little prospect of it 'for some considerable time to come'. Thus, the Crown sought an adjournment – and not for a specific period but 'sine die'. Cornish suggested that Maori had already intimated that if the appeals were decided in their favour, 'and if the Government should decide to acquire such rights as they might be found to possess, the sum so fixed or agreed upon need not be paid until after the war. That being so, the interests of the Natives will not be prejudiced by a further postponement'.[358]

Clearly, the Government had rejected Cornish's advice to delay the appeals and settle with Maori in the meantime, or this would have been used as grounds for the adjournment. The Crown still intended to see whether it could win the appeals (and therefore might not have to pay anything). But preparation of the Crown's case had not been prioritised and would still not be prioritised for the foreseeable future. If Maori won, the Crown would buy out their interests – but that could wait until after the war.

---

356. Solicitor-General to Attorney-General and Native Minister, 25 February 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1128)

357. Prendeville to Under-Secretary, Department of Lands and Survey, 6 March 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(a)), p 469)

358. Solicitor-General to Chief Judge, 22 March 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1130)

In reply to the Solicitor-General, the Chief Judge wrote that an adjournment was a decision to be made by the Appellate Court. Nonetheless, he indicated that – given the length of time since the Crown had lodged its appeals, and given the efforts of Maori to get the appeals heard – it was likely 'only very substantial grounds for an adjournment would avail the Crown'.[359]

On 28 March 1944, the Appellate Court sat and Cornish applied for an adjournment sine die on much the same grounds as those put forward in his letter to the Chief Judge (indeed, the letter was read out in court).[360] He also explained that the application might not need to be 'sine die' if the Crown could arrange for 'skilled assistance', and that – in a week or so – the Crown Law Office might be able to advise of a time by which it could be ready to proceed. But he also stated that this might not be possible.[361]

Mr Wiren responded that the Crown was trifling with the court and making a mockery of his clients. He pointed out that the Crown had never turned up to argue its case in the original hearing, and had then lodged an appeal in 1918:

> from that date to this it has not done anything to see that the Maoris received justice. By justice I mean the right of a British subject to have his case dealt with by a Court and his rights determined.[362]

Wiren also denied that his clients would not be prejudiced if the matter was held over until after the war (which, of course, no one knew would end in 1945). All of the Maori appellants from 1918 were now dead save one – the long delays were causing injury in respect of these other appeals. Also, Maori were unable to get compensation for use of or injury to their lake in the meantime. Wiren pointed out that the Government was in the process of modifying the lake for hydroelectricity, even as the Appellate Court was sitting, in the following exchange with Cornish:

> **Wiren:** The Public Works Department is filling in a fairly large section of Lake Waikaremoana and they are tunnelling . . .
> **Cornish:** I don't know that that is correct.
> **Wiren:** And they are tunnelling under the road for the purpose of extracting water from the Lake. For that the Maoris have no remedy until they get a freehold title. So long as this land is customary land claims for trespass can be brought only by the Crown. That is Section 116

359. Chief judge to Solicitor-General, 23 March 1944 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1129)

360. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 2. Doc H2 is a typescript reproduction of the minutes for the Native Appellate Court hearing of the Crown's Lake Waikaremoana appeal in 1944. Unfortunately, some text has been omitted from the early part of the document. The missing material may be found in a reproduction of the minutes for the Native Appellate Court's April 1944 hearing in volume 59 of the Waitangi Tribunal's *Raupatu Document Bank*. For this reason, most of our references are to doc H2 but some references are to volume 59 of the *Raupatu Document Bank*.

361. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 4

362. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 4, 6

> of the Native Land Act, and in other words the Crown can trespass as it wishes so long as this case is in abeyance.[363]

Wiren also suggested that there was no question of fact to resolve, it was all a matter of law and there was no need for the Crown to do detailed research on matters of fact. Contrary to what Cornish had indicated, Wiren stated that none of his clients had ever intimated to the Crown that they would wait for the end of the war to receive compensation – but if that were to be the case, they were entitled to have their claims resolved, the amount determined, and then a rate of interest set.[364]

Cornish responded that he hoped Maori understood there was no:

> wilful, contemptuous disregard of their rights by the Crown. Nothing is further from the Crown's intention than to do that. It is only because it is not possible adequately to prepare the case that the Crown is unable to go on.[365]

Nonetheless, he was very definite that the Crown was not prepared to abandon its appeals.[366]

As Cornish had feared, the court was not prepared to adjourn the case sine die simply on the basis that the Crown was still not ready to proceed after 26 years. No reasons were given, although the Chief Judge later commented (in a remark cited by the Nga Rauru o Nga Potiki claimants):

> After a lapse of years the matter has assumed very great importance. It was up to the Crown in the past 26 years to initiate proceedings but the Crown has had no excuse for not having done so.[367]

The court adjourned the case for a week to allow the Crown time to prepare.[368] When Cornish later asked for more time to prepare an 'affirmative' case that the Crown owned the lake, he was granted a three-month adjournment to prepare his case.

(5) *Our conclusions about who was responsible for the delays*

Our conclusion is that the Crown did try to prosecute its appeal between 1921 and 1926, allowing for an agreed break in the middle to accommodate the UCS negotiations and Bell's absence from the country. Its attempts failed in this period, through no fault of its own. From 1926 to 1929, the Crown did nothing to prosecute its appeal. This was later blamed on the fact that the Maori owners had not come back to it with the name of a new lawyer. We attribute it more to the successful negotiation of the Rotorua and Taupo lakes cases by

363. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 6–7
364. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 7
365. RDB, vol 59, pp 22348–22349
366. RDB, vol 59, p 22349
367. RDB, vol 59, p 22362; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 173
368. RDB, vol 59, p 22350; Walzl, 'Waikaremoana' (doc A73), p 335

1926, which took the heat out of the need to prove the Crown's case in Waikaremoana. The Crown's loss in court in the Lake Omapere case must have served as a further disincentive to prioritise the Waikaremoana appeal. Then, from 1929 to 1932, the Crown acquiesced in a situation where Maori could not afford to participate in litigation during the Depression. Although this was the least punitive approach that the Crown could have taken (rather than insisting on its appeal being heard at that time), it did not take any positive steps such as re-evaluating whether it should continue with the appeal in light of the Taupo and Rotorua settlements and the Omapere decision.

From 1934 to 1943, the Crown negated all attempts of the Maori owners and of the Appellate Court to get it to either prosecute or give up its appeal. Whenever those attempts lapsed, as they did from 1940 to 1942, the Crown's default position was to do nothing and preserve the status quo. Although we can find no evidence of a deliberate policy to continuously delay the appeal, such was the effect. A decision was apparently taken in 1937 to proceed with the appeal but nothing happened. We agree with the Nga Rauru o Nga Potiki claimants that the delay was 'largely due to vacillation on the part of the Crown' and its failure to take steps to ensure the case proceeded.[369] Nothing had really changed by 1944. The Crown still sought an adjournment sine die, even when it was forced to show up in Court and prosecute its appeal. Certainly, there were other important priorities for the Crown during the war years. But this long-outstanding matter, supposedly of great importance to the public interest, had already been left in limbo for 26 years.

We turn next to consider another of the claimants' arguments: that the Crown should not have insisted on keeping its appeal live – and acting as if it owned the lake in the meantime – when the law was so clear that the Crown never had any hope of actually winning in the courts.

20.6.4 An 'entirely predictable' result? What is the significance of the Crown's loss in the Native Appellate Court in 1944?

According to the claimants, the Crown should have abandoned its appeal long before 1944. It was 'entirely predictable' that Salmond's arguments would fail in the Native Appellate Court.[370] In claimant counsel's submission, the Crown's appeal 'clearly lacked substantive merit'.[371] This was not, we were told, a submission based on 'hindsight'. According to counsel for Wai 945 Ngati Ruapani, the law giving the Native Land Court jurisdiction to decide these matters had been clearly stated in *Tamihana Korokai*, it was well known that English common law did not give the Crown 'a presumptive title to lakebeds', and the Crown had lost on all points in the Lake Omapere case back in 1929. It should not have come as any

369. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 169, 170
370. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 37–40
371. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 47

surprise, therefore, that the Crown's arguments got 'very short shrift' in the Native Appellate Court in 1944.[372] Further, counsel for Wai 945 Ngati Ruapani argued that if the Crown had had genuine doubts about the Native Land Court's jurisdiction to make the decision it had come to in 1918, then it should have taken that issue to the Supreme Court immediately. It failed to do so – presumably because it knew that it could not succeed.[373]

Because the Crown had succeeded in diverting the Rotorua lakes case out of the Native Land Court before it was finished, and had failed to turn up or make its case in the Waikaremoana proceedings, the first time that Salmond's arguments were put to the court and decided was in the Lake Omapere case in 1929. As is well known, Judge Acheson rejected any notion that there was an implicit reservation of all navigable waterways when Maori agreed to the Treaty of Waitangi. He also completely rejected the idea that Maori were not the customary owners of their lakes: a lake was a piece of land covered by water and Maori custom recognised territorial authority over and possession of such bodies of water (see box). In his 1929 decision, Judge Acheson thus rejected the two main planks of the Salmond argument. The Crown appealed this decision but, as with Lake Waikaremoana, had not prosecuted its appeal by 1944.[374]

Extracts from the 1929 Omapere Decision, as Reproduced by the Waitangi Tribunal in its *Te Whanganui-a-Orotu Report*

Page 7:

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

. . . Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

372. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 47
373. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 48
374. For an account of the Lake Omapere case, see White, 'Inland Waterways: Lakes' (doc A113), pp 223–242.

Page 8:

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

Page 9:

. . . To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

. . . Finally, to all these things there was added the value of a lake as a permanent source of food supply.

. . . Lake Omapere . . . has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shell-fish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

Pages 10 and 11:

. . . *Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?*

. . . Yes! The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake-occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores . . . Great numbers of the Ngapuhi, must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights

over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

. . . In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

Pages 13 and 14:

. . . It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.

Page 19:

. . . *Are the words 'Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess', contained in Article Two of the Treaty of Waitangi, ample in their scope to include Lake Omapere?*

. . . Yes!

According to both English Common Law and ancient Maori Custom, the term 'Lands and Estates' would be ample to include by description a lake or a lake-bed. But even if that were not so, the further term 'other properties collectively possessed' would be more than ample to include a lake occupied and possessed as was Omapere.

Page 20:

. . . Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?

. . . The parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed.

Page 21:

. . . Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Crown would claim the bed of Lake Omapere?

. . . No!

There was no Common Law Right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right.

Page 24:

. . . In these later days, 1929, it is not sufficiently realised how dependent the early settlers were on the Treaty of Waitangi, and what great benefits the white people derived from it for several decades.

. . . In view of the considerations set out above, the Native Land Court holds that it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives.

Source: Lake Omapere judgment, Bay of Islands Native Land Court, Minute Book 11, fols 259-263, 265-266, 271-273, 276 (Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, pp 201-203)

In Professor Boast's evidence, the decision in the Omapere case was decisive:

> lakebeds are simply land to which the Crown must demonstrate that it has clearly extinguished native title before it is entitled to assert ownership. The legal position with respect to the bed of Lake Waikaremoana is, therefore, quite clear despite all the complexities and delays that have occurred with respect to this case.[375]

375. Richard Boast, 'The Crown and Te Urewera in the 20th Century: A Study of Government Policy', report commissioned by the Waitangi Tribunal, December 2002 (doc A109), pp 280–281

In the claimants' view, it was a travesty for the Crown to rerun Salmond's discredited arguments in the Waikaremoana appeal. From 1929 at the latest, the Crown should have abandoned its appeal, recognised the Maori owners' title, and negotiated a just arrangement with them about the use and management of the lake. Crown counsel did not respond in detail to this aspect of the claims, stating simply that the Crown was entitled to contest such an important matter as the ownership of Lake Waikaremoana in the courts.[376]

In the Native Appellate Court, Solicitor-General Cornish began with a preliminary argument that 'Judge Gilfedder's decision was a nullity because the Native Land Court had failed to determine on "proper evidence" that the land under investigation [that is, the lakebed] was indeed customary land'.[377] Relying on *Tamihana Korokai*, Cornish suggested that the Native Land Court's task was to determine 'whether any particular piece of land is native customary land or not'. This might involve determining whether a lake or any part of a lake was navigable, and – if so – 'whether according to native custom the Maoris were and are the owners of the bed of such lake or whether they had and have merely a right to fish in the waters thereon'.[378] Cornish also cited Justice Edwards' statement that a relevant question of law, raised by Solicitor-General Salmond, was whether a lakebed is subject to native title given the 'inherent probability' that the Treaty and the native land laws had not intended detriment to the public. Although Salmond had not spoken of 'lighting and power', Justice Edwards had added that there was a question as to whether the Treaty had 'destroyed' the Crown's right to use 'rain water that collects in this natural reservoir' for hydroelectricity. Cornish's suggestion to the Appellate Court was that Justice Edwards, in his part of the judgment, had accepted these as legal questions which had to be determined by the Native Land Court.[379]

According to Cornish's submissions to the Appellate Court, Judge Gilfedder had known of these legal questions in 1918 and had failed to investigate and determine them. Also, as Cornish saw it, there was only one piece of evidence in the whole Native Land Court inquiry – that of Hukanui Watene (see box) – on which any finding of ownership could

The Evidence of Hukanui Watene

During the Native Appellate Court hearing in 1944, Solicitor-General Cornish cited the evidence of one of the Ngati Kahungunu witnesses in the original Native Land Court hearing. This witness was

376. Crown counsel, closing submissions (doc N20), topic 28, pp 5–6
377. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 31
378. RDB, vol 59, p 22353 (quoting *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, 359)
379. RDB, vol 59, p 22353 (citing *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, 350–351)

Hukanui Watene, whose evidence was also relied on in our hearings by the Wai 621 Ngati Kahungunu claimants and by counsel for Ngai Tamaterangi. The passage quoted by Cornish was as follows:

> As to rights to [the] lake, the rights were the same as on the land. The people who surrounded the lake had the right to use it in common. They went on the lake for fishing, canoeing, bathing etc. From the lake they got food, a fish called the Maihi or Koari, fresh water crayfish, and the fresh water cockle. That is why we claim the lake as we were entitled to the food and used it for canoes to cross it. We have done this from the days of our ancestors. It was always recognised there were Maori owners of the lake. No outside tribes could fish or use the lake. They would have been killed had they attempted to do. *It was different to the ocean* in this respect. There the Maoris had rights to certain rocks and fishing places but with the lake the people who owned the surrounding land were only entitled to the use of the lake and its products. We would have the right to the bed of the lake and the water above it. [Emphasis in original.]

Source: Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 53

have been based. But in Cornish's view, this piece of evidence was consistent with a claim to fishing rights as much as ownership of the bed.[380]

Thus, Cornish argued that Judge Gilfedder's decision was made without jurisdiction because there was no 'proper evidence' of Maori customary usage or ownership of the bed of the lake.[381] Nor was there any other 'authoritative binding judgment of this Court' on the ownership of lakes – there was only the Omapere decision, which, he argued, had been criticised and was under appeal.[382] The Native Appellate Court therefore had no jurisdiction to affirm or reverse Gilfedder's decision, because that decision had itself been made without jurisdiction. Cornish asked the court to state a case to the Supreme Court to determine this point. Then, if he lost in the Supreme Court, he wanted to come back to the Appellate Court and proceed with an 'affirmative' case to prove that the Crown owned the lake. More time, however, would be needed before such a case could be made out.[383]

The Chief Judge refused to agree that a case should be stated to the Supreme Court. Instead, on 4 April 1944 he delivered the Appellate Court's decision about jurisdiction (see box for the full text of this decision). In response to the preliminary matter raised by Cornish, the court relied on *Tamihana Korokai* to find that Maori had a right to go to the

380. RDB, vol 59, pp 22353–22356
381. RDB, vol 59, pp 22357–22361
382. RDB, vol 59, p 22361
383. RDB, vol 59, pp 22361–22362

Native Land Court to have their title investigated. The only things that could stop the Court from performing this statutory duty were: first, some contrary provision in the Native Land Act 1909; secondly, proof in court that the Crown had extinguished Maori customary title; or, thirdly, proof in court of Crown title to the lakebed. For 'some reason which we are not concerned to discover', the Appellate Court stated, the Crown had been aware of the Lake Waikaremoana claim but 'refrained from attending Court or offering any evidence of title in the Crown'. In that circumstance, Judge Gilfedder was entitled to rely on the 'uncontradicted evidence of the Natives' witnesses'.[384] Having examined that evidence and the claims that were before Gilfedder, the Appellate Court was satisfied that:

> sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.[385]

The question before the Appellate Court then became whether or not the Solicitor-General could now establish his 'affirmative' case that title to Lake Waikaremoana was actually in the Crown. We do not intend here to examine Cornish's further attempts to remove

The Text of the Native Appellate Court's Decision on Jurisdiction

On the evening of 4 April 1944, the Native Appellate Court delivered its decision on jurisdiction:

> The Solicitor-General has raised, as a preliminary point in the matter of this appeal, that there is no valid judgment before the Court upon which an appeal may lie, and has directed argument to show that under these circumstances this Court has no authority to hear the appeal. He has submitted that the Order purported to be made by Judge Gilfedder was and is a nullity because a condition precedent to the exercise of jurisdiction by the Court was not complied with. He submits that the Court has jurisdiction to investigate the title to customary land, and customary land alone, and that the Court could only determine whether or not the land the subject of the application was customary land upon proper evidence.
>
> The Solicitor-General offered the opinion that there was no evidence upon which the Court could find that the lake was customary land. The Natives have a right to go to the Native Land Court to have their title investigated and the Native Land Court can only be prevented from performing its statutory duty, first, under the Native Land Act; or, second, on proof in that Court that

384. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 43
385. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 43

the lands are Crown Lands freed from the customary title of the Natives, or, third, that there is a Crown title to the bed of the Lake – *Tamihana Korokai v Solicitor-General* (1913) NZLR 321.

The Crown was aware of the application to the Court but for some reason which we are not concerned to discover, its representatives refrained from attending Court or offering any evidence of title in the Crown. Under these circumstances, the Court had before it the uncontradicted evidence of the Natives' witnesses. Having examined the claims and the uncontradicted evidence adduced at the hearing, and after giving full consideration to the submissions of the Solicitor-General in this matter, we are of the opinion that sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.

Source: Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 43

the case to the general courts. Those attempts, and the basis on which they were made, will be considered in the following section. In this section, we are concerned with the case made by Cornish for the Crown and the Appellate Court's decision.

After hearing further argument on 21 April, the Appellate Court agreed to a three-month adjournment to allow the Crown time to prepare its case.[386] The hearing resumed on 1 August 1944, before Chief Judge Shepherd and Judges Carr, Harvey, Dykes, Beechey, and Whitehead. Cornish argued the Crown's case on three grounds:

- First, Maori custom did not recognise a 'separate property in the bed [or 'soil'] of a navigable lake', and Judge Gilfedder was mistaken 'on the subject of custom'.[387] Maori conceptualised lakes as water, giving rise to a right of user or fishery, rather than the English conception of owning the land under the water.[388]
- Secondly, that 'even if there was a native custom, it has never been recognised or given legal validity by our legislation on the ground of public interest in navigation, [and] that there never has been granted to the native population the beds of navigable waters.'[389] This argument was based on the legal theory that native title and the Treaty of Waitangi had no force other than through statute (the native land laws), and that navigable waterways were implicitly excepted to protect the public interest in these 'highways.'[390]

386. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 45
387. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 49
388. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 49–50, 51–59, 61, 67–69, 72, 80–81
389. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 49
390. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 62–74

- Thirdly, 'on the assumption that I may be wrong on all that', that the Crown had acquired the lands abutting the southern shores of the lake before 1918, and thus had become an owner under the *ad medium filum aquae* rule.[391]

Apart from the emphasis on the Crown's claim as the owner of riparian lands, this was indeed a rerun of arguments rejected by the Native Land Court in the Lake Omapere case.[392]

The Native Appellate Court's substantive decision was delivered on 20 September 1944 (see box for the full text). In the claimants' submission, the Court's unanimous decision was very short (just over two pages), saw matters as 'very simple', and rightly 'gave the Crown appeal very short shrift'.[393] After confirming its preliminary decision on jurisdiction, the Appellate Court found that Lake Waikaremoana was native customary land and the lower court had correctly exercised its jurisdiction to make freehold orders. The Solicitor-General's arguments about an exception for public rights of navigation ('highway of necessity'), the *ad medium filum* rule, and the legal effects of the Crown's acquisition of lands abutting the lake, were all 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.' The Maori claimants had satisfied the Court that they 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 of rights as owner of riparian lands.[394]

The Court concluded:

> In our view the matter before the Court is very simple. We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor-General to vary this view and the appeal of the Crown must fail.[395]

The Text of the Native Appellate Court's Decision, 20 September 1944

This is an appeal by His Majesty the King against a decision of the Native Land Court delivered on the 7th June, 1918, on the investigation of title to Lake Waikaremoana.

391. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 49, 74–89
392. See White, 'Inland Waterways: Lakes' (doc A113), pp 226, 229–239.
393. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 47
394. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 153–154
395. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), pp 154–155

The Solicitor-General submits that there was insufficient evidence before the Lower Court to establish that Lake Waikaremoana was held by natives in accordance with their ancient customs and usages, and in addition or alternatively he submits that various dispositions of the lands adjoining the lake have the effect of disposing of the ownership of the bed of Lake Waikaremoana. He challenges the jurisdiction of the Native Land Court to make final orders in respect of the bed of the lake and the jurisdiction of this Court to review the orders so made. It was not explained to this Court why the Crown should file a notice of appeal and then argue that there was no jurisdiction to deal with the matter instead of adopting the usual means of having an invalid order set aside.

Before a Court can proceed to hear any matter whatsoever it must first be satisfied that it has the necessary jurisdiction to proceed. This applies to the Native Land Court no less than any other Court, and if the question of jurisdiction is raised at any time during the hearing the Court must first determine this preliminary issue. When it is found that a Court has proceeded to make a final order it is deemed to have arrived at the conclusion that it was acting within its jurisdiction.

In the absence of special statutory jurisdiction, the jurisdiction of the Native Land Court is limited to matters which concern native land and native customary land, and in making final orders in respect of Lake Waikaremoana it is clear that the Native Land Court, of necessity, must have considered the lake as being native customary land. At no stage of the proceedings was any contrary opinion expressed to the Lower Court either by the natives concerned or by the representatives of the Crown. If the Native Land Court was in error in assuming jurisdiction the proper course for the Crown to adopt was to apply to the Supreme Court for an order restraining the Native Land Court from proceeding further with the matter and nullifying the order already made. Such a course has not been adopted at any time by the Crown during the long space of time which has elapsed since the making of the order. During the present proceedings the attention of the Solicitor-General was specifically drawn to this aspect of the matter but no such action has been taken. The Solicitor-General has been content to make the matter an issue before this Court, and this Court has proceeded to make a determination which affirms that not only did the Native Land Court possess the necessary jurisdiction to make the orders, but the quantum of evidence was sufficient to justify the making of such orders. In arriving at this conclusion it is apparent that this Court must necessarily have considered the question as to whether Lake Waikaremoana was or was not native customary land and as such a proper subject matter for the Native Land Court to investigate. The Solicitor-General has raised no ground of appeal which is not satisfactorily dealt with by this preliminary determination.

The questions of the application of the *ad medium filum* rule, highway of necessity and the effect of conveyances or memorials of ownership are of great interest, but are not applicable to the present case. 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. The natives successfully establish their title to Lake Waikaremoana once they satisfy the Court that it was held by them in accordance with

their ancient customs and usages, unless it be shown that this title has been extinguished. This cannot be shown by the mere assertion of title by the Crown but satisfactory proof must be adduced to the Court. In the course of years there are many rules and presumptions which have become incorporated in English law but we are of the opinion that in New Zealand these are of no force or effect if it is found that they in any way conflict with the customs and usages of the Maori people. We consider that these rights once established are paramount and freed from any qualification or limitation which would attach to them if the rules and presumptions of English law were given effect to.

In our view the matter before the Court is very simple. We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor-General to vary this view and the appeal of the Crown must fail.

Source: 'Extract from Wellington Appellate Minute Book no 8, p 30 et sec' (doc h2) pp 153-155

20.6.5 Why did the Crown refuse to accept the Appellate Court's decision, and wait another 10 years before finally accepting Maori ownership of the lake?

The Native Appellate Court's decision in September 1944, remarkably enough, did not end the Crown's procrastination over Waikaremoana litigation. Section 51(1) of the Native Land Act 1931 provided:

> No order made with respect to Native land by the Court or the Appellate Court shall, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than ten years after the date of the order.

This Act gave the Crown a 10-year period in which it could still seek a writ of prohibition or a writ of certiorari in the Supreme Court. A writ of prohibition is an order from a superior court to a lower court, directing that litigation cease or that orders not be given effect because the lower court does not have proper jurisdiction to hear or determine the matters before it. A writ of certiorari orders a lower court to deliver its record in a case so that the higher court may review it.

Even before the Appellate Court delivered its judgment, the Crown intended to challenge it as based on an inadequate inquiry. In arguing for an adjournment, the Solicitor-General had told the court that such a major decision, affecting the public interest, needed as much

research and authority behind it as possible if the Crown were to rely on it to compensate or settle Maori claims:

> I know of course that an argument of sorts can be presented to this Court, but an argument of sorts is not good enough. The Court is entitled to more than that, and the public interest demands more than that. As far as I know – I believe I am right – this particular issue now raised has never been dealt with in a considered judgment of this Court. I venture to say, therefore, that this Court expects a very thorough examination of the subject of native customary title, its roots, its nature and its limits, and the Court, I assume, will wish to have addressed to it submissions on the place, if any, that Maori conceptions of possession and ownership have in a system of jurisprudence. Now only a determination of this Court following a reasoned, a comprehensive, and an exhaustive study of these disputes will be of any use, I venture to suggest with respect. Only a judgment of the Court following such an examination of the issues will satisfy the Government that the beds of lakes and streams were papatupu, and only such a judgment following such an examination will avail the natives. In the event of discussions taking place between the natives and the Government for compensation for rights claimed, the Government cannot be satisfied – as I imagine, because I am not the Government, I am not the Executive or any member of the Executive – but as I imagine, the Government, if or when it should proceed to consider compensation for the natives, would want to be satisfied by a judgment that convinced its reason that the natives did own in fact and in law the beds of our navigable streams and lakes. . . . Now I have, with my friend Mr Prendeville, made a serious effort to prepare this case for this Court, but we find, both of us, that in the time available to us we simply could not present to the Court a considered survey and examination of the position such as the needs of the case require.[396]

On the evening of 4 April 1944, the Court made its preliminary decision on jurisdiction (see above). Having delivered the judgment, the Chief Judge said:

> You told us this afternoon, Mr Cornish, that should the point go against you, you proposed to move in the Supreme Court for a writ of certiorari. We propose to facilitate your doing that all we can, and for that reason we propose to adjourn the hearing of this appeal until the 21st April, that is a Friday, and at that time we expect you either to have issued your writ, or to have applied to me for a further fixture.[397]

Cornish noted that he did not 'tie myself down to certiorari' and might seek a writ of prohibition instead.[398]

396. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 3
397. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 43
398. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 43

When the Appellate Court hearing resumed on 21 April 1944, Prendeville appeared for the Crown because Cornish was busy in the Court of Appeal. Prendeville asked for a sine die adjournment because the Crown intended to institute proceedings in the Supreme Court. Wiren objected. The Crown was already supposed to have instituted those proceedings if it was going to, and Wiren asked for a fixture to resume hearing the appeal. The court once again refused to adjourn the case sine die and set down a hearing for 1 August 1944.[399] As noted above, this gave the Crown three more months to prepare its case.

When the court resumed on 1 August, the Crown had still not attempted to remove the proceedings to the Supreme Court. The Solicitor-General submitted his understanding that the jurisdiction decision delivered orally on 4 April 'was only an expression of the Court's opinion' and that it was still open for him to argue the point – as he proceeded to do.[400] During this August hearing, Cornish prepared a series of questions and asked the Appellate Court to state a case to the Supreme Court for its opinion on the questions he had raised. While he was considering the possibility of an appeal to the Privy Council, Cornish suggested that it would be preferable and cheaper to get these matters resolved by way of a case stated to the Supreme Court. Mr Cornish said:

> I would say quite frankly this; my own personal view is that if this case went to a full bench of the Supreme Court, and the material matters were decisively answered against the Crown, as far as I am concerned that would be the finish. I would be satisfied.[401]

The Appellate Court resolved to consider the matter closely while it was deliberating on its judgment, and to state a case to the Supreme Court if it was felt necessary.[402] In point of fact, the Appellate Court did not consider it necessary. Judgment was delivered on 20 September 1944.

In essence, the Government did not like the answer that it got from the Appellate Court, and did not consider that the answer was correct in law, let alone convenient. Two strands of thinking interacted over the next decade: on the one hand, a desire to quash the Native Land Court and Appellate Court decisions through further litigation; and, on the other hand, to make the problem go away by reaching a one-off settlement with these particular Maori owners. The second possibility had been given some consideration before 1944, and it had always been a likely destination of the long, slow journey that was taking place. But Salmond's view that lake cases should be settled politically rather than through litigation was no longer predominant. Instead, it still seemed possible to overturn the Appellate Court decision and never have to settle with or compensate the Maori owners – this remained a live possibility for the full 10 years permitted by statute. It was not until the Crown finally

399. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 45
400. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 49
401. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 152
402. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal' (doc H2), p 152

had to give up on the option of litigation in 1954 that some kind of negotiated settlement (or the more extreme option, expropriatory legislation) became inevitable. The question of why it took another 16 years after that to reach agreement is the subject of section 20.8.

As far as we can tell from the record, no consideration was given to an appeal from the Appellate Court to the Privy Council, even though Cornish had foreshadowed the possibility during the 1944 hearings. Presumably, the view prevailed – as expressed in Court by the Solicitor-General – that it would be cheaper and more sensible to have the matter dealt with by the Supreme Court in New Zealand.

The option of seeking writs of certiorari and prohibition, however, was under consideration for the next 10 years. The very first thing that the Crown did, following the Appellate Court decision, was to take steps to prevent the Court from completing the issue of titles. In late September 1944, Lands and Survey staff were instructed to follow the advice of the Solicitor-General:

> If you are asked to approve a plan of the bed of Lake Waikaremoana for the purpose of completing the Freehold Orders made by the Native Land Court and confirmed by the Native Appellate Court, I should be obliged if you would communicate with me before taking any action.
>
> The Crown does not acquiesce in the Freehold Orders referred to above and considers that to the extent that the Native Courts had any jurisdiction they acted wrongly and to the extent to which they had no jurisdiction anything that they did is a nullity. In the Crown's view the Natives are not entitled to the bed of Lake Waikaremoana and the Crown will take all necessary steps to establish this. It is therefore desirable that nothing be done to alter the status quo pending the taking of further steps in the matter.[403]

Nonetheless, the Crown did not initiate proceedings in the Supreme Court. In April 1945, Crown solicitor A E Currie wrote a memorandum for the Lands under-secretary, pointing out that 'fresh original proceedings in the Supreme Court have been contemplated'. In the meantime, Cornish had retired and no successor had been appointed. Currie noted that although the department had ordered its staff not to provide maps for freehold titles, it had not actually instructed the Crown Law Office to begin proceedings in the Supreme Court.[404] A 1954 Cabinet paper revealed why no action was taken:

403. Solicitor-General to Under-Secretary, Lands and Survey, in Under-Secretary to Chief Surveyor, Gisborne, 20 September 1944 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(a)), p 463)

404. A E Currie to Under-Secretary, Lands and Survey, 9 April 1945 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(a)), p 462)

> The Attorney-General at the time proposed that issues in relation to Wanganui River should be determined in the Supreme Court first, in anticipation that the decision in that case would, to some extent at least, settle the issues in the Waikaremoana case.[405]

Negotiation with the owners was impossible in any case because of the oustanding Maori appeals against Gilfedder's decision, which were heard after the Crown's appeal was dismissed.[406] As will be recalled, a decision had been reached back in the 1920s to hear the Crown's appeal first, as, if the Crown won, then the other appeals would not need to be heard. Until these appeals were resolved (which happened in 1947), there was not a finalised group of owners with whom the Crown could arrange a settlement.

But the Crown was contemplating a more drastic resolution than litigation or negotiation. In 1946, the Government considered passing legislation to establish the Crown's ownership of all lake and river beds, although the Native Minister feared that it might be necessary to reserve any rights arising out of current litigation (as at Waikaremoana). The Minister, H G R Mason, who proposed settling the issue in this extreme fashion, commented:

> Consider, for example, Waikaremoana. It was probably a tribal boundary. Eels cannot live in it and therefore it can hardly be said to have been a source of food supply. It separated the tribes almost as much as an arm of the ocean would do. . . . By an accidental circumstance or oversight, the valueless bed may be held to be not included in the Crown acquisitions [of the land abutting the lake]. It is hard to see what value can be given to the bed of the Lake. The Maoris probably think that because it feeds the Hydro-electric Works their claim will amount to the whole value of the Hydro-electric Works. On any sort of proper estimation I do not see how it can be said to be substantial. The native agents and lawyers will make much money over what in fairness, is a little thing, though no one can say that it will cost the Crown little. . . . The Crown Law Office has a knowledge of these matters and has reported more than once that the whole matter should be cleared up by legislation. It is apparently because that Office is not an administrative office that this has not hitherto been done.[407]

Mason urged that legislation be passed before further claims were 'stirred up': 'it seems to me there is no emotional difficulty in passing legislation that will prevent their being stirred up and it ought to be done.'[408]

---

405. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1289)

406. Walzl, 'Waikaremoana' (doc A73), pp 339–340

407. Native Minister to Prime Minister, 24 July 1946 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1118)

408. Native Minister to Prime Minister, 24 July 1946 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1118)

This option was rejected in 1946 but it remained a possibility. In the late 1940s, the Government's options were essentially to litigate, legislate, or negotiate.[409] For the most part, right through to September 1954, litigation was the primary strategy, although a decision was made in either 1944 or 1945 to deal with the Whanganui River case first. The Government could not have predicted that that case would still be unresolved 10 years later, after a Supreme Court hearing, a royal commission, and a Court of Appeal hearing. Apart from a brief spate of discussions/negotiations in the late 1940s, there was no effort to negotiate about Waikaremoana while the Crown still had the option of litigation open to it.

The Government's short-lived recourse to negotiation came in 1947 to 1949. Prime Minister Peter Fraser had just taken over the Maori Affairs portfolio from H G R Mason, who had been very opposed to negotiating a settlement. In January of that year, Fraser had a meeting with his Maori members of Parliament and the Native Department under-secretary, Chief Judge Shepherd. Lake Waikaremoana was discussed at this meeting. Fraser's attitude was crucial. The Appellate Court's decision was wrong, in his view, but the Government needed to accept it and negotiate a settlement with the Maori owners:

> The Prime Minister said he thought that decision wholly wrong. He did not think anybody could own the bed of a lake unless he were prepared to go down into the bed of the lake and live there. The bed of the lake was only symbolical in so far as it was where the food of the Maoris was to be found. However it was one of those matters which would have to be dealt with and solved.[410]

Shepherd pointed out that the Maori appeals had to be resolved first. He also observed that Mason had offered the Maori owners an annuity of £1000 a year to settle their claim. We have no other information that Mason had made an actual offer. Rangi Mawhete, a member of the Legislative Council, responded that 'the Maoris are talking about £6000 a year.'[411]

Fraser had clearly decided to negotiate. But rather than consider an annuity on the basis that the Crown was not acknowledging Maori ownership of lakes (as at Rotorua and Taupo), the Prime Minister decided on an outright purchase of Lake Waikaremoana. In April 1947, with the Appellate Court decision on the Maori appeals imminent, the Native Department advised its Minister: 'Whether that will bring to an end all litigation over the lake does not yet appear – the Crown Law Office was, I believe, at one time considering whether the correctness or otherwise of the Appellate Court's decision on the Crown Appeal should not be

409. Walzl, 'Waikaremoana' (doc A73), pp 340–341

410. 'Notes of conference held in Rt Hon Prime Minister's Room, 29 January 1947 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1115)

411. 'Notes of conference held in Rt Hon Prime Minister's Room, 29 January 1947 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1115)

tested by some proceeding in the Supreme Court.'[412] Fraser instructed the department to summon a meeting of assembled owners as soon as the titles were completed. The Crown would make a purchase offer for the bed of Lake Waikaremoana.[413] The Native Department let the Solicitor-General know about this development: 'This information is passed on to you because it appears that the proposal will do away, at all events, for the time being, with the need for considering whether the Crown should proceed in the higher Courts.'[414]

Thus, it seemed that the question had been decided: the Government would negotiate rather than litigate. But nothing was done until 1949, when the owners approached the Government asking for it to settle with them 'for the future use of the Lake for hydro electric, fishing and tourist purposes'.[415] In June 1949, Fraser and his officials met with the owners' representatives to discuss either an outright sale or an annuity on the model of the Rotorua and Taupo settlements.[416] The explanation for the delay between 1947 and 1949 may be that officials preferred to await the outcome of the Whanganui River case in the Supreme Court. On 11 July 1949, a memorandum (possibly from the Crown Law Office) to the Native Department revealed:

> No proceedings have been filed in respect of Lake Waikaremoana. What will be done about this, unless the whole matter of Maori claims to subaqueous lands is dealt with as a matter of policy, will, no doubt, be considered by the lawyers after the Wanganui judgment has been given. In the circumstances, any talks with the Maoris on the footing that they are to be granted compensation for the abandonment of any rights they have in Lake Waikaremoana may be premature, unless the Maoris interested are given clearly to understand that the legal issues may still be debated in the appropriate forum. Perhaps you would consider whether the Minister might not ask the Attorney-General for an expression of his views before any meeting with the people is determined on. . . . If the Waikaremoana case is to be settled without a final ascertainment of the rights of the parties in the Courts, a point which you might think worthy of some consideration is whether the amount of compensation should not be determined by a tribunal such as a Commission to be set up for the special purpose.[417]

412. Under-secretary, Native Department, to Native Minister, 21 April 1947 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1114)

413. Native Minister to under-secretary, 24 April 1947 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1114)

414. Under-secretary, Native Department, to Solicitor-General, 30 April 1947 (Walzl, 'Waikaremoana' (doc A73), p 342)

415. Under-secretary, Native Department, to Minister of Native Affairs, 1 February 1949 (Walzl, 'Waikaremoana' (doc A73), p 342

416. Walzl, 'Waikaremoana' (doc A73), pp 342–344

417. Memorandum for under-secretary, Native Department, 11 July 1949 (Walzl, 'Waikaremoana' (doc A73), pp 344–345

This view was not shared by the Prime Minister. He went ahead and met with a deputation of owners in August 1949. We are not concerned with the substance of Fraser's 1949 negotiations at this point in our chapter – we will discuss that later, in section 20.8.2. Here, we are concerned primarily with the Crown's litigation option and how that was presented to the people. In brief, the August deputation asked for 'compensation' of £10,000 a year. Fraser replied that Cabinet would not consider such a sum. When the people explained their extreme lack of land, he proposed an exchange of land, and stated:

> The Appellate Court had made a decision and he was not in favour of any further appeal to the Supreme Court. He would ask the Government to accept the decision of the Maori Appellate Court.[418]

The Maori owners were pleased with this and reminded him of it at the next meeting in October 1949. He had, they said, 'intimated' that the 'appeal to the Supreme Court would not be proceeded with.'[419]

Discussions between the Government and the Maori owners in late 1949, however, were interrupted by a general election and a change of government at the end of November. In January 1950, Maori Affairs under-secretary Jock McEwen was asked to summarise the Lake Waikaremoana situation for the new National Government.[420] McEwen set out the issues and the content of discussions so far. He noted that the issues had become linked with the question of compensation for any damage to the lake arising from previous Crown or parliamentary actions, which would have included the recent hydroelectricity works and the lowering of the lake (see the next section). In addition to the questions of annuities, damages, and title, McEwen noted that recourse to the courts was still an option for the new Government:

> Nevertheless, unless Government is prepared to consider the whole question of subaqueous lands and treat it as a matter of policy, and unless action is to be taken in the Courts to obtain a final determination of the law as to the property in the bed of Waikaremoana – a course of action which an appeal to principles would justify – it is suggested that the only means possessed by Government of apprising itself of the facts in relation to the Maori claims is by setting up a Commission to inquire into them and report thereon. Such a course would be in line with that adopted in the case of the Wanganui River.[421]

418. Notes of interview between Minister of Maori Affairs and a deputation of owners at Nuhaka on 27 August 1949 (Walzl, 'Waikaremoana' (doc A73), p 346)

419. 'Notes of representations made to the Rt Hon P Fraser, Minister of Maori Affairs, at Kohupatiki, Hastings, 8 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1186)

420. Walzl, 'Waikaremoana' (doc A73), p 348

421. McEwen, 'Notes on Waikaremoana Claim', not dated (early 1950) (Walzl, 'Waikaremoana' (doc A73), pp 349–350)

In late 1949, the Crown had essentially won the Whanganui River case in the Supreme Court, but not on the basis of Salmond's navigable waterway arguments. In 1948, the Attorney-General decided that it was time to jettison Salmond's arguments:

> Previously the Crown has relied largely on opinions attributed to Sir Francis Bell and Sir John Salmond which attempt too much and cannot be sustained, to the neglect of points that undoubtedly can be sustained. These opinions would deny any ownership to the Maoris from the beginning, and neglect the point that the land under the water is presumed to pass with the sale of the land on the banks unless there are circumstances to contradict the presumption.[422]

Mason, no longer Native Minister but Attorney-General, thought that the Crown could win the Whanganui River case on that ground, and then apply it to Lake Omapere and Lake Waikaremoana.[423]

Accordingly, this was the argument put to the Supreme Court in *The King v Morison and Another* in 1949.[424] Justice Hay found that the Native Land Court's investigations of riparian land did not appear to have considered the effect of its titles on the riverbed. The Court would need much fuller information about the surrounding circumstances before it could accept that the *ad medium filum* rule applied. Nonetheless, Justice Hay held that he did not need to decide the point because the Coal-mines Act Amendment Act 1903 had made the beds of all navigable rivers, including the Whanganui River, the property of the Crown.[425] The Crown and the Whanganui River people held a meeting and agreed to avoid the expense of appeals from Justice Hay's decision to the Court of Appeal and Privy Council by setting up a special royal commission. This would inquire into whether the Whanganui River tribes had owned its bed under Maori custom (until the Coal-Mines legislation), whether they were entitled to compensation, and – if so – how much.[426]

In May 1950, after the receipt of McEwen's advice, the new Government decided to wait for this commission's report before taking any action at all on Waikaremoana.[427] In June of that year, however, the Maori Land Court disrupted the Government's plan by asking the Chief Surveyor at Gisborne for 'a compiled plan of Lake Waikaremoana which is needed to complete the freehold order made by the Court'.[428] Thus, the situation foreshadowed back in 1944, when officials were instructed not to provide such a plan, had finally arrived. The Attorney-General met urgently with the Solicitor-General and instructed him 'to take

422. Attorney-General to Prime Minister, memorandum, 'Maori Claims to Wanganui River, Waikaremoana, Lake Omapere etc', 13 February 1948 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1112)
423. Attorney-General to Prime Minister, memorandum, 'Maori Claims to Wanganui River, Waikaremoana, Lake Omapere etc', 13 February 1948 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1112)
424. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 210
425. Waitangi Tribunal, *The Whanganui River Report*, pp 195, 210–212
426. Waitangi Tribunal, *The Whanganui River Report*, p 212
427. Walzl, 'Waikaremoana' (doc A73), p 350
428. Under-secretary, Native Affairs, to Native Minister, 14 June 1950 (Walzl, 'Waikaremoana' (doc A73), p 350)

appropriate proceedings in the Supreme Court to test the validity of the order made by the Maori Land Court and confirmed by the Maori Appellate Court.'[429]

On 12 July 1950, the Minister of Maori Affairs[430] advised Ngata of what was about to happen. The Crown had no alternative but to comply with the Maori Land Court's request or proceed in the courts: 'The Attorney-General feels that the Crown is obliged to adopt the second course and the Solicitor-General has been directed to file appropriate proceedings in the Supreme Court.'[431]

But there the matter stalled. Waikaremoana leader Takarua Tamarau took advantage of a meeting with the Minister of Maori Affairs at Ruatoki in April 1951 to ask when compensation would be finalised for Lake Waikaremoana. The Minister, E B Corbett, put the matter off by agreeing that it should be finalised, and asking the people to 'discuss what would be a fair settlement'. After they had held such discussions, he said, they should let him know the outcome and the Government would then consider the matter.[432] Other than this one interchange, there had been no discussions or negotiations since the new Government had taken office.[433]

We do not know for certain why the Attorney-General's decision in 1950 was not acted upon. Certainly, the plan was withheld from the Maori Land Court to prevent the issue of titles, but no claim was filed with the Supreme Court. A detailed statement of claim had been prepared by Cornish back in 1944 and was ready to go. It sought a writ of certiorari to remove the records and judgments of the Maori Land Court and Appellate Court into the Supreme Court, for the purpose of quashing those judgments; a writ of prohibition to prevent the Maori Land Court or Appellate Court from taking any further steps to give effect to the judgments; and a declaration that the Crown was 'solely entitled to the Lake and the Islands therein.'[434]

In our view, it is very likely that the Attorney-General's intention was altered by the outcome of the Whanganui River Commission. In May 1950, the Government had been planning to wait for this commission's report before deciding whether to take the Waikaremoana case to the Supreme Court. Then, the Maori Land Court request for the survey plan had precipitated a decision in June 1950 to start proceedings, which Corbett advised Ngata of on 12 July 1950. But a few days after Corbett's letter to Ngata, on 18 July 1950, the Whanganui River commission released its report. Sir Harold Johnston, a retired Supreme Court judge, endorsed the Native Land Court and Native Appellate Court decisions that the Whanganui River bed was Maori customary land (had it not been for the Coal-Mines legislation), and

429. Under-Secretary, Native Affairs, to Native Minister, 14 June 1950 (Walzl, 'Waikaremoana' (doc A73), p 350)
430. The position of Native Minister was retitled as Minister of Maori Affairs in 1947.
431. Minister of Maori Affairs to Ngata, 12 July 1950 (Walzl, 'Waikaremoana' (doc A73), pp 350–351)
432. 'Notes of interview', 16 April 1951 (Walzl, 'Waikaremoana' (doc A73), p 351)
433. Walzl, 'Waikaremoana' (doc A73), p 351
434. Walzl, 'Waikaremoana' (doc A73), p 352; Solicitor-General to Director General, Lands and Survey, 24 February 1953 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(a)), p 434)

that the Maori owners were entitled to compensation. This was not the outcome that the Crown had wanted or expected.[435] Faced in 1951 with what it considered very exaggerated claims for compensation from Whanganui Maori, the Government inserted a clause in the Maori Purposes Act 1951 to refer this matter for further litigation in the Court of Appeal.[436] The flow-on effect was once again to keep open but delay the option of proceedings about Lake Waikaremoana.

On 24 February 1953, the Solicitor-General wrote to the Lands Department, pointing out that the Crown's ability to seek writs over Waikaremoana in the Supreme Court would expire on 20 September 1954. The Crown had to make a definite decision before then. The Director General of Lands replied that no decision would be made until the outcome of the Whanganui River case in the Court of Appeal was known.[437] The Court of Appeal heard this case in July 1953 but did not deliver its judgment until July 1954.[438] In the meantime, on 4 May 1954, the Lands Department – anticipating that the Whanganui decision might be imminent – asked the Solicitor-General to discuss with the Government what to do about Waikaremoana.[439]

By a majority, the Court of Appeal decided in the Whanganui River case that the Crown 'failed on all issues' except one: whether the *ad medium filum aquae* rule had applied to land titles granted by the Native Land Court (before the Coal-mines legislation). It seems that the Crown had relied on the Salmond arguments, in conjunction with the *ad medium filum* rule. The Court of Appeal rejected the Crown's argument that the Treaty of Waitangi had made the Whanganui River a 'navigable public highway' and the property of the Crown, with Maori rights restricted to fishing rights. The Court declared instead that Maori had customary title to the riverbed at the time of the Treaty and after the acquisition of British sovereignty. On the *ad medium filum* issue, however, the Court said that it needed more information. A section was inserted in the Maori Purposes Act 1954, enabling the Maori Appellate Court to take further evidence on questions submitted to it by the Court of Appeal.[440]

In September 1954, just weeks before the Waikaremoana deadline, the Maori Affairs Department prepared a draft Cabinet paper for its Minister. Again, the question of damage and interference with the lakebed was considered an issue. Also, 'if the declaration by the Maori Courts that certain Maoris own the bed of Waikaremoana is permitted to stand, an attempt might be made by injunction to interfere with the user by the Crown of the waters for hydro-electric purposes'. This was because the 'level of the lake is subject to control, and

435. Waitangi Tribunal, *The Whanganui River Report*, pp 217–219
436. Waitangi Tribunal, *The Whanganui River Report*, pp 219–220
437. Walzl, 'Waikaremoana' (doc A73), p 352
438. Waitangi Tribunal, *The Whanganui River Report*, p 221
439. Director General, Lands and Survey, to Solicitor-General, 4 May 1954 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(a)), p 531)
440. Waitangi Tribunal, *The Whanganui River Report*, pp 221–224

the control works have impinged on the bed to a minor extent'. Officials considered that an injunction was unlikely to be granted because 'the Court has a discretion to refuse an injunction and to award damages instead, especially where the injury to the plaintiffs is small and it would be oppressive to the defendant to grant an injunction'. The department considered that the Maori owners (if accepted as such) would likely win an action for trespass, but 'it is difficult to see that the measure of damages could be great'. Most land around the lake was now owned by the Crown or 'tenants or freeholders from the Crown'.[441]

The draft Cabinet paper noted the significance of the drawn-out Whanganui River litigation, which the Government had decided to take first. This case had extended over a number of years and had only recently resulted in a decision from the Court of Appeal. The decision was described – accurately if not fully – as having 'not dispose[d] of the matter finally'. In terms of Lake Waikaremoana, however, the only practical problem for the Government, if the 1944 Appellate Court decision was allowed to stand, was that Maori might be able to interfere with the Crown's use of the lake and bed for hydroelectricity purposes. No other issue (such as tourism interests or compensation) was even mentioned. Nor were the interests of the Maori owners discussed, let alone given any kind of weight.[442]

The paper ended:

> The question for the consideration of Cabinet is whether proceedings to test the validity of the decision of the Maori Courts – the proceedings being by way of an application for a writ of prohibition to prohibit the completion by the Maori Courts of the freehold order for the bed, coupled with an application claiming a declaration of the Crown's ownership – should be filed in the Supreme Court *before* the 20th of this month, or whether the Maoris are to be permitted to retain the benefit of their declared ownership of the bed.[443]

On 10 September 1954, this paper was put to the Minister of Maori Affairs. The Secretary of Maori Affairs' advice focused on a single question: should this be treated as a matter of principle? If not, then – unlike the Whanganui River – the Waikaremoana case was no threat in terms of lakes in general, and the Crown had already withdrawn its appeal against the Lake Omapere decision:

> Waikaremoana might be a horse of a different colour to that of Wanganui River. If, in the latter case, the Maoris can successfully set up, in relation to the bed of the river, a separate property unrelated altogether to the ownership of the riparian lands, it could possibly be that similar claims will be made in respect of other rivers, at all events, in the North

441. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1289)

442. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1288–1290)

443. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1289–1290)

> Island. The practical effect of allowing the judgments of the Maori Courts about the bed of Waikaremoana to stand might not be so very great. The Rotorua Lakes and Taupo Lake will not be affected because of the settlements and money payments made. The Crown appeal in respect of Omapere was withdrawn, and there are no other lake claims on the stocks just now. So far as the South Island is concerned, it is not easy to see, in view of the terms of the deeds of purchase or cession to the Crown, that any claim could successfully be made by the Maoris either to lakes or river beds. Standing against all this, however, is the question of principle.[444]

On 13 September 1954, Cabinet considered the Maori Affairs paper and decided that no action would be taken in the Supreme Court. The following month, the Government lifted its ban on supplying the Maori Land Court with the plan so that the titles could be completed.[445] As well as the advice that, in practical terms, it did not much matter who owned the Waikaremoana bed so long as it did not interfere with use of the lake for hydroelectricity, the outcomes of the Whanganui River case in the royal commission (1950) and the Court of Appeal (1954) must have seriously discouraged the Crown from trying its luck in the general courts.

What is astonishing, in our view, is that in all the evidence and papers available to the Tribunal, the various Government departments and Ministers never once seemed to consider what would benefit Maori or what was in their best interests. Indeed, they had actively sought to defeat the rights claimed by Maori.

Not surprisingly, the Maori owners were very unhappy with what had now been 36 years of Crown procrastination and refusal to recognise the Native Land Court's decision that they were the owners of Lake Waikaremoana. Their view of this latest series of delays (from 1944 to 1954) was expressed in a letter from their solicitor, S A Wiren, to the Minister of Maori Affairs on 18 April 1957. This is an important letter and we quote it in full:

> The Crown appealed against this [1918] decision but the appeal was not heard until 1st August 1944 and even then the Crown wished to delay the hearing. A special Court of six Judges of the Maori Appellate Court unanimously dismissed the appeal. The date of the judgment was 20th September 1944.
>
> Section 51 of the Maori Land Act 1931 provided that no order made with respect to Maori Land by the Court or the Appellate Court should, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed or declared or held to be invalid by any Court in any proceedings instituted more than ten years after the date of the order.

444. Secretary to Minister of Maori Affairs, 10 September 1954 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1287)
445. Walzl, 'Waikaremoana' (doc A73), p 353

> The Crown took full advantage of this section and intimated from time to time that proceedings were in contemplation to quash the order of the Appellate Court.
>
> Finally on 18th October 1954 the Solicitor-General informed the writer that no such proceedings would be brought and the Crown would accept the Court's order. About the same time he informed the Chief Surveyor at Gisborne, who until that time had been forbidden to supply a plan for registration of title, that such a plan could be prepared. Our clients are now registered as owners of the Lake and have a full Land Transfer title.
>
> We should mention that during the year 1948 [sic: 1949] the then Prime Minister told a deputation of owners in the presence of representatives of your Department, the State Hydro Department and the Lands Department that the Government would accept the judgment of two Courts which were both against the Crown. A stenographer was present and no doubt the report of that interview is available.
>
> Notwithstanding all this, the Crown has persistently disregarded the ownership of the Lake, particularly in the activities of the State Hydro Department and the Tourist Department. We submit it is clearly improper that the rights of citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded. The Maoris have, through all these years, been much more forbearing than Europeans would have been.[446]

Thus Wiren, for the owners, pointed out how the Crown had tried to prevent the appeal being heard even in 1944, and their view that it had used the provision in the native land laws to protect its position and prevent Maori from obtaining their rights for another decade. This was so despite a publicly recorded assurance from the Prime Minister that the Government would accept the judgment of the two Courts – an assurance that was not honoured. In our view, this letter is an entirely accurate summary of the situation. The question, as the Maori Affairs Department put it in 1954, was 'whether the Maoris are to be permitted to retain the benefit of their declared ownership of the bed'. For 10 years, the Crown denied them that benefit on increasingly flimsy grounds. This demonstrates how easily Maori rights could be read down in the face of what was perceived to be the public good. Even the Attorney-General admitted in 1948 that Salmond's doctrines had no hope of success in the courts. Peter Fraser's approach was the correct one: despite his personal belief a lakebed could not be owned, the appeal had gone against the Crown and he saw that the Government needed to accept that fact and enter into an arrangement with the Maori owners.

446. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1283–1284)

20.7 What Were the Effects of the Crown's Denial of Maori Ownership for 36 Years?

Summary answer: *One effect of the Crown's denial of Maori ownership for 36 years was to deprive the owners of any control over or economic return from their taonga. Instead, the Crown itself used the lake for tourism and hydroelectricity without permission or payment. The Maori owners have not ceased demanding payment for the use of their lake and its water for electricity from the 1950s (when the Crown accepted their ownership) to the present day.*

We accept that the Crown had legal authority (by order in council under the public works legislation) to use, control, and modify the lake for hydroelectricity, regardless of who owned the lake, with the possible exception of constructing a sealing blanket. Nonetheless, the Crown does appear to have avoided its obligations to pay compensation under that legislation. Also, its management of lake levels for hydroelectricity purposes had significant impacts on the taonga. The lake was permanently lowered by 15 feet (five metres), exposing a permanent ring of Maori-owned dry land around its circumference, and transforming Patekaha Island into a peninsula. The taniwha Haumapuhia, in her final resting place at the lake's outlet, was buried during a landslide associated with the power scheme construction. The littoral (inshore) habitat was reduced by one-fifth, with a significant impact on fisheries, and it was impossible to begin establishing a new equilibrium during the period of massive draw-downs (which occurred through the 1950s and early 1960s, finally coming to an end in 1965). Serious erosion and reduction of habitat and fisheries have been long-term consequences.

All this damage constituted a spiritual affront to the taonga and its kaitiaki, and had long-term impacts on the lake and its people. The economic value of Lake Waikaremoana was affected in two ways: revenue from fisheries was more limited, but a ring of dry land was created around the edge of a key visitor attraction in Te Urewera National Park, and which therefore assumed a high market value.

20.7.1 Introduction

In this section, we address the effects of the Crown's denial of Maori ownership of the lake on the people whose title was thus denied. We begin with the Crown's own description of the many acts which it asserted established its ownership, but which in fact were the acts it carried out without the permission of or payment to the true owners. We then consider the Crown's use of Lake Waikaremoana for hydroelectricity while it still disputed the title, focusing in particular on the works that it constructed and the effects of permanently lowering the lake in 1946.

20.7.2 The Crown continues to use the lake for tourism as if it were the legal owner

In 1944, the Solicitor-General tried to prove that the Crown had title to Lake Waikaremoana. In support of this contention, he referred to the following 'facts':

- that the Armed Constabulary and all other travellers before 1902 had used the lake as a public highway;
- that the Crown had established its own launch and rowing boats on the lake since around 1897;
- that, from 1903, Europeans needed the Crown's permission to hire out boats on the lake;
- that, from 1900, Europeans used the lake for recreational boating;
- that an acclimatisation society and the Tourist Department had kept the lake stocked with trout since 1897, and Europeans had been licensed to fish for trout 'without let or hindrance' from Maori;
- that, from 1903, the Crown had regulated the fishery by appointing local Europeans as fisheries officers; and
- that the Crown had regulated the lake under the Animals Protection Acts and other statutes for the control of hunting.[447]

Ben White summarised the situation thus:

> From the late-nineteenth century, the Crown acted as if it were the legal owner of Lake Waikaremoana. Variously the Government stocked Lake Waikaremoana with trout, managed the fishery through licensing anglers and the appointment of rangers, ran a tourist launch service, and provided tourist accommodation on the lake's shore.[448]

A Crown Law Office paper of the time made this claim explicit. From 1898, the Crown had claimed ownership of the lake when it 'sailed boats on it, stocked it with fish, granted fishing licences, declared it a sanctuary and kept rangers. All these were consistent only with ownership having passed to the Crown'.[449] One of the two main effects of the Crown's denial of Maori ownership for 36 years, from 1918 to 1954, was that the Crown continued in all these ways to act as if it owned the lake, without permission and without payment to those who had been declared the owners by the courts.

In Crown counsel's submissions to us, the Crown was clearly within its rights to build a government tourist lodge on its own land next to the lake. In respect of its creation of a trout fishery, counsel argued that the peoples of the UDNR had consented to (indeed sought) the introduction of trout in their waterways.[450] But the Crown accepts that the 'regulation

447. [Draft] Statement of claim in proceedings in the Supreme Court for certiorari and prohibition, undated (c 1944), ADOI 17084 CL200/2/16, Archives New Zealand, Wellington, pp 14–15

448. White, 'Inland Waterways: Lakes' (doc A113), p 139

449. 'Miscellaneous Notes and Files', ADOI 17084 CL200/1/7, Archives New Zealand, Wellington (Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 35)

450. Crown counsel, closing submissions (doc N20), topic 28, pp 19–20

of trout fishers and the operation of the launch – both activities which occurred on the lake, and therefore on Maori land – were not conducted with the consent of the land owners.'[451] Counsel added:

> In fairness to the Crown, however, it considered in good faith that title to the lakebed did not reside with tangata whenua. It consistently maintained this view from the time of its correspondence with Te Reneti in 1905 through to the dismissal of its appeal in 1944.
>
> Hindsight shows that the Crown ought to have consulted the lake owners with respect to the regulation of fishing and the operation of the launch on the lake.[452]

We do not consider that hindsight was necessary. From the evidence discussed in earlier sections, the Crown knew of the Maori claim to ownership of the lake from at least 1905. It also knew of Maori objections to its regulation of fisheries and operation of a launch without permission or payment. From 1913, it was aware that tribal leaders had filed a claim with the Native Land Court to legal ownership of the lake. From 1918, it knew that the Court had found Maori to be the owners of the lake. From 1944, this finding had been confirmed by the Native Appellate Court, and, in the meantime, the Crown had also lost the Lake Omapere case and had negotiated settlements of the Rotorua and Taupo lake claims. Given all these points, when should the Crown have finally accepted that it needed to consult Maori and obtain their permission to conduct and regulate tourist fishing and boating on the lake? In our view, given that Maori ownership was the presumption after 1918 (unless it could be overturned on appeal), that was the point at which the Crown at least needed to consider and make provision for the possibility that it did not own the lake.

It did not do so, however; rather, the Crown continued to use and benefit from the lake as if it were the owner. In our view, this was inexcusable in the decade following the Appellate Court's decision. The Crown should have taken legal action immediately (if it was going to) rather than delay matters for another 10 years before finally giving up the ghost at the last possible moment in 1954. As a result, the Crown continued to act as if it owned Lake Waikaremoana for 36 years after the Native Land Court first said that it did not, and appropriated to itself the sole benefit from the commercial exploitation of the Maori owners' property during that time. The prejudice to the Maori owners in lost revenues, infringement of property rights, and loss of mana is clear.

To make matters worse, the Crown made no arrangement even after accepting in 1954 that Maori should 'be permitted to retain the benefit of their declared ownership of the bed'.[453] As we shall see in sections 20.8 and 20.9, the Crown took another 17 years to negotiate an agreement with Maori, and continued to use the lake as if it were the owner all the

451. Crown counsel, closing submissions (doc N20), topic 28, p 20
452. Crown counsel, closing submissions (doc N20), topic 28, p 20
453. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1289–1290)

while. When a lease was finalised at the end of 1971, it was only backdated to 1967. As we shall discuss later in the chapter, the failure to backdate the lease (and the payment of rent) earlier than 1967 was a serious infringement of the Maori owners' Treaty rights (see section 20.11).

Crown counsel suggests that the Maori owners did benefit indirectly from the presence of tourism in their district,[454] but the Crown has not presented any evidence to that effect, and Mr Walzl's report does not support this submission. While we accept that there was some limited employment in the maintenance of the Lake House grounds, and that the manager sometimes allowed Maori the use of the launch or dispensed medicines, that hardly makes up for the Crown's arrogation to itself of all the commercial benefit from the use of the Maori owners' taonga, Lake Waikaremoana.

20.7.3 The Crown's use of the lake for hydroelectricity

In our inquiry, the claimants were very concerned about the Crown's use and modification of the lake for hydroelectricity, without permission or payment.[455] In section 20.3, we described the three stages of the Crown's Waikaremoana hydro scheme (see appendix for map of scheme). From 1929 to 1945, the Crown used the waters of Lake Waikaremoana for hydroelectricity but relied on the natural outflow of water from the lake, and did not directly manipulate the lake itself. After the completion of the Tuai stage of the scheme in 1929, electricity demand (and funds) dropped during the Depression. Once demand recovered, the Piripaua and Kaitawa stages of the Waikaremoana scheme were built within 10 years (from 1938 to 1948).[456]

The idea of modifying the lake so that its water level could be controlled and lowered was first seriously proposed in 1917, when title to the lake was still being decided in the Native Land Court. Frederick Kissel (later General Manager of the State Hydro-electric Department)[457] reported to the Chief Electrical Engineer that a tunnel could be driven through the lake barrier, some 70 to 80 feet below the surface. This tunnel would have two uses: to lower the lake so that the 'shattered lake rim [could] be made watertight'; and to take water through the barrier under pressure to a power station downstream. As Garth Cant's research team commented, this was the concept behind the Kaitawa phase of the Waikaremoana power scheme.[458]

454. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 19–20

455. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 76–79

456. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 151

457. The State Hydro-electric Department was established in 1946. From 1911 to 1945, it had been a branch of the Public Works Department. In 1958, the State Hydro-electric Department was renamed the New Zealand Electricity Department.

458. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 190–191

The first Waikaremoana power station was completed at Tuai in 1929. The *Poverty Bay Herald* reported the Government's intention to lower the lake and seal the leaks, which would have to be done before the full Waikaremoana scheme was completed. But the means of lowering the lake had not been decided, nor was there any definite time frame for doing so. An overseas expert, Professor Hornell, inspected the lake for the Government in 1930. He advised that it should be lowered by a drainage tunnel 100 feet below the surface.[459] The Public Works Department considered his report and decided that the lake would need to be lowered by 50 feet or more (with possible fluctuations of 30 to 40 feet below that). Its Engineer-in-Chief warned in 1931 that there would be 'grave criticism of the vandalism of the Public Works Department by a large section of the public'. Lowering the lake by 50 feet would create a band of bare rock around the sides and the lower end of the lake, and 'unsightly mud-flats in the upper arms'. Nonetheless, the hopeful prediction was made that 'nature soon restores the ravages of man . . . and not many years would elapse before all this bare ground would be clad with vegetation and the beauty of the Lake restored to something very similar to what it is at present'.[460]

The Depression meant that there was no need to rush because electricity demand was low and funds were short. Test tunnels and exploratory shafts were excavated near the lake in 1935 and early 1936, at a time when the Native Appellate Court and the Maori owners were trying without success to get the Crown to prosecute its appeal. Mr Walzl suggests that this exploratory work was stopped because of safety concerns. The Government decided to proceed with the Piripaua part of the scheme instead.[461] Engineers began to consider siphons instead of a tunnel to take water out of the lake. Professor Hornell had ruled this idea out as too limited, but that was in the context of his plan to lower the lake by 100 feet. In 1937, pumping water out of the lake was also considered and rejected. Finally, in 1941, approval was given for construction of the tunnel, although work did not begin until late December 1943.[462] As we mentioned earlier, the Maori owners were very concerned about this work. Their lawyer, Wiren, objected to the Appellate Court that they were powerless to stop it until the appeal was heard and title was finalised for the lake. But, as we discussed above, the Native Appellate Court's decision in 1944 was not the end of the matter. The Government decided to withhold survey plans and prevent the Court from finalising its orders, keeping the possibility open of overturning Maori title in the general courts for another decade.

In the meantime, there was a severe electricity shortage in the mid-1940s. The Government decided that it could not wait for the tunnel intake. Instead, it built temporary

459. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 191

460. Engineer-in-chief to Minister for Public Works, 9 September 1931 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 192)

461. Walzl, 'Waikaremoana' (doc A73), p 302

462. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 193

siphons in 1946 to increase the supply of water to Tuai and Piripaua stations. Two of these siphons were extended to a greater depth in 1947, so as to allow more water to be sucked out of the lake.[463]

During the period between the Native Appellate Court ruling in 1944 and the Government's decision not to litigate further in 1954, the following structures were built on the lakebed:

- The tunnel intake at Te Kowhai Bay: a U-shaped amphitheatre with a series of concrete steps, the floor of which is at 1960 feet above sea level. At its bottom is a short vertical shaft through which water flows into a 10 foot diameter tunnel. Using this intake, the lake can be lowered to 1970 feet. Excavations for the intake began in 1947, and 150 feet of the intake channel's base is located on the Maori-owned lakebed. Clearing of rock and other material from around the intake channel continued for several years after it was completed in 1948.[464]
- The siphons/spillway: In 1946, three 4-foot diameter pipes were installed over the top of the natural dam at Te Wharawhara Bay to suck water out of the lake and discharge it into the Waikaretaheke River. This was intended to increase the supply of water for generation in the short-term. These temporary siphons were replaced by two permanent concrete conduits, built between 1952 and 1955, completed a year after the Crown accepted that it did not own Lake Waikaremoana. These permanent siphons extend 100 metres under water from the lake shore, and can lower the lake to 1981 feet. They are used for backup or to allow water to be spilled from the lake in case of abnormal rainfall and potential flooding.[465]
- The sealing blanket: built from 1948 to 1955, this sealed former leaks in the lakebed and natural dam at Te Wharawhara Bay. The Waikaretaheke River was once supplied with about half its volume of water from these natural leaks. The sealing blanket has a foundation of layers of graded fill, coated with a surface of small rocks and gravel. Work began with the removal of driftwood in 1948, after which material was dumped from barges and special temporary jetties to fill depressions and then deposit the graded sealing blanket.[466] Gladys Colquhoun, who was a teenager at the time, recalled: 'They used to have a big barge, with a big tractor, and they fill it up with soil and take it to a certain place and open the barge and all the stuff fell down under water, it was all

463. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 193

464. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 152, 171

465. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 154, 172, 256

466. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 155, 171

> rubbish. So you weren't allowed to touch the water, drink it or do anything, even the marae.'[467]

Garth Cant's research team commented about this construction work:

> Regrettably, it has not been possible, owing to the lack of correspondence available for inspection, to comment on the degree to which lakebed ownership was taken heed of during the execution of these works; nevertheless, it may be indicative that in the Crown's early negotiations over the lakebed, as reviewed by Walzl, the first mention that there may be a problem with the new works on the lakebed seems to have been a Cabinet paper from Maori Affairs in 1954. An examination of comments by Crown officials during the late 1950s suggests that the consensus was that as the engineering works occupied only a small area, and that on the margin of the lakebed, the infringement of title was too trivial to require any corrective action.[468]

From the evidence available to us, the Government did not at first consider the possibility that it needed to acquire the land for these public works or negotiate with the Maori owners, because it was convinced that the Crown, not Maori, owned the lake. As we have seen, it maintained this view from 1944 to 1947 and from 1950 to 1954. In 1947, Prime Minister Fraser, in an about-face, decided to recognise the Maori owners and buy the lakebed from them. But nothing happened until 1949, possibly because officials were awaiting the outcome of the Whanganui River litigation. In the meantime, work was completed on the tunnel intake and commenced on the sealing blanket in 1948. Fraser's efforts at negotiation in 1949 had not got far when there was a change of government. The new ministry again denied Maori ownership and obstructed the Maori Land Court from finalising the titles, while it waited (in vain) for a favourable outcome from the Whanganui River litigation. In the meantime, permanent siphons were built and the sealing blanket completed.

It was not until after 1954, as Cant's research team suggested, that the Government began to contemplate the fact that its Waikaremoana power scheme was reliant on structures that it had just built on Maori land without permission, acquisition, or compensation. Yet, as we shall see in section 20.8, the Electricity Department remained unconcerned in the late 1950s and saw no necessity to acquire or pay for the land.[469] Nor did the Crown actually require permission to take or modify land for hydroelectricity: the Public Works Act 1928 authorised those actions.[470] Counsel for Wai 945 Ngati Ruapani speculated that the Maori owners might have been able to prevent unpaid-for works if their title had not been under

467. Gladys Colquhoun, brief of evidence (doc H55), p 12

468. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 172

469. See, in particular, General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 964)

470. Public Works Act 1928, ss 254, 276, 311

dispute, or at least bring a civil case against the Crown for damages.[471] But one point that escaped researchers in our inquiry was that the Crown's lakebed works were authorised by an order in council in 1943. Crown counsel located the relevant gazette notice. In their submission, this gave the Government the power to 'enter lands in order to construct and maintain hydro works', although compensation was still payable 'where land was taken or damage was done to property'.[472]

The Public Works Act 1928, under which the order in council was issued, empowered the Crown to take Maori or general land for hydro works without the usual processes of notification or opportunity for objection.[473] It also empowered the Crown to:

- erect and use works, appliances, and conveniences;
- raise or lower the level of any lake and impound or divert the waters of any lake;
- construct tunnels, aqueducts, and flumes (artificial channels) on or under private land without being required to take that land; and
- have right of way to and along all such works.[474]

There is little doubt, therefore, that the Crown had the legal authority to construct its hydro works and manipulate the levels of Lake Waikaremoana, although it ought to have compensated the owners for any damage, once Maori title was confirmed.[475] Only the Minister could initiate either a formal taking or a claim for compensation; owners of Maori land could not apply on their own behalf for compensation under the public works legislation.[476] One point of uncertainty is the sealing blanket, which covers about three-quarters of a hectare of the lakebed in Te Wharawhara Bay.[477] It appears to us that authority to impound the waters probably covered construction of the sealing blanket.[478]

We note also that the compensation requirements of section 313 were broader than the Crown claimed in its submissions.[479] Specifically, owners were not only entitled to compensation for 'injurious affection'. They were also entitled to compensation where 'the property of any person is at any time . . . used for any purpose mentioned in paragraph (d)' of section 311. But the only way they could obtain such compensation was for the Minister of Works to make a claim to the Maori Land Court, which he 'may' do 'at any time' (section 104). The Crown's submission, however, was that compensation was only payable where 'land was taken or damage was done to property'.[480] No land was taken and, in the Crown's

471. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 48–49
472. Crown counsel, closing submissions (doc N20), topic 28, p 12
473. Public Works Act 1928, ss 254, 276
474. Public Works Act 1928, s 311; Crown counsel, closing submissions (doc N20), topic 28, p 12
475. Public Works Act 1928, ss 311, 313
476. Public Works Act 1928, s 104. This section remained in force until 1962: see the Public Works Amendment Act 1962, s 6.
477. For the size and location of the sealing blanket, see Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 153, 155
478. Public Works Act 1928, s 311(1)(c)
479. Crown counsel, closing submissions (doc N20), topic 28, p 12
480. Crown counsel, closing submissions (doc N20), topic 28, p 12

The Order in Council, 12 May 1943

C L N Newall, Governor-General

Order in Council

At the Government Buildings at Wellington, this 12th day of May, 1943

Present: The Hon D G Sullivan presiding in Council

In pursuance and exercise of the powers vested in him by section three hundred and eleven of the Public Works Act, 1928, and of all other powers in anywise enabling him in this behalf, His Excellency the Governor-General of the Dominion of New Zealand, acting by and with the advice and consent of the Executive Council of the said Dominion, doth hereby authorize the Minister of Works to erect, construct, provide, and use such works, appliances, and conveniences as may be necessary in connection with the utilization of water-power from Lake Waikaremoana in the Land District of Gisborne, and in connection therewith to raise or lower the levels of the said lake and to impound or divert or control the flow of water from same for the generation and storage of electrical energy, and in connection with the transmission, use, supply, and sale of electrical energy when so generated; also to use electrical energy so generated in the construction, working, or maintenance of any public work or for the smelting, reduction, manufacture, or development of ores, metals, or other substances, also to construct tunnels under private land or aqueducts over the same, erect poles thereon, and carry wires over or along such land without being bound to acquire the same, and with right of way to and along all such works and erections; and also to supply and sell electrical energy and recover moneys due for the same.

C A Jeffery, Clerk of the Executive Council.

Source: *New Zealand Gazette*, 1943, no 37, p 540

view, Maori had 'sustained negligible loss', hence compensation was not necessary.[481] In our view, however, the Act's provision for compensation to owners also included the use of their property for such purposes as tunnels, aqueducts, and flumes. This, we think, included the Waikaremoana intake structure and siphons. The owners were also entitled to compensation for any damage to their property that resulted from the Crown's manipulation of lake levels and of the outflow of water.

481. Crown counsel, closing submissions (doc N20), topic 28, p 12

The Wai 36 Tuhoe claimants accepted no more than that the order in council purported to authorise the hydro works.[482] But for them, the fact that the law allowed the Government to act in this way was beside the point: 'The Crown has not engaged with the fundamental Treaty issue of whether the compulsory use of the lake for hydroelectricity purposes could be justified.'[483] Just because the Crown *could* use compulsion did not mean that it had to do so, or that it should have done so in the case of a Maori-owned lake.

At the time, the Maori owners of Lake Waikaremoana saw the actions of the various government departments, which were conducted without permission or payment over so many decades, as 'arrant trespasses' on their property. They saw the Electricity Department as no different in this respect. Also, regardless of any legal requirements, the Maori owners have been adamant from the 1950s to the time of our hearings that the Crown must pay them for the use of their asset to generate electricity. In 1961, for example, their lawyer, S A Wiren, pointed out to the Minister of Maori Affairs that Maori had had title to the lake since 1918, and 'over all these years the Crown in one capacity or another has been using the Lake as its own and deriving considerable revenue in so doing'. In calculating what the Crown should pay Maori for the purchase of the lake, Wiren stated that the owners were entitled to compensation for the Crown's use of their lake for over 40 years (by 1961). He added: 'But since 1918 at all events the Crown has been disregarding the legal position in particular through the Tourist and Electricity Departments: For instance, tunnelling under the outlet, lowering the lake by as much as seventy feet, and siphoning water from it were arrant trespasses.'[484]

In our inquiry, Crown counsel did not accept that there was any significant damage to Maori *land* worthy of compensation. Environmental damage to the lake was admitted, however, although – in the Crown's view – it was and is offset by the value of hydroelectricity to the nation.[485] We turn next to consider the effects of the Crown's 'arrant trespasses' for electricity purposes.

20.7.4 What were the effects of the Crown's management of lake levels?

(1) *Natural lake levels, 1921–1945*

The natural levels of Lake Waikaremoana were recorded regularly in the period from 1921 to 1945. These records provide an essential point of comparison. Dr Cant's research team has outlined the results in their report for the Tribunal. The minimum level observed was in 1915, when the lake dropped to 2001 feet. In the period from 1921 to 1945, the lake's lowest level was 2006 feet and the greatest height it reached was 2026 feet (in 1944). Otherwise:

- the mean annual level was 2015 feet;

482. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 31
483. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 31
484. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 876–877)
485. Crown counsel, closing submissions (doc N20), topic 28, pp 12, 17

- the mean annual maximum was 2020 feet (this figure was later used as the legal limit of the Maori owners' property);
- the mean annual minimum was 2011 feet; and
- the annual range was mostly between 2 and 3.5 metres.[486]

The lake tended to be at its highest in October (mean level of 2017 feet) and at its lowest in April (mean level of 2013 feet). The lake's waters recharged for two to three months after the winter rains, and then the dry spring and summer months led the lake to drop steadily from October onwards. This natural 'periodicity' (high levels at the start of spring and low levels in autumn) was significant because it was reversed when the lake began to be managed for electricity generation.[487]

(2) *Dynamic and dramatic fluctuations in lake levels, 1946–1965*

The Government went into the Kaitawa phase of the power scheme expecting to do massive damage to Lake Waikaremoana. The Minister of Internal Affairs, W E Parry, wrote to the Prime Minister about it in June 1943:

> There are two questions involved in the Waikaremoana scheme and also in the Taupo scheme. They are, the supply of hydro-electric power for the development of the country, and the effect the works will have on the country's scenic and freshwater fishing assets. As Minister in charge of the developments which have the responsibility of safeguarding these assets, I feel bound to draw your attention to the way in which, in my opinion, the assets will be affected.
>
> Both of these lovely lakes – Waikaremoana and Taupo – are rapturously admired by thousands of our New Zealand citizens. They have been referred to as forming the future natural playgrounds of our Dominion. The lakes will be, as a result of the hydro-electric schemes, very seriously affected by the drawing-off of water to below the natural lake levels. The Waikaremoana will be very much more affected in this way than will Lake Taupo and will be ruined for fishing. The lowering of the lake level of Waikaremoana by some forty or fifty feet (which I think will be inevitable) will rob it of its rich and unique scenic beauty.
>
> It is my firm opinion that the inflow of water into Lake Waikaremoana will not balance the outflow for the hydro-electric scheme, hence the inevitable lowering of the lake. Constant lake levels over the years have caused beaches and sandy inlets, with a consequent accumulation of marine growth which provides food for the fish.
>
> In the case of the Waikaremoana, it will take years and years for such growth to again accumulate, if it ever does, owing to the variation of the lake levels. Once the hydro-electric

486. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 188–189

487. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 188–190

> scheme is completed, fishing in the lake will be a thing of the past, to be remembered only by those who had the pleasure of enjoying it in former years.
>
> I appreciate that for me to advance claims of the scenic and fishing interests of the two lakes, both for the present and the future, as against those of hydro-electric power for the development of the country, would not obtain for them the consideration to which I hold they are entitled and, in the circumstances, I recognise the fight would be as unfair as it would be futile. I am not unmindful of the imperative need for power to enable development to go on unimpeded to meet the enormous demands of the future. In the case of the lakes, as in many other cases, the planning for the full use of our natural assets and resources has not been kept far enough ahead. Surely it must be obvious to the most casually-minded person that ultimately we can harness only the rivers and artesian waters for electric power. The use of such waters should be so planned so that they can be duplicated, in place of having to draw water from our lakes and lowering their natural levels. This conclusion will be readily seen and as to what, in my opinion, will be the inevitable result at Waikaremoana.[488]

Lowering the lake, however, did not have the catastrophic effect of completely destroying its fisheries. It was not actually necessary to lower Waikaremoana permanently by the 40 to 50 feet anticipated by Parry, let alone the 100 feet proposed earlier. But it still had significant effects, especially for the first 20 years of lake-level control, when the levels were managed in such a way as to produce extreme variations. No new equilibrium was allowed to start emerging until well into the 1960s. For our analysis of these effects, we rely mainly on Dr Cant's research team, which has reviewed the relevant scientific literature and source material, and interviewed tangata whenua living at Waikaremoana.[489]

From 1946, using the temporary siphons, the State Hydro-electric Department began to lower the lake. In 1947, it was drawn down to 1995 feet. During that year, the average was five metres lower than normal. Tourist Department officials were alarmed. They contacted Frederick Kissel, the General Manager of the State Hydro-electric Department, asking what would happen with lake levels in the future. Kissel replied that it was impossible to say for certain, but the lake would certainly be kept lower than it had been naturally, and there would be a greater range of levels each year than was natural. The plan was to hold the lake at about 2000 feet to aid construction of the intake tunnel, and then it would be allowed to rise. Extra capacity, however, would be needed for an expected gap in electricity supply in the early 1950s. Kissel warned that the lake would likely be drawn down to its engineering limit of 1970 feet at that time.[490]

Events happened as Kissel predicted: the lake was kept low in 1947 and 1948, until the intake structure was completed, and then allowed to rise between 1948 and 1950. In 1951, the

488. Minister of Internal Affairs to Prime Minister, 21 June 1943 (Walzl, 'Waikaremoana' (doc A73), pp 359–360)
489. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1)
490. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 194

lake was lowered by more than nine metres to a level of 1976 feet. But with power expected to come from a new station at Maraetai (completed in 1953), the lake was allowed to gradually rise again by 1954. In the winter of that year, it was up to 2007 feet. According to the *Wairoa Star* in August 1954, the lake had 'recovered its full beauty with a restoration of its waters.'[491]

But further 'wild fluctuations' followed. The changes in lake level were 'far greater in scale' in the 1950s than at any other time, before or since.[492] During that decade, Lake Waikaremoana was used to save the water in Lake Taupo as much as possible. As Cant's research team explained, the Waikato River power network was a much greater generator for the North Island and thus in greater need of conservation. Lake Waikaremoana, on the other hand, was less important to overall power generation and it had a higher rainfall and faster inflow, thus allowing it to recover faster than Taupo. In 1956, the drawdown was such that the newspapers predicted that Lake Waikaremoana might drop below the mouth of the intake shaft, thus shutting down its power stations and causing an electricity crisis. This was only just avoided, the lake dropping to 1973 feet in 1956. But then a wet winter and the opening of a new power station on the Waikato River allowed the lake to be raised again, back up to 2003 feet by the end of 1956 (a rise of more than nine metres in eight months).[493]

In 1958, a new electricity crisis caused the lake to be drawn down very low again. The *New Zealand Herald* complained in April 1958 that 'a brown and ugly band of barren foreshore about 40ft high now fringes Lake Waikaremoana'. Although not a 'dying lake', it was 'a very sick one'.[494] The lake remained at its minimum generating level for the rest of 1958, dropping to its lowest recorded level (1972 feet) in July of that year.[495]

In 1959, newspapers continued to publish critical articles and 'graphic images of the lake in its newly reduced state'.[496] The Supervisor of National Parks, R W Cleland, visited Lake Waikaremoana in April 1959. He reported to the Director-General of Lands:

> Much of Lake Waikaremoana's beauty, fish, launch and boating areas have been lost to hydro-electricity. The uncovering of the forest stumps as a result of the lowering of the level

491. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 195
492. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 195
493. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 196–197
494. *New Zealand Herald*, 28 April 1958 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197)
495. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197
496. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197

> of the water has severely restricted movement and the submerged stumps are a constant menace near most of the shoreline.[497]

The Government's management of the lake was also criticised by J T Salmon, a biologist, who complained that the lake's forested shore had deteriorated to the point that lake and forest were separated by 50 feet. Acres of 'exposed mud flats grew weeds', and long-drowned stumps poked above the surface. In Salmon's understanding, the lake had by now been permanently lowered by 20 feet (with fluctuations below that).[498] Cant's research team commented that the lake had certainly been lowered permanently, but that – as it was to turn out – it had not been *permanently* lowered by 20 feet.[499]

By this time, of course, the Crown had accepted that Maori owned the lakebed, which was being alternately exposed and covered to an extreme, artificial degree, thus modifying the bed and impacting on the lake's fisheries, with apparently no end in sight to these fluctuations. We will consider the post-1954 negotiations between Maori and the Crown in section 20.8, where the question of compensation for use of (and damage to) the lake naturally loomed large. Here, we note that Maori representatives raised the issue of lake levels with the Government in 1949 and again in 1959 and 1961, when there was widespread concern about how the Crown was manipulating the lake.

In 1949, as we have seen, Prime Minister Peter Fraser met with the owners to discuss the possibility of purchasing the lake or paying for its use, as they had requested. The owners suggested to him then that the scenic value and feeding grounds of the fish had been harmed by lowering the lake.[500] This was confirmed by officials independently of Maori complaints. The Tourist Department had complained to Internal Affairs that the fishing was poor. The Rotorua conservator was sent to investigate the complaint of 'deterioration brought about by the use of the lake waters for hydro electric purposes'.[501] The conservator reported that lowering the lake had 'undoubtedly made a very big in-road into the fish food', by destroying shallow feeding grounds as well as shellfish and aquatic vegetation.[502] He recommended a scientific study by the Marine Department, which took place in 1950. This report indicated that the Waikaremoana trout fishery had always been precarious but lowering the lake had caused a 'crisis':

---

497. R W Cleland to Director-General, 9 April 1959 (S K L Campbell, 'Te Urewera Overview Project 4: Te Urewera National Park 1952–75', report commissioned by the Crown Forestry Rental Trust, June 1999 (doc A60), p 59)

498. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197

499. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 197–198

500. Walzl, 'Waikaremoana' (doc A73), p 347

501. Under-secretary of Internal Affairs to the Secretary of Marine, 22 November 1949 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(d)), p 2039

502. Rotorua conservator of wildlife, memorandum, 31 October 1949 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(d)), p 2040)

> There is no doubt that lowering of the lake level has been detrimental to the bottom fauna and feeding grounds. The lake in normal times could ill afford to lose any shallows.[503]

There was a further impact on the trout fishery because a large number of fish were being destroyed each year by being drawn down the intake tunnel to Kaitawa power station. Also, native species were affected. The lake's eel population had been cut off from the sea; migration was now impossible. The report recommended better screening of the intake tunnel, annual releases of trout fry, possibly introducing a new species of fish as food for trout, and close monitoring. No solution was suggested for eels.[504]

In 1959, Sir Turi Carroll, part of a deputation to discuss compensation for the Crown's use of the lakebed, informed Prime Minister Nash that 'the lake had deteriorated from a fishing point of view because the Electricity Dept's operations had reduced the level by a good 15ft and this had deprived the fish of quite a lot of food'. The delegation of owners was concerned that lowering the lake had 'exposed the shores where the marine growth was and exposed the vegetation'.[505] Carroll raised this issue again in 1961. When the Government insisted that the lake's only monetary value came from fishing revenues, Carroll said that 'with regard to fishing licences of Waikaremoana the Hydro people had drained the water and this had resulted in ruining the feeding grounds and thus killing the fish'.[506] In response, Nash 'promised to investigate this claim'.[507]

This resulted in a second government inquiry as to the effects of controlling the lake for hydroelectricity. In 1961, the Maori Affairs Department asked Internal Affairs if there was any evidence to support the Maori owners' claim.[508] The results were mixed. The Internal Affairs Department provided a report in November of that year, which Crown counsel cited extensively as follows:

- 'Alterations to lake levels had created problems in the management and utilisation of the fishery'.
- Fluctuations in lake levels had 'affected weed growing in shallow areas and the yield to shore-based fishers'.
- But, contrary to what had been expected, the abundance of smelt (principal food for trout) had not been affected.
- There had been 'little or no difference to the trolling yield', although trolling was now dangerous, especially after dark, and was not allowed after 11 pm.

503. Assistant fishery officer Dickinson, 'Report on Lake Waikaremoana', circa September 1950 (Walzl, 'Waikaremoana' (doc A73), p 362)

504. Walzl, 'Waikaremoana' (doc A73), pp 362–363

505. 'Notes of deputation to the Right Hon the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests', 19 August 1959 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 210–211)

506. 'Notes of deputation held in Hon. Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 886)

507. Walzl, 'Waikaremoana' (doc A73), p 489

508. Walzl, 'Waikaremoana' (doc A73), p 489

- Screens had been erected over the siphon at Onepoto but their effectiveness had not yet been determined.
- Despite the limiting factors, the trout fishery was actually under-exploited and could sustain a greater degree of exploitation than at present.[509]

At first, Ministers and officials had denied that there had been any significant modification of the lake, or – at least – not much impact on the Maori owners if there had been. In part, this was because of their view that the lake was poor in native fish and had never been an important food source for its Maori owners.[510] By the 1960s, officials accepted that there had been a drastic effect at first in the late 1940s, but the trout fishery had always been precarious and was understood to have recovered in the 1950s, partly as a result of introducing smelt to serve as a new source of fish food. Even so, the growth of Waikaremoana's trout fishery may have been slower than it should have been. In terms of Maori claims, the Government's attitude to compensation was undoubtedly influenced by its view that the lake had never been important as a customary fishery.[511] Counsel for Wai 945 Ngati Ruapani suggested that this point was 'simply irrelevant'.[512] Regardless, Crown counsel in our inquiry accepted that lowering the lake had had significant effects on native and introduced fisheries.[513] Against this fact, the Crown cited two points: first, lake levels (and therefore fisheries) were more stable after 1965; and the value of hydroelectricity to the nation was such that the negative impacts – such as they were – were justified.[514]

In 1968, when the lakebed was professionally valued for the first time, the Government's valuer found that there were two 'major drawbacks to really good fishing in Lake Waikaremoana'. Growth in fishing revenues had been far outpaced by Taupo and Rotorua as a result. First, the deeper parts of Lake Waikaremoana were of no use for fishing, and, secondly, the lake level 'is subject to fairly wide fluctuations'. These two 'drawbacks' had a significant impact on fishing revenue and therefore on the monetary value of the lake. Lake Waikaremoana's advantage was its comparatively long and sheltered shoreline.[515] As Dr Cant's team observed, the Government was directly responsible for the fluctuating lake levels but it had also contributed to the overall problem: permanently lowering the lake had reduced the shallow waters by almost one-fifth and thus the fisheries.[516]

By 1968, however, the more extreme fluctuations were a thing of the past and the lake was never again allowed to drop as low as it had in 1956 and 1958. The power crises of the

509. Crown counsel, closing submissions (doc N20), topic 28, p 16; Walzl, 'Waikaremoana' (doc A73), pp 489–490
510. See, for example, Walzl, 'Waikaremoana' (doc A73), pp 340, 349.
511. Walzl, 'Waikaremoana' (doc A73), pp 320, 335–336, 340, 349, 359–364, 420–422
512. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 50
513. Crown counsel, closing submissions (doc N20), topic 28, p 17
514. Crown counsel, closing submissions (doc N20), topic 28, pp 16–17
515. Valuer-General to Director-General of Lands, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1095–1096)
516. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 208–209, 213

1950s were resolved by the commissioning of new power stations. Lake Waikaremoana was allowed to refill in 1959 and 1960. Heavy rain even led to flooding in December 1960, with the lake topping at 2011 feet; there was an annual range in 1960 of 7.6 metres. A new equilibrium was not established, however, because there were further major drawdowns of the lake in 1962 and 1964, although on a 'lesser scale' than in the 1950s. The lowest level in those years was 1985 feet.[517]

Finally, in 1965, the Cook Strait power cable and the Benmore power scheme meant that the need for further 'drastic lowerings of the lake was largely eliminated'. Dr Cant's research team considered that there were no more wild fluctuations and drastic drawdowns of the lake after 1965.[518]

We will consider the longer-term effects of lowering the lake later in the chapter. Here, we note that the effects were significant during this 20-year period when the lake levels fluctuated in such an extreme manner. They included reduction of littoral (nearshore) habitat, damage to fisheries (particularly shellfish and other species in the littoral zone), exposure of a permanent but fluctuating band of dry land at least 15 feet in height, navigational hazards (in the years when the drowned forest stumps were exposed), and the impossibility of establishing a new equilibrium while such extreme fluctuations occurred from year to year (and even within particular years).[519]

Another immediate (and permanent) effect of lowering the lake was the transformation of Patekaha Island into a peninsula.[520] This was of great concern to Ngati Ruapani. Claimant counsel explained: 'This has meant that the natural protections once afforded to Patekaha as an island have been lost, with urupa and other wahi tapu suffering from exposure.'[521]

Claimant witnesses were also extremely concerned about the damage to the mauri of the lake. Kuini Te Iwa Beattie, who was brought up at Kuha in the 1950s and 1960s, told us:

> The tampering with or contamination of our wai has been a calculated act of invasion upon the very existence of my people. That tampering is witnessed by the manipulations of our lake levels for hydro electricity developments and by the misguided attempts at managing rather than caring for our waterways. Our wai is polluted as much as the hearts and souls of its tamariki.
>
> Our atua, our tupuna are not indulgent people. When obligations fail to be met, repercussions result. As a consequence of being denied the capacity to fulfill our kaitiaki obligations

517. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 198

518. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 198

519. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 207–213

520. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 258

521. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

> we have been adjudged with strict culpability. The lake with its healing kaupapa, has taken the lives of two of my uncles Rehua Rurehe and Wa Aranga. Though we were without blame, we have paid the ultimate price for the interference to the lake.
>
> He mea ata whakarite ko te tanoanoa i to matau wai, i te mauri o to matau tuhauora. Kua kaikanohi i enei mahi i te raweketanga o te wai, ona taitimu, me ona taipari e whaihihiko noa iho ai nga whare hihiko ra, me ta ratau whakahaere kuri i te moana, he aha ai i kore ai i manaaki noa iho ai? Kua rite tahi te tanoanoatanga o te wai ki te tanoanoatanga o nga whatumanawa me nga wairua a nga tamariki.
>
> Ehara o matau atua o matau tipuna i te tangata ngawari noa iho nei. Ki te kore e ea nga utu, ka utua e matau. Ko tetahi mea i puta i ta koutou tango i to matau mahi tiaki i te mauri o te whenua, ka whakapaea kehia ko matau. Na te mauri o te moana me ona kaupapa whakaora tangata ka mate i a ia oku na matua keke e rua a Rehua Rurehe, me Wa Aranga. Na te mea ehara na matau te hara kei te noho papa ko matau mo te tanoanoatanga o te moana.[522]

Interference with the lake in this way was a spiritual affront to the taonga and its kaitiaki. The burial of the form of the taniwha Haumapuhia, until then clearly visible in her final resting place at the outlet of the lake, was seen as a 'significant omen' or tohu. This occurred as the result of a landslide 'during power scheme construction'.[523] Ngati Ruapani also saw it as the 'desecration of a significant historical site'.[524] When further sealing of leaks was proposed in the 1970s, there were other tohu and the local people were strongly of the view that the 'lake outlet should not be interfered with further'.[525] Sir Rodney Gallen stressed to us the importance to the kaumatua of the 'continuing and present significance' of Haumapuhia; for them, she was 'much more than a myth'.[526]

In her evidence, Kuini Beattie also referred to the erosion caused by lowering the lake. She described it as having defiled their mother, the lake, and 'eaten away the shores of Waikaremoana'.[527] This was a significant and ongoing issue for the claimants, as Dr Cant's team found when interviewing tangata whenua.[528] Although not many details were supplied, lakeshore wahi tapu have inevitably been affected, both by exposure of the lakebed and by construction works.[529] Te Ariki Mei, for example, referred to the disturbance of burial sites

522. Kuini Te Iwa Beattie, brief of evidence, 11 December 2003 (doc B30), pp 7, 14–15
523. 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 216
524. Rapata Wiri, brief of evidence, 19 October 2004 (doc H52), p 21
525. Stokes, Milroy, and Melbourne, 'Te Urewera, Nga Iwi Te Whenua Te Ngahere' (doc A111), p 216
526. Sir Rodney Gallen, brief of evidence (doc H1), para 43
527. Beattie, brief of evidence, 11 December 2003 (doc B30), p 3
528. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 211, 258
529. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 65–66; app A, pp 82–83

during the excavation of the Kaitawa intake.[530] Fortunately, the Minister of Works intervened to prevent the destruction of the important rock formation, Nga Hoe a Kupe.[531]

Increased erosion has been one of the long-term consequences of the artificial management of lake levels. Not all of the effects were long-term, and we will return to this question in section 20.10.

Finally, there was one remarkable impact of the Crown's lowering of the lake, which would have unanticipated benefits for the Maori owners. By the 1960s, the lake was being maintained within a maximum level of 2006 feet. Before 1946, the natural maximum each year was normally 2020 feet. This meant that the hydro works had created a ring of dry land, Maori-owned, running all the way around the lake, about five metres or 15 feet in extent. This separated the bush from the shore (an eyesore for many) and it also separated the lake from the park lands. Prime lakeside land was now in the hands of the Maori owners and outside the legal grasp of the national park. Not only did this strengthen the Maori owners' bargaining position with the Crown in the 1960s, it doubled the commercial value of their property. As we shall see in the next section, the lake was professionally valued in 1968, at which time just over half the value of the bed came from this relatively small area of dry land.

20.8 Why Did it Take So Long for the Crown to Negotiate an Arrangement with the Lake's Owners after it Accepted their Title in 1954?

Summary answer: *If we take the starting point of negotiations between Maori owners and the Crown as 1949 (when Fraser's abortive negotiations took place), then it took 21 years for the Crown and owners to reach an agreement about Lake Waikaremoana. For part of that period (1950 to 1954), the Government was still considering litigation, which was not finally ruled out until September 1954. After the titles were registered, the owners sought to open discussions with the Minister of Maori Affairs, E B Corbett, during the period 1954 to 1957, but were rebuffed. They then sought to open negotiations with the Prime Minister in 1957. What followed was a decade of negotiations with first Labour and then National ministers and prime ministers, which ended up in deadlock from 1962 until the end of 1967.*

Why were these negotiations unsuccessful?

First, the Maori owners wanted to retain ownership or at least a permanent connection to their taonga, on the model of the Rotorua and Taupo lake settlements, by means of an annual payment to a Waikaremoana Maori trust board. The Crown, on the other hand, wanted an

530. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 182

531. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 82–83

outright purchase of the lake and was extremely resistant to paying an annuity. These remained sticking points until 1969, when the Crown gave way on them.

Secondly, officials decided in 1957–1958 that the Crown did not really need to own the lake to protect its interests in hydroelectricity, tourism, and the national park, and wanted (in essence) to keep using it for free. Also, they considered that Maori had no real claim for 'injurious affection' as a result of the lake hydro works. Nonetheless, ministers (especially Walter Nash) insisted that the Crown come up with a respectable purchase offer for the lake. It was not until the 1960s, when it became clear that the newly-created ring of dry Maori-owned land posed a significant problem for the national park, that officials became serious about trying to acquire the lake. This was because they now saw a significant risk to the use of the lake in the national park, if visitors could be sued for trespass and no amenities could be built on the Maori-owned land close to the water's edge. As a result, the Government came up at first with a series of what the claimants called 'ludicrous' offers, based mainly on capitalising annual fishing revenue. The Maori owners, on the other hand, were convinced that the Crown must pay for its past and present use of their taonga (including its use for electricity generation), and that the value was much higher than even the highest Crown offer. As officials struggled to justify a value closer to the owners' expectations, they came to accept that the purchase price should include compensation for past use (although not for hydroelectricity). Nonetheless, even the greater incentive for the Government to settle in the mid-1960s could not produce a Crown offer higher than half what the owners wanted. The negotiations were deadlocked from 1962 to 1967.

A breakthrough came in late November 1967, when the Minister of Lands, Duncan MacIntyre, agreed to the owners' proposal for an independent commission to decide the value of Lake Waikaremoana. MacIntyre suggested, however, that the first step was to obtain a special Government valuation (GV). The parameters for the special GV were set by officials, who sought a legal opinion and decided that the use of the lake's water for electricity should be excluded from the GV. After a delay of several months, while the limit of the lake's pre-1946 shore was defined and surveyed, the special GV was finally completed in November 1968. The current value of Lake Waikaremoana was set at $147,000, consisting of $73,000 for the marketable exposed lakebed, $70,000 for the submerged bed, and $4000 for buildings and improvements on the bed. This outcome showed that the Crown's offers in the 1960s (the latest being in 1966) had seriously undervalued the lake. After receipt of the GV, the next step should have been the appointment of a commission, representing the owners and the Crown (with a judge as chair), to determine the relationship between the present capital value and compensation for past use, so as to set an overall value for the lake. This did not happen, however, and the Government proceeded to make another purchase offer in September 1969, based on the special GV (minus improvements). Although Cabinet considered the possibility of a lease in perpetuity or an annuity at that time, it once again preferred outright purchase – this time for

the sum of $143,000, to be paid in instalments. Negotiators were authorised to increase this offer by 15 per cent if necessary. This was the first time since 1961 that the Crown's offer did not include a component for past use.

At the meeting of assembled owners on 26 September 1969, the Crown's purchase offer was rejected in favour of a counter-offer to lease Lake Waikaremoana for 50 years (with a perpetual right of renewal), backdated to the re-opening of negotiations in 1957. Officials reported back to MacIntyre that the only way the Crown could obtain the lake was by lease, never by purchase. The Minister agreed and proposed to Cabinet that the counter-offer of a lease should be accepted, although not on all the terms and conditions sought by the owners. Cabinet agreed in December 1969. The two key points here are that:

(a) the special G V was the first key breakthrough, enabling the Crown to make an offer much closer to what the Maori owners were willing to accept; and

(b) the second key breakthrough was the Government's agreement in December 1969 to stop insisting on outright purchase and accept a lease with annual payment to go to a Maori trust board.

These breakthroughs enabled the conclusion of negotiations in 1970–71, which is the subject of section 20.9.

20.8.1 Introduction

Once the Crown abandoned the idea of further litigation in 1954, it took until May 1970 to negotiate an agreement in principle about the lake with the Maori owners. Negotiations began in 1957, after a failed attempt by Peter Fraser to arrange a settlement in 1949. During this period, the Crown continued to use the lake as it had before, without a single concession – as far as we are aware – to the legal rights of the Maori owners.

In this section of our chapter, we rely mainly on Tony Walzl's research report and his extensive collection of supporting documents. We explore the claimants' arguments about the negotiations, and why it took so long to reach agreement. In the claimants' view, the Crown singlemindedly pursued an outright purchase to the exclusion of other arrangements which would have provided better for Maori interests. This postponed agreement for many years but the Crown gradually increased its purchase price until finally, by the late 1960s, it seemed that 'some owners would capitulate and sell to the Crown'. This might have happened if tribal leaders had not countered by offering a lease in 1969, which the Crown was prepared to accept.[532] The 1971 lease represented a 'hard fought victory' and a 'relatively simple solution to an often vociferously fought dispute'.[533] It took so long to resolve this dispute, in the claimants' view, because the Crown also remained 'dogmatic' in its efforts to keep the amount paid to Maori as low as possible, even when it acknowledged that there

532. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 69–70; pt C (doc N8(b), p 13
533. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 70

were inconsistencies with its settlement of other inland waterway claims, and that there was no clear basis for the value it was attaching to the lakebed.[534] In claimant counsel's submission, the Crown 'endlessly sought to find such a basis with often ludicrous results'.[535] Finally, the deadlock in negotiations was broken in 1967 because the owners came up with the idea of a special commission to inquire into the value.[536]

The Crown offered no submissions about the negotiations, confining itself to arguments about the 1971 lease and its terms. Crown counsel did, however, stand by the position developed by Ministers and officials during the negotiations, that the Maori owners would have had little or no claim to 'injurious affection' as a result of the Crown's hydroelectric works and lowering of the lake.[537]

20.8.2 First serious engagement: negotiations with Peter Fraser in 1949

As we discussed in section 20.6.5, the first serious engagement between the Crown and the Maori owners of Lake Waikaremoana occurred in 1949. Prime Minister Peter Fraser had decided to make a purchase offer for the lakebed in 1947. Nothing happened, however, until the Maori owners approached him as Minister of Maori Affairs at the beginning of 1949. On 1 February, his department informed him that the owners' lawyer, Wiren, had approached the Government on behalf of his clients. They 'were desirous of coming to some arrangement with the Government in connection with the future use of the Lake for hydro electric, fishing and tourist purposes'.[538] As the under-secretary understood it, there 'seems to be some suggestion that the Government should either purchase the lake or come to some arrangement similar to the Rotorua and Taupo lake settlements' (in which the Crown had settled Maori claims without actually acknowledging their title to the lakes).[539] But this was not in fact an offer to sell the title that the people had just secured at such cost to themselves. Later in the year, Fraser acknowledged that 'the Maori owners were not prepared to sell'.[540] If possible, they sought some other arrangement with the Government under which it would pay them for the use of their lake. This became one of the key points for debate: what exactly was the Crown buying from or settling with Maori, and how should it be valued?

Under-secretary T T Ropiha advised Fraser in February 1949 that he should avail himself of this opportunity to 'bring the matter to a head' and open negotiations with the Maori owners. That being the case, officials collected information about the revenues generated by the lake, including those from fishing licences and boating fees. This was a problematic

534. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 50
535. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 50
536. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 50
537. Crown counsel, closing submissions (doc N20), topic 28, p 12
538. Under-secretary to Minister of Maori Affairs, 1 February 1949 (Walzl, 'Waikaremoana' (doc A73), p 342)
539. Under-secretary to Minister of Maori Affairs, 1 February 1949 (Walzl, 'Waikaremoana' (doc A73), p 342)
540. Notes of interview with Minister of Maori Affairs, 5 October 1949 (Walzl, 'Waikaremoana' (doc A73), p 346)

exercise. Fishing licences issued at Lake Waikaremoana in the 1948-49 year had generated about £121, but this was only part of the revenue because any Rotorua fishing licence entitled the licensee to fish at the lake. The revenue from the government launch was £778 for the same year but 'overheads and depreciation meant that there was little profit'.[541] Overall, the Lake House tourism industry had generated some £10,000 in revenue but had actually operated at a loss in 1948/49.[542] Since the Government-run tourism project was not actually profitable, what share of the revenue could or should be set aside for the owners of the lake? On the other hand, there would have been no Waikaremoana tourism revenue at all without the use of the lake, its fisheries, and its scenic attractions.

While this information was being collected, Fraser met with a small delegation of owners at Wairoa on 19 June 1949. The delegation consisted of Ngati Kahungunu leader Turi Carroll and R McGregor, accompanied by two of their kaumatua, and had been authorised by Tuhoe (as well) to open discussions with the Crown. The goal was to discover whether Fraser would be willing to negotiate an arrangement and, if so, of what kind. Fraser's response was that he wanted a concrete proposal from the owners to consider. This was to become a feature of negotiations: the Crown and Maori, both unsure of the exact basis on which to proceed, each sought to put the onus for designing a solution on the other. At this point, however, the Maori owners did have a solution in mind: they wanted an annual grant similar to those for Rotorua and Taupo, but in this case with the distinction that they had a Court title and were the proven legal owners of the lake. Further, they wanted a grant that could be utilised by the people as a whole and not by each individual owner. Fraser made no promises in response but said that the Government was keen to settle all Maori claims, and that the matter would now be dealt with by officials.[543]

In July and August 1949, while information was being collated about the Crown's revenue from Lake Waikaremoana, officials debated what steps to take. Within the Maori Affairs Department, advice prevailed that a settlement should take the form of compensating Maori for 'the abandonment of any rights they have', with the proviso that the legal issues might still be 'debated in the appropriate forum' (that is, the courts). As for the level of 'compensation', a recent commission of inquiry (the 1948 Myers Commission) had found that the Government overpaid Maori in the 1920s lake settlements. A commission of inquiry should therefore be used to determine the amount of compensation, if the Government decided to settle 'without a final ascertainment of the rights of the parties in the Courts'.[544]

Thus, two opposing positions took shape: Maori wanted an annual payment for the Crown's use of their lake, of which they would retain ownership; and the Crown wanted them to give up all their rights (of whatever kind) for a compensation payment, with the

541. Walzl, 'Waikaremoana' (doc A73), p 343
542. Walzl, 'Waikaremoana' (doc A73), p 343
543. Walzl, 'Waikaremoana' (doc A73), pp 343–344
544. Memorandum for Under-secretary, Maori Affairs Department, 11 July 1949 (Walzl, 'Waikaremoana' (doc A73), pp 344–345

possibility still of resorting to the courts to prove that their rights had not amounted to ownership.

On 14 July 1949, 37 Maori owners living at Tuai sent a petition to the Prime Minister and Minister of Maori Affairs, as the Minister responsible for Maori claims 'passed down from Government to Government'. They asked him to visit their marae at Tuai so that matters could be settled there, at their home marae at the lake: 'We the people directly interested in the Lake would like to hear you personally give your decision re the lake on our marae'. They also felt that if he could see the poverty in which they lived, and their shortage of farmland, he 'might be influenced to settle the Lake claim to help us to live better'.[545]

Although Fraser replied that the lake negotiations were now in the hands of officials, Tony Walzl notes that the Prime Minister did in fact meet with a delegation at Nuhaka in August 1949. At that meeting, Matamua and Rurehe asked for an annuity of £10,000.[546] As we noted earlier, Fraser told the owners that he was not in favour of further litigation and would ask his Government (presumably Cabinet) to accept the Maori Appellate Court decision. But Cabinet, he said, would not agree to a yearly payment of £10,000. The Prime Minister exposed a gulf between the Crown and Maori positions when he noted that the owners 'were not prepared to sell and if the bed of the Lake was not to be sold he could not see where there was a basis for a claim'. They could not, he said, 'claim for the water on the bed'. Rather than respond directly, Matamua pointed out that the Waikaremoana people were virtually landless, and Fraser hit upon a new solution: an exchange of 'land' – the bed of the lake for 'land for the people to live on'. Fraser promised to get his officials to find out what lands were available for exchange.[547]

The results of this meeting were then debated among the communities of Maori owners. It seemed that the Government would not agree to an annuity based on continued Maori ownership, and that it was willing to exchange farmland for their rights in the lakebed. The next meeting took place at Kohupatiki, Hastings, on 8 October 1949. The delegation of owners was led by Turi Carroll. Its spokesperson was R McGregor, and he reported the consensus at which the communities of owners had arrived. The titles determined so long ago by the Native Land Court and the Appellate Court had created individual owners:

> The question had to be decided by the people whether they should insist on individual rights of ownership. They agreed to waive their rights in that respect and hand the matter over to the people and that any funds [were] to be applied for the welfare and benefit of the people generally and not for the individual owners. It was hoped in view of that decision that the Government would consider a more generous settlement. . . . He had been asked by

545. Petition of Tamihana Ranginui and others to Prime Minister, 14 July 1949 (translation) (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1190)

546. Walzl, 'Waikaremoana' (doc A73), p 346

547. Notes of interview with Minister of Maori Affairs at Nuhaka on 27 August 1949, 5 October 1949 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1188)

> the people to make a tentative offer subject to the approval and consent of the Government of an annual grant of £6,000 in full settlement of their rights.[548]

Thus, the Maori owners were willing to agree to the Crown's insistence on alienation of ownership, on the basis that they would give up their individual rights in return for an annual payment to 'the people' collectively. The owners were not prepared to entertain a land exchange:

> The people living round the lake were very poor. The land was of very poor quality and was almost impossible to be used for farming. The houses were in a deplorable condition. If an annual grant was made, the owners hoped to assist the people by providing homes, improving the maraes and by purchasing suitable areas of land for farming. Those people who were too old for farming would be assisted in other ways. A suggestion had been made that the Crown should make a grant of land to enable the people to farm and improve their living conditions. This proposal had been considered and it was found that although it might be suitable to the young people it would not benefit the older people. A grant in perpetuity would be more desirable.[549]

Also, the owners were prepared to reduce their asking price by £4000 a year. They had arrived at a 'tentative' figure of £6000 because they 'were finding it difficult to decide upon a fair and adequate amount'. McGregor said that the people wanted the Government to investigate this issue, taking into account the lake's 'scenic value' and the damage that lowering the lake had done to its fisheries.[550]

In response, the Prime Minister agreed that the 'people near the lake were on poor land', but he also noted that it was the Government's responsibility to do something about that, and about their poor living conditions, regardless of any arrangement made about the lake. He also assured the delegation that the Government was 'anxious' to reach a settlement with them, but acknowledged common ground in respect of the difficulty in finding an appropriate basis for calculating 'compensation'. What would the Crown be paying for? Scenery alone, he said, could not provide a reason for compensation. Fishing rights were a possibility but there was little basis for comparison – Lake Taupo, for example, was not comparable in that respect. 'It would be difficult', he added, 'to fix a basis on the water.' Maori Affairs officials would look into the matter but (falling back on advice from officials in July) it might be necessary to set up a special commission to 'assess the amount to be paid'.[551]

548. Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949, 21 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1186–1187)

549. Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949, 21 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), pp 1186–1187)

550. Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949, 21 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1187)

551. Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949, 21 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1187)

There was a marked shift of position here on both sides. Originally, it had been the Maori owners who had opposed a sale but they were now willing to consider it on the basis of giving up individual rights for the communal good. On the other hand, Fraser now appears to have been following the advice received from officials in July 1949. Instead of purchase, he was talking about compensation for rights and the difficulty of determining an exact formula for that compensation. He ventured no opinion on whether the compensation should take the form of an annuity. He talked about fishing rights, scenery, and water but, as far as we can tell from the record of the meeting, did not mention paying for ownership of the bed. As discussed earlier, it was put to Fraser that he had given up the idea of going to the Supreme Court. He did not deny it.[552]

The parties seemed as far apart as ever in mid-October 1949, despite significant concessions from the Maori owners. Both sides were really feeling their way as to what might be an acceptable compromise that each could live with. There were serious difficulties to surmount in respect of what exactly was being transacted and on what basis it should be valued. Nonetheless, a promising dialogue had begun. Further progress came later in October 1949, when agreement was reached within Government to abandon Fraser's idea of a land exchange. This was because the 'allocation of good land to the Urewera people who have undoubted need of it' would not settle the claims of those owners who lived in Wairoa or further afield.[553] But no other progress was made. As we noted in section 20.6.5, the Labour Government lost office in November 1949. The new National Government preferred the litigation strategy. Engagement between Maori and the Crown did not resume for eight years. We explain why in the next section.

20.8.3 Re-engagement between the Crown and Maori, 1957–61

(1) *Attempts to engage with Corbett and the Holland Government*

As will be recalled from section 20.6.5, the National Government considered its options in 1950 and decided not to continue Fraser's negotiations with the Maori owners of Lake Waikaremoana. The new Government preferred to await the outcome of the Whanganui River litigation and then proceed with the Waikaremoana case in the courts. In the meantime, the lake was included within the boundaries of Te Urewera National Park, although it was not technically part of the park (see chapter 16). In 1954, the time limit for litigation expired and Cabinet decided to accept the legality of Maori ownership of the lakebed. The Department of Lands and Survey released the plans so that the Maori Land Court could complete the titles for registration. This was duly done.

552. Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949, 21 October 1949 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1187)

553. Walzl, 'Waikaremoana' (doc A73), p 348

As far as we can tell, there was no engagement between Maori and the National Government, either before or after the finalisation of title in 1954, until the owners took a new initiative in 1957. Mr Walzl commented:

> By the mid-1950s, the owners had had an unsatisfactory experience of negotiations with the Crown. Although great hope had attended negotiations with the first Labour Government, it was soon found that the parties had markedly different views as to the value they each placed on the Lake. The subsequent Holland-led National Government, however, had even less empathy with the owners' cause and negotiations soon ground to a halt. But although the same Government was in power in 1957, the owners judged that it was time to reinitiate an approach to try and have their grievances settled.[554]

In the period from 1954 to 1957, the efforts of Tuhoe leaders had been concentrated on battling timber restrictions and negotiating a settlement of the UCS roading claim (see chapters 14 and 18). They had some victories in both cases, including the establishment of the Urewera Land Use Committee (to evaluate Ruatahuna lands for milling) and the roading settlement with E B Corbett, Minister of Maori Affairs, in 1957. Nonetheless, Waikaremoana leaders did try to approach Corbett during the period 1954 to 1957 through the Maori Member of Parliament, Tiaki Omana, who had facilitated the October 1949 meeting with Fraser. The response was always that 'Mr Corbett was too busy with matters that were more pressing' to meet with them about the lake.[555]

On 18 April 1957, the owners' lawyer, S Wiren, made a formal, direct approach to the Minister, in the letter quoted above in section 20.6.5. Wiren pointed out to Corbett that, notwithstanding all the attempts of his clients to have their title to the lake confirmed, the Crown was simply disregarding their ownership, 'particularly in the activities of the State Hydro Department and the Tourist Department'. 'We submit', he wrote, that:

> it is clearly improper that the rights of any citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded. The Maoris have, through all these years, been much more forbearing than Europeans would have been.[556]

Wiren also suggested that in other such situations, and acting in conformity with the Treaty of Waitangi, the Crown had purchased lakes from their Maori owners. Because of the number of interested Government departments (and presumably because of the previ-

554. Walzl, 'Waikaremoana' (doc A73), pp 390–391

555. Report on visit of Prime Minister and Minister of Maori Affairs to Taihoa Marae, Wairoa, 22 May 1959 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1249)

556. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1284)

ous failed approaches to Corbett), Wiren asked the Minister to arrange a meeting with the Prime Minister.[557]

Corbett's private secretary, J H Grace, replied to Wiren that this matter was one for the Ministers of Tourism or Public Works, not the Minister of Maori Affairs. He also suggested that Wiren's clients could arrange a meeting with the Prime Minister directly, but that they should have a 'concrete proposal' ready to put to the Government if they did so.[558] This is important because it indicates a surprising lack of interest on the part of the Department that was charged with dealing with Maori matters, possibly reflecting Corbett's earlier deflections of the lake issue. Wiren responded in May 1957 that the Minister of Maori Affairs ought to be the most interested of all, and that previous meetings had been arranged by his department.[559]

A second initiative, this time from Turi Carroll, sought another route for dialogue with the Government. He proposed bringing in the Urewera Land Use Committee to deal with the lake, as the vehicle for discussions with the Maori owners. This proposal resulted in a meeting between T T Ropiha and D M Greig, the heads of the Maori Affairs and Lands Departments respectively, in May 1957. As we discussed in chapter 18, the Urewera Land Use Committee had been created in 1954, composed of officials and a Tuhoe representative, to classify land as millable or unmillable. Ropiha was in favour of using the committee 'to go and see the Maoris and to give them some idea of what the Crown considered the lake was worth'. Although it would not be easy, he considered that Lake Taupo was the obvious point of comparison: 'Similar matters would be taken into account, that is, value of fishing revenue and other privileges which brought in money to the Crown. The offer would, of course, have to be on today's value.'[560]

Greig's response was that 'the lake was used today by the Crown without cost' and 'had been for a long time'. For him, the question was limited to the lakebed: 'Was there much value in the bed which was exploitable?' In his view, the Crown should take no account of the Taupo arrangements and simply offer a straight-up capital sum for the bed. Ropiha agreed that this could be done but the purchase should, he suggested, not only include the lakebed but also the Maori-owned reserves on the lake's shores. He suggested offering a capital sum of £12,000, or possibly an annuity of £3000 a year.[561] As far as we are aware, this is the first time that officials suggested a value of their own, rather than reacting to the figures proposed by the owners in 1949 (at first £10,000 and then £6000 a year).

557. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1284)
558. J H Grace to Wiren, 1 May 1957 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1282)
559. Walzl, 'Waikaremoana' (doc A73), p 391
560. 'Note for File: Lake Waikaremoana', 15 May 1957 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 984)
561. 'Note for File: Lake Waikaremoana', 15 May 1957 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 984)

This was the beginning of an intense and long-lasting debate within and between government departments as to what exactly was being purchased and how it should be valued, which complicated negotiations and delayed settlement for many years. Ropiha thought that the Crown would have to pay for 'privileges which brought in money to the Crown', which (in the owners' view) included hydroelectricity. But Greig's approach was different. In any case, the question of involving the Urewera Land Use Committee was referred back to Corbett, who rejected it the following month. In the Minister's view, it was the Maori owners who should first agree among themselves and put a definite proposal to the Crown, through their solicitor, for it to consider – and this view had been conveyed to Wiren.[562]

In the meantime, Wiremu Matamua had written to the Secretary of Maori Affairs on 16 May 1957, inviting him to visit Tuai and discuss matters with the people. This proposal was turned down. Again, the Government urged the people to come up with a definite proposal or offer of their own.[563] In response, a hui of the owners was convened at Tuai on 27 July 1957. This meeting was 'well attended' and its resolutions were approved unanimously: that a trust board similar to the Te Arawa and Tuwharetoa trust boards be established; and that the Crown pay an annuity to the people through such a board, at the rate of £4500 a year. This proposed annuity had two components. First, the Government would pay £3000 a year for current and future use of the lake. Secondly, the annuity would include a component of £1500 a year in compensation for past use of the lake while it was in Maori ownership. The figure of £1500 was calculated by assuming that the Crown should have paid £30,000 since Maori ownership was finalised 10 years earlier in 1947 (when the Maori appeals were settled). The sum represented 5 per cent interest on £30,000, on the basis that if they were paid what the Crown owed them in 1957, they would have £30,000 in the bank and would thenceforth get £1500 a year in interest on it.[564] Mr Walzl commented: 'The period of Crown use from 1918–1944 whilst the title was delayed by the maintenance of the Crown's appeal, was not featuring in negotiations at this stage.'[565]

Wiren reported the results of this hui to the Minister on 13 August 1957. In his letter, the solicitor reminded the Government that the courts had decided that Maori owned the lake at the time of the Treaty, and the Treaty 'confirmed and guaranteed them in their possession', and that nothing had happened since 1840 to 'take away that ownership'. While it may be true that the Treaty can be altered by Act of Parliament, it is:

> binding upon the honour and conscience of the Crown and any Government facing the question of altering the Treaty by legislation must consider whether it is honourable to do so. The Maori Land Court was constituted for the purpose of conferring upon Maoris in

562. 'Note for File: Lake Waikaremoana', 15 May 1957; Secretary of Maori Affairs to Director-General of Lands, 17 June 1957 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 983–984)
563. Walzl, 'Waikaremoana' (doc A73), p 392
564. Walzl, 'Waikaremoana' (doc A73), pp 393–394
565. Walzl, 'Waikaremoana' (doc A73), p 394

> respect of their lands the nearest equivalent in English law which is the freehold tenure. Freehold tenure of lakes is a commonplace in English law, and the effect of the judgment is that my clients were entitled to this tenure.[566]

Having thus set out what he saw as the owners' entitlements in Treaty and legal terms, Wiren outlined the resolutions of the July 1957 hui. He also emphasised the poverty of the Waikaremoana people, a recurring concern during negotiations, and put forward the view that theirs was the only lake that the Crown used without purchasing it from its proper owners.[567]

Now that a definite proposal had come from the owners, as sought by Corbett, the issues of purchase and price were debated among the various government departments until they were overtaken by the general election on 30 November 1957. The Holland Government was defeated, replaced by the second Labour Government led by Walter Nash. Nonetheless, this discussion of issues and positions within and between departments was crucial for how matters would develop under Labour.[568]

In brief, the Maori Affairs Department took the view that no compensation should be paid for past use of the lake, and that the matter should be viewed as one of current use only. In part, this was because the owners had not specified any past losses; in other words, the Government needed an itemised list of actual losses before considering compensation. Nor, in the Department's view, had the owners specified what exactly they would lose if they conveyed the lake to the Crown. This was a reversal of Ropiha's opinions earlier in the year. He had been replaced by M Sullivan as Secretary of Maori Affairs. Nonetheless, it was Maori Affairs' view that the Crown had definitely decided to purchase the lake. The key point was therefore what value should be attached to it – and this was a matter for Lands and Survey to take the lead on.[569]

The Director-General of Lands consulted the State Hydro-Electric Department on 8 October 1957. He noted that the owners' proposals resembled the Lake Taupo arrangements, and suggested:

> There is some comparison between the two Lakes. Both are used to a major extent for the generation of hydro-electricity although there is at Taupo the added value of the fishing. You may consider that it would be preferable to pay the Maori owners a lump sum in cash but from the tone of their solicitors' letter it seems fairly definite that the owners will require compensation on an annuity basis.[570]

---

566. Wiren to Minister of Maori Affairs, 13 August 1957 (Walzl, 'Waikaremoana' (doc A73), p 393)
567. Walzl, 'Waikaremoana' (doc A73), pp 393–394
568. Walzl, 'Waikaremoana' (doc A73), pp 394–396
569. Walzl, 'Waikaremoana' (doc A73), p 394
570. Director-general of lands to General Manager, State Hydro-electric Department, 8 October 1957 (Walzl, 'Waikaremoana' (doc A73), p 395)

Tony Walzl commented that negotiations between the Crown and Maori essentially began in 1957, and, 'at the beginning of negotiations, the State Hydro Electric Department could not conceive that the use of the Lake for power generation and the impact this had brought on Lake levels would play an important part in addressing the owners' claims for compensation'.[571] In essence, the Department's view in December 1957 was that the Crown did not need to buy the lake for the purposes of hydroelectricity, although it might want to buy the lake for other reasons. Such other reasons might include the precedent of having purchased lakes in the past, or the interests of Te Urewera National Park, but they had nothing to do with power generation :

> *So far as this Department and its operations are concerned there is no need for the bed of the lake to be vested in the Crown*. The only advantage seen in ownership by the Crown is that the settlement of compensation claims arising out of the Department's use of the lake would thereby be avoided. The Department has drawn down the level of the lake considerably over a long period, and areas of lake shore which under natural conditions would be under water have been continuously exposed. It can presumably be expected that if the bed of the lake is not purchased, claims will be made by the Maori owners for compensation for injurious affection. While there might not be a great deal of substance in such claims, they would probably be difficult to settle on an acceptable basis to both parties, and it would be worth something to dispose of such claims.
>
> However, the question of acquisition will probably be decided on other grounds, such as precedents that have already been established elsewhere, and the value of the lake to the Urewera National Park. . . .
>
> This Department has no information and can give little assistance in connection with the supposed value of the Maoris' rights of ownership for compensation *purposes, or the amount of compensation* that might be payable for injurious affection if the lake bed is not acquired. However, the Department will be glad to take part in any discussion with the Maori Affairs Department. [Emphasis in original.][572]

By this time, however, Walter Nash had become Prime Minister and also held the portfolio of Maori Affairs, reflecting – Walzl suggests – the tight alliance between Labour and Maori. This created a new environment in which Maori had more political clout. Would it make a difference? We discuss the outcome in the next subsection.

571. Walzl, 'Waikaremoana' (doc A73), p 396

572. General Manager to Commissioner of Works, 10 December 1957 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 976. The first sentence was underlined in pen, which was likely done by an official in the Lands and Survey Department after receipt of this letter. The term 'purposes, or the amount of compensation' was typed in vertical on the side of the page and are likely an insertion by Davenport.

(2) *Engagement between the Maori owners and the second Labour Government, 1958–1960*

The Maori owners of Lake Waikaremoana raised their issues with the new Labour Government in March 1958. A deputation met the Minister of Forests, Eruera Tirikatene, while he was visiting Rotorua. They asked for his assistance to bring the matter of the lake before the Prime Minister. He encouraged them to invite Nash, as Minister of Maori Affairs, to visit them.[573]

In the meantime, the Ministry of Works had been considering the Electricity Department's view that it was unnecessary for the Crown to buy the lake because it did not actually need to own it. This view, which reversed that behind the Crown's long opposition to Maori title up to 1954, was now adopted by the Commissioner of Works as well. In April 1958, the commissioner advised the Director-General of Lands that there was no pressing need to purchase the lakebed:

> There is no evidence whatever that the construction or use of the public work for the control of the level of the lake have resulted in any injurious affection or damage to the land of the Maori owners (in this case the owners of the bed of the Lake). As far as I am aware, no claims have ever been made and the works have been operating for several years [and] it is most unlikely that no claims would have been made if there had been injurious affection.
>
> Furthermore, it is some years since the work was carried out and it appears that all claims are now Statute barred by the effluxion of time.[574]

This analysis was deeply flawed for three reasons. First, under the public works legislation in force at the time, only the Crown could lodge compensation claims in respect of Maori land, including claims for injurious affection.[575] Secondly, the Crown had disputed Maori ownership of the lake until 1954, which meant that the Crown did not accept that there were Maori owners on whose behalf a claim should be made for compensation. For the Crown, therefore, to rely on the 'effluxion of time' and the failure of owners to make claims was doubly unjust, and entirely careless of the position in which the Crown itself had placed the Maori owners. Thirdly, the owners' entitlement was not limited to compensation for injurious affection. As we discussed earlier, our view is that they were also entitled to compensation for the placing of the siphons and intake structure on their land – but again, only the Minister could make the claim on their behalf. We note that, as Wiren told Corbett in 1957, the owners had been forbearing all this time and had been waiting to negotiate with the Government.[576]

---

573. Walzl, 'Waikaremoana' (doc A73), p 396

574. Commissioner of Works to Director-General of Lands, 15 April 1958 (Walzl, 'Waikaremoana' (doc A73), p 397)

575. Public Works Act 1928, s 104. See the Public Works Act 1928 reprinted with all amendments as at 1958: *Reprint of the Statutes of New Zealand 1908–1957*, vol 12 (Wellington: Government Printer, 1960)

576. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1284)

In any case, as Labour was about to reopen negotiations with the Maori owners, key government departments were coming to the view that the Crown did not really need to own the lake, and nor were Maori owed any compensation for the Crown's past use of (or damage to) the lake. In response to the views of the Electricity Department and the Ministry of Works, the Director-General of Lands saw the likely consequence: that if the Crown only needed the lake for the national park, the entire payment was going to come out of his budget. Partly for that reason, he too now supported the view that the Crown did not need to own (and therefore to buy) the lake. On 18 June 1958, he replied to the Commissioner of Works:

> I note your comments and the opinion expressed that the primary factor in considering the purchase of the bed of Lake Waikaremoana is its inclusion in the Urewera National Park. Certainly from added scenic views the lake is of value to the Park but apart from this is not an integral part of the Park. Any restrictions governing the Park area do not affect the lake nor do they conflict with the lake's use. Consequently it is of no great concern whether the lake forms part of the Park or not.[577]

This left the issue of whether the Government needed to buy the lake because of 'precedent'. Wiren had argued on more than one occasion that the Maori owners were entitled under the Treaty to the same treatment as other lake owners, and that the Crown was obliged to provide them with an annuity for the use and/or ownership of their lake. The Director-General of Lands felt that budget difficulties prevented the payment of Maori for precedent alone, and the Crown simply did not need to buy the lake for any other reason. He wrote to the Commissioner of Works:

> Having in mind therefore, the present non availability of government funds for other essential requirements and the general shortage of funds, purchase of the lake on the grounds of precedents is not warranted or possible. If you concur with this view I propose to suggest to the Secretary for Maori Affairs that the claimants be advised that the Crown does not feel that it is essential that the Lake be in Crown ownership nor is it considered that there has been any injurious affect to the owners because of use of the water flowing from the lake for hydro electric purposes.[578]

As the departments lined up behind the view that the Crown did not need the lake, the Maori owners began to lobby the Labour Government. In May 1958, a petition from 159 Waikaremoana owners was sent to Walter Nash. The petitioners identified themselves

577. Director-General to Commissioner of Works, 18 June 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(b), p 970)

578. Director-General to Commissioner of Works, 18 June 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(b), p 970)

as Ngati Ruapani (53), Ngati Kahungunu (44), and Tuhoe (62).[579] The first signatory was Wiremu Matamua.[580] The petitioners stated:

> This matter has been in a state of suspension for forty years and the owners of the lake have had no benefits from being owners. However, in this period of forty years all Maori claims from other parts of the island seem to have been satisfied, including claims to confiscated lands. The claimants to Lake Waikaremoana alone seem to be unappeased.
>
> Therefore we your Maori people here fervently pray that you will be able to visit us and by deliberation we may be able to arrive at some arrangement satisfactory to your Government and to us the Maori owners and maybe we can fulfill in a small measure the hopes of our grand old people who have gone to the great beyond.[581]

Wiren followed this petition up on 28 May 1958. He wrote to Nash, asking him to meet with a committee of representative owners.[582]

On 3 June 1958, the Secretary for Maori Affairs reopened the question with the Director-General of Lands. He commented: 'It is understood that no settlement has been reached as between your Department and the other two Departments concerned about the questions of purchase of the lake and of any compensation that might be involved.' The owners had approached the Minister, expressing concern at the lack of progress, and the Secretary asked for an expedited process.[583] It must have been clear to all concerned that Nash was taking an interest and wanted action. As Walzl noted, this 'reactivated' the debate between the departments, essentially on a new basis that the Crown must develop a counter-offer of its own in response to the owners' proposal for an annuity of £4500.[584] Lands and Survey and Works agreed that the Government's main interest in the lake was for hydroelectricity, with the national park as an 'adjunct'. The Tourist Department also had an interest because of the use of the lake by Lake House visitors, especially its launch. It was agreed that all these departments would confer anew on the Maori 'offer' and develop a definite counter-offer.[585]

In particular, Lands and Survey and Ministry of Works officials wanted to know what revenue was generated by fishing, boating, and any other tourist activities, and whether the State Hydro Department could give 'some idea of what it would consider to be a reasonable sum to pay for use of the water'. Also, they wanted to know if the hydro works affected

579. Walzl, 'Waikaremoana' (doc A73), p 398
580. Wiremu Matamua and others to Minister of Maori Affairs, 16 May 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1266)
581. Wiremu Matamua and others to Minister of Maori Affairs, 16 May 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1263)
582. Wiren to Prime Minister, 28 May 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1262)
583. Secretary for Maori Affairs to Director-General of Lands, 3 June 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 972
584. Walzl, 'Waikaremoana' (doc A73), p 399
585. Walzl, 'Waikaremoana' (doc A73), p 399

Maori land and, if so, whether the land had been acquired and for what compensation.[586] The Commissioner of Works suggested to the head of the Electricity Department that 'it would be in the interests of your Department to make some contribution towards the cost of acquiring the bed of the lake'. This was because purchasing the bed would pre-empt the 'question of compensation for the use of the lake which is being made by the Crown for hydro-electric purposes', which had 'never been investigated, and it is quite possible that it may be raised at some time in the future'.[587] The commissioner stressed that a contribution would only need to be made if the Electricity Department agreed that there was an advantage in Crown ownership of the bed, giving the Crown the complete control of the lake.[588]

A E Davenport, General Manager of the Electricity Department,[589] provided a detailed and thoughtful response, which we consider at length. He began by saying:

> in one sense the monetary value of the bed of the lake for hydro-electric purposes is very great indeed, because it holds the water by which millions of pounds worth of equipment functions and produces large sums in revenue, without which the equipment would be useless. But the value of the lake bed or the water in it is clearly not to be measured according to the amount of money required to be spent in developing it. It could be said that the lower the cost of development, the greater is the value of the lake.
>
> Until large sums have been spent in development the lake really has no value. Whatever value it may have is entirely contingent on the expenditure of the amount required for development.[590]

Thus, Davenport's first point was that the use of the lake produced 'large sums in revenue' but only because large sums had been spent first in developing it. We note that some of these improvements been constructed on what was still Maori land, and that Davenport's thinking may have been out of step with valuation theory.[591] This underlines for us the point that the Government had not sought expert advice from its specialist department responsible for valuations, and did not do so for many years to come. This is especially puzzling because the Crown was not permitted to buy Maori land at less than GV, and there was no such valuation for the lakebed.

---

586. Assistant administration officer, 'Note for File', 27 June 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(b)), p 968)

587. Commissioner of Works to General Manager, State Hydro-electricity Department, 15 July 1958 (Walzl, 'Waikaremoana' (doc A73), p 400)

588. Walzl, 'Waikaremoana' (doc A73), p 400

589. In 1958, the name of the State Hydro-electricity Department was changed to the New Zealand Electricity Department. For ease of reference here, we refer to it as the Electricity Department.

590. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 963)

591. See Bruce Stirling, 'Te Urewera Valuation Issues', report commissioned by the Tuhoe-Waikaremoana Maori Trust Board, February 2005 (doc L17).

Next, Davenport posited a counterfactual: what if the Electricity Department had to pay for a licence to use the water of Lake Waikaremoana, as private power companies were required to do? Private licensees had to pay the Crown a rental of 2s 6d per kilowatt per annum. On that basis, the Electricity Department would have paid almost £17,800 in the 1957/58 year for the right to generate electricity from Lake Waikaremoana. This, too, Davenport rejected as a basis for analysis:

> But it must be admitted that the sum of 2/6 is not fixed on any scientific basis. It is arbitrary, and has no relation to any royalty that might be payable to the owners of the lake for the use of their water.[592]

Davenport then turned to the issue of profit. He calculated that the cost of generating power from the lake in the 1957/58 year was £727,274. Revenue from selling electricity 'is in general only sufficient to cover costs, there being no net surplus or profit accruing to the State from the use of the lake'. In other words, the Government was not running the hydro-electricity sector on a business footing. Davenport added: 'The value to the community of the power that is generated is impossible to measure.'[593]

Profits for the Waikaremoana Power Stations

An Electricorp publication in 1992 used official statistics to calculate profits for the Waikaremoana power stations, once system and station costs had been taken into account. A snapshot was offered for the years 1955, 1966, and 1986. These figures relate to the period before corporatisation.

Station	1955	1966	1986
Tuai	$192,000	$446,000	$3.37 million
Piripaua	$117,000	$324,000	$2.2 million
Kaitawa	-$2000	$110,000	$1.29 million

Source: G G Natusch, *Power from Waikaremoana: A History of Waikaremoana Hydro-Electric Power Development* (Gisborne: Electricorp Production, 1992), pp 73–74

592. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 963)

593. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 963)

From the Electricity Department's point of view, therefore, it was hard for the Government to compare itself to a private concessionaire or to calculate the commercial or market value of a lake for hydroelectricity. This was especially so since the Crown had already developed the lake and had the statutory right to use its water for power generation :

> It is hard to know on what principle the commercial value of a concession, or the possession of a right, to use the lake for hydro-electric purposes could be assessed. Many factors could influence the value to private interests seeking to acquire the right to develop a lake for power purposes. Private interests might be prepared to pay a high price, but of course the Crown is not in the same position, and the same considerations should not be taken into account.
>
> The Department is not in the position of having to consider the value of the water, or of the right to use it, on a commercial basis. The sole right to use water for the purpose of generating electricity has been vested in the Crown since the Water Power Act of 1903, and the Department has full statutory powers, subject only to the payment of compensation.[594]

From Davenport's perspective, the only legal obligation that the Electricity Department had to consider was whether it should pay compensation for 'injurious affection' :

> Thus the only question of money payment involved is in relation to compensation for injurious affection. Any claim for injurious affection would now be statute barred, and in any case the injurious affection does not seem very great. Certainly the level of the lake has from time to time been drawn down lower than under natural conditions, but this has not seriously prejudiced the Maori owners so far as is known. Claims from them could however have a nuisance value.[595]

Having considered all these matters, Davenport concluded :

> To sum up, I am unable to suggest a proper basis for putting a value on the use of the lake water by this Department for hydro-electric purposes. This seems to be a matter for speculation.
>
> The purchase of the lake by the Crown would not benefit this Department in any apparent way, other than by removing the possibility of compensation claims.[596]

Given his view of such claims, the General Manager stressed that his Department would only be liable for a small contribution to any purchase price, and that it would certainly not be willing to incur an ongoing liability for an annuity.

---

594. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 963–964)

595. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 964)

596. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 964)

Next, Davenport addressed the question of his department having built structures on Maori land (a point, it should be recalled, that Wiren raised in the Appellate Court in 1944 at the beginning of the construction work described in section 20.7 above). According to Davenport:

> No portion of the bed of the lake has been acquired for the development of water power, and it is not intended to take any part of it. In fact the [Crown] land around the outlet has not been acquired by the Department either, but action is now being taken to acquire it from the Lands Department, less a chain strip along the lake margin.[597]

In 1956, the department had been advised by the Chief Surveyor, Gisborne, that Maori owned the bed up to 'mean high water mark', 'roughly defined as the edge of the permanent vegetation'. That being the case, Davenport conceded that 'both the main intake structure or channel in Onepoto Bay and the siphon intake near the outflow of the Waikaretaheke River extend out into the bed of the lake and encroach on the Maoris' title'. Nonetheless, he saw no need to acquire title for this land, and considered the Department's obligation to be restricted solely to a claim for injurious affection.[598] Legally speaking, he was probably correct that the Crown was not obliged to acquire the title, but acquiring land was not the only circumstance under which compensation was required. Damage or use of it was also compensable under certain circumstances (see section 20.7). Even so, some Ministers and officials remained worried about the possibility of a civil action for trespass.[599]

The Electricity Department did not consider Lake Waikaremoana in a vacuum: other claims to the Tribunal reveal a pattern of departmental resistance to recognising Maori lake and hydroelectricity claims. Simultaneously, there was something of a legal turn-around on the part of the Maori Land Court, which began to recognise Maori rights in water. In 1955–56, for example, the court empowered the Lake Omapere trustees to sell or lease the lake's water.[600] A similar trust order was made for Lake Rotoaira in 1956, which empowered the trustees to:

> make arrangements or contracts with the Crown or any department thereof for the use of the water from the said Lake for hydro electric or other purposes and to arrange and decide on behalf of the Maori beneficial owners upon the conditions affecting the rights to carry

597. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 964)

598. General Manager, Electricity Department, to Commssioner of Works, 1 September 1958 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 964)

599. Walzl, 'Waikaremoana' (doc A73), p 451

600. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), pp 12, 42; Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2012), vol 3, pp 1157–1159

out such works including fixing the consideration of compensation payable to the owners thereof.[601]

The Rotoaira trustees proposed a licensing regime which was to be put in place by legislation in 1959. As the National Park Tribunal explained, the Electricity Department succeeded in getting the Minister to insist on exempting the Crown's powers to use Rotoaira for electricity (and other public) purposes. The Tribunal noted that a similar exemption was sought (and granted) in respect of Omapere.[602]

In the case of Lake Rotoaira, the trustees had proposed to establish permits and fees which would (among other things) have required the Crown to pay for its use of the lake in its Tongariro Power Development scheme. The Electricity Department was adamantly opposed to this proposal in 1959 and succeeded in quashing it.[603] The National Park Tribunal quoted Davenport's objections, which for our purposes reveal the approach that underlay his apparent one-off proposition above: that hydroelectricity could play no part in valuing Lake Waikaremoana for purchase from its Maori owners. Davenport wrote:

> In view of the proposed development of the Tongariro and other rivers in the locality for hydro-electric purposes, which is at present under investigation, this Department would view with concern the passing into law of the [Māori Purposes] Bill [1959]. The use of Lake Rotoaira and the Poutu River is an integral and essential part of these proposals, and it is considered that the provisions of the Bill in their present form would be likely to add to the cost of, impede, or even prevent the construction and operation of works for the use of the lake and river.
>
> . . . The Department is not only perturbed about the possibility of inflated compensation claims, but is also concerned about the exclusive rights relating to entry on the lake, river and surrounding land that the Bill creates. The statutory rights of entry of the Department, the Ministry of Works and others concerned with the investigation, construction and operation of power schemes are contained in sections 107 (relating to surveys) and 311 and 312 (relating to construction and operation) of the Public Works Act 1928. It is most undesirable that any legislation affecting any particular piece of land, especially if it features prominently in a power scheme, should derogate from these wide and general powers.
>
> It is desired therefore that even if it is decided to proceed with the Bill . . . the rights of entry under the Public Works Act without the need for an entry permit should be preserved. This could be done by making the provisions relating to the need for entry permits without prejudice to the rights of the Crown, its servants, agents or contractors under the Public Works Act.[604]

601. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1157
602. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, pp 1157–1158
603. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, pp 1157–1158
604. A E Davenport, general manager, to assistant law draftsman (referred to Maori Affairs Department), 28 July 1959 (Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1158)

Together, the Omapere, Rotoaira, and Waikaremoana cases show that the Electricity Department was familiar with Maori lake claims in the period 1956–1959, and opposed them so as to avoid any risk of having to pay or compensate Maori for the use of their lakes. Even though there was, as far as we are aware, no plan to use Omapere for electricity, the department still insisted on safeguarding the Crown's rights. It is in this context that we should view Davenport's insistence in 1958 that there was no obligation to compensate the owners of Lake Waikaremoana, and no way in which electricity was a factor in setting the value or price that should be paid for the purchase of their lake.

With both Davenport for the Electricity Department and the Commissioner of Works denying that hydroelectricity was a factor, the Lands and Survey Department was left in 1958 to calculate a counter-offer for the Crown. It fell back upon the idea that compensation for Rotorua and Taupo had been based on fishing revenues, and that this was the only factor upon which the value of Lake Waikaremoana should be calculated. The Wildlife branch had reported in July 1958 that the licence fees for fishing at Waikaremoana were difficult to disentangle from more general fees, but probably amounted to £4035 over the past six years.[605] On 18 November, a Lands official noted that the request for £4500 per annum seemed 'a bit high in comparison' with the Rotorua and Taupo settlements. The lake might only reasonably be worth £12,000, which would result in an annuity (at 5 per cent) of only £600. But officials admitted that this was 'arbitrary' as there was no settled opinion among the various departments as to how to value the lake, or what its value might be.[606] If looked at purely in terms of fishing revenue, and the Taupo model of half such revenue going to Maori, then the offer should only be £500 a year. Officials pondered: 'Does £500 a year seem low? So low that it might be offensive to the Maoris. Should we offer a cash settlement of £10,000?'[607]

In December 1958, almost six months after the petition and Wiren's offer to meet, the Maori Affairs Department chased this matter up with Lands and Survey. On 22 January 1959, the Director-General replied that it was proving difficult to find 'a substantial reason as to why the Crown should buy Lake Waikaremoana'. He observed:

> It has been agreed however, that the Crown has some interests in the lake. The waters of the lake are used for State Hydro purposes, it is surrounded by the Urewera National Park and the Crown does obtain some revenue from the sale of fishing licences. Precedents have been established by the purchase of other lakes from the Maoris, notably Lake Taupo and Lake Rotorua and it could be expected that the Crown would also purchase Lake Waikaremoana.

605. Walzl, 'Waikaremoana' (doc A73), p 400
606. Walzl, 'Waikaremoana' (doc A73), p 402
607. Lands and Survey Department, 'Note for file', 18 November 1958 (Walzl, 'Waikaremoana' (doc A73), p 403)

> There is no settled opinion from any of the interested Departments as to the value of the lake and apart from finding this in some arbitrary manner it is doubtful how a value can be established.[608]

Given the Electricity Department's view that it did not need to pay for use of the lake, and that any injurious affection had been very minor, and also given the relatively low fishing revenue generated by this lake, the Director-General was certain that the Crown would have to make an offer much lower than the owners' expectations. Before fixing on a precise offer, however, he intended to consult Treasury.[609]

The Maori Affairs Department advised Nash to write to Matamua and Wiren, informing them that the Crown had not yet made a decision as to whether to buy the lakebed.[610] In his letter to Wiren of 4 February 1959, Nash told the Maori owners that the Government was having 'difficulty in finding a basis upon which negotiations might proceed if a decision to purchase were taken'. 'The question is still being examined,' he wrote, 'and assuming that negotiations for purchase go forward, the matter will be the subject of further advice to you.'[611]

In late January 1959, there was a meeting between Lands and Survey Department and Treasury officials about the proposed purchase. A crucial point for officials was that Prime Minister Nash 'would not approve of any refusal of the Crown to pursue compensation.'[612] Officials agreed that it was politic to settle the matter and so they had to come up with a definite counter-offer for ministers to consider. The best the Lands and Survey Department could propose was a lump sum payment of £10,000. The 'rough consensus' within the department was a figure of £600 a year, which would equate to the interest on a principal of £12,000, but this would be too low for the owners to accept. For Lands officials, it had become an inescapable truth that the Government did not really need to own the lakebed:

> This Department is of the opinion that there is little reason or obligation on the Crown to purchase Lake Waikaremoana. *The waters of the lake have been used for hydro purposes for many years with the tacit consent of the Maoris*. However, now that the issues have been raised and comparisons made with other Crown purchases, past experience would indicate that a refusal to purchase will only lead to further representations on the highest political level and possibly to repeated petitions to Parliament until some satisfaction is obtained. It is possibly politic therefore to settle the issue rather than let it become a long drawn out series of representations and petitions. [Emphasis added.][613]

608. Director-General to Secretary of Maori Affairs, 22 January 1959 (Walzl, 'Waikaremoana' (doc A73), pp 403–404)
609. Walzl, 'Waikaremoana' (doc A73), p 404
610. Walzl, 'Waikaremoana' (doc A73), p 404
611. Nash to Wiren, 4 February 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1257)
612. Department of Lands and Survey, 'Note for file', 2 March 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 952)
613. Director-General to Secretary of Treasury, 27 January 1959 (Walzl, 'Waikaremoana' (doc A73), p 405)

In other words, this was seen as a political issue requiring a political settlement. Even so, we query the statement that Maori had given their 'tacit consent' for the use of the waters of the lake for electricity for many years – the historical evidence does not support this contention at all. In any case, as Tony Walzl commented, officials made it clear that they would not even consider purchasing the lakebed were it not for the political alliance between Labour and Maori.[614]

So what basis, if any, was there for going ahead, other than political reasons and 'precedents'? In discussions, a Lands official told Treasury that it was 'desirable' to own the lakebed because the Crown used the water for electricity, and because the lake was 'an essential adjunct' of the national park. But it was not *essential* to own the bed for electricity purposes, because 'we had used the waters of the lake for years without interference'. Politically, the Lands Department considered that the Waikaremoana owners had as good a case as the Rotorua and Taupo peoples; the Crown used the lakes in the same ways, and it made an annual cash payment to 'Trust Boards representative of [those] owners'.[615]

At the meeting between the Treasury and the Lands and Survey Department, it seems to have been agreed that £10,000 would be too low but it could at least serve as a starting point for negotiation.[616]

The Secretary of the Treasury advised his Minister accordingly on 20 March 1959. It is interesting to note that there was already some rewriting of history going on: the Secretary suggested that the delay between 1944 and 1954 had been caused by sorting out 'sectional appeals' (that is, the appeals of the Maori owners) and not by the Crown.[617] In any case, the Secretary recommended that the Crown did not need to pay for its use of the lake for electricity because of the 1903 Water Power Act and its successors. He also suggested that the only interference with Maori land was the two 'intake systems' which projected from the shore out onto the bed of the lake, and for which any claim would be minimal. Therefore, the only real basis for compensation was an arrangement in line with fishing revenues as with the Taupo and Rotorua settlements. On that reasoning, the Waikaremoana Maori owners' request for £4500 a year was 'excessive and unreal'. Also, Treasury disliked annuities and could not recommend one. Hence, it advised its Minister that the Crown should make a lump sum offer of £10,000.[618]

614. Walzl, 'Waikaremoana' (doc A73), p 405

615. Department of Lands and Survey, 'Note for file', 2 March 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 951)

616. Department of Lands and Survey, 'Note for file', 2 March 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 951–952)

617. Secretary to the Treasury to Minister of Finance, 20 March 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 949)

618. Secretary to the Treasury to Minister of Finance, 20 March 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 949–950)

The Minister of Finance and the Minister of Lands supported this recommendation.[619] Walzl notes, however, that a Cabinet paper was not prepared straight away. Instead, ministers requested more information from the Electricity Department about the comparative value of Lake Taupo and Lake Waikaremoana for hydroelectricity generation. On 22 April 1959, Davenport responded that there was no practical method for determining the value of a lake for electricity purposes, and therefore no such comparison could be made. In terms of respective output and storage capacities, he thought that Waikaremoana was worth no more than a quarter of the value of Taupo (but there was no method to calculate what that value might be).[620]

In May 1959, after all of this debate between ministers and departments, a Cabinet paper was finally prepared by the Minister of Lands. It suggested that:

- an annual payment of £4500 was excessive;
- an arbitrary method had been used to determine a value because none of the departments had a method for valuing a lake;
- the Crown already had the right to use the waters for electricity;
- there was little validity to any claims of injurious affection;
- the lake had some 'scenic' value for tourism, for the national park, and for Lake House; and
- the Crown should make a purchase offer for a lump sum payment of £10,000.[621]

The cost of the purchase was to come out of the Lands and Survey Department budget, charged to the 'National Parks – Acquisition' item.[622]

In terms of the negotiations that would need to follow, the Minister noted that the owners were not simply seeking a purchase to the exclusion of some other kind of arrangement: 'The owners, in 1957, asked the Crown to either purchase the bed of the lake or otherwise compensate them for past and future use thereof.' Also, the Minister noted some restraint on the part of the Maori owners because, even though their ownership had been determined many years ago, they were only seeking compensation for the past 10 years of the Crown's use of the lake.[623]

The Minister also summarised the official view of how the lake had been valued. 'Lake Waikaremoana', he wrote, 'is partly comparable with Lake Taupo from the point of view of hydro electric generation.' On the basis of how many units of electricity each lake supplied, 'the relative values of the lakes would be approximately 1:6 at present, rising to 1:8 in 1964' (because generation from Taupo was planned for a significant increase). But Lake

619. Walzl, 'Waikaremoana' (doc A73), p 406
620. Walzl, 'Waikaremoana' (doc A73), p 407
621. Walzl, 'Waikaremoana' (doc A73), pp 407–408
622. Minister of Lands to Cabinet, 21 May 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 944)
623. Minister of Lands to Cabinet, 21 May 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 943)

Waikaremoana stored more than one season's units of electricity so its relative value was actually higher than first appeared (1:4). On an area basis, the 'comparison with Taupo is 1:11'. The Minister concluded: 'It is difficult to convert these values to £.s.d. The only real comparison that can be made on a monetary basis is in respect of fishing revenue'. Hence, the Crown had derived a figure based solely on comparative fishing revenues and no other consideration, resulting in £500 a year, capitalised at £10,000.[624]

Thus, the Crown did consider the question of value for electricity generation purposes in some depth in 1958 to 1959, despite the Electricity Department's opposition. Ultimately, it was ruled out because of the Crown's statutory right to use the waters, and the difficulty of deciding how to express the generation capacity of a lake in monetary terms. It seems particularly narrow, however, to have come to the conclusion that the lake's only monetary value came from its annual fishing revenue.

Before this paper could be presented to Cabinet, however, it was overtaken by a new approach from the owners on 22 May 1959. On that date, Nash met with three owners' representatives (Turi Carroll, H E McGregor, and Wiremu Matamua) at Wairoa. McGregor told the Prime Minister:

> However, although all the original owners were now deceased, he felt that if there was anything due to their descendants this was the time for a settlement. The Waikaremoana housing position was the worst in the district and their Maraes were all very decrepit and it was evident that assistance in this direction would be more than justified. However, all the beneficiaries were not there. Some were living in other areas partly in the Bay of Plenty, but he would leave the matter at this juncture to the Minister who would no doubt, in his wisdom, suggest some means of finalising the issue but in conclusion he would again ask that, if possible, a further meeting with representatives of the owners and the Minister be arranged.[625]

In a written submission to Nash, McGregor and Matamua noted:

> Although the hydro-electric operations are still functioning and the supply of electricity is flowing to all parts of New Zealand, the rightful owners are still awaiting a definite decision. We further reiterate that the claims of the Maori owners should be settled and we feel Sir, that with your knowledge and experience of the case and your sympathy for your Maori people we will reach a speedy and favourable settlement.[626]

624. Minister of Lands to Cabinet, 21 May 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 944)

625. Report on visit of Prime Minister and Minister of Maori Affairs to Taihoa Marae, Wairoa, 22 May 1959 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1249)

626. Mc Gregor and Matamua, 'Waikaremoana Lake Bed Issue', [May 1959] (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1250)

The Prime Minister replied that 'previous amounts asked for had been too high' and that there should be further discussions with the owners' representatives. In his view, 'various authorities on valuations etc. would have to be consulted to settle an equitable compensation for this claim'. At this stage, he thought that a lump sum might be 'the most reasonable' form of settlement. Nash asked that a deputation visit him soon 'in an attempt to finalise the issue'.[627]

The Cabinet paper, seeking authority for the Minister of Lands to negotiate a purchase with a lump sum offer of £10,000, continued to be held over in the meantime. Mr Walzl suggests that this was because Nash wanted to meet first with a full delegation of owners, after the preliminary meeting in Wairoa.[628] This meeting took place on 19 August 1959. It was the first significant Crown–Maori engagement on the Lake Waikaremoana issue since the meetings with Prime Minister Fraser in 1949. It was thus a very important meeting, at which the Maori owners reformulated, explained, and advocated for a new offer to the Crown: an annuity of £5000 or a lump sum payment of £100,000, to be held in trust and used for the owners' benefit by a Waikaremoana trust board.

Key points made by the owners' representatives were:

- The lake was being used by the Electricity Department for 'national purposes'. They accepted that was important to the nation and so the owners sought 'a settlement now and one that was reasonable in that it should meet all requests for all time'.
- The fishery had been damaged because the Electricity Department had lowered the lake's level by a good 15 feet, which had deprived the fish of a large quantity of food, and also because thousands of fish were destroyed every year 'through being drawn in through the tunnel down to the power house' (although the department had recently installed screens to try to stop this happening).
- That the history of this claim went back to 1915, that the people had been brushed off by the previous National Government, and the new Labour Government must now fulfil 'the late Mr Fraser's wishes'. McGregor emphasised that the 'owners had never at any time consented to the use of the lake for hydro-electric purposes. The Government simply took it over and has effectively used it for years.' Yet the people had been patient and had not taken interference with the lake for electricity purposes to court, and their forbearance needed to be recognised in any settlement.
- That the Maori Land Court and Maori Appellate Court had recognised Maori 'ownership of the lake', which had value for fishing, as a 'scenic asset', and for 'hydro-electric generation'. For all these reasons, 'the owners had something to sell to the Crown that was of value to the Country but not for an inadequate consideration'. In terms of detail, the Crown derived revenue from fishing licences, camping grounds, and the use of the

627. Report on visit of Prime Minister and Minister of Maori Affairs to Taihoa Marae, Wairoa, 22 May 1959 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c), p 1249)

628. Walzl, 'Waikaremoana' (doc A73), p 409

bed and waters for hydro-electric generation. There were also islands in the lake, for which payment was necessary, although Maori wished to retain their burial grounds and their reserves, which were of great traditional importance to them.

- Other lake claims had been dealt with by an annual payment, and Waikaremoana was the last (and long outstanding), although the owners were willing to consider a lump sum if that would get the matter settled.
- That for many years the owners had 'the empty title of being the owners with no rights whatsoever', and a just and equitable settlement was now required for this 'grave injustice'.
- In concrete terms for such a settlement, the owners proposed that the lake was worth an annual payment of £3000 a year (which meant a lump sum of £60,000 at 5 per cent interest). Past use at £3000 a year for 15 years (back to 1944) represented a capital sum of £45,000. Adding these two together (and rounding it down), the owners would accept a lump sum of £100,000, although they would prefer an annual payment of £5000.
- The money should be paid to a trust board and used to repair their marae and alleviate their extreme poverty. The people 'threw themselves on a generous Government to provide a just settlement'.[629]

In response, Prime Minister Nash agreed that the Crown was obliged to 'purchase and provide compensation', but noted that the fishing revenues generated by Lake Waikaremoana were less than a tenth of those from Lake Taupo: 'Perhaps the people in the light of that would not maintain that the lake was worth all that they said'. Then, he noted that the Crown already had 'all the rights it needed to the waters of the lake'; no further payment was necessary for that, was the implication. The Crown certainly wanted to buy but the people's compensation figure was too high. Nash noted that the owners had come down from their earliest request of £10,000 a year to £3000 a year, although compensation for past use raised that figure again to somewhere in the vicinity of £5000. But the clear import of his speech was that they would have to come down further still: 'They should go a good bit lower than what they thought.' Nash also suggested that if the Crown and Maori could not ultimately agree on a figure, then the Maori Land Court could be asked to determine a fair compensation. In the meantime, he wanted the people to reconsider their position and try to reach a more 'reasonable' figure.[630]

Others who spoke on the Government side included Eruera Tirikatene, the Minister of Forests, who supported the owners as having 'put up an excellent case', although he was more interested in forestry matters. The Minister of Lands, C F Skinner, and the Maori

629. Walzl, 'Waikaremoana' (doc A73), pp 410–413. For a full account of the meeting, there are two different sets of minutes, which are located in Walzl, comp, papers in support of 'Waikaremoana' (doc A73(b)), pp 925–938.

630. Walzl, 'Waikaremoana' (doc A73), pp 413–414; 'Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests', 19 August 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 935–936)

member of Parliament Tiaki Omana, both supported the idea of 'fair' compensation, suggesting that it be determined by the Maori Land Court if the parties could not agree.[631]

Turi Carroll responded to the Prime Minister, thanking him and suggesting that the Crown and the owners could surely 'agree on compensation but how could they assess a fair and equitable figure'? This was truly a dilemma for both sides, especially in light of their wildly divergent views of what the final figure should be. Nash promised that the Government would consider this question further and try to determine 'something equitable'. Although he was 'fearful' of the gap in expectations between the parties, he 'thought that something could be offered which was fair'.[632]

As Mr Walzl noted, this meeting and the Prime Minister's assurances scuppered the May 1959 Cabinet paper. The result was a significant shift within government towards a more reasonable counter-offer, rather than one based solely on fishing revenue without compensation for past use or, indeed, any other kind of use of the lake. Ministers sent their departments back to the drawing board to see if they could come up with a figure more likely to result in settlement than one-tenth of the sum being sought by Maori.[633] As Fraser told the owners, the lead in negotiations would be taken by the Minister of Lands, and so it was his department which took responsibility for coming up with a new counter-offer.

First, the Director-General asked the Maori Affairs Department if Nash already had a view as to what a fair offer might be.[634] Maori Affairs officials spent a week trying to work out a new formula for arriving at a Crown position as to purchase price, now including (for the first time) compensation for past use. As a starting point, they ignored the owners' claims about hydroelectricity and took the view that claims were legitimately based on the scenic value of the lake, the fishing rights, and the islands. They also took a lead from Nash's statement at the recent meeting that the solution should be worked out on the same or similar lines as for Lake Taupo.[635]

The Maori Affairs Department began with scenic value. In that respect, officials thought that by comparing the size of the two lakes, Waikaremoana would be worth £300 a year, but by comparing the length of shorelines (considered more important in terms of beauty), Waikaremoana could be worth about £1000 a year. Nonetheless, this latter figure was too high because, in the officials' view, Maori had not made much use of the lake for either transport or food, and would therefore not suffer much monetary loss from either the sale

631. 'Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests', 19 August 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 936–938)

632. Walzl, 'Waikaremoana' (doc A73), p 414; 'Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests', 19 August 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 938)

633. Walzl, 'Waikaremoana' (doc A73), p 414

634. Director-General to Secretary of Maori Affairs, 25 August 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 924)

635. Walzl, 'Waikaremoana' (doc A73), p 414

or the infringement of their ownership rights. On the other hand, the figure of £300 was clearly too low. So, compromising these two figures, a payment of £500 could be justified.[636]

But this only got the Crown back to where it had started, this time by applying a monetary value to the scenic value of the lake (as an attraction for the national park): a lump sum payment of £10,000 or an annual payment of £500. There were still the fishing and other revenues to consider. Based on what Walzl called some 'extraordinary assumptions', the department recommended:

- Half of all fishing, boating licences, and other revenue (in excess of £500),[637] plus
- Half of camp site fees, fines, and penalties (all of which had been considered in the Taupo settlement), plus
- A lump sum payment for 12 years' past use (back to 1947) at £500 per annum, plus interest (totalling £6150), plus
- A lump sum payment of £10,000 for scenic value (or £500 per annum).[638]

From a later explanation, the Maori Affairs Department was actually proposing a lump sum payment of £16,150 (the third and fourth items), plus annual payments of the revenues derived from the first two items.[639] Alternatively, officials suggested that if agreement could not be reached, the Government should take the lakebed compulsorily under the Public Works Act 1928 and leave it to the Maori Land Court to determine compensation.[640]

On 3 September 1959, Nash approved these suggestions to be sent to the Lands and Survey Department for its consideration.[641]

It took three months for Lands and Survey to respond. On 8 December 1959, the Minister of Lands, C F Skinner, agreed to the annual payment or lump sum component (£500 or £10,000), but felt that supplementing it from the actual revenues would only add £100 a year at most. Given the cost of administration, this was simply uneconomic. The Minister was also opposed to the idea of paying Maori half the camp fees, since they had not contributed to the costs and did not own the land – this should not be mixed up with ownership of the bed, in his view. While agreeing that there should be compensation for the past 12 years' use of the lake, and compensation for Maori losing their sole fishing rights, he thought it

636. Walzl, 'Waikaremoana' (doc A73), p 415

637. That is, any revenue generated in excess of the first £500, which the Government would retain. Maori were guaranteed payment of the first £500 under the heading of 'scenic value', or alternatively that would be capitalised at £10,000. This was modelled on the Lake Taupo settlement, where the Crown paid a guaranteed £3000 per annum, and then topped it up with 50 per cent of annual revenues received in excess of £3000.

638. Assistant Secretary to Minister of Maori Affairs, 2 September 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 921)

639. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961', [May 1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1234)

640. Assistant Secretary to Minister of Maori Affairs, 2 September 1959 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 922)

641. Walzl, 'Waikaremoana' (doc A73), p 416

best to simply offer a lump sum payment of £25,000 to cover all the bases identified by the Maori Affairs Department.[642]

Why was Lands and Survey now willing to go so far beyond the £10,000 of six months previous? According to Mr Walzl, it was not only because of the Prime Minister's assurances at the August 1959 meeting. The department was beginning to realise the significance of an issue that once again made it seem necessary (rather than desirable) that the Crown own the lakebed. This was the issue that we noted as so influential in chapter 16: the permanent lowering of the lake had created a ring of Maori-owned dry land that meant, legally speaking, Maori could deny any access to the lake for private or public purposes. The owners could also prevent the national park from building the kinds of facilities and services necessary on the lakeshore for visitors' use and enjoyment of the lake and its surrounds. The Minister of Lands noted this (and its significance) in his response to the Maori Affairs Department's figures. Walzl argues that from this point on, 'the tone of negotiations change' because the Maori owners were suddenly perceived to be in a much stronger position.[643]

This was not immediately apparent to the Maori owners. During a visit by Nash to Ruatahuna on 11 December 1959, the lake question was raised with him by the kaumatua and pressed by John Rangihau. He reminded the Prime Minister of the long period of time since their claim had begun, and that all the people involved had now died (although, 'as our elders say, "Mate atu he tete ara mai he tete" meaning that though some may die there will always be others to take their stead'). The people had heard many things about how loyal other tribes had been. 'So have we been loyal to the Crown', Rangihau said: 'There are many of our boys overseas who lie there forever. There is the proof of our loyalty.' Rangihau pressed Nash for a decision now, that there should be no more waiting. The Prime Minister replied: 'I cannot agree more about the delay of time', and he was unable to account for it. But nor could he give an immediate answer. Instead, he promised 'to let you know what I think' before Christmas 1959.[644] As a result, on 23 December 1959, Nash sent a telegram asking six owner representatives to visit him in Wellington in February 1960.[645]

The year 1960 saw the negotiations peter out in confusion about a series of missed meetings. Despite the telegram of December 1959, Wiremu Matamua and others wrote to Nash on 25 February 1960, stating that they had received no further news about Lake Waikaremoana and were still awaiting a long-overdue settlement. On 14 March 1960, Nash replied to the effect that a deputation of owners should visit him in Wellington. From his

642. Walzl, 'Waikaremoana' (doc A73), p 416
643. Walzl, 'Waikaremoana' (doc A73), p 417
644. 'Extracts from representations to the Minister at Ruatahuna by the Tuhoe people on Friday, 11 December 1959', not dated (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1246–1247)
645. Walzl, 'Waikaremoana' (doc A73), p 418

study of the files, Walzl suggests that confusion ensued for the remainder of 1960.[646] The owners' deputation did not turn up when the Government expected it, whereas, from the owners' perspective, they were still waiting for the Government to make definite arrangements with them. As a result, no meeting took place for the whole year. Walzl was unable to explain this 'breakdown of communication'. From a meeting that occurred in April 1960, between Ministers Nash and Tirikatene and officials, Walzl suggests that the Government clearly intended to pursue the dialogue and reach a settlement.[647] From the Government's point of view, an appointment had been made but the delegation had not turned up.[648] From the owners' point of view, no definite reply had been received from Nash in 1960, 'apparently because he was waiting for the final result of the election'.[649]

Thus, the benefit of engagement between Nash, Tirikatene, and the owners in 1958 to 1959 was dissipated by a year of inaction in 1960. Even so, as Mr Walzl observed, it seemed as if matters were shaping up for an impasse anyway because the parties' views were so far apart. The Labour Government was determined that the Crown would arrange a settlement, and had tried to get officials to arrive at a reasonable counter-offer. But officials found it difficult to justify acquisition at all, let alone any particular method of valuation. In the end, they moved up from a lump sum of £10,000 to £25,000, partly because of assurances made by the Prime Minister, but also because the Lands Department was beginning to appreciate the risk for the Government created by the permanent lowering of the lake. While still unwilling to compensate for hydroelectricity, the Government was now prepared to compensate for scenic values, fishing rights, and 12 years' past use by the Crown. This was quite a big move, although it fell far short of the £100,000 sought by the Maori owners.[650]

(3) *The culmination of these negotiations: the Maori owners reject the Crown's offer, 1961*

The Labour Government lost office on 26 November 1960, and was replaced by Keith Holyoake's National Government. This did not mark the end of the negotiations that had started under Walter Nash. As we noted earlier, the Director-General had become concerned about the implications of the ring of now-permanent dry Maori land encircling the lake. Tony Walzl pointed to further expressions of concern in early 1961. In March, the National Parks Authority raised its concerns about this issue. Then, in April 1961, the

646. Tony Walzl also says: 'Although Nash was further urged to act when he attended a hui in May 1960 where Waikaremoana was discussed, nothing occurred and in November 1960, the Labour Government lost power.' (Walzl, 'Waikaremoana' (doc A73), p 440) This is based on a mistaken date in the original source – the reference was to a hui with Minister Ralph Hanan in May 1961, not with Nash in May 1960 – see doc A73(c), pp 1231–1232.

647. Walzl, 'Waikaremoana' (doc A73), p 418

648. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961', [May 1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1235)

649. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961', [May 1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1232)

650. Walzl, 'Waikaremoana' (doc A73), pp 436–440

Hamilton Commissioner of Crown Lands drew the Director-General's attention to a problem with the government-run motor camp. This camp was in need of improvements, which were being deferred because it might actually be located below the original lake level and thus on Maori land. The Director-General replied that there was an 'even chance' that at least part of the camp was on Maori land. As a temporary solution, he instructed that its layout must not be shown on 'anything published or which can be seen by the public'.[651]

In the same month, Director-General Webb brought the proposed purchase to the attention of the new Government. He advised that it was important for the Crown to own the lakebed for both hydroelectricity and national park purposes. But, as was by now agreed among the departments, he played down the significance of hydroelectricity. Webb noted that the Crown had the right to use the water anyway, and infringement on the Maori title for that purpose had been 'small' and its value 'nominal'.[652] Clearly, in his view, the interests of the national park were uppermost: 'The settlement of the dispute concerning the bed of the lake is very desirable and the National Parks Authority is being prejudiced in its plans for the development of the Park because it cannot establish parking areas, conveniences or other facilities, near the water's edge, as these would be on Maori land.'[653] Webb was also keen to obtain the Waikaremoana reserves for the same reasons. He recommended that the Crown offer the Maori owners a lump sum of £25,000. Adapting the Maori Affairs Department's 1959 calculations, this figure was made up of:

- the original £10,000;
- £8500 for past use;
- £2000 for the Maori reserves in the old Waikaremoana block; and
- £4500 in '[r]ecompense for good will and in lieu of payment of fines, penalties and rentals etc.'[654]

Although the figure put on the reserves is not in direct issue here, we note as a matter of important context that the special Government Valuation seven years later valued these reserves at $50,000. In chapter 16, we noted that this estimate of £2000 in 1961 was simply risible. This did not augur well for the remainder of the department's calculations.

The figure of £4500 was later described purely as a 'good will' payment, so we emphasise here that it was partly to replace Maori Affairs' suggestion of sharing a proportion of lake-related revenue with Maori. That suggestion, in turn, had been based on the Crown's settlement of the Lake Taupo claim in the 1920s. The proposed payment for past use of £8500

651. Walzl, 'Waikaremoana' (doc A73), pp 442–443
652. Director-General to Minister of Lands, 24 April 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 915)
653. Director-General to Minister of Lands, 24 April 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 917)
654. Director-General to Minister of Lands, 24 April 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 917)

was later explained as £600 a year for 14 years (rounded up to £8500).[655] So this proposal was dated back to 1947, the year in which title was finalised because all appeals had been disposed of. Recalling the Maori owners' 1957 proposal, the use of 1947 seemed a point of common agreement. We note, however, that in 1959 the Maori owners had proposed 1944, the date at which the Crown's appeal was dismissed and Maori ownership confirmed, as the date from which compensation for past use should be calculated.

The Minister of Lands approved Webb's memorandum to go to Cabinet, subject to a favourable Treasury report.[656] In the meantime, the Maori owners had already put their take before the new Minister of Maori Affairs, J R Hanan, at a hui at Taihoa Marae, Wairoa, on 10 May 1961. Led by Turi Carroll, they outlined what they saw as Nash's failure to make a decision or respond to them in 1960, and asked the new Minister:

> What is the attitude of the present Government towards final settlement of this matter? . . . This claim has been going on too long and we would appreciate a settlement as soon as it is possible to do so, while some of our 'Kaumatuas' are still alive.[657]

On 2 June 1961, the Secretary of the Treasury wrote to the Minister of Finance, recommending that he should support purchase of the lakebed for a lump sum payment of £25,000. Treasury noted that there was no 'established basis' on which to calculate value and that the Lands and Survey Department's method was 'probably as good as any'. But Treasury was concerned to avoid annuities (because they 'cost much more in the long run') or long delays (which would inevitably push the price up). The Minister of Finance accepted this advice and the paper went up to Cabinet, which approved its recommendations on 20 June 1961.[658]

At last, after four years of internal debate and discussions with the Maori owners, the Crown had arrived at a definite position and was ready to make a formal counter-offer to their proposals of 1957 and 1959. The owners were invited to send representatives to a meeting in Wellington to discuss the Crown's offer. Hanan outlined the details in a letter to Wiren in July 1961. The Government wanted to buy the lakebed, the islands in the lake, and the Waikaremoana reserves for £25,000. In return, the owners had to give up all claims about hydroelectricity and past legal expenses:

> The price is to be considered as including the settlement of any claims whatsoever that the owners may feel they have against the Crown in respect of its use of the bed and the

655. Minister of Maori Affairs, paper, 7 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 901)

656. Walzl, 'Waikaremoana' (doc A73), p 444

657. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961', [May 1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1232)

658. Walzl, 'Waikaremoana' (doc A73), p 444

> waters for hydro-electric purposes, and it extends to cover any claim against the Crown for any legal costs, whether in the Maori Courts or otherwise.[659]

Thus, without any acknowledgement of the validity of such claims or compensating them, the owners were to be required to acknowledge that all such claims were settled.[660]

The proposed meeting took place on 9 August 1961. The 665 owners[661] were represented by Turi Carroll, Wiremu Matamua, Jimmy Moses, Max Tipene, Thomas Ranginui, John Rangihau, Mr Mei Mei, Dave Ranginui, Mr Kahurore and their lawyer, S A Wiren. The Crown was represented by the Minister of Maori Affairs, the Minister of Lands, and senior officials.

Wiren responded to the Crown's offer on behalf of the owners, who had already held a meeting to discuss it. In their view, it was not high enough, nor did they want a lump sum payment that would have to be divided up among so many owners. As they had made clear before, they wanted an annuity to be administered by a trust board. Hanan replied that he took the Crown's offer of £25,000 as having been rejected. Wiren responded that 'at present it could not be accepted'. Wiren also noted that the owners were not willing to part with their islands or their reserves (which we note had just been introduced into the negotiations by this offer from the Crown).[662]

There was debate about the reserves and islands, with Wiremu Matamua asking that the people 'be allowed to retain their islands'. Hanan agreed to reconsider whether the Government really needed them for the park.[663] But the key issue for the Crown was the price: if the Maori owners would not accept £25,000, did they have an alternative basis for arriving at a value for the lake? Wiren noted that the owners were now willing to come down to an annuity of £4000 per annum. Hanan (incorrectly) stated that he understood from the files that they had preferred a lump sum.[664]

Turi Carroll intervened at this point and reminded the Crown of the long-standing failure to settle this claim:

> He felt the claim should be settled. It was most unfair for Government after Government to postpone the settlement. If it were a Pakeha matter it would have been settled in 5 min-

659. Minister of Maori Affairs to Wiren, 21 July 1961 (Walzl, 'Waikaremoana' (doc A73), p 445)
660. Minister of Maori Affairs, paper, 7 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 899)
661. Minister of Maori Affairs, paper, 7 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 899)
662. 'Notes of deputation held in Hon. Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 885)
663. 'Notes of deputation held in Hon. Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 886–887)
664. Walzl, 'Waikaremoana' (doc A73), p 446

utes but because it was a Maori owned Lake it had been delayed too long. They were looking to the Minister and the Government to settle.[665]

In response, Hanan 'intimated the Pakeha would jump at £25,000'. Carroll retorted that the revenue from fishing licences, what Hanan called the 'only basis for comparison', was too low because the fishery had been damaged by the hydroelectric works. He also felt that the Maori owners could do a better job than the Government at running the tourist resort and 'could build that up as had been done at Taupo and elsewhere'.[666]

Nonetheless, Carroll promised to put the Crown's offer to a formal meeting of the owners, but said that he thought a Minister of the Crown must be present for any offer to succeed. Hanan replied that this was inappropriate until the matter had been settled.[667] He did, however, agree to make inquiries about one of the owners' key concerns: whether the lowering of the lake had damaged the trout fishery, thus reducing the value on which at least part of the price had been calculated.[668]

Later in the day, there was a separate meeting between some of the representatives and the Secretary for Maori Affairs, J K Hunn.[669] Turi Carroll 'threw out a feeler' as to whether the Crown would accept a lower annuity of £3200. Hunn responded that this meant a capitalisation at £65,000, which was out of the question. From the official record of this meeting: 'Various other annual sums were spoken of but the reply made was confined to what these sums represented by way of capital.'[670] Hunn, it should be noted, had expressed strong opposition back in 1960 to settling this claim by an annuity, much preferring a single lump sum payment.[671] Also, Hunn – as authorised by the Minister – gave the owners the breakdown of figures behind the £25,000, so that they would know how it had been calculated.[672]

On 19 August 1961, the owners held a meeting at Tuai to consider the outcome of this hui with the Ministers. It was very clear that the Maori owners were angry with the Crown's first concrete offer. Director-General Webb decided that the Crown should not be represented at the meeting, lest – instead of generating a counter-offer – it devolve into argument and embarrassment for the Government.[673] About 80 owners were present, 'including all the leaders of the people'. The Crown's offer was formally rejected and a counter-offer was

665. 'Notes of deputation held in Hon. Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 886)

666. 'Notes of deputation held in Hon Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 886)

667. Walzl, 'Waikaremoana' (doc A73), p 446

668. Walzl, 'Waikaremoana' (doc A73), p 447

669. This meeting was attended by Turi Carroll, Wiremu Matamua, Rangi Mitchell, and Mac Stevens for the owners.

670. 'Note for File', August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1217)

671. J K Hunn, Acting Secretary for Maori Affairs, minute, 1 April 1960 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1242)

672. 'Note for File', August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1217)

673. Director-General to Minister of Lands, 11 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 890)

proposed: an annuity of £3250. The seven islands in the lake were included in this offer (not including Patekeha) but the people were adamant that they would not alienate their Waikaremoana reserves.[674]

Wiren communicated this counter-offer to the Government on 22 August 1961. He noted that the Crown's offer, as explained to the owners, was understood to have included:

- £10,000 for the lake ('based on capitalising a fishing revenue averaging £500 per annum');
- £2000 for the reserves and islands; and
- £13,000 for 'past use of the lake'.[675]

Clearly, the Crown had not informed the owners that part of the £13,000 figure was actually for 'good will' and in commutation of future revenue from fines and other sources. Wiren pointed out that if the Government had compromised the Waikaremoana claim back in 1919 in the same way as it had for Taupo and Rotorua, then an annuity based on 'so small a sum as £20,000' would have already resulted in £42,000 for the Maori owners. Instead, 'over all these years the Crown in one capacity or another has been using the Lake as its own and deriving considerable revenue'.[676]

Wiren explained the owners' reasons for rejecting the Crown's valuation:

> the owners do not accept £10,000 as the value of the Lake, nor do they accept that the value is to be based, except in part, on the fishing revenue derived from it. The value is rather to be sought in its beauty and scenic and tourist attractions and its availability for water conservation, and in these respects Waikaremoana is unique. It is extensively used for travelling by boat or other vessel. Nor does an examination of previous purchases by the Crown, and this is the last large Lake remaining to be purchased, lead one to think that fishing revenue has played a dominant part.[677]

Wiren stressed that the preservation and importance of Lake Waikaremoana for water conservation (which, of course, was crucial for hydroelectricity) had not been a factor when calculating the price of other lakes.[678] Further, he pointed out that values in 1961 were much higher than when the last lake settlements had been negotiated in the 1920s:

> at the present time quite small lakeside properties fetch the £25,000 which you have offered.

674. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 876). For a summary of this important letter, see Walzl, 'Waikaremoana' (doc A73), pp 447–449.

675. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 876). These appear to have been the figures supplied by Hunn at the 9 August 1961 meeting.

676. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 876)

677. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 876

678. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 876, 877

> In addition, if you wish to capitalise the annual sum which is asked for, there is the factor that the Crown has for many years been using Lake Waikaremoana as its own without right or title.[679]

Since 1918, the Maori owners had had title to the lake, confirmed by the Appellate Court in 1944. Yet, as the owners saw it, the Crown had trespassed on the lake for hydroelectricity and tourism purposes without permission or payment, and was still doing so in 1961. Further, the Electricity Department's trespass had had the effect of diminishing the fishing revenue, on which such a significant part of the Crown's valuation was dependent.[680]

Wiren added that the owners had two other, crucial, reasons for rejecting the Crown's offer. The first was that for Maori, with their strong spiritual relationship with the lake, an annuity was considered to be a lasting connection with the lake. Wiren was clearly wary of advancing this point, perhaps fearing that it would not receive a sympathetic reception from the Government in 1961. The Hunn report was released that year, advocating the transformation of such connections into a stake in modernity, such as modern home ownership (see chapters 15 and 18). Wiren was quick to add that there was another, 'more powerful' reason why the owners would not agree to a lump sum payment: a one-off payment was of no long-term benefit to the people. We are certain, however, from the evidence of the witnesses in our inquiry, that the spiritual relationship with and ancestral connection to the lake was in fact of overriding importance to the Maori owners, then as now.

Wiren stated:

> It is not quite in this way [as a payment for past and present use] that the owners regard the matter. To them the Lake is part of them – it dominates the history and traditions of their tribe. It is almost a spiritual relationship. They do not wish that it should go from them forever. The fact that an annual income is received for it is something in the nature of a rent retaining some part of it for the good of their people. That is one reason why they ask for an annual payment.
>
> Another, and more powerful, reason is this. Any sum divided amongst the large number of owners would produce to the individual only a small amount which it would be difficult to put to permanent use. Much of it would in fact be wasted. The Ngati-Ruapani are a good people, but practically landless. If they could use an annual sum for such purposes as educating children, establishing persons in occupations, and the like, this would be a great advance to their [illegible: people?] Their need is great, and the provision of such help would be of advantage to State Welfare services.[681]

679. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 877

680. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 877

681. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 877–878

Further, Wiren commented that the Maori owners were not only poor (compared to other tribes) but also disempowered: the 'responsibility of administering a Trust Board must have a good influence upon a Maori people'.[682]

Wiren also noted that the owners had had to pay £1559 in legal costs since 1944: they had had to 'fight for their rights over a long period of years' and 'the Crown should repay at least part of the costs'.[683]

In light of all these reasons, the Maori owners' counter-offer (which had been revised significantly downwards) was derived as follows:

> The £3250 per annum which is mentioned in the owners' resolution may be regarded as the capitalisation of £60,000 for the Lake including the use of it for over 40 years plus £250 per annum being half the present fishing revenue.[684]

All of the islands except for Patekaha were included in this offer, which was to sell the bed of the lake in return for a permanent annuity, administered by a trust board. Patekaha was an urupa.[685]

Soon after the receipt of this counter-offer, the importance of the issue for the national park was again underlined when the Commissioner of Crown Lands wrote to the Director-General, explaining that a proposed road extension had to be put on hold because it might run over Maori land at the edge of the lake. Also, he reported rumours that Maori were about to lease some of their land below the original lake level for holiday homes or camping. He commented: 'The vexed question of ownership of the lake shore causes complications of many kinds and as a Park Board is about to be appointed it would be desirable to have this problem cleared up as soon as possible.'[686] There was growing concern within government at this time that the owners could carry out development of their lake, its islands, and their reserves to the detriment of the national park.[687]

Nonetheless, Mr Walzl notes that the offer and counter-offer of August 1961 resulted in a deadlock that lasted for several years.[688] On 15 November 1961, Hanan forwarded Wiren's letter to the Minister of Lands, observing that the Maori counter-offer was 'quite unacceptable' but that the owners could be induced to accept less.[689] In essence, this remained the Crown's view for the next five years.

---

682. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 878
683. Walzl, 'Waikaremoana' (doc A73), p 449
684. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 877
685. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 876–878)
686. Commissioner of Crown Lands, Hamilton, to Director-General of Lands, 26 September 1961 (Walzl, 'Waikaremoana' (doc A73), pp 449–450)
687. Walzl, 'Waikaremoana' (doc A73), p 450
688. Walzl, 'Waikaremoana' (doc A73), p 449
689. Walzl, 'Waikaremoana' (doc A73), p 450

20.8.4 Negotiations in deadlock, 1962–66

At the end of 1961, the Crown and Maori knew each other's positions and also understood something of the reasoning behind them. This development both helped and hindered negotiations. On the one hand, the Crown had not laid its cards on the table before August 1961. This was the first time that it had told the Maori owners what it thought the lake was worth, and how it had calculated that worth. The owners were not aware of the significant shift in Government thinking between 1957 and 1960, away from the original idea that they should receive a one-off payment of £10,000 based solely on capitalising fishing revenue. Instead, they had been presented with a figure of £25,000 and had been told (not entirely accurately) that it was derived from £10,000 (capitalising the fishing revenue), £2000 for the islands and reserves, and £13,000 in compensation for past use.

In turn, the Crown had been presented with three proposals:

- in 1957, a £4500 annuity based on £3000 for present and future use and £1500 for past use;
- in 1959, a £100,000 lump sum or a £5000 annuity; and
- in 1961, a significantly lower annuity of £3250, based on a capital value of £65,000 (which included compensation for past use and £250 per annum for fishing rights).

Each side now had something concrete to work with in terms of the other's expectations and goals. But there were some apparently insurmountable obstacles. The Government insisted on a one-off payment and thought that the owners had massively over-valued the lake. In part, this was because it refused to take hydroelectricity into account. The Maori owners, on the other hand, were determined to obtain an annuity to be administered in trust by a board, and they considered that the Crown had barely offered a quarter of the lake's true value. These would not be easy positions to bridge, although Maori poverty and growing desperation to achieve a settlement favoured the Crown, whereas the Crown's relatively new concern about the ring of Maori land around the lake became an incentive for it too to compromise.

(1) *More of the same: a 'new' offer in 1962*

In late 1961, the Government was adamant in its rejection of the Maori owners' counter-offer. J R Hanan, the Minister of Maori Affairs, refused to even consider it. He was, as we have noted, convinced that the owners could be persuaded to accept a lower figure. Officials hoped that a slight increase to the Crown's offer would suffice. The Lands and Survey Department and the Maori Affairs Department suggested raising the offer to £30,000 (but then lowered it by £2000 because the reserves were now subtracted). The Minister of Lands approved this new price of £28,000 in February 1962, and it was sent to Treasury for comment the following month.[690]

690. Walzl, 'Waikaremoana' (doc A73), pp 450–451

Interestingly, the Lands and Survey Department's draft Cabinet paper (prepared in late 1961) made no mention of the ring of dry Maori land separating the national park from the lake, despite growing concerns about it. Instead, the only risk to the Crown was said to be the possibility of litigation over the hydroelectric works. As the department understood it, the owners' legal recourse would be 'an action against the Crown for trespass to the bed of the Lake' and to seek an injunction. It was 'difficult to see that they would get other than a nominal award of damages'. Nor were they likely to get 'an injunction prohibiting the Crown from entering on the Lake for hydro-electric purposes because an injunction would, in the circumstances, be oppressive'.[691]

The Cabinet paper also referred to the fact that 'informal discussions' had been held with Turi Carroll. Apparently, he had suggested that the owners would accept a much lower sum than previously stipulated if it was put to them again – the sum of £30,000 was talked about, but it had to be lowered by £2000 because the Crown was no longer buying the reserves and all the islands.[692]

Thus, the Government reassured itself that there was no significant risk from a delay or even a halt to the purchase, and that the owners would soon come to terms at only a slightly higher price. Treasury supported the proposal, warning: 'Past experience has shown the desirability of settling Maori Land claims as soon as it is practicable. The claims invariably grow when settlement is long drawn out.'[693]

The Minister of Lands' recommendations were accepted by Cabinet in April 1962, after which the offer of £28,000 was put to the owners on 21 May 1962. Hanan told the owners that this offer was final and that there was a limited time for them to accept it.[694]

An initial discussion occurred with Wiren two days later, in which he advised that the owners might come down to an annuity of £2500.[695] Then, on 25 May 1962, Wiren met with Hanan and officials, urging them to accept the owners' preference for an annual payment to a trust board, which they could use for education, to look after their old people, and to repair their marae. Clearly, the owners recalled the travesty of land purchasing in the 1910s and 1920s. Wiren warned that they did not want the money dissipated in small payments to so many individuals. Nor did they want interest from investing a lump sum, preferring the security of an annual payment direct from the Government. And it was difficult for them to understand why such an arrangement could not be made, when it had been done for other lakes. A trust would also give the people responsibility and 'something to look after and administer'. This was, in our view, an important point in terms of their aspirations for mana

691. Minister of Lands to Cabinet, draft Cabinet paper, [1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 881–882)
692. Minister of Lands to Cabinet, draft Cabinet paper, [1961] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 882)
693. Secretary to the Treasury to Minister of Finance, 27 March 1962 (Walzl, 'Waikaremoana' (doc A73), p 451)
694. Walzl, 'Waikaremoana' (doc A73), p 451
695. Walzl, 'Waikaremoana' (doc A73), p 451

motuhake. Wiren told the Minister that he had met with the owners and recommended that they lower their requested annuity to £2500; any lower than that and it would not even be worthwhile setting up a trust board.[696]

Hanan was not ultimately responsible for the purchase and he had to consult R G Gerard, the Minister of Lands. Gerard expressed disappointment that the owners were still pressing for an annuity, and referred the matter to his officials in the Lands and Survey Department. F T Barber responded that the Crown's new offer was 'generous enough', that Treasury was unlikely to go higher, that it would not be reasonable to go higher in any case, and that there was a reasonable chance of success if the Crown persisted with the current offer.[697] Gerard therefore recommended to Hanan that the Crown should keep its offer open for a while.

On 2 June 1962, a committee of the owners considered the Crown's new offer and unanimously rejected it. Wiren communicated this in a letter of 21 June 1962. He made some very important points:

> They [the owners] do not consider that the sum offered for the Lake is sufficient, either in view of the intrinsic value of this beautiful lake or in the view of what was paid for other lakes at a time when monetary values were much less. They do not consider that sufficient allowance has been made for their established legal rights having been ignored by Government Departments over a long period, and profitably ignored. You will understand that they are the people of the Lake, and their history and traditions have centred around the Lake from time immemorial. They would much prefer to retain the ownership, and be paid by the Government under lease or otherwise for the use of it.
>
> Some years ago they consulted us regarding what action could be taken against trespassers. They did not then take the actions available because they felt this might embarrass the Government. They have renewed these discussions, because they think some action is necessary when their rights are just being flouted. For instance, we have no doubt that the Lake boundary extends to the land, already visible, where it stood before the Ministry of Works lowered the level some 14 feet. Rights are now being claimed by individuals over this strip of land.[698]

Previously, Wiren had indicated that the owners saw an annuity as recognition of their ongoing connection with the lake, but now he referred to the possibility of a lease for the first time. It fell on deaf ears. An official minuted Wiren's letter to the effect that the Crown's offer did include payment for past use of the lake. While the State's investment in the lake was considerable and could not be moved elsewhere, the Government's view was that there had been no 'real damage to the asset' and no attempts in the past to bring an action for

696. 'Notes of Interview in Hon J R Hanan's Office with Mr Wiren', 25 May 1962 (Walzl, 'Waikaremoana' (doc A73), p 452)

697. Director-General of Lands to Minister of Lands, 1 June 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 851); Walzl, 'Waikaremoana' (doc A73), pp 452–453

698. Wiren to Minister of Maori Affairs, 21 June 1962 (Walzl, 'Waikaremoana' (doc A73), p 453)

trespass.[699] Here, matters stalled and the Government began to contemplate the possibility not of a lease but of a compulsory taking.

(2) *Negotiations in deadlock, 1962–1966*

In June 1962, the Maori owners rejected the Crown's new offer of £28,000. In response, officials began to debate the possibility of taking the lake under the Public Works Act and leaving it to the Maori Land Court to sort out the level of compensation. A Lands and Survey official minuted Wiren's letter with that suggestion. But, as Mr Walzl notes, another official in the department pointed out that the Maori Land Court was likely to arrive at a sum 'much more than £28,000 judging by other instances'.[700] This was to prove a significant deterrent to compulsory acquisition. Quite how such a taking would be justified was unclear, but it continued to be debated throughout 1962.

Given the Crown's determination not to budge, Lands and Survey officials prepared an explanation and defence of its current position. In their view, the Maori owners had not suggested a credible basis for an alternative valuation. It was difficult for anyone to suggest an 'intrinsic' value but the Crown had tried comparisons with other lakes, including correlations in respect of area and hydro generation. Officials admitted that the Crown had interfered with the Waikaremoana lakebed but emphasised that the physical impact of the hydro structures was very low; any injurious affection claim could only arise from the lowering of the lake. In that case, Maori remained the owners of the exposed lakebed so their title was not affected. Nor had there been any legal claim for injurious affection in the past. Overall, the risk of litigation seemed as low as it had when the 1961 offer was rejected, so there appeared to be no pressing need for the Crown to raise its offer.[701]

The Director-General's advice to his Minister was that the Crown had made an 'equitable' offer, even though it was 'difficult to assess a firm basis of value'. Maori had made 'vague statements as to intrinsic value of the lake and its value as ancestral land', but the Director-General did not consider this a firm basis for negotiating a different price. He advised the Minister to cut through further argument and consider taking the lake compulsorily for public works, leaving it to the Maori Land Court to determine appropriate compensation. The only risk there was that this might result in a higher sum than the Crown's current offer.[702]

The option of a compulsory taking was clearly getting some consideration at the highest level, although it was not particularly serious or sustained consideration. In July 1962, however, Lands and Survey officials came up with a new proposal to break the deadlock. The Crown could pay an annuity for a limited period of time, as had been arranged in the

699. Walzl, 'Waikaremoana' (doc A73), p 453
700. Walzl, 'Waikaremoana' (doc A73), p 454
701. Walzl, 'Waikaremoana' (doc A73), p 454
702. Director-General of Lands to Minister of Lands, undated draft submission, 'Purchase of Lake Waikaremoana' (Walzl, supporting papers to 'Waikaremoana' (A73(b)), p 848)

Ngai Tahu settlement. Officials proposed £2500 a year for 17 years: 'On a 5% basis this has a present value of £28,185. The Maoris would receive a total of £42,500.'[703] A draft memorandum was prepared from the Minister of Lands to the Minister of Finance, to secure Treasury approval for this proposal, but it may not have been sent. Compulsion was clearly rejected in this draft memorandum – it was specified that the arrangement would need to be approved by a proper meeting of owners before any legislation resulted, vesting the bed in the Crown.[704] In any case, this innovative compromise seems to have disappeared without trace. There was no sense of urgency. In September 1962, when the supplementary estimates were being prepared for Vote: Lands and Survey, officials agreed that no money need be sought to fund a lake purchase. They were not expecting resolution any time soon.[705]

In November 1962, the Commissioner of Crown Lands also raised the possibility with the Director-General of a compulsory taking – this time, to preserve not the Crown's use of the lake for hydroelectricity but its use of the lake for tourism and fishing. He reported a rise in feeling among local Maori that action should be taken to prevent visitors using the lake, especially for fishing, while their claim remained outstanding. He urged a speedy acquisition, perhaps by compulsion, and noted that the price would only rise as more time went by.[706]

But nothing happened for several months. In March 1963, Wiren raised the matter at a meeting with the Minister of Maori Affairs. He put the people's view that they were being treated differently (and unfairly) compared to other Maori lake owners, and asked the Minister to attend a meeting with them and explain why this was the case. A file note stated:

> The Minister traversed the case and said that he could not see that the Crown could go any higher. Neither on the basis of the production of electricity or fishing revenue, nor on any other ground such as size, could he see how the offer could be increased. If Mr Wiren could translate the offer into an annual payment, the Minister would be prepared to ask Treasury to consider the business afresh.[707]

From the Government's point of view, it now rested with the Maori owners to come up with a new proposal. Wiren requested the original Cabinet paper proposing the Crown's offer, so that the owners could see the basis on which the Government had arrived at a sum of £28,000, but the Government declined to supply it. In the view of officials and Ministers, the Crown did not have to justify how it had arrived at its offer, and it would be positively

703. 'Lake Waikaremoana', 5 July 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 843)
704. Minister of Lands to Minister of Finance, draft ministerial, [1962] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 840–841)
705. 'Leases, Titles', 4 September 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 842)
706. Walzl, 'Waikaremoana' (doc A73), pp 455–456
707. RJ Blane, Department of Maori Affairs, 'Note for file', 10 March 1963 (Walzl, 'Waikaremoana' (doc A73), pp 456–457)

dangerous to provide the requested information: it might disturb the existing lake settlements, and would only provide 'ammunition' for the Waikaremoana owners.[708]

Nothing happened between the March 1963 meeting and March 1965. For two years, the Government waited for Wiren to arrange a counter-offer, although it is difficult to see how he could do so on the basis stipulated by Hanan: that Wiren explore how the Crown's current offer of £28,000 could be turned into an annuity. Perhaps Hanan expected the owners to come up with the Lands Department's idea of converting the amount into a 5 per cent annual payment for a specific period of time. This had the potential for the Crown to spend a greater sum in the long run, although still not as much as the owners wanted. But no counter-offer was forthcoming. It may be that the owners were waiting in hope that there would be a new Government returned in the general election at the end of 1963. If so, they hoped in vain.

In the meantime, the Hamilton Commissioner of Crown Lands wrote to the Director-General again in December 1964, emphasising a new threat to the national park arising from the ring of Maori land around the lake. The Te Urewera National Park Board was anxious to prevent buildings springing up around the lake, but now a number of 'huts' had been built, some on this ring and others on the Maori reserves. The park board wanted the Government to resolve matters so that these huts could be removed.[709] On 22 December 1964, the new Director-General, RJ MacLachlan, replied to the commissioner, advising that the park board's concerns had been referred to a recent meeting of the National Parks Authority. The Authority agreed that buildings around the lake would be:

> most undesirable and that the land in question should be added to the Park if at all possible. It resolved that as a matter of policy, steps should be taken to acquire the reserves and the lake bed as soon as practicable.[710]

MacLachlan noted that there were legal restrictions on the Waikaremoana reserves, which could not be leased, but that there was nothing to stop the Maori owners from leasing or building on the ring of Maori land around the shores of the lake.[711]

This situation spurred the Government back into action in 1965.[712] MacLachlan wrote to Wiren that the Government was still waiting for a counter-offer. He suggested that the Crown was 'most anxious to conclude a sale'.[713] In 1962, the Crown had accepted that Maori

708. Walzl, 'Waikaremoana' (doc A73), pp 457–458; Minister of Lands to Minister of Maori Affairs, 8 July 1963 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 833)

709. Walzl, 'Waikaremoana' (doc A73), p 458

710. Director-General to Commissioner of Crown Lands, 22 December 1964 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 830)

711. Director-General to Commissioner of Crown Lands, 22 December 1964 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 830)

712. Walzl, 'Waikaremoana' (doc A73), pp 458–459

713. Director-General to Wiren, 4 March 1965 (Walzl, 'Waikaremoana' (doc A73), p 459)

did not want to sell their reserves but now it exerted new pressure to acquire the reserves as well as the lakebed in one negotiated arrangement.

MacLachlan met with Wiren in March 1965, soon after this renewed approach from the Crown. The owners' lawyer suggested that the Crown should arrange formal meetings of assembled owners for the lake and the various reserves, as well as a special GV of the reserves. In his view, the old valuation of £2000 was far too low, but the owners might be willing to consider a sale if annuities could be arranged for the reserves as well as the lake, all being paid to the same Waikaremoana trust board.[714]

In May 1965, the Crown had to face some challenging issues if it were to break the deadlock. Ministers and officials had been adamantly opposed to a Taupo-style annuity ever since negotiations began in 1957. Was it time to reconsider this approach? In 1962, the Lands and Survey Department had contemplated a *temporary* annuity that would give the owners a greater sum, more affordable for the Crown because spread over 17 years. But this idea had gone nowhere. Now, in May 1965, MacLachlan advised Treasury and the Maori Affairs Department that the Crown was unlikely to be able to acquire the lake unless it gave in on the question of an annuity.[715]

On the other side of the deadlock, the Te Urewera National Park Board tried a direct approach to the Maori owners, seeking to persuade them to come to terms and sell the lakebed. The board believed that there was common ground in the Maori people's desire to preserve and protect their taonga, the lake and its environs, and the Crown's wish to add the lake and reserves to the national park. Tama Nikora and Reverend Laughton (members of the board) held a hui with a large number of owners at Waimako Pa in May 1965, to 'explain why the board held it to be necessary to include lake and reserves in the park if the owners wanted them to be reserved for all time'.[716] They reported back to the park board that they 'had been given a very difficult hearing':

> The owners replied that they had been willing to hand over the lake 15 years ago and had stated their terms but had heard no more since; meanwhile the Government, Tourist Department, Electricity Department and general public had all been using the lake as they wished. The reserves were a separate matter and they were not prepared to discuss their transfer until the matter of the Lake had been settled. They saw no reason why the terms should be any different from those under which the Rotorua and Taupo lakes were transferred. They did not want a lump sum payment as there was a danger it could be eroded away even under a Trust; they wanted a fair annual payment in perpetuity.[717]

714. Walzl, 'Waikaremoana' (doc A73), p 459

715. Director-General to Secretary to the Treasury, copied to Secretary of Maori Affairs, 26 May 1965 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 824)

716. Cecilia Edwards, 'Selected Issues: Te Urewera National Park, Thematic Issue 33', report commissioned by the Crown Law Office, February 2005 (doc L12), p 81

717. 'UNP board minutes', 5–6 May 1965 (Edwards, 'Selected Issues: Te Urewera National Park' (doc L12), p 81)

On 29 June 1965, Wiren wrote to MacLachlan, asking why nothing had been heard from the Government since the March 1965 meeting. On his understanding, the owners were awaiting a new offer from the Crown at a meeting of assembled owners, at which tikanga required them to reach a unanimous decision. He pointed out that the owners remained determined that they would not accept a lump sum, because it would result in 'smallish payments to a large number of owners and much of the money would inevitably be put to more or less useless purposes'. At the March 1965 meeting, Wiren had understood that the objection to an annuity came from Treasury, and that MacLachlan was going to pursue this matter and see if the objection could be removed. Wiren said that the lake involved a whole tribe and – in similar situations – trust boards had been created for other tribes. He made it clear that the next move was the Crown's; the owners would not be coming up with a new offer to the Crown.[718]

In the meantime, the Commissioner of Crown Lands (who chaired the park board) had suggested uncoupling the lake and reserves, dealing with the lakebed first. In July 1965, the Lands and Survey Department agreed to that idea, and had a concrete proposal ready to put to Treasury. Going back to the last official owners' position, MacLachlan suggested to Treasury that an annuity of £3250 was too high because it meant the lake had a capital value of £65,000. Instead, he recommended that the Government give way over payment of an annuity while sticking to £30,000 as the value of the lake. The Government should call a meeting of assembled owners and offer £30,000 cash or an annuity of £1500 a year (5 per cent of £30,000).[719]

This proposal shows at least some shift within Government towards a compromise. MacLachlan was willing to separate the lake and the reserves and to agree to an annuity, although his figure was virtually the same as before and was still far below the Maori owners' expectations. By the end of August 1965, there was a further shift: Treasury agreed that an annuity could be paid 'if this proves to be the only alternative'.[720]

But Walzl points out that, for unknown reasons, nothing happened then for six months. It was not until March 1966 that MacLachlan approached the Secretary for Maori Affairs with a proposal to call a meeting of assembled owners.

MacLachlan's 1966 memorandum made the by-now usual points that the Government did not need to own the bed for hydroelectric purposes and that any claim for injurious affection would be small, and made comparisons with other lakes. The Director-General summarised the well-rehearsed arguments about hydroelectricity, although – seven years on from the 1958–59 debate – there was less certainty that raising and lowering the lake had minor effects:

718. Wiren to Director-General of Lands, 29 June 1965 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 821)

719. Director-General of Lands to Secretary to the Treasury, 16 July 1965 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 820)

720. Director-General of Lands to Minister of Lands, 31 August 1965 (Walzl, 'Waikaremoana' (doc A73), p 460)

> At one time enquiries were made from the Electricity Department on the value of ownership of the lake bed for hydro electric purposes. The sole right to use water for electricity generation has been vested in the Crown since the Water Power Act 1903 subject only to payment of compensation [for injurious affection]. In the case of Waikaremoana *apart from variation of the levels from time to time the injurious affection has not been great* and there had been no formal claims for compensation. There has not been great interference from a permanent occupation point of view as only a small area of the lake bed is occupied by the intake structures. It was not possible to arrive at a value for the lake on the basis of cost of generating power from it in relation to the sale of electricity because revenue from power sold by the Department is in general only sufficient to meet costs and service capital investments. [Emphasis added.][721]

The impetus for acquiring the lake therefore came from the national park:

> It is felt that a large lake such as Waikaremoana should be in Crown ownership in view of its situation within the Urewera National Park, its use for recreational pursuits and its scenic attractions. All the other major lakes within New Zealand are in Crown ownership. I think it is generally accepted among the owners that sale to the Crown is the proper course to follow and the question then arises of what the price should be.[722]

In making this statement, MacLachlan may not have been aware that Wiren had earlier mentioned a lease, or the owners' view that an annuity would go some way towards retaining their permanent link with the lake by providing ongoing recognition and benefit. In any case, MacLachlan noted the owners' preference for an annuity and indicated a major shift in the Crown's position. The Crown would not suggest an annuity itself because there might be individual owners who had a use or need for their share. But if the owners at the meeting wanted an annuity then the Crown could agree to it as a last resort. The price would be increased from £28,000 to £30,000 because 'some time has passed' since the last offer was made. But, as always, MacLachlan noted that there was no real way of valuing a lakebed (even by comparison to other lakes). This purchase offer worked out at almost £2 10s an acre, which he thought was 'not ungenerous'.[723]

The Maori Affairs Department put this proposal to the Board of Maori Affairs in April 1966. The paper to the Board specified that if the Maori owners insisted on an annuity, then the Crown would make an offer of £1500 a year at the meeting, 'which is equivalent to a

721. Director-General of Lands to Secretary for Maori Affairs, 4 March 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 811)

722. Director-General of Lands to Secretary of Maori Affairs, 4 March 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 811)

723. Director-General of Lands to Secretary of Maori Affairs, 4 March 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 811–813)

lump sum payment of £30,000'.[724] On 7 April 1966, the board agreed to call a meeting of assembled owners to consider the Crown offer to purchase the lakebed for £30,000.[725]

Hanan and Gerard met with officials in June 1966 to discuss the Government's strategy for the meeting of owners. The Ministers had indicated their willingness to attend this meeting but officials persuaded them not to do so because it would 'give the owners the opportunity of raising various outstanding grievances and could put Government in a position of having to close a deal which could better be negotiated independently [that is, in its own right, without the other grievances having to be addressed]'. Instead, Secretary McEwen and F T Barber of Lands and Survey would represent the Crown.[726] In the event, this left the meeting vulnerable to influence by Opposition members of Parliament, as we shall see.

In terms of the annuity, a new issue was raised in this era of growing inflation: 'It was generally agreed that a cash offer be made to the Maoris and that this would be more advantageous than an annuity which would lose its worth through depreciation over the years'. If the owners still wanted a trust board, Hanan could consent to their investing the lump sum in land or some other investment 'so that they would have the benefit of the capital increment in the future'.[727] The risk of inflation appears to have been introduced as an argument for the Crown to use in combatting the owners' request for an annuity. Methods were available for inflation-proofing an annuity (see chapter 19), but there was no discussion of how such methods might be used to protect the owners' interests. In other words, this was a tactic rather than a concern; the Government still wanted to avoid an annuity if it possibly could.

The meeting of assembled owners took place on 16 November 1966. More than 150 people attended, of whom 72 were confirmed as owners.[728] Going into the meeting, officials expected to be able to gain agreement and were prepared to go up to £35,000, which they thought would suffice.[729] As a result of 'inquiries made privately' before the meeting, they believed that the owners would settle at that sum. But in the opening speeches, Sir Eruera Tirikatene advised the owners that £30,000 was 'quite inadequate' for their beautiful lake and they should 'demand something very much higher than that'.[730] In his view, they should

724. Board of Maori Affairs, 'Proposed Acquisition of Maori Land by the Crown', 7 April 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 808)

725. Walzl, 'Waikaremoana' (doc A73), p 461

726. 'Notes of meeting in the office of the Minister of Maori Affairs 9.15 am 15.6.66', 16 June 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 806)

727. 'Notes of meeting in the office of the Minister of Maori Affairs 9.15 am 15.6.66', 16 June 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 806)

728. Secretary to Minister of Maori Affairs, 13 December 1966; F T Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 783, 789)

729. Walzl, 'Waikaremoana' (doc A73), p 461

730. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 783)

hold out for a six-figure price.[731] Although Sir Eruera left the meeting temporarily after that, Secretary McEwen reported that 'it was apparent that his remarks had carried a considerable amount of weight with the owners'.[732] Already, the Crown's new strategy was in trouble.

F T Barber opened for the Crown, stating that all other major lakes in New Zealand were publicly owned, and that Lake Waikaremoana should be added to the national park. He also advised that the Crown would pay an annuity if required but that inflation could make it worth a lot less within five or six years.[733] This meeting was the first time the Crown put forward the idea that inflation could soon render an annuity valueless. Officials suggested that the Waikaremoana owners follow the example of Whakatohea, and use the lump sum payment to buy a successful farm, administered through a trust board.[734]

Barber's opening speech was followed by a debate of the matters at issue. Although pressed by Matamua and Carroll, he refused to explain exactly how the Crown had arrived at the figure of £30,000. Barber did confirm that it included compensation for past use.[735] There was discussion about the significance of using the lake for hydroelectric purposes, and the Crown's position that it did not need to pay for doing so (because of its statutory right as sole user).[736] The Maori owners, on the other hand, wanted royalties for electricity as part of their annuity.[737] Although it is not recorded in the minutes, Barber's explanation apparently included an assertion that the water belonged to the Crown. Reverend Rangiihu disputed this point, arguing that Barber's 'reference to the water in the lake belonging to the public was incorrect as this was contrary to the Treaty of Waitangi'. Rangiihu added that, in any event, 'the best prospect for the owners would be to obtain an annual payment in perpetuity.' Barber replied that he was authorised to consider an annuity if that was what the owners wanted. Also, the Commissioner of Crown Lands suggested that the whole public had paid (indirectly) for the Waikaremoana electricity scheme and so it belonged to everyone. Barber claimed that the future use of the lake was limited for electricity purposes and its great value was as a public amenity. Assurances were given that the lake would be included in Te Urewera National Park and would not be developed.[738]

731. F T Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 789)

732. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 783)

733. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1405)

734. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 783)

735. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1405–1406

736. Barber's speech notes, section entitled 'Value for Hydro Electric Purposes', undated (November 1966) (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 795)

737. 'Maoris Refuse £30,000 for Waikaremoana Bed', *Hawkes Bay Herald-Tribune*, 23 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 787)

738. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1406)

Also important was what happened in the lunch hour. The officials had a private talk to Sir Turi Carroll, who asked them if the Crown would go up to £35,000. Lands and Survey officials replied that it would do so. Carroll thought that there was 'some prospect' of getting agreement at that amount.[739] But in the meantime, Sir Eruera Tirikatene had returned, bringing Norman Kirk, the Leader of the Opposition. They asked to address the hui without the Crown representatives present.[740] There is some disagreement about what exactly Kirk said to the owners. Mr Walzl suggests that the Leader of the Opposition promised them a higher payment if his party became government.[741] Secretary McEwen, however, understood that Kirk was asked this question by the owners 'but that Mr Kirk was not prepared to commit himself'.[742]

Nonetheless, there was no prospect of agreement, even at a higher price of £35,000. When the officials returned to the meeting, they were advised that the resolution (sale to the Crown for £30,000) would be formally rejected. But the owners were not giving up. They intended to appoint a steering committee to negotiate with the Crown. Officials considered asking the owners for a counter-offer at once but were advised against this by Sir Turi Carroll. McEwen believed that this was good advice because 'if we did so at this stage, the answer would be up among the stars'.[743] In his notes of the meeting, Barber recorded:

> We had learned from various sources during the luncheon recess that there was no hope of settlement at under £60,000 possibly a figure between that and £80,000. I personally do not think there is any hope of acquiring the lake at less than £60,000. It is hard to justify this offer but the price will go all the higher the longer we leave the matter.[744]

There was another aspect to consider, however, and that was the question of the owners' continued connection to the lake. How was this to be provided for? Could a way be found to provide for the needs and interests of both parties? The Commissioner of Crown Lands reported to MacLachlan on 29 November 1966 that he had been informed that:

739. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 789)

740. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 789)

741. Walzl, 'Waikaremoana' (doc A73), pp 462–463

742. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 783)

743. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 784)

744. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 790)

had we asked them to reserve this land as part of Urewera National Park in such a manner that the Maori people were not having all their ancestral ties (if any) severed completely from it[,] we would not have met with any opposition on cost.[745]

The method discussed by the owners at the meeting (outside the formal proceedings) was a section 439 trust. They were willing to consider putting such a trust under the control and administration of the park board (presumably because of their informal representation on and influence in that board). The disadvantages, from the Crown's perspective, were that a section 439 reservation could later be revoked by the owners, and it would be inalienable – that is, the Crown had no hope of eventually purchasing the lakebed while it remained in such a trust. Legislation might be needed to create a special trust more in keeping with the Crown's longer term interests. But either way, a section 439 trust or a specially-legislated trust, the commissioner thought that this kind of solution might remove difficulties over price.[746]

MacLachlan replied in December 1966 that he was happy to discuss either of these possibilities with the steering committee, but that the next move and initiative needed to come from the committee, not the Crown. He seemed annoyed by the outcome of the meeting, suggesting that it had only been called because of 'persistent pressure from representatives of the owners'; the ball was now firmly back in their court.[747]

The key issues seemed as far away from resolution at the end of 1966 as they had been at the end of 1961. The Crown's offers had inched up from £25,000 to £28,000 to £30,000, but were still less than half of what the owners wanted. The Government was finally willing to consider an annuity but only as a last resort, and the annuity it was willing to consider (£1500) was very low. There was no intention of making it inflation-proof. The Government had given no serious thought to making an arrangement that protected (or enhanced) the owners' links with their taonga, although this was known to be a serious issue for them since at least 1961, when Wiren raised it. Nor had any thought been given to the many representations about the owners' poverty, or of the benefits of a Maori-controlled trust to the owners.

Throughout, the Crown's main considerations seem to have been the protection of its hydroelectricity scheme, and keeping the price as low as feasible while still obtaining the lake. The Crown and Maori owners held irreconcilable views as to whether payment should be made for use of the lake to generate electricity. Every offer since 1961 had included compensation for other past uses, yet the Crown seems to have had no problem about continu-

745. Commissioner of Crown Lands, Hamilton, to Director-General, 29 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 786)

746. Commissioner of Crown Lands, Hamilton, to Director-General, 29 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 786)

747. Director-General to Commissioner of Crown Lands, 8 December 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 785)

ing to use the lake for free in the meantime with no apparent end in sight. Where there was concern within government, it was mainly about actions that the Maori owners might take – especially in the courts – to stop the Crown's use of the lake. The Government made no attempt to negotiate an interim arrangement so as to respect the legal rights of the Maori owners until agreement could be reached.

It must have seemed in December 1966 that the deadlock might carry on for another decade. But there was growing incentive for the Crown to compromise. As Tony Walzl explained it:

> Despite there being little reason for hope [by the end of 1966] that the negotiations would be successfully concluded, a collection of events associated with the National Park and the increasing awareness of the nature of Maori rights of ownership placed pressure on Crown officials to accept a compromise. Compared with earlier negotiations, this process occurred over a comparatively short timeframe, such were the influences which came into force.[748]

Even so, the negotiations took another five years to complete. We explain why in the next section.

20.8.5 Negotiation of a settlement, 1967–1970

(1) *The deadlock is broken, November 1967*

In 1967, the negotiations deadlock was finally broken when the Crown and the Maori owners agreed on a method for establishing the value of the lake. As Mr Walzl notes, there was growing pressure on the Crown to find a new way forward at this time. In December 1966, the Marine Department discovered that it could not enforce boating regulations on the lake, and that there was in fact no public right of navigation on Lake Waikaremoana. The Crown Law Office supplied the Marine Department with a legal opinion to that effect on 8 December 1966:

> Because the level of the Lake has been drawn down by the use of the water for the hydro-electric power stations there is a margin of dry land round the Lake which is included in the Maoris' title. There is no public right of navigation on the Lake unless the Maori owners have in some way granted such rights, and there is no evidence that they have done so . . .
>
> Even if there were a public right of navigation it seems that boat owners would have to cross privately owned land in order to obtain access to the water. The position seems to be that persons boating on the Lake are probably in law trespassers. At best they would appear to be licensees of the Maori owners who do not seem to attempt to exercise any control over the use of the Lake for boating and seem to permit boating without restriction.[749]

748. Walzl, 'Waikaremoana' (doc A73), p 464
749. E Rockel to Secretary for Marine, 8 December 1966 (Walzl, 'Waikaremoana' (doc A73), p 464)

E Rockel, the Crown counsel who wrote the opinion, concluded that the Marine Department had no authority to make regulations concerning navigation on the lake.[750]

The Secretary for Marine was 'rather disturbed' to discover that Waikaremoana was a 'private lake' and that there was no public right of navigation. The Motor Launch Regulations 1962 did not apply, and anyone boating was probably trespassing. Given the importance of this as a public safety issue, the Marine Department considered opening negotiations with the Maori owners to come to some arrangement about navigation and boating. Officials from Lands and Survey, however, were worried that this might prejudice the Crown's negotiations to purchase the lakebed. Presumably, their concern was that highlighting the owners' rights in this way (and negotiating separately on the issue) might complicate matters and drive the price up, although this was not stated openly. After discussions between officials from the two departments, the Marine Department agreed to take no action and 'let sleeping dogs lie'.[751]

The same approach had been taken back in 1961, when Lands and Survey sought to conceal the motor camp's encroachment on Maori land rather than acknowledging the owners' rights. A similar issue arose in October 1967, when the national park board wanted to erect a large complex beside the lake to serve as park headquarters. By now, of course, the park authorities were only too well aware of the strip of permanently dry Maori land around the lake. Everyone was anxious to ensure that the new building was not located on Maori land. But, as we described earlier, the Electricity Department had raised and lowered the lake with significant fluctuations before 1965, sometimes quite extreme. Officials were unsure where the outer boundary of the Maori-owned lakebed was located. Upon inquiry, there was no record of a particular lake level having been adopted as the official title boundary for the lake.[752] On the one hand, officials were anxious to avoid any publicity about this 'question of boundary definition', presumably for fear of alerting the Maori owners and drawing more attention to the whole question. On the other hand, the department decided that it needed to survey the lake shore to determine the official shoreline.[753]

While this matter was being debated within government, the committee of owners (appointed back in 1966) approached Sir Eruera Tirikatene's daughter, Mrs Whetu Tirikatene-Sullivan, member of Parliament, to see if she would help them reopen a dialogue with the Government.[754] Tirikatene-Sullivan had recently taken her father's place in Parliament at the beginning of 1967. She agreed to meet with the Waikaremoana owners in November of that year. Before doing so, Tirikatene-Sullivan approached the new Minister

750. Walzl, 'Waikaremoana' (doc A73), p 464

751. Secretary for Marine to Commissioner of Crown Lands, Hamilton, 3 January 1967; Commissioner of Crown Lands, Hamilton, to Director-General of Lands, 20 January 1967 (Walzl, 'Waikaremoana' (doc A73), p 465)

752. Walzl, 'Waikaremoana' (doc A73), p 465

753. Walzl, 'Waikaremoana' (doc A73), p 466

754. Minister of Lands to Whetu Tirikatene-Sullivan, 6 November 1967; Minister of Lands to Whetu Tirikatene-Sullivan, 10 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 778–780)

of Lands, Duncan MacIntyre, to find out what was happening on the Crown's side and for 'an indication of the amount Government would be prepared to consider as a just compensation'.[755] MacIntyre replied that the Government was still waiting for a counter-offer from the steering committee. Rather than commit himself as to a figure, the Minister recited the Government's view of the history of the negotiations, including that fact that it had been willing to consider paying up to £35,000 in 1966. This, he said, 'gives you some indication of the Crown's ideas of value'. He added that if the steering committee was willing to make a 'reasonable offer this will be carefully investigated by Government'.[756]

On the face of it, this response from MacIntyre was not promising. A year had gone by since the Crown's last offer had been firmly rejected, but government thinking had not moved past the top figure it had been willing to offer back in 1966. Officials knew that a figure of £35,000 was completely unrealistic. Barber had advised after the 1966 meeting that the Crown could not get the lakebed for less than £60,000.[757] Despite the growing incentives for the Crown to settle, it seemed as if the Government was stuck. If there were to be any kind of breakthrough, it would have to come from the Maori owners.

After meeting first with Tirikatene-Sullivan, a deputation of owners met with MacIntyre, McEwen, and Barber on 21 November 1967. Tirikatene-Sullivan introduced the owners, who were recorded in the official minutes as Messrs Matamua, Tawera, and eight 'other members of the Tuhoe Tribe', all residents of Tuai.[758] She then 'outlined the reasons for the deputation'.[759] This included the Maori owners' 'long-standing grievance' about the Crown's use of the lake without paying compensation.[760] After a meeting at Wairoa earlier in the year, the owners had resolved on a new course of action: they had 'come to a decision to ask for a Commission of Enquiry to be established to place a valuation on the Lake Bed'.[761]

In response, the Minister noted that at the last meeting with officials, the owners had rejected an offer of £30,000 and had appointed a steering committee to negotiate with the Crown. MacIntyre asked for confirmation that it was this committee which 'had now decided on the establishment of a Commission of Enquiry'. Tirikatene-Sullivan duly confirmed this. She added that the owners would require representatives on the commission

755. Minister of Lands to Whetu Tirikatene-Sullivan, 10 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 778–779)

756. Minister of Lands to Whetu Tirikatene-Sullivan, 10 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 779)

757. F T Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 790)

758. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25 am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775); see also hand-written notes of meeting, 21 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 776)

759. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

760. Hand-written notes of meeting, 21 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 776)

761. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

alongside government representatives, with an independent judge as chair (perhaps a Maori Land Court judge). MacIntyre responded that such a commission would 'probably have to start with a special Government valuation of the property'. He also asked McEwen and Barber if the officials had any objections to the proposed commission. They responded that they did not.[762]

Then, the official minutes of the meeting state: 'Mr Matamua eloquently put forward the feelings of his people on this subject and concluded by asking for such an independent tribunal', which was supported by Mr Tawera.[763] From hand-written notes, taken by one of the officials present, Matamua:

> recalled the unhappy state of his people almost with tears. Govt had known of his people's ownership since award in 1918 confirmed in 1944. No firm attempt to compensate . . .

Matamua suggested that a commission made up of six representatives of the owners and six government representatives should be chaired by a Maori Land Court judge. The owners wanted this commission to set compensation which the Government would then be obliged to pay.[764]

Barber then introduced the subject of the Waikaremoana reserves, asking whether they should be included in the work of the commission. Mr Matamua responded that the people wanted to retain ownership of these reserves but that there would be no objection to valuing them. After discussion of the reserves, the Minister:

> concluded by thanking the deputation and saying that he realised both sides were keen to arrive at a solution. He agreed to look at their proposal and to make a recommendation to Government that their wishes be met.[765]

After the deputation had left, MacIntyre held a private meeting with Barber and McEwen, at which it was agreed that the tribunal should consist of a Supreme Court judge or retired judge, as well as one assessor for the Maori owners and one assessor for the Government. MacIntyre and the heads of Maori Affairs and Lands and Survey also agreed that a submission should be prepared for Cabinet, proposing the establishment of this tribunal to 'fix the compensation award'. The Minister asked his officials to meet with the Valuer-General and arrange a valuation of the lakebed.[766]

762. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

763. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

764. Hand-written notes of meeting, 21 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 776)

765. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

766. Hand-written notes of meeting, 21 November 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 777)

This break-through ended the deadlock. The Crown and the Maori owners agreed that the lake should be valued by professional government valuers, after which a commission – with representatives from both sides, chaired by an independent judge – would set the figure to be paid. Although the second half of this agreement was never carried out, the Government did abide by the professional Government Valuation, which established that the Crown had significantly under-valued the lakebed in its previous offers.

(2) *The Government gets a special valuation, December 1967 – November 1968*

The November 1967 agreement was not followed by rapid progress. It took a year to get a special Government Valuation, and then another nine months after that before the Crown was ready to make the owners an offer. Potential stumbling blocks remained:

- the Government and the Maori owners did not agree on the composition of the proposed tribunal to set 'compensation';
- the relationship between the special government valuation (of present capital value) and compensation for past use was yet to be determined by the proposed tribunal; and
- it was still not clear how the owners' wish for a permanent, ongoing connection with and benefit from their lake could be reconciled with the Crown's desire for a one-off lump sum payment in compensation and to purchase the freehold of the lakebed.

We do not intend to explore the special Government Valuation in detail in this section. The details are a matter for section 20.9, where we consider the claimants' argument that the resultant lease (including the level of rent) was unfair. Here, we provide a brief outline, focusing on why it took a whole year to carry out the valuation, and how the results enabled the Crown and Maori owners to finally reach agreement in 1970.

Barber and McEwen met with the Valuer-General in December 1967. At this meeting, the officials debated how to carry out a Government Valuation of a lakebed. An assumption was noted that 'the waters of the Lake are owned by the Crown. The bed is vested in Maori owners.' Because of the activities of the Electricity Department, part of the bed was known to be dry land, some of it now occupied (with 'improvements') by the Tourist Hotel Corporation and the national park board. Fortunately, the departments agreed that it was possible for the Valuation Department to go ahead and value the lakebed. But the Valuer-General asked the Lands and Survey Department to get legal advice as to whether there were any court cases bearing on the valuation of a lake, and also to confirm that 'the legal situation was as we thought' (that is, that the Crown owned the water and Maori owned the bed.[767]

It took a couple of months to get this legal opinion. In brief, the Lands and Survey office solicitor, R Heenan, found that there were no relevant judicial decisions about how to value a lakebed. Also, although the solicitor took the view that Maori owned the water as well

767. 'Note for file: Lake Waikaremoana: purchase by the Crown', 5 December 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 773)

as the bed, his advice was that this should have no bearing on the valuation because the Crown had the sole statutory right to use the water for electricity. Hence, the special valuation should take no account of hydroelectricity. As Heenan understood it, the water was used for hydroelectricity after it had flowed out of the owners' lake, and they had no right to stop the water from flowing for that purpose because of the Crown's statutory rights. Therefore: 'It would appear that the owners could not claim any value in the water for its subsequent use for generating electricity but that they could prevent anybody using the lake for any other purpose, such as fishing.' Also, he confirmed that Maori still owned the exposed parts of the lakebed.[768]

After receipt of this legal opinion in February 1968 and discussion with the Minister, the Director-General finally made a formal request for a special Government Valuation of the lake on 26 March 1968. In doing so, he set parameters for the valuation:

- the Maori owners owned the whole of the bed (including the now permanently exposed strips of dry land resulting from the lowering of the lake);
- the Maori owners – in view of 'the fact that I have no evidence to the contrary' – also owned 'the waters of the lake' but this had no relevance for the valuation, at least as far as hydroelectricity was concerned, because the owners had no legal right to stop the Crown using the water for electricity generation, and could 'not claim any value in the water for its subsequent use for generating electricity';
- the Maori owners had the right to 'prevent anybody using the lake for any other purpose, such as fishing'; and
- the valuation should have regard to the Rotorua and Taupo lake settlements as precedents.[769]

Although the Valuation Department now had its instructions, it took another four months before it could get information from Lands and Survey as to the exact boundary of the lakebed. On 10 July 1968, the Surveyor-General advised that the legal limit of the lake was its maximum pre-1946 level (according to usual seasonal fluctuations, not unusual conditions). Thus, the 'boundary of the bed of Lake Waikaremoana should be the 2020 feet contour'.[770] This meant that the ring of permanently dry land extended to a line 15 feet above the water of the lake (from 2006 feet to 2020 feet).

On 24 July 1968, Mrs Tirikatene-Sullivan wrote to inquire what progress had been made since the meeting in November 1967. There was a flurry in the Lands and Survey Department in response. One official suggested that a 'hurry up' be given the Valuation Department 'and anyone else concerned in negotiation for purchase of bed of lake'. Officials were beginning to worry that the continued delays might result in the Maori owners selling off parts of the

768. Walzl, 'Waikaremoana' (doc A73), pp 467–468; R Heenan, solicitor, 'Lake Waikaremoana: purchase by the Crown', 8 February 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 762)

769. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 756)

770. Walzl, 'Waikaremoana' (doc A73), p 469

lake shore to private interests. They were also worried that the Waikaremoana reserves were vulnerable to alienation, and there would be an even longer wait to sort out the reserves because the Maori owners wanted the bed dealt with first.[771] In response to the 'hurry up', the Valuation Department stated that it was aware of the urgency but had been waiting for the necessary information about the exact boundaries of the lake, which the Surveyor-General had only just provided.[772]

The Minister replied to Tirikatene-Sullivan in August 1968:

> You will recall that when you introduced the deputation to me it was agreed that the first step was to obtain a special Government valuation of the Lake bed. The Valuation Department was requested to undertake this valuation. This was delayed on account of the need for up to date boundary definitions but the valuation is now in hand and I hope it will be completed very soon.[773]

It took nearly three further months to carry out the valuation itself, which was completed in mid-October 1968. In brief, the valuers ascribed just over half of the lakebed's value ($73,000) to the marketable parts of the ring of dry land around the lake. The submerged lakebed was held to be worth slightly less ($70,000), its value derived from fishing and other revenues (excluding hydroelectricity). Finally, a relatively small value was attached to the improvements that had been made on the bed ($4000). Again, hydroelectricity structures were excluded from that calculation, as were temporary buildings intended for removal (baches) and jetties. Thus, the present value of the lake was set at $147,000.[774]

Decimal Currency: Comparing the Values in Pounds and Dollars

In 1967, New Zealand switched from pounds, shillings, and pence to dollars and cents. In the old currency, there were 12 pence in a shilling, and 20 shillings in a pound. With the switchover to decimal currency, one shilling became 10 cents. Because there were 20 shillings in a pound, one pound became two dollars.

In his instructions to the Valuer-General in March 1968, Director-General MacLachlan stated that the Crown's offer in 1966 (£30,000) equated to $60,000. The special Government Valuation in 1968

771. Minutes on Minister of Lands to Whetu Tirikatene-Sullivan, July 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1109)

772. Minutes on Minister of Lands to Whetu Tirikatene-Sullivan, July 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1109)

773. Minister of Lands to Whetu Tirikatene-Sullivan, draft for signature, August 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1106)

774. Walzl, 'Waikaremoana' (doc A73), pp 469–472; Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1094–1100)

($147,000) thus valued the lake at more than twice what the Crown had offered in 1966. F T Barber reported in 1966 that the Maori owners wanted from £60,000 to £80,000, which would have put the value of the lake in dollar terms as $120,000 to $160,000. The upper limit here was higher than the 1968 valuation by only $13,000. At the 1966 meeting of assembled owners, Sir Eruera Tirikatene had suggested that the lake was worth six figures, which would have represented a sum of at least $200,000. Tirikatene's estimate was thus closer to the £100,000 sought by the owners back in 1959.

When we take inflation into account, it is possible to express the Crown's offers in 1968 dollars as follows:

Year	Crown offer	Value in 1968 dollars	GV in 1968
1961	£25,000	$64,626	$147,000
1962	£28,000	$71,177	$147,000
1966	£30,000	$67,181	$147,000

Calculated from the Reserve Bank of New Zealand's consumer price index inflation calculator, based on the quarter in which the Crown's offer was first communicated to the owners and the date on which the 1968 GV was completed. The calculator is located at: http://www.rbnz.govt.nz/monetary_policy/inflation_calculator/

After receiving the special Government Valuation, the Director-General of Lands forwarded it to his Minister a month later, on 12 November 1968. The proposal being put to the Minister was written by Barber on behalf of the Director-General, for MacIntyre to discuss with his Cabinet colleagues. Barber recommended that the Crown should once again approach the Maori owners. This time, however, the Crown might actually succeed, since it would be offering almost the top figure that the owners had sought back in 1966. Also, the Lands and Survey Department was now willing to consider a lease instead of buying the lakebed. This was a breakthrough on two of the major stumbling blocks.

Barber recommended four options for Ministers to consider:

- purchasing for a lump sum of $147,000;
- purchasing for $147,000 by means of a downpayment and instalments (with interest) over 10 years;
- a perpetual lease with rent at 5 per cent of unimproved value ($143,000); or
- purchasing by way of an annuity.

Barber was not sure how a value should be set for a permanent annuity, noting that it would not necessarily be appropriate to pay 5 per cent of Government Valuation for that purpose.[775]

Nothing was mentioned, however, about compensation for past use, which had been a component of all previous Crown offers. Nor was there any mention of convening the agreed tribunal to consider the Government Valuation (and any other factors) before setting the price or compensation. On the other hand, Barber knew that if the provisions of the Maori Affairs Act 1953 were followed, the transaction would end up in front of the Maori Land Court for confirmation, and that court might well require the Crown to offer more than the minimum (GV).[776]

We will return to issues of valuation in the next section. Here, we note Barber's explanation of the Crown's incentive to settle this matter and acquire the lakebed:

> The control of Lake Waikaremoana should be in the hands of the Crown so that its boating, fishing and scenic attractions will be preserved for the public for all time. The land outside the title boundary forms the major part of the Urewera National Park and the National Parks Authority is being prejudiced in its plans for the development of the Park because it cannot establish parking areas, conveniences etc. near the water's edge as these would be on Maori land. Furthermore if the Maori owners cared to exercise their rights of ownership they could stop all access to the lake.[777]

MacIntyre agreed with Barber's position but a Treasury report had not been sought as yet, and there would be no money to pay for a purchase until a sum could be set aside in the 1969 budget under Vote: Lands and Survey (Item: National Parks acquisition).[778] As it turned out, however, no further action was taken in the next six months, and no money was set apart in the 1969/70 budget, which might otherwise have accounted for the delay. In the meantime, the Minister remained concerned about the amount of temporary holiday accommodation being built around the lake, and further inquiries were made about it. It remained a factor in MacIntyre's view that there was an urgent problem to resolve.[779] He told Cabinet: 'Already elaborate tent camps and the first house boat have appeared on parts of the Maori title area.'[780]

---

775. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1092)

776. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1090–1093)

777. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, 'Waikaremoana' (doc A73), p 472)

778. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1093)

779. See correspondence, December 1968 to March 1969, in Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1079–1089.

780. Minister of Lands, memorandum to Cabinet, undated, ca 1968–1969 (Walzl, 'Waikaremoana' (doc A73), p 474)

In June 1969, the Minister of Lands made a formal submission to Cabinet. Mr Walzl observed that the submission was mostly a repeat of Barber's November 1968 paper, except that Treasury advice had been obtained. Treasury favoured outright purchase with the payment spread over 10 years, but without paying interest (which Barber had proposed). This was obviously the cheapest option for the Government but the Minister of Lands did not favour it because he thought that there was no way the Maori owners would agree to it. Walzl also notes that the major difference was a change in the value ascribed to the lake: 'it had been decided that the offer being made should not take into account improvements made by others'. So the proposed basis for a purchase price or annuity was dropped to $143,000.[781] We will consider this point further in section 20.9.

Also, MacIntyre introduced a new option (or, in fact, Fraser's preference from 1949 was reintroduced): swapping the lakebed for an equivalent value in Crown land. This does not appear to have been a very serious proposal:

> Consideration could also be given to the exchange of the lake bed for either undeveloped or developed Crown land of equal value, although at the present time I have no particular area in mind and the owners have not offered this as a possible solution.[782]

Having considered these various options, MacIntyre's recommendation to Cabinet was that the Crown should purchase the lakebed for $143,000, paid in instalments over 10 years with interest at 5 per cent a year. He hoped that this would enable the Crown to purchase the bed outright while still meeting the Maori owners' aspiration for 'payment spread'. He also recommended authorising an increase of 15 per cent in the price if necessary. His advice to Cabinet was that, because the lake was known to be such a 'desirable purchase', the owners might 'request a minimum price of valuation plus 15% in which case we might have to increase our offer to $164,450'.[783]

In his submission to Cabinet, the Minister emphasised that there was some urgency for the Crown to get this matter resolved. A visiting national parks advisor from the United States had suggested that New Zealand urgently needed to rationalise its park boundaries, with 'Lake Waikaremoana and the surrounding Maori land as the top priority'.[784] MacIntyre told his colleagues:

> Purchase of the lake bed has been mooted for some time and the longer it is deferred the more the price will escalate with the growing popularity of Urewera as the nearest national park to the greatest concentration of population in New Zealand. Delay in purchase will

781. Walzl, 'Waikaremoana' (doc A73), p 473
782. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1077)
783. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1076)
784. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1077)

also compound the problems as boating use of the lake goes uncontrolled. Already elaborate tent camps and the first house boat have appeared on parts of the Maori title area.[785]

MacIntyre sought Cabinet approval for two recommendations:

> Negotiations to purchase the bed of Lake Waikaremoana at a price of $143,000 with authority to increase this by up to 15% if the owners are not prepared to settle at a lower figure; payment to be by equal annual instalments over a 10 year period with interest on the balance outstanding at 5 % per annum and –
>
> The introduction of special legislation to authorise the transactions subject to the agreement of the owners to the sale.[786]

On 16 June 1969, the Secretary of the Cabinet advised the Minister of Lands that Cabinet had agreed to his recommendations. A file note dated 17 June 1969 recorded Cabinet approval and noted that the Minister wanted 'urgent action . . . he does not want it hanging on till end of year'.[787] MacIntyre was determined to get negotiations underway, even though there was no provision for the purchase in the 1969–70 budget, and any payment would need to wait until the new financial year.[788]

A month or so later, Jock McEwen, the Secretary for Maori Affairs, was opposed to any action so close to a general election. He was worried about a repeat of the owners' meeting in 1966, when – in his view – the Maori owners tried to get a better offer from Opposition Members of Parliament. But Barber insisted that the Minister wanted a meeting of owners no later than mid-September 1969, and that the meeting should go ahead 'irrespective of political considerations'.[789] As a result, a paper went foward to the Board of Maori Affairs in early August, which duly approved the Government's proposal to call a meeting of assembled owners. At that meeting, the owners would consider the Crown's offer to buy the lakebed at 'not less than $143,000', allowing room for negotiations up to the 15 per cent ceiling approved by Cabinet.[790]

MacIntyre advised Tirikatene-Sullivan of developments on 19 September 1969, describing the Crown's offer as $143,000 for 'the unimproved value of all the area within the title

785. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1077)

786. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1077–1078)

787. Walzl, 'Waikaremoana' (doc A73), p 474

788. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1077)

789. F T Barber, 'Note for file', 4 August 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1067)

790. Board of Maori Affairs, 'Proposed Crown Purchase of Lake Waikaremoana', July 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1066); Walzl, 'Waikaremoana' (doc A73), p 474

boundary'.[791] The owners, of course, were not to know that the Government was prepared to pay up to $164,450. Nor did they know that the options of a lease and an annuity had been put to Cabinet and rejected. What they did know was that this was an unprecedented offer, much higher than before and apparently derived from a professional valuation. They were not supplied with the valuers' report itself.

The meeting of assembled owners took place on 26 September 1969. We only provide a brief account here because we will be consider aspects of it further in the next section. Barber addressed the meeting on behalf of the Lands and Survey Department, telling the owners that the Crown wanted 'to have the Lake in public ownership as part of the Urewera National Park when it would be available to all the people of New Zealand – including the Maori people'. The Commissioner of Crown Lands, who also chaired the park board, told the meeting that the lake would become a reserve for the people of New Zealand for all time.[792] These statements were influential because the Maori owners wanted their lake preserved and protected.[793]

After Barber explained the details of the valuation, the owners asked for an adjournment. When the meeting was resumed, the owners voted unanimously to reject the Crown's offer. The owners then passed a resolution of their own to offer the Government a lease for 50 years with a perpetual right of renewal, backdated to 1957. We will consider the details in the next section. Here, we note that Sir Rodney Gallen, who became the owners' lawyer at this time, told officials that this alternate proposal would 'effectively give the Government control and at the same time Maori ownership would be retained'.[794] In response, officials replied that they had no authority to accept such a proposal. In 1966, the meeting of owners had preceded a Cabinet decision so that matters could be negotiated and the resultant deal taken to Cabinet, but that was not the case for the 1969 meeting. The owners then asked officials to refer their resolution to the Government for a response.[795]

The Government Valuation of the lake was the decisive factor both in Cabinet's June 1969 decision and at this September meeting of assembled owners. This was a 'game changer'. Tama Nikora explained how close the owners came to agreeing to the Crown's purchase proposal in 1969:

> The first major issue of disagreement was in relation to the sale of the lake. Some of the owners preferred to sell the lake and receive the proceeds of sale. Others were opposed to sale, but appeared resigned to a sale happening (as with Lake Taupo and the Rotorua lakes) as they could not see an alternative. In this respect I disagree with Sir Rodney Gallen's com-

791. Minister of Lands to Tirikatene-Sullivan, 19 September 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1063)
792. Walzl, 'Waikaremoana' (doc A73), p 474
793. Sir Rodney Gallen, brief of evidence, undated (doc H1), para 28
794. Walzl, 'Waikaremoana' (doc A73), p 475
795. Walzl, 'Waikaremoana' (doc A73), p 475

> ment [in his evidence to the Tribunal] that there was never any prospect that the owners would sell the land. I know for a fact that by 1969 [there] was a real possibility of a sale because the owners were moving in that direction. John Rangihau told me that he was concerned that the price of $143,000 was so high that it would not be possible to prevent a sale by the owners. It was only when John Rangihau put forward the idea of leasing the lake to the Crown in perpetuity in 1969 that there appeared to be a viable alternative to sale.[796]

The Crown was unaware that it had come close to succeeding. The Maori owners reached consensus, either before the meeting or during the break, and presented a unanimous position to the Government's representatives. On 10 October 1969, Lands and Survey officials advised their Minister: 'There is no possibility that the owners will agree to the Crown taking over the Lake on any other basis [than a lease].'[797] MacIntyre had already been prepared to accept a lease back in June, and he instructed his officials to prepare a Cabinet paper seeking approval for a lease. The Government, however, would want to negotiate the terms, especially the rent.

On 8 December 1969, Cabinet approved MacIntyre's recommendations for a perpetual lease, special legislation, and negotiations over rentals – but, for 'some unclear reason', as Mr Walzl notes, the owners were not informed until the end of April 1970.[798] After that, agreement in principle was reached at a meeting between officials and the owners' committee on 8 May 1970. We will consider the negotiations over the lease and the rental in the next section.

20.8.6 Our conclusions as to why it took the Crown so long to negotiate an agreement with the owners of Lake Waikaremoana

For an agreement to be reached, it took: 52 years from the Crown's appeal of the Native Land Court decision in 1918; 26 years from the Native Appellate Court decision in 1944; 21 years from Peter Fraser's opening of negotiations in 1949; and 16 years from the Crown's decision to give up on litigation and accept Maori ownership in 1954. For all those years, Maori had been the declared owners of the lake and the Crown had acted, in the words of claimant counsel, as if 'possession was nine-tenths of the law and it could proceed in treating the lake as its own'.[799] Counsel for the Wai 621 Ngati Kahungunu claimants argued:

> such dishonourable Crown conduct has denied to owners the economic, cultural and political leverage that would have been theirs since June 17 1918. Indeed it locked their asset up and left them with little choice but to make it available for national park purposes in 1971.[800]

796. Nikora, 'Waikaremoana' (doc H25), p 125
797. Walzl, 'Waikaremoana' (doc A73), p 475
798. Walzl, 'Waikaremoana' (doc A73), p 475
799. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 176
800. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 133

In this section of our chapter, we are concerned with the question of why it took so long to reach agreement after the Crown had decided to give up on litigation in 1954 and accept Maori title to the lake. The evidence outlined above shows some key points:

- Having opposed Maori title for 36 years (1918 to 1954), the Government decided in 1958 that it did not really need to own the lake after all. For some time after that, the Crown was ambivalent about the necessity of coming to any kind of arrangement with the Maori owners. Its overriding concern at first was the use of the lake for hydroelectricity. After much debate in 1958 and 1959, officials and Ministers agreed that hydroelectricity was not to be a factor in valuing the lake, or in compensation for past use. Also, the Government was quite certain that its legal position was unassailable; Maori could at most win slight damages in any action for trespass or 'injurious affection'. Gradually, however, the interests of the national park came to be seen as at risk, especially by the mid-1960s. This was not in itself enough of an incentive for a significantly higher offer to the Maori owners, although it convinced the Government that it must continue to pursue an agreement. Otherwise, negotiations might have lapsed for much longer after 1962.
- The Maori owners, on the other hand, wanted compensation for past, present, and future use of their lake by the Crown, including a component for hydroelectricity. They wanted to retain ownership if possible but were willing to relinquish individual ownership in favour of a tribal annuity that preserved an ongoing connection to (and benefit from) the lake. Their bottom line was a permanent annual payment to be administered by a trust board. They offered lower and lower sums in hope of obtaining agreement from the Crown, but never low enough to satisfy the Government.
- Positions that were developed in 1958 to 1959 essentially dominated government thinking for the next 10 years. The Crown remained opposed to an annuity or any arrangement other than outright purchase. Other options were not seriously considered until 1969, and even then Cabinet still stuck with outright purchase in its offer to the Maori owners. From 1961, the Crown was willing to include compensation for past use in its purchase offers (although not for hydroelectricity), but it remained convinced that the lake's monetary value came solely from the relatively low fishing revenues.
- Both sides acknowledged that it was hard to determine a fair value for the lake. From time to time, the Government referred to the possibility of an independent body, the Maori Land Court, determining the compensation, but this option was linked to a compulsory taking and so was not chosen.
- The Maori owners held out for a much higher price than the Crown was willing to pay. The professional valuation in 1968 showed that they had been right to do so. Before 1965, however, it was not clear how much marketable dry land there would be around the lake, because of the extreme fluctuations in levels (see section 20.7). At times, it seemed

that there would be a much wider strip of permanently dry land than proved to be the case by 1968. Regardless, the Government Valuation showed that even with its highest offer in 1966, the Crown was offering less than half of the value of the lake.

- The result was a deadlock, in which the Government continued to insist on outright purchase for a low lump sum payment, and Maori continued to refuse all such offers. The Crown, in its turn, refused all Maori counter-offers of an annuity. Breakthrough came in 1967, when the Crown and the owners agreed to a special commission to set a value for the lake, with a special Government Valuation as its starting point. Once the special GV established beyond doubt that the Crown had seriously under-valued the lake, the Government's offer in 1969 was finally raised to something that Maori might conceivably accept. When the owners continued to hold out for ongoing ownership and permanent benefit, in the form of a lease, the Government dropped its insistence on purchase and agreed to a lease, so long as it contained a perpetual right of renewal.

While agreement in principle (to a lease in perpetuity) had finally been reached by May 1970, the proposed commission of inquiry had not been convened, and there were still crucial issues to resolve about the valuation and rental, the questions of hydroelectricity and compensation for past use, and the terms of the lease and any validating legislation. We turn next to consider the negotiation of the lease and the claimants' concerns about the outcome in 1971, which they consider was unfair and in breach of Treaty principles.

20.9 Was the 1971 Agreement Fair in All the Circumstances, and Was it Given Proper Effect in the Lake Waikaremoana Act 1971? What Adjustments Have Been Made since 1971, and with What Results?

Summary answer:

Was the 1968 valuation fair?

The claimants were concerned about the focus on European property considerations in setting the value of a Maori taonga. We would agree if the purpose had been (as the Crown intended) extinguishment of all their rights by purchase, but in the event the result was a lease, in which Maori retained ownership of their taonga. We also accept that the value of 'improvements' was rightly excluded from the rental value. We note that the submerged part of the lake may have been under-valued – the valuers' concern on this point was not followed up. But, in our view, the key deficiency of the valuation was its exclusion of any value in the lake or its water for hydroelectricity. That was fundamentally unfair to the Maori owners of Lake Waikaremoana.

Were the negotiations conducted fairly?

The Crown and the Maori owners' committee negotiated an agreement in May 1970. We agree with the Crown that the negotiations were conducted fairly. The Maori owners proposed the terms (some of which were accepted), the Crown made some appropriate compromises, and the owners had access to legal advice. The owners' committee made informed choices. Nonetheless, we do not consider that the parties were negotiating on an even playing field. The Crown had acted as the owner of Lake Waikaremoana for decades without permission or payment, and had clearly been prepared to continue doing so throughout the 14 years of negotiation since 1957 – and presumably would continue to do so for as long as it would take to get agreement. The owners, in the meantime, were very poor and their bargaining power appeared slight; they were still not treated in any sense as the owners of Lake Waikaremoana, and had suffered that situation for decades. As we see it, they had little choice but to accept the Crown's position on key terms, such as the exclusion of payment for hydroelectricity, the rental value, and the backdating of the lease (to pay for past use), if they were to finally have their rights acknowledged and obtain some form of return on their 'asset'.

Was the negotiated outcome a fair one?

In our view, the Crown made appropriate (if belated) compromises when it agreed to a lease and to a rental in the form of an annual payment to a Maori trust board. It also agreed to 10-yearly rent reviews, external arbitration (if the parties disagreed about rent adjustments), and a rental set at 5.5 per cent (instead of its negotiating position of 5 per cent). In return, the Crown secured a taonga of immeasurable value for the Te Urewera National Park. Nonetheless, there were key flaws in the negotiated outcome. The evidence is that the Maori owners thought (and were advised by their lawyer) that the valuation was still too low. They agreed to it, however, for the sake of bringing this very long contest to an end. We think that was an appropriate compromise for the sake of reaching a lasting agreement with the Crown. But the owners were required to make some compromises which we think were excessive. First, the lease was based solely on the current GV with only a small component for past use (by backdating to 1967), which was a major departure from a position hitherto agreed between the parties – that the Crown should pay for its past use of Lake Waikaremoana. Secondly, although the claimants were prepared to compromise on past use (by backdating to 1957 instead of 1954 or even 1944, as they had earlier sought), they were asked to give up too much when the Crown insisted on 1967 as the date from which it would pay rent for using Lake Waikaremoana in the national park. This was fundamentally unfair, and was not a compromise on which the Crown should have insisted. Thirdly, as noted earlier, the exclusion of any payment for hydroelectricity was unfair. We do not, therefore, accept the Crown's position that the 1971 lease represented a full and final settlement of all the issues raised during the lengthy negotiations, and that no additional payment is required.

Was the negotiated agreement given fair and proper effect by the Lake Waikaremoana Act 1971?

It took 19 months to turn the May 1970 agreement into a lease and have it validated by the Lake Waikaremoana Act in December 1971. There was disagreement between the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants on the one hand, and the Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants on the other, as to whether the Act gave fair and proper effect to the negotiated agreement.

After reviewing all the relevant evidence, we accept the Crown's argument that the choice to vest the lakebed in the existing Tuhoe and Wairoa Maori Trust Boards was made by the owners' committee, not the Crown. While there was definitely a significant number of owners at the time who either did not know of this choice or did not understand its implications, the Crown was nonetheless obliged to give effect to the deliberate decision of the owners' chosen representatives. It did so in the Lake Waikaremoana Act 1971. The principal reason for the delay in introducing the Act was the length of time it took for the owners' committee and the Crown to agree on an appropriate mechanism for assigning the owners to one of the two trusts. We do not accept the argument put forward by some claimants that the validating legislation was used to circumvent their legal protections, such as vetting of the lease by the Maori Land Court. While we note the distress of some claimant witnesses about the current situation, it is a matter for the claimants to resolve and does not arise from any action or omission on the part of the Crown at the time of the negotiations. The difficulties of assigning individual owners in the lake bed to trusts at this time would have been avoided, however, had a community title to the lake itself been available to the court in 1918.

Have post-1971 adjustments changed the situation (and for better or worse)?

The 10-yearly rent reviews have resulted in periodic re-valuation of Lake Waikaremoana and consequent rent increases. As far as we are aware, the rent increases have been agreed between the parties and have not generated any fresh issues for the Tribunal. In the 1990s, the process of corporatisation provided an opportunity for the Maori owners of the lake to seek ownership of the Waikaremoana power scheme or – at the least – negotiate an agreement about the hydroelectricity structures on the lakebed. In the event, the power scheme was not privatised but rather was transferred to State-owned enterprise Electricorp and then to Genesis. But the Tuhoe-Waikaremoana Maori Trust Board and the Wairoa-Waikaremoana Maori Trust Board did succeed in negotiating an easement and licensing regime with Electricorp in the late 1990s. Thus, all claimant groups maintain that the Crown must pay them for the use of Lake Waikaremoana for hydroelectricity for the period from 1946 to 1998.

20.9.1 Introduction

As we discussed above, the Crown and the Maori owners reached agreement in principle about a lease in May 1970. Many of the trickiest issues were resolved at a meeting between the owners' committee and officials on 8 May 1970. At that meeting, the parties agreed to a lease in perpetuity, backdated to 1967, with a rental at 5.5 per cent of unimproved value, and with 10-yearly rent reviews. Nonetheless, it took over a year to negotiate the details. The lease was not signed until August 1971, after which it was validated by the Lake Waikaremoana Act in December 1971. This Act provided for the vesting of the bed of the lake in the Tuhoe Waikaremoana Maori Trust Board and the Wairoa Waikaremoana Maori Trust Board. It also made the rental an asset of the boards for the benefit of all beneficiaries, whether former owners of the lakebed or not.

For some of the claimants in our inquiry, their issues are with the Act rather than the lease. They argue that the lease agreement was not supposed to have resulted in a change of legal ownership or a general fund for the benefit of all the boards' beneficiaries.[801] The Crown, they say, breached the Treaty by failing to give proper effect to the lease agreement, and by dispensing with protections such as Maori Land Court confirmation of the lease.[802] Other claimant groups, including the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants, have no quarrel with the 1971 Act. In their view, the Crown simply carried out the deliberate choices of the owners' representatives.[803] All claimant groups, however, argue that the lease itself was unfair because the Crown refused to compensate them for its past use of the lake for tourism and National Park purposes, and also refused to pay for use of the lake for hydroelectricity. As a result, they see the lease and the rental as unfair.[804]

In the Crown's submission, the terms of the lease were:

- proposed by the Maori owners;
- arrived at by reasonable compromises;
- fair to both sides; and
- settled by the free and informed consent of the owners' representatives.[805]

While the Crown accepts that some owners misunderstood part of the agreement, which was to vest the bed in the legal ownership of the boards, it saw its responsibility as to give effect to the deliberate wishes of the owners' representatives.[806] Also, the Crown denies that

801. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 68–70
802. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219
803. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 30–31
804. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 134; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 73, 155
805. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9
806. Crown counsel, closing submissions (doc N20), topic 28, pp 10–11

there are any outstanding issues about its past use of the lake: the 'lease constituted a comprehensive settlement of lake issues, including that of the Crown's lake use prior to 1971.'[807]

We begin our discussion with the 1968 valuation, on which the rental was based.

20.9.2 The 1968 valuation

We discussed the 1968 valuation briefly in the previous section. Here, we provide additional detail about how the valuation was conducted, and the Government's response to some of the issues that it raised. These matters have great significance for the question of whether a fair rent was agreed as part of the lease arrangements in 1970 to 1971. The key issues here are:

- the concentration on European property values to the exclusion of Maori values;
- the exclusion of hydroelectricity from the valuation when the parameters were set in 1968;
- the possible under-valuing of the submerged bed, and the Government's response to the valuer's cautions on that point;
- the Government's decision in 1969 to exclude improvements from the capital value (or selling price) of Lake Waikaremoana, despite its legal obligation to offer Government Valuation as a minimum price; and
- the unexpected consequence that the Government Valuation resulted in rates being levied on the lakebed.

We deal with each of these issues in turn.

(1) *The use of 'European ideas of property' to the exclusion of Maori values*

Relying on the evidence of Belgrave, Deason, and Young, the Nga Rauru o Nga Potiki claimants have criticised the 1968 valuation for its limitation to 'English ideas of property.'[808] Belgrave, Deason, and Young suggested:

> The distinction between what Europeans valued in terms of waterways and Maori values was particularly problematic for this Lake because when valued according to these European assumptions the Lake had little to recommend it . . . The problem was that the issues discussed by the valuers were fundamentally linked to European ideas of property ownership and took no account of values associated with Maori use and ownership of the Lake that could not be reduced to economic value. Food collecting could be included, but ancestral association with the Lake could not.[809]

807. Crown counsel, closing submissions (doc N20), topic 28, p 2

808. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 203–204

809. Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: an overview report of issues relating to Ngati Kahungunu', report commissioned by the Crown Forestry Rental Trust, April 2003 (doc A122), p 74

In that sense, Lake Waikaremoana was undeveloped and had relatively poor fisheries. Yet no value was accorded its sacred sites, its conservation status, or its beauty.[810] Counsel submitted:

> The Claimants' difficulty was that the issues discussed by the Crown in regards to the valuation were fundamentally linked to selected English ideas of property ownership as expressed in the Valuation of Land Act 1951 and took no account of values associated with Maori use and ownership.[811]

We agree that this would have been a significant flaw if the valuation had been used to set a purchase price, in which the Crown negotiated compensation with the Maori owners not simply for what it believed it was acquiring but also for what they believed they were giving up. But this was not quite the case for the 1971 lease. The Crown was acquiring the use of the lake for the national park but the Maori owners were retaining their ancestral taonga. They were also, perhaps, gaining a new level of respect and protection for their values in connection with the lake, through formal recognition as its lessors. For these reasons, we do not think that this potential flaw in the valuation was a material point in our inquiry.

(2) *The exclusion of hydroelectricity from the valuation*

The claimants were also critical about the exclusion of hydroelectricity from the valuation.[812] As we discussed in section 20.8, government departments debated the question of hydroelectricity in 1958 and 1959. Their conclusion was that it was not possible to attach a monetary value to the use of the lake's water for power generation, and that the Crown's statutory right to use the water for that purpose made it unnecessary to do so in any case. This remained the Government's view from 1959 to 1967, when Barber and McEwen met with the Valuer-General to discuss how a Government Valuation might be carried out for a lakebed. As a starting premise, officials noted that 'the waters of the Lake are owned by the Crown. The bed is vested in Maori owners'. Barber agreed to get legal advice to confirm this point before formally requesting a valuation.[813]

In February 1968, the Lands and Survey office solicitor, R Heenan, supplied a legal opinion:

> Briefly my view is that the Crown does not own the waters of Lake Waikaremoana. I refer to *Johnston v O'Neill* (1911) AC 553 where in the course of several wordy judgements the following propositions were stated with authority:—

810. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 177
811. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 204
812. See, for example, counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 203.
813. 'Note for file: Lake Waikaremoana: purchase by the Crown', 5 December 1967 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 773)

(1) The Crown is not of common right entitled to the soil or water of an inland, non-tidal lake.

(2) No right can exist in the public to fish in the waters of an inland non-tidal lake.

Lake Waikaremoana is a non-tidal lake. The bed is vested in Maori owners and unless there are statutory provisions[,] the water while in the lake, would be in the ownership of the persons owning the bed of the lake or riparian rights.[814]

Heenan rejected the possibility that the Crown had acquired any riparian rights, but went on to conclude that Maori ownership of the water entailed no rights in respect of hydroelectricity:

S.306 Public Works Act 1928 provides '(1) Subject to any rights lawfully held, the sole right to use waters in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in Her Majesty.' It would appear that the prior rights referred to are rights to use the water for the purpose of generating or storing electricity, etc. and not subject to any prior rights of ownership of the water itself. While the water is in the lake the Maoris have complete ownership but have no right to stop the water flowing from the lake.[815]

Because of that section in the Public Works Act, it followed, in Heenan's opinion, that 'the owners could not claim any value in the water for its subsequent use for generating electricity but that they could prevent anybody using the lake for any other purpose, such as fishing'.[816]

In our inquiry, Crown counsel preferred the approach in *Halsbury* that water is unowned at common law, stating that Heenan's opinion 'was not a Crown Law Office opinion and is wrong in law'.[817] Here, the material point is that Heenan's opinion still held that no value (for the Maori owners) could attach to the use of their lake for hydroelectricity. After receipt of Heenan's opinion and discussion with MacIntyre, the Lands and Survey Department did not query Heenan's conclusions or refer the matter to the Crown Law Office. The Director-General advised the Valuation Department that he had sought legal advice, as requested, and that section 306 of the Public Works Act 1928 was applicable: 'It would appear that the owners could not claim any value in the water for its subsequent use for generating electricity'.[818] This position was accepted as authoritative for the purposes of the valuation.

814. R Heenan, solicitor, 'Lake Waikaremoana: purchase by the Crown', 8 February 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 762)

815. R Heenan, solicitor, 'Lake Waikaremoana: purchase by the Crown', 8 February 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 762)

816. R Heenan, solicitor, 'Lake Waikaremoana: purchase by the Crown', 8 February 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 762)

817. Crown counsel, closing submissions (doc N20), topic 28, p 25

818. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 756)

In the 1968 Government Valuation, the valuer recited section 306 and noted: 'No account can therefore be taken of the value of the water of the lake for the generation of electricity and this factor has been excluded from the valuation.'[819]

Gladys Colquhoun recalled that the Maori owners saw it very differently:

> how the hell can it be their water when we named it Lake Waikaremoana. When did they come and say this is their water? We told them if they felt that way to come and take their water off our lakebed; they said they had nowhere to put it; that was way back in the 1970s. When did they come and name it Lake Waikaremoana?[820]

(3) *The possible under-valuing of the submerged bed*

As we have noted, the use of the lake for hydroelectricity was specifically excluded from the Government Valuation. The exposed and submerged parts of the lakebed were calculated to have a sale value of $143,000. This value came from the commercial exploitation of fishing, boating, and 'scenic attractions'. Boating on the lake was not just for fishing or tourist recreation; the lake was also an important means of accessing difficult or impractical places otherwise for hunters and trampers, including commercial deer hunters, to get to. Net income from tourist operations, including Lake House and motor camps and motels, from fishing licences, and from boating was all taken into account and compared to other lakes.[821]

The valuer also noted that there were no New Zealand court cases relevant to determining the value of a lake. In his assessment, there was clearly a market for the Waikaremoana lakebed, whether as a whole or subdivided, and whether for purchase or lease. There would be a 'firm demand for the purchase and control of such an attractive private lake'. Hypothetical purchasers included private individuals, syndicates, organisations or local clubs, and the Crown itself (as a neighbour, giving the zoning of the lake as 'National Park'). Also, overseas interests 'desirous of obtaining control of remote and attractive sporting grounds' numbered among 'would-be purchasers'.[822] Thus, it was possible to determine a capital value or 'selling price' for the lake.

Having stressed that there were no agreed principles for valuing a lake in New Zealand, and the factors that he took into account, the valuer concluded that there were three separate sources of value:

- 'the value of the land now exposed and dry between 2006 feet and 2020 feet';

819. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1099)

820. Gladys Colquhoun, brief of evidence (doc H55), p 13

821. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1094–1099). The valuation was carried out by M R Mander, Supervising Valuer (Rural) of the Valuation Department. His valuation report was supplied to the Lands and Survey Department under the name of the Valuer-General.

822. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1098)

- the 'value of the residue of the lake area';
- 'the value of improvements.'[823]

In this subsection, we are concerned with the value of the submerged bed (estimated at 12,500 acres). This was assessed as earning net annual revenue from fishing and boating of $3500 per annum. The valuer noted that there were two 'major drawbacks to really good fishing in Lake Waikaremoana'. The first was that the deeper parts of the lake were unproductive in terms of fishing, and the second was that the lake level 'is subject to fairly wide fluctuations'. As we discussed earlier, the period of extreme fluctuations was over by 1968. The valuer stated that the lake was unlikely to exceed a maximum operating level of 2006 feet in future, but his report confirms that the modification of lake levels had had a significant impact on fishing (and therefore revenue from licences).[824] As Dr Cant's research team concluded, the lake's shallow zone, where the fish food and spawning grounds were located, had been significantly reduced by the permanent lowering of the lake (see section 20.7). In 1998, Electricorp accepted that fisheries in Lake Waikaremoana had been reduced but its proposed mitigation was to create 'angling opportunities' elsewhere in the Wairoa district, working with the Eastern Region of Fish and Game New Zealand.[825] Not only did this not help to compensate the Maori owners for the loss of fishing in their lake, it actually created new competition.

In any case, in 1968 the value of the fishing and boating revenue was capitalised at 5 per cent to give a total value of $70,000. The valuer then cautioned:

> It could be argued that due to the nature of this type of enterprise, 5 per cent is too low a capitalisation rate. However, it is considered that as this is a very moot question, any doubt regarding the capitalisation rate should be decided to the vendor's advantage.[826]

In other words, the valuer thought that capitalisation of the value of the submerged lakebed at 5 per cent might be too low – and if doubt was felt about this point, it should be resolved in favour of the Maori owners. As far as we can tell from the evidence available to us, the Government took no notice of this warning and did not resolve the question in favour of the owners. Nor were the owners advised of this point. Again, from the evidence available to us, the owners were not supplied with the valuer's report, and were not warned that the value of the lakebed may have been set too low.

---

823. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1099)

824. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1095–1096)

825. Electricity Corporation of New Zealand, 'Waikaremoana Power Scheme: Assessment of Effects on the Environment', April 1998, p 102; see also Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 86

826. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1099)

(4) *The exclusion of improvements from the Crown's purchase offer*

In his request to the Valuation Department, the Director-General asked for a valuation 'for the purpose of assessing a purchase price'.[827] In doing so, the valuer assessed improvements that had been made on the lakebed (excluding roads and the intake tunnel and siphons). Two park board huts at Marauiti and Te Puna were located below the 2020 feet boundary, valued at $3600. A boatshed belonging to the Wairoa Anglers' Association at Mokau was also sited on the lakebed, valued at $400. Thus, the value of improvements was set at $4000, and the total capital value estimated at $147,000.[828]

In his submission for the Minister of Lands, Barber summarised the main points of the valuation report but did not mention the idea that the value of the submerged bed might have been under-capitalised, or that any doubt should be resolved in favour of the Maori owners. He did, however, refer to the Crown's legal obligations to buy Maori land at a special Government Valuation, and in some cases at a special valuation plus 15 per cent.[829] Another requirement was that the Maori Land Court vet and approve purchases. The valuer's report had found that there was a market for the lake, involving several kinds of would-be purchasers. In that circumstance, Barber thought it 'likely that the Maori Land Court would request a minimum price of valuation plus 15% and this would raise the figure to $169,050. Negotiations could commence at $147,000'.[830] In terms of a possible lease, however, Barber suggested that the rent should be based on the unimproved value of the lakebed.[831]

After consultation with Treasury, the value of improvements was subtracted from the Crown's purchase offer. MacIntyre's explanation for this to Cabinet was that construction of the permanent buildings (the park board huts and the boatshed) had not been paid for by the owners. Other 'improvements' (baches and the like) would have to be removed once the Crown acquired ownership. Hence, the value of improvements should not be part of the purchase price: 'It is proposed to offer unimproved value only ie $143,000 as the major improvements were effected by the National Park Board and the others are unauthorised structures which will have to be removed.'[832]

827. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 756)

828. Valuer-General to Director-General, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1100)

829. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1091)

830. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1092)

831. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1092)

832. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1075–1076)

We note that Barber explained these points at the meeting of assembled owners, and there were no objections (then or later) to excluding the value of these buildings and using the unimproved value as the basis for a lease.[833]

(5) *An unexpected consequence of the Government valuation: the first rates demand and the question of who would pay the rates*

There was an unexpected consequence of the special Government Valuation in 1970. In November of that year the Wairoa County Council wrote to the Minister of Maori Affairs, noting that there was now a rateable assessment of the lakebed at $143,000. For the first time, therefore, rates would be levied on the lake in 1971. At the present rate, this would result in a demand of $8386 for 1971.[834] The rent, which was going to be $7865,[835] would not even cover the rates. The council wrote to ask the Minister whether rates would be paid on the lake and, if so, by whom? Would the Crown pay the rates as the future lessee? Would this be included in the lease negotiations? The council also made the point that rates remained unpaid on all the Waikaremoana reserves as well.[836] On 3 December 1970, MacIntyre replied that 'a clause exempting the area from payment of rates' would be included in the validating legislation for the lease: 'The question of payment of rates on this area is therefore resolved.'[837]

This was not, however, the eventual solution to the question of rates. Instead, it was a term of the 1971 lease that the Crown would pay rent to the owners, free of all deductions, and would pay 'all rates and charges associated with the land'.[838] Thus, the Crown as lessee agreed to pay the rates, in addition to its annual rental payments, thereby preventing the Maori owners from losing the whole of their rent in paying rates. We have no information as to why the Government's initial idea of a rates exemption was not included in the Lake Waikaremoana Act 1971.

20.9.3 Negotiating the rent and the terms of the lease

As we discussed above, the Crown's purchase offer was rejected at the meeting of assembled owners on 29 September 1969. The meeting was held at Wairoa and was attended by 200 people, including 68 owners and 12 proxies. One of those proxies was held by

833. Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1058–1059)

834. County Clerk, Wairoa, to Minister of Maori Affairs, 17 November 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1027)

835. Heenan, 'Lease of Waikaremoana', 6 July 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1035)

836. County Clerk, Wairoa, to Minister of Maori Affairs, 17 November 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1027)

837. Minister of Lands and of Maori Affairs to County Clerk, 3 December 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1025)

838. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 140)

Rodney Gallen,[839] who was elected a member of the owners' negotiating committee. Barber explained the Crown's offer to the assembled owners, including the valuation, and then the officials withdrew so that the owners could discuss the proposal. When the officials returned to the meeting at 1.30pm, they were presented with a series of decisions:

> (1) The Crown's offer to purchase had been rejected.
>
> (2) The Owners would not appoint the Maori Trustee as their agent to negotiate sale or lease to the Crown.
>
> (3) The Owners appointed a Sub-Committee comprising Sir Turi Carroll and 8 others (Secretary: Mr R G Gallen, Solicitor of Napier). This Committee was empowered to carry on further negotiations with the Crown along the lines of the next paragraph.
>
> (4) The Owners had, during the absence of the Crown's representatives, resolved that the Crown be offered a lease for a term of 50 years from 1957, the lease to contain the perpetual right of renewal with 10 yearly reviews of rental, the first of such reviews to be in 1977, the rent to be 6% of the Government Unimproved Value of $143,000.[840]

It is important to note that the Government Valuation assessed the present selling price or capital value of the lakebed, which had been adjusted downwards to the unimproved value only. But the value of the bed had only ever been one component of what were often referred to as negotiations for 'compensation'. As we explained in section 20.8, all the Crown's offers since 1961 had included a sizable component in payment for past use. The special Government Valuation, of course, was only supposed to be the first step in arriving at a value for the lake. The November 1967 agreement was for the final amount to be determined by a special commission, comprised of Government and owners' representatives and chaired by an independent judge. In Mr Walzl's view, the Government abandoned this idea because it was likely to increase the price that the Crown had to pay.[841]

The Maori owners did not raise the issue of a commission at the September 1969 meeting, but they did propose the backdating of the lease to 1957, the date at which these negotiations began. As at 1969, this would have involved the Crown in paying for 12 years' past use, which represented a significant compromise on the part of the owners. Previously, they had wanted the Crown to pay for past use from either 1944 (when its appeal was dismissed) or 1947 (when their titles were settled by the Appellate Court). The Government's approach in the 1960s was to accept that it should pay for past use of the lake, dating back to 1947. Now, however, Barber proposed 1967 (the date of agreement to obtain a special valuation) as the starting date for any lease. In his account:

839. Sir Rodney Gallen appeared as a witness in our inquiry. We heard his evidence on 19 October 2004 at our Waikaremoana hearing. When we address this evidence, we refer to the witness as 'Sir Rodney'. When, however, we are dealing with events and sources of the time, we refer to him as 'Gallen'.

840. F T Barber, file note, 6 October 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1057)

841. Walzl, 'Waikaremoana' (doc A73), p 472

> I told the meeting that I did not think the Government would accept the Owners offer, firstly because the valuation of $143,000 was an up to date one and the value in 1957 would be less. I further explained that if the Crown did accept this, it would be for the benefit of the whole of the New Zealand public. I considered that the rental, should a lease be accepted, must be reasonable. I welcomed the fact that a Committee of Owners had been appointed to negotiate and I suggested that a lease beginning in 1967 at a reasonable rental could be considered as a most likely solution. I explained further that in effect the type of lease proposed would require the authority of special legislation and I would ask Government to consider the proposition after some better arrangements for rent terms etc, were settled.[842]

The official minutes of the meeting state:

> Discussion ensued as to the valuation upon which the rental was to be initially assessed – it being pointed out that the 1957 Valuation could quite possibly be less than the current (1969) valuation as arrived at by the Crown. Mr Barber pointed out that the valuation was not specified in the new Resolution. Mr Gallen stated that in fixing the 1957 valuation this gave some recognition of the Committee's doubts about the valuation and it was an offer generously made. It would effectively give the Government control and at the same time Maori ownership would be retained.[843]

While the wording of these minutes is ambiguous, Gallen seems to have meant that the owners had doubts about settling at Government Valuation. Their offer of backdating only to 1957 (but at the 1968 value) was a generous way of resolving those doubts. In his evidence to the Tribunal, Sir Rodney explained that the owners hoped for a more favourable reception from Duncan MacIntyre than from previous Ministers, who had insisted on a purchase. MacIntyre, it was thought, 'might be more receptive to some other arrangement and in particular to taking a lease in favour of the then Urewera National Park'.[844] From the owners' perspective, the idea of a lease to (essentially) the national park board was influential in securing their agreement, because they wanted to preserve the lake and felt that the park was controlled by a board consisting 'largely of local people including representatives of the owners'. In Gallen's view, this was part of why the owners accepted a lease at less than what they believed was the lake's full value.[845]

At the 1969 meeting of owners, officials had authority to negotiate a purchase at up to 15 per cent above the unimproved value, but could not entertain a proposal for a different kind of alienation. Barber advised the owners that he had no authority to accept their counter-

842. FT Barber, file note, 6 October 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1057)

843. 'Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1059)

844. Gallen, brief of evidence (doc H1), para 9

845. Gallen, brief of evidence (doc H1), paras 10, 31

offer. Sir Turi Carroll responded that a lease was preferable to the owners foregoing title and was a genuine attempt to resolve the situation. If any negotiations were required, the owners had nominated a committee for that purpose: 'The Committee so authorised were Messrs Gallen, John Rangihau, Sir A T Carroll, Turi Tipoki, Canon Rangiihu, Aussie Huata, William Waiwai and Wiremu Matamua.'[846]

In October 1969, Barber reported the outcome of the meeting to the Minister of Lands, explaining his view that there was 'no possibility that the owners will agree to the Crown taking over the Lake on any other basis'. If the Minister agreed, Cabinet would need to approve entering into a lease, which would also require special legislation. But further negotiation would be necessary because the terms offered by the owners were 'not acceptable'.[847]

MacIntyre accepted Barber's recommendations and requested a short Cabinet paper, proposing a new Crown offer:

1. To accept a lease for 50 years with R/R [right of renewal].
2. RV [rental value] $143,000
3. Date of commencement 1.7.67
4. Rent to be reviewed every 10 years
5. Rent to be 5% or as a better bargaining basis to go up to 5½ %
6. Govt to sponsor legsn [legislation] to validate lease.[848]

Cabinet approved these proposals on 8 December 1969.[849] The Cabinet paper basically repeated what had been discussed by MacIntyre and Barber. It included the statement that there was no possibility of the owners agreeing to the Crown taking over the lake on any basis other than a lease. The Government had to compromise on this point: 'It is most desirable that the control of Lake Waikaremoana should be in the hands of the Crown and [therefore] a lease should be negotiated.' But a rental rate of 6 per cent was considered 'too high', although no reason was given. Also, MacIntyre noted: 'I have been informed the owners might settle for a term commencing in 1967.' No source was given for this information.[850]

As we noted in section 20.8, there was a four-month delay before the terms of the Government's offer were conveyed to the owners' lawyers on 27 April 1970.[851] On 8 May 1970, the Assistant Director-General of Lands and the Secretary for Maori Affairs met with

846. 'Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1059)

847. Barber for Director-General to Minister of Lands, 10 October 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1056)

848. F T Barber, minute, 22 October 1966 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1056)

849. Secretary of the Cabinet to Minister of Lands, 9 December 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1052)

850. Minister of Lands to Cabinet, [December 1969] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1055)

851. Director-General to Gallen, 27 April 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1051)

the owners' committee. For our purposes, this was a crucial meeting. The committee had been empowered to negotiate on behalf of the owners. At this meeting in May 1970, the Crown – having accepted a lease – won agreement to all of Cabinet's stipulations. The contested issues were the rental rate and the backdating of the lease: the owners wanted an interest rate of 6 per cent of the unimproved value and a lease backdated to 1957; the Crown wanted an interest rate of 5 per cent and a lease backdated to 1967. Cabinet had authorised officials to go up to an interest rate of 5.5 per cent but was not prepared (at this stage) to agree to what was already a compromise starting date from the perspective of the owners. As will be recalled from section 20.8, the owners had originally wanted the Crown's payment for past use to start from 1944 or 1947.

Our only documentary source for this meeting is a report prepared by the Assistant Director-General of Lands for his Minister. From his account, the owners began by renewing their request for a 6 per cent rental and a term beginning on 1 July 1957. The Assistant Director-General responded:

> the rental value was established in 1968 and the rental rate [ie, 5 per cent] was related to current interest rates. Backdating the commencement of the lease would involve a revaluation, and a lower rental rate, which would in the long term not be to the owners' advantage, as the rental rate would remain unchanged for 50 years.[852]

This led to a discussion on the method of fixing the rental value at the 10-yearly reviews. The owners wished to provide for arbitration if agreement was not reached, but accepted the officials' suggestion of using the Land Valuation Court 'as the final authority'.[853] After resolving that point, the Crown agreed to three of the owners' requests: to pay the expenses of the meeting (so long as agreement was reached about the lease); to preserve a right of access to the lake for the owners of the Waikaremoana reserves; and to pay the rent to a special trust board.[854]

Discussion then returned to the two sticking points, which were the rental rate and the backdating of the lease. The Assistant Director-General merely recorded: 'after further discussion agreed to grant a lease from 1 July 1967 at 5½ % rental – the terms approved by Cabinet'.[855]

We have the benefit of evidence from the late Sir Rodney Gallen, who was (we understand) the only surviving member of this committee at the time of our hearings. Sir Rodney

852. Assistant Director-General to Minister of Lands, 12 May 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1048)

853. Assistant Director-General to Minister of Lands, 12 May 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1048)

854. Assistant Director-General to Minister of Lands, 12 May 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1048)

855. Assistant Director-General to Minister of Lands, 12 May 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1048)

told us that the owners' representatives accepted a valuation and therefore a rental 'less than they believed the Lake interests were actually worth' for two main reasons. He described the first reason as:

> They felt ground down by what more than one elder said to me was nearly one hundred years of effort for which there had been very little response, or recognition. They wanted to bring things to a conclusion and actually get some return for the people. They felt that for the first time in many years there was some chance of achieving some recognition and they believed that once the lease was in place a true recognition of the worth of the Lake interests would follow on renegotiation of rentals under the lease in the future. They were worried that in view of the flat refusal of the Crown in the past to accept their concerns they would endanger a settlement if they sought more. This was not a good basis for settlement. But it reflected the historical frustration of the owners.[856]

The second reason was that there was a strong feeling that the lake was a 'sacred place of importance to the owners far beyond its monetary value' and that they wanted to see the lake and its shores preserved:

> There was a fear that individual owners despairing of ever receiving any return on their interests might be persuaded to sell or dispose of their shares to outsiders. There was also a worry that rates might be levied on an interest which could not yield a monetary return to pay these.[857]

As we have seen, the worry about rates was a valid one. The Wairoa County Council, having discovered that there was now a valuation in place for Lake Waikaremoana, did seek to levy rates in 1971 that were higher than the Crown's proposed annual rental.

Gallen's advice to the owners at the time was that:

> the value the Crown placed on the Lake Bed did not adequately take into account the true monetary value of the land. The lowering of the Lake level had made extensive areas of prime lakeside land free of water and available for possible use. There had already been, I was told approaches from interested parties to purchase land, but the owners did not wish to alienate it or to see such development.[858]

Also, in Gallen's advice to the owners, the value had been 'artificially reduced by planning, and restrictions occasioned by the proximity of the Park'. In his belief, the valuers:

> took the view that owners would not have been able to make private sales for development because development would have been prevented by planning considerations and the fact

856. Gallen, brief of evidence (doc H1), para 27
857. Gallen, brief of evidence (doc H1), para 28
858. Gallen, brief of evidence (doc H1), para 29

> that the Park was adjacent. I consider this distorted the true value of the land and this distortion reflected in the rentals both initially and subsequently. The fact that the owners wished to see the land preserved ought not to have reduced the value placed on it. Such money as has been available from rental has therefore in my view not represented the value return of the land and through the two trusts not benefited the owners to the full extent that it ought to have.[859]

As far as we are aware, the valuer's report was not supplied to the owners. In 1968, the valuer did consider that there was a private market for the lakebed, whether as a whole or subdivided. The zoning as national park was noted but the valuer considered that there would still be private interests wanting to develop such a desirable tourist asset, including overseas interests. More than half the unimproved value came from the areas of dry land which could be exploited commercially. On the other hand, as we noted above, the valuer was concerned that a 5 per cent capitalisation was too low to reflect the true value of the submerged bed, and this concern had resulted in no corrective action from the Government.

In terms of the issue of compensation for past use, Sir Rodney advised that this question was not actually discussed at the 1970 meeting. It was, of course, implicit in the owners' request for the backdating of the lease to 1957. Sir Rodney's point was that neither the owners nor the Crown understood that past use had been included in the deal – except, we presume, for the three years back to July 1967. Nor was hydroelectricity discussed, although it remained part of the owners' concern that the lake had been under-valued, despite the professional exercise undertaken in 1968.[860]

The negotiation between the owners' representatives and the Crown at this May 1970 meeting was exactly that: a negotiation, and a culmination of negotiations that really began in 1949. Both sides gave up some of their key positions. The Crown compromised on the following points:

- a lease instead of an outright purchase;
- an annual payment to a trust board;
- a rental rate of 5.5 per cent of unimproved value (instead of 5 per cent);
- ten-yearly rent reviews;
- backdating of the lease (but only for three years); and
- a rental value of more than double the value that it was previously prepared to accept, prior to the special Government Valuation.

The Maori owners' compromises included:

- a lower rental rate (5.5 per cent instead of 6 per cent)
- a lower valuation than they felt was fair, especially because hydroelectricity was excluded but also for other reasons; and

859. Gallen, brief of evidence (doc H1), para 30
860. Gallen, brief of evidence (doc H1), paras 32, 58

- only three years' compensation for past use instead of 13 years (their negotiating position) or 23–26 years (their pre-1970 position).

While we accept that compromises are necessary in negotiations, we will consider the Treaty implications of the process and outcomes in section 20.11.

According to Tama Nikora, the owners never accepted that the Crown should not pay for its use of the lake for hydroelectricity. Rather, this issue was shelved to be fought again another day. As Gallen noted, the lease was conceived as a lease to the park board for national park purposes – indeed, so prominent was this aspect that the board became a party to the lease, even though it was not technically the lessee. Mr Nikora told the Tribunal:

> When the lease of the lake was negotiated with the Crown between 1969 and 1971 the lake was leased for National Park purposes. It was not leased for hydro electricity purposes. The valuation provided by the Crown to set the lease rental took no account of the use of the lake for hydro electric purposes, and the rental payable by the Crown has never paid for the use of the lake for hydro electric purposes.[861]

The opportunity to fight that battle came in the 1990s, which we shall discuss below.

20.9.4 A risk of unravelling: from agreement to legislation, May 1970 – December 1971

It took 19 months to turn the May 1970 agreement into a signed lease, validated by legislation. During that period, further negotiations took place and details were decided or adjusted. The Wai 36 Tuhoe claimants and the Wai 621 Ngati Kahungunu claimants were satisfied that the Lake Waikaremoana Act was a fair representation of what was agreed between the parties. The Wai 144 Ngati Ruapani claimants and the Nga Rauru o Nga Potiki claimants, however, have raised concerns with the Tribunal about the outcomes of this process. In their view, the Lake Waikaremoana Act failed to carry out the proper intent of the lease agreement, for which they hold the Crown responsible. Key issues for us to consider are:

- the switch from creating a new Waikaremoana trust board to using the existing tribal trust boards;
- the transfer of legal ownership to the trust boards; and
- the question of whether the use of validating legislation allowed the Crown to evade protections for Maori in the Maori Affairs Act 1953.

861. Nikora, 'Waikaremoana' (doc H25), p 131

(1) *Who was responsible for the switch from a Waikaremoana board to tribal boards, and the vesting of legal ownership in those boards?*

On 14 May 1970, Duncan MacIntyre notified his formal acceptance of the 8 May agreement to the owners' lawyers. He promised that they would be consulted 'to ensure that the terms of the legislation cover all the points you consider necessary.'[862]

The task of drafting the legislation was given to the Maori Affairs Department. Sir Rodney Gallen's evidence to the Tribunal was that legal ownership of the lakebed did not need to be transferred to a trust board for the 1970 agreement to be carried out. That is, a board or boards could still have administered the rents on behalf of the owners without any change to the underlying legal ownership. But this would have caused administrative difficulties, especially with 'negotiation of renewals and the like'. He commented:

> No such proposal was discussed and it was not until years later that I learned of dissatisfaction by some beneficiaries. The Crown had nothing to do with the transfer of assets. *This was initiated by the committee* and put to the meeting of owners in the absence of the Crown Representatives. [Emphasis added.][863]

Thus, Sir Rodney's evidence is that the idea of vesting the lakebed in the new trust board (or the existing boards) originated with the owners' committee. According to his account, the possibility of a board administering rents but not assuming legal ownership was not even discussed. Crown counsel relied on this evidence, submitting: 'The Crown played no role in suggesting that title to the lakebed be vested in the two trust boards.'[864]

From other evidence available to us, however, the idea may have come from the Crown. In between May and August 1970, the owners' committee was waiting for the Government to draft the lease and legislation. On 5 June 1970, E W Williams of the Maori Affairs Department wrote to the Director-General of Lands, setting out his proposals for the Lake Waikaremoana Bill. As far as we can tell, this was the origin of the idea that the bed would be vested in the proposed trust board, which could then act as lessor and take over renegotiation of the rental payment. It appears, therefore, that this idea originated with the Crown and was then put to the committee of owners in August 1970, although it may have been the committee's intention all along.

Matters were still very inchoate when the Maori Affairs Department began this work. Any lease would need to be validated by legislation because it had not been negotiated in the way prescribed by law. But it had not even been decided that there needed to be a lease, since legislation might suffice without it. Williams put the following queries and suggestions to the Director-General:

862. Minister of Lands to Lusk, Willis, Sproule, and Gallen, 14 May 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1047)

863. Gallen, brief of evidence (doc H1), para 23

864. Crown counsel, closing submissions (doc N20), topic 28, p 11

> An important question is the form to be taken by the legislation. Should there be a full and formal lease document drawn up and executed on behalf of the Crown and the owners to be validated by legislation? Alternatively, should the legislation itself create the leasehold tenure and set out all the terms and covenants? From a technical drafting point of view, I am inclined to lean toward the first course. It would be preferable to keep some of the detail out of the Bill.
>
> We are inclined to feel there should be a separate 'Lake Waikaremoana Settlement Bill' or something of the sort which should proceed as follows:
>
> (a) Recital of meeting and of agreement and execution of formal lease document.
>
> (b) Validation of lease and some provision for registration.
>
> (c) The Maori Trust Boards Act 1953 [1955] to be amended to include a new 'Waikaremoana Maori Trust Board' whose income will be the rental from the lake, the beneficiaries being the owners and their descendants. *Land could be vested in the Board which would take over the rates and responsibilities of the lessor for the purposes of executing renewals and negotiating new rentals.*
>
> Would you please let me have your views on this matter. No doubt when we reach agreement, we will have to put something to the solicitors acting for the owners. [Emphasis added.][865]

On 12 June 1970, the Lands and Survey Department forwarded a draft Bill to the Hamilton Commissioner of Crown Lands, so that he could draw up the proposed lease.[866] This draft Bill, based on the points made by Williams in his memorandum, was entitled: 'An Act to validate the lease to the Crown of the bed of Lake Waikaremoana, and to constitute a Maori Trust Board to administer the rental therefrom.'[867] This title adequately captured the essence of what had been agreed with the Maori owners to date. But the Bill itself went from Williams' tentative 'land could be vested in the Board' to a definite proposal to do so. Clause 5 vested the bed of Lake Waikaremoana in a Waikaremoana Maori Trust Board.[868] The Director-General envisaged the possibility of creating such a board first, vesting title in it, and then having the board grant the lease to the Crown.[869]

The Crown's draft lease and Bill were sent to the owners' committee on 21 July 1970. There was a delay because one of the committee members was overseas. Gallen advised the Government that the committee would not be able to consider the drafts until September.

---

865. E W Williams, Assistant Maori Trustee, to Director-General, 5 June 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1043–1044)

866. Director-General to Commissioner of Crown Lands, Hamilton, 12 June 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1037)

867. 'Lake Waikaremoana Act', 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1038)

868. 'Lake Waikaremoana Act', 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1042)

869. Director-General to Commissioner of Crown Lands, Hamilton, 12 June 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1036–1037)

At this point, the Government was expecting speedy confirmation of the lease and Bill, followed by legislation before the end of 1970.[870]

In the event, the owners' committee did not respond until 8 October 1970.[871] In the meantime, the Maori Affairs Department contacted Gallen by telephone to find out what was happening. A C P MacRae discovered that the committee had met on 18 September 1970 and the Bill and lease were now being redrafted. First, the committee wanted to use existing trust boards (mainly for 'cost' reasons), and therefore the 'bed of the lake should be vested in both the Tuhoe and the Waikaremoana [sic: Wairoa] Maori Trust Boards jointly'.[872] Thus, the committee agreed with the proposal to vest legal ownership in a board, but wanted it to be the two existing trust boards, which were to be renamed and their membership increased by direct representation of the Waikaremoana owners. Secondly, the committee did not want the income to be disposed of in the broad proportions established by the original Native Land Court decisions, which would be two-thirds to Tuhoe and one-third to Ngati Kahungunu. Instead, they wanted an exact division by current owner affiliation. Whare Cotter and Tama Nikora had been sent off to Gisborne to search the Maori Land Court titles and try to sort this out.[873]

In response, MacRae told Gallen that the committee's proposals could involve some difficulties. He recommended legislation in the present session, validating the lease but paying the rental to the Maori Trustee in the meantime, with further legislation later to finalise matters. Gallen, however, did not favour this idea because he thought 'the time was ripe, while the present co-operation existed between the Tuhoe and Kahungunu peoples, to hammer out a final agreement'. Sir Turi Carroll had recently been admitted to hospital with a broken hip but Gallen feared that if there was a delay, and if it were anyone other than Carroll and John Rangihau handling the negotiations, 'there could be trouble between the two groups and reaching agreement could be difficult'.[874]

MacRae replied that the Minister wanted the Bill passed in 1970 if at all possible. Gallen promised to send the amended lease and Bill in the next week or so and hoped that an Act would still be achievable by the end of the year. But MacRae felt that 'what is now proposed

870. Director-General to Lusk, Willis, Sproule, and Gallen, 21 July 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c), p 1351); Director-General to Minister of Lands, 3 August 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1033)

871. Gallen to Director-General, 8 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c), p 1340)

872. A C P MacRae, administration officer, to Secretary of Maori Affairs, [September 1970] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1347)

873. A C P MacRae, administration officer, to Secretary of Maori Affairs, [September 1970] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1347)

874. A C P MacRae, administration officer, to Secretary of Maori Affairs, [September 1970] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1347)

is vastly different from the legislation originally drafted' and that there would be legal difficulties in trying to carry it out.[875]

On 5 October 1970, Secretary McEwen warned MacIntyre that it was unlikely legislation could be passed in 1970, either in interim or final form, because the lease was still not ready to be signed and the further work necessitated by the owners' change of mind would take some time.[876]

Gallen sent the committee's written response on 8 October 1970.[877] He reported that the committee members were:

> concerned over the expense involved in the setting up and administration of an additional Trust Board. It was felt that the cost of this would seriously diminish the annual income and that it would be preferable to use existing organisations if this could be done.

Thus, the issue was presented to the Government entirely as matter of expense and administration costs. After 'a considerable amount of discussion', the committee had agreed unanimously to use the existing trust boards as 'administering authorities'. Owners with 'Tuhoe affiliations to go in the Tuhoe Trust with their shares', owners with 'Ngati Kahungunu affiliations to go into the Wairoa Maori Trust with their shares', and rental and 'any other income relating to the lake bed to be divided between the two trusts in accordance with the shares of the owners going into each trust'.[878]

Both trust boards were to add 'Waikaremoana' to their names, and would have three additional members 'to be elected by those beneficiaries with interests in the bed of Lake Waikaremoana'. The inaugural appointments for each trust would be nominated by the committee. Both 'reconstituted' trust boards were to 'act jointly as lessors of the lake bed'. Any future negotiations about the lake or the lease would be conducted by 'the three representatives of the Waikaremoana beneficiaries on each Board'.[879]

An immediate problem was the division of all the owners into two lists. The delay between the 18 September meeting and the 8 October letter was because the committee hoped that 'representatives of both sides' would carry out this exercise. Gallen reported, however, that 'they were not able to agree and it looked as though there could be some difficulty'. Then, a meeting took place between John Rangihau, Sir Turi Carroll, and Gallen, at which they

875. A C P MacRae, administration officer, to Secretary of Maori Affairs, [September 1970] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1347)

876. Secretary to Minister of Maori Affairs, 5 October 1970; A C P MacRae, administration officer, to Secretary of Maori Affairs, [September 1970] (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1343–1344)

877. Gallen to Director-General of Lands, 9 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1030–1032); see also 'Meeting of Committee of Owners of Bed of Lake Waikaremoana Held at Wairoa on Friday September 18th 1970' (counsel for Wai 621 Ngati Kahungunu, memorandum, 6 October 2004, attachment A (paper 2.647))

878. Gallen to Director-General of Lands, 8 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1030)

879. Gallen to Director-General of Lands, 8 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1031)

decided 'the best way to deal with the division would be to provide for each owner to have a right of election which would avoid any difficulties or bad feeling'. Any owners who did not make a choice within 12 months would be placed on one of the two lists by the Maori Trustee – and provision for that had been made in the Bill as redrafted by the owners' lawyers. Having redrafted parts of the Bill, Gallen accepted that further substantial changes might be needed from the Crown's legal draftsmen.[880]

It seemed less and less likely that a Bill could be introduced in 1970. A significant delay ensued while the Crown and the committee negotiated on exactly what mechanism would be used to assign current owners to one of the two trusts. In response to Gallen's letter of 8 October, MacRae told Secretary McEwen that the owners' proposals 'are just not on'. In particular, he objected to clauses 5–7 of the amended Bill, which:

> provide that within 12 months of the passing of the legislation all owners in the bed of the lake must elect to be members of either the re-constituted Wairoa-Waikaremoana or Tuhoe-Waikaremoana Maori Trust Boards. In the case of owners who do not make an election within that time, the Maori Trustee has been asked to determine their affiliation having regard to the tribal background in each case.[881]

And clause 10 of the redrafted Bill 'provides that the land is to be vested in the two re-constituted Trust Boards as tenants in common in proportion to the shares owned by the Tuhoe owners or the Kahungunu [owners], based on an election in accordance with clauses 5, 6, and 7'.

The owners had not consulted the Maori Trustee, who in any case was not:

> in any position to accept the responsibility of determining an owner's affiliation, and it is manifestly impossible for legislation to be passed now, vesting the bed of the lake in the two re-constituted trust boards on the basis of some future determination of the owners' affiliations, either by the owners themselves or by the Maori Trustee. It seems that this point was not realised by the owners' committee in formulating their proposals.[882]

Gallen was going to meet with the Lands and Survey Department on 21 October. MacRae proposed to advise him of these objections, and that it was now too late to pass legislation in 1970.[883]

880. Gallen to Director-General of Lands, 8 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1031)

881. MacRae to Secretary of Maori Affairs, 14 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1339)

882. MacRae to Secretary of Maori Affairs, 14 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1339)

883. MacRae to Secretary of Maori Affairs, 14 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1339)

In the meantime, it appeared as if the May 1970 agreement might unravel. Gallen had written to MacIntyre on 9 October, urging him to secure legislation as soon as possible. After the committee meeting on 18 September, trouble had arisen 'between the two tribal groups most concerned as to the means of division'. This was 'substantially resolved' by an agreement that owners could choose which tribal trust they would join. Sir Turi Carroll and John Rangihau both supported this solution but 'it is desirable to conclude the matter fairly soon so that no opportunity exists for future disagreement amongst the beneficiaries. The present unanimity of purpose is very worthwhile and worth pursuing.'[884]

Tama Nikora explained what was happening behind the scenes. According to Mr Nikora, the idea of using the two existing trust boards came from Tuhoe, and in particular from Waikaremoana leader John Rangihau. Part of Rangihau's motivation, according to Nikora's account, was to correct the exclusion of the Waikaremoana people from the trust board and the benefits of the UCS roading settlement:

> During that time he had considered it most unacceptable that his own Waikaremoana people were not part of the Tuhoe Trust Board simply because they were not beneficiaries of the Trust Board. The beneficiaries of the Trust Board (up until the Lake Waikaremoana Act 1971) included only the owners and the descendants of the owners of the original 156 blocks of land which contributed to the arterial roading. That did not include Waikaremoana. Accordingly, as John Rangihau saw it at the time, the Waikaremoana settlement with the Crown provided an opportunity for the Waikaremoana owners to also become beneficiaries of the Trust Board, and for Tuhoe to thereby be united.[885]

Sir Rodney Gallen's account supports this interpretation.[886]

In Mr Nikora's evidence, there was another reason for the suggested division of owners between two tribal trust boards. Since 1949, the owners had always talked of using any funds for their general welfare:

> This same attitude of using the lake for the general benefit of the people was present in all of the discussions between 1969 and 1971 when the lease was being negotiated. For many years the owners had been considering a Trust Board, much like Te Arawa and Tuwharetoa. But the idea of using a single Trust Board had major problems. To put it frankly, Tuhoe did not trust Ngati Kahungunu and it may well have been that Ngati Kahungunu did not trust Tuhoe. When the prospect of the lease payment was raised in the media at the time, it was suggested in the newspaper that the Takitimu Marae was about to be upgraded. The Tuhoe owners took this as a warning that Ngati Kahungunu already had their own plans for what

884. Gallen to Minister of Maori Affairs, 9 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1337–1338)
885. Nikora, 'Waikaremoana' (doc H25), pp 126–127
886. Gallen, brief of evidence (doc H1), paras 19, 25

> would be done with the money. As I have said, the meetings had been very heated and tense and the issue of a single Trust Board was the subject of much debate.[887]

According to Mr Nikora, however, the 'most contentious issue' was the question of 'how people would decide whether to be beneficiaries of the Tuhoe Maori Trust Board or the Wairoa Maori Trust Board'.[888] It seemed that Sir Turi Carroll and John Rangihau had agreed upon a solution. The Government had immediately accepted the committee's decision to use the existing trust boards in 1970. But its objection to the proposed method for assigning owners between the trusts (as agreed by Carroll and Rangihau) threatened to destabilise the whole deal. Hence, Gallen urged the Government to agree to it in October 1970, and to enact legislation as soon as possible.

On 19 October 1970, the Minister replied to Gallen that he too was anxious to see legislation passed as soon as possible but that it was no longer achievable in the present year. This was because of the owners' proposed amendments to the Bill. The Minister said that the Maori Trustee 'does not have the staff or the facilities to undertake additional work of this sort at the present time, nor would he be particularly anxious to have the responsibility for deciding what is after all very much the business of individual people'. Also, the lakebed could not be vested in the boards on the basis of some future determination of the owners' affiliations: that would have to precede the vesting. Thus, the owners' committee would now need to reconsider these two points and come up with some alternative proposals. In the meantime, MacIntyre suggested that the lease could still be finalised and signed.[889]

On 21 December 1970, Gallen wrote to the Secretary for Maori Affairs in response to the Government's concerns. After discussions with Sir Turi and John Rangihau, a new proposal had been prepared to submit to the wider committee. The solution for owners who did not elect which trust they wanted to belong to within 12 months was to allot them to the trusts:

> on an alphabetical basis in proportion to the interests of those who have elected during the period of the year. This would obviate the need for inquiry into the background of owners and avoid any need for decisions to be made by some third party.[890]

Gallen included draft provisions for the Government to consider. These provisions retained a role for the Maori Trustee, who would be the one to apply the proposed formula and direct remaining owners into one trust or the other. Other suggestions from Carroll, Rangihau, and Gallen were that the exact proportions of the bed being vested in the two trusts need not be specified in the Act: 'In the circumstances it would be reasonable if the

887. Nikora, 'Waikaremoana' (doc H25), p 126
888. Nikora, 'Waikaremoana' (doc H25), p 127
889. Minister of Maori Affairs to Gallen, 19 October 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1336)
890. Gallen to Secretary for Maori Affairs, 21 December 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1330)

section merely stated that the land was vested jointly in the two trust boards without specifying the proportions.'[891]

This time, Gallen sought the Government's views ahead of a proposed committee meeting early in 1971, and – if possible – to reach agreement with the Government prior to the meeting.[892]

Secretary McEwen replied to this initiative on 1 February 1971. He advised that he did not favour the proposed method of determining which owners would go into which trust. On his understanding, the Maori Land Court had 'settled on a fixed proportion of shares' for each group, and that lists of owners were settled on that basis. If that was correct, then the owners needed to 'stick by the determination under which they derived their rights.'[893] Rangihau had indicated to McEwen that he planned to check the Maori Land Court records and report back to the next committee meeting. If the position was not as McEwen had thought, then some other way would need to be found to allocate owners to the trusts, but the Government was unlikely to agree to any proposal 'which does not tie the whole thing up hard and fast.'[894]

In May 1971, the Crown and the owners' committee reached agreement on the wording of the lease.[895] The finalised lease was forwarded to the Te Urewera National Park board, which approved it for signing on 14 June.[896] The lease was thus ready to go but the proposed legislation was still far from settled. On 17 June 1971, E W Williams wrote to Gallen on behalf of the Secretary, now concerned that there might not be any legislation in 1971 either. The Government was concerned at the delay and, presumably, aware of intense debate and disagreement among the communities of owners. Thus, the Maori Affairs Department proposed a new solution: scrap the proposed Lake Waikaremoana Act and insert sections validating the lease into the Maori Purposes Bill for 1971. Williams sent draft provisions to Gallen for approval. Their effect was to validate the lease and provide for the rent to be paid to the Maori Trustee until the owners had been split between the trust boards. In that way, the Government hoped to get the lease finalised and signed 'with a limited piece of legislation

891. Gallen to Secretary for Maori Affairs, 21 December 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1331)

892. Gallen to Secretary for Maori Affairs, 21 December 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1331)

893. Secretary for Maori Affairs to Gallen, 1 February 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1329)

894. Secretary for Maori Affairs to Gallen, 1 February 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1329)

895. Director-General to Secretary for Maori Affairs, 28 May 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1022)

896. Te Urewera National Park Board, Minutes of meeting of executive committee, 14 June 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1015). The park board's agreement was necessary because it was named as a party to the lease.

merely ratifying the lease'. Williams noted, however, that the owners might have an issue with not getting their own separate Act.[897]

If the Government's solution had been adopted, it would have had the effect of dividing the rent between the two trust boards but the ownership would have remained with the then current owners. The Crown would accept a lease from the committee on behalf of the owners as lessors, which would be validated as if it were a properly confirmed lease from the Maori Trustee, and the bed was not to be vested in the trust boards.[898] If accepted, this would have been largely what the Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants say that they were seeking at the time. In our view, this underlines the point that it was not the Crown that was insisting on the vesting of title in the boards.

There is no response from Gallen or the owners' committee recorded on the Maori Affairs files supplied to us in evidence, and no further information until August 1971, when Duncan MacIntyre went to Wairoa to sign the lease. Dated 21 August 1971, the day that the Minister and committee signed the lease at Taihoa Marae, John Rangihau 'and other owners' made a submission to the committee about how to allocate persons to trusts. This submission revealed what had been going on in the meantime.

Rangihau began by arguing why a split of the owners was necessary, and why existing trust boards should be used:

- The 'area of interest extends from Ruatoki in the north to Wairoa in the south and is too wide to administrate fairly, effectively and economically'.
- A single trust (with only one source of income) might find it difficult to do more than make educational grants.
- 'It would lead to tribal competition for funds.'
- Tuhoe did not want to 'umpire' Ngati Kahungunu 'domestic applications', and they did not want Ngati Kahungunu umpiring theirs either.
- 'The aims and objects of Tuhoe and Ngati Kahungunu differ.'
- Setting up a new body with similar functions and responsibilities to those of existing bodies was unnecessary and would entail extra administrative costs for no good reason.[899]

The owners represented by Rangihau had held public meetings in Rotorua, Ruatoki, Waikaremoana, Waimana, and Ruatahuna – the 'proposal for a division has been mooted

897. E W Williams, for Secretary of Maori Affairs, to Gallen, 17 June 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1317)

898. 'Lease of Lake Waikaremoana to the Crown', draft clauses for Maori Purposes Bill, 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1318–1319)

899. J Rangihau and other owners, submissions to the Minister of Maori Affairs and the Lake Waikaremoana Committee assembled at Wairoa, 21 August 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1297–1298)

and approved unanimously'.[900] In terms of methodology, their proposal was to use Maori Land Court records to carry out the division. So far, they had located the original lists as finalised in 1918 and 1947 (though without successions, so that there was no current list of owners). The next step would be to identify successions and prepare two lists for the two different trusts, and then make those available on public display at Wairoa and Rotorua. Owners would be allowed 'a limited time to object to the Committee and to exercise a right to nominate their classification'. Thus, instead of the earlier proposals for self-nomination, it would work the other way around: owners would be assigned to a trust and given a limited period of time to object. This process, if approved, could then be given legislative force.[901]

We do not have minutes or an official record of the 21 August 1971 meeting in the evidence that has been supplied to us. What appears to have happened is that the people gathered for the signing of the lease. The question of whether there should be a single new Waikaremoana trust board or use made of the Tuhoe and Wairoa trust boards was debated intensely. In addition, if the two existing trust boards were to be chosen, there was disagreement as to how the rent (and owners) should be divided. At this meeting, Whare Cotter proposed a 50/50 division, to which Tuhoe objected. John Rangihau presented the Tuhoe submission outlined above, proposing automatic selection according to the Maori Land Court lists, with a right to object and self-nominate as a necessary protection.[902]

Sir Rodney Gallen's recollection of this meeting was that these matters were debated without the official party present. He had explained the proposed arrangements in English, including the vesting of title in the two boards, but could not recall who gave the explanation in Maori. 'The explanation in Maori', he noted, 'was important as that was the first language for many of those present'.[903] Sir Rodney commented:

> I have since learned that some Waikaremoana people did not understand that their interests were to be transferred to the Tuhoe Trust. I was not aware of such a misunderstanding at the time and cannot say what explanation was given in Maori at the meeting.[904]

The meeting was generally favourable to the proposals but 'there was a considerable dispute over the constitution of a trust'. Ngati Kahungunu representatives preferred setting up a new trust with all the Waikaremoana owners as beneficiaries, whereas Tuhoe leaders preferred using existing trusts. According to Gallen, there 'was a fear that the Kahungunu

900. J Rangihau and other owners, submissions to the Minister of Maori Affairs and the Lake Waikaremoana Committee assembled at Wairoa, 21 August 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1298

901. J Rangihau and other owners, submissions to the Minister of Maori Affairs and the Lake Waikaremoana Committee assembled at Wairoa, 21 August 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), p 1298)

902. Tama Nikora to Sir Turi Carroll, 23 August 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1295–1296)

903. Gallen, brief of evidence (doc H1), para 15

904. Gallen, brief of evidence (doc H1), para 22

members might dominate any trust formed and this was not acceptable to some at least of the people living at Waikaremoana.'[905] We note, too, John Rangihau's concern, as Tama Nikora recalled, that the Waikaremoana people were not beneficiaries of the Tuhoe Trust Board and the roading compensation: 'the Waikaremoana settlement with the Crown provided an opportunity for the Waikaremoana owners to also become beneficiaries of the Trust Board, and for Tuhoe to thereby be united'.[906]

The meeting was unable to reach consensus and 'eventually it was moved from the floor that the issue be decided by the committee'. Sir Turi Carroll then made the decision that the existing trusts should be used:

> He did not further consult the committee and there was no further discussion after he had spoken. Sir Turi made the decision he did, as he later explained to me, because he felt that there would be difficulty in the two peoples working together administering one trust, and in making the decision that he did, he went against the views of his own people.[907]

In response to questions in writing from counsel for the Wai 621 Ngati Kahungunu claimants, Sir Rodney confirmed that this decision was taken after a long period of discussion (since September 1970), and because consensus between the groups could not be reached:

> When the question was referred back to the committee I believe most people expected Sir Turi to make the decision. He was the Chairman and a Rangatira of great status. It would not have been proper for anyone else to speak after him let alone question his decision. It is important that the decision was not his personal preference. I know that he would have preferred one new trust but as I said before, he later told me that he had made the decision as he did because he thought there would be difficulty in reaching agreement on administration of one trust bearing in mind the differing views of the two tribal groups.[908]

Reay Paku, who was Sir Turi's driver and 'aide-de-camp' from 1965 to 1974, and was present at all of the meetings, confirmed Sir Rodney's account of what happened:

> Of particular importance, and which I say is absolutely correct, is the evidence which has shown how Sir Turi conducted the committee leading up to the decision for the Lakebed Settlement to be administered by two already existing Trust boards.[909]

From the evidence of Maria Waiwai and other Ngati Ruapani witnesses, there was a view among some Ngati Ruapani at the time that there should be a third, separate tribal trust for them. In answering questions from counsel for the Wai 144 claimants, however, Mrs Waiwai

905. Gallen, brief of evidence (doc H1), para 16
906. Nikora, 'Waikaremoana' (doc H25), pp 126–127
907. Gallen, brief of evidence (doc H1), para 17
908. RG Gallen, answers to questions in writing from counsel for Wai 621 Ngati Kahungunu, 11 October 2004 (doc H68), para 9
909. Reay Paku, brief of evidence, 22 November 2004 (doc I35), para 3.4

clarified that what may have been meant was the original idea of a specific trust for just the Waikaremoana owners. As she recalled it, agreement was reached instead to use the Tuhoe (and Wairoa) Trust Boards, but 'to administer the money that we were going to receive . . . not to take control of everything'.[910]

Mrs Waiwai's recollection probably refers to this 21 August 1971 meeting, although it could also perhaps refer to the consultation meeting held earlier in the year at Waikaremoana. In either case, many owners shared the view that the 1971 agreement was to use the tribal trust boards to administer the rent. Not all owners were present, of course. And, as we shall see, there were some people in the years immediately afterwards who had not understood that the intention was to transfer their legal ownership to the trust boards. According to Sir Rodney Gallen's recollection, he did explain this point in English. But debate focused on which trust board should be used; it is not at all surprising that the vesting of the bed in the board or boards, and its ramifications, may have been overlooked or not widely understood.

Nonetheless, an owners' hui in 1969 had entrusted the negotiations to a committee of representatives, and now a second hui had agreed in 1971 that the final decision would be made by this committee. The decision was made immediately by the committee's chairperson and announced to the hui, and acquiesced to by all according to custom. From the beginning – or at least since its first discussion of a draft Bill in September 1970 – the committee had agreed that the lakebed should be vested in a board or boards, which would then become the lessor(s) of the lake. We accept, therefore, the submissions of the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants that the vesting of the lakebed in the boards was a deliberate decision by the owners' representatives. We also accept Crown counsel's submission that the vesting of the lakebed in the boards was not an action or decision of the Crown, and that the Government of the day was entitled to rely on the committee's decisions as the body appointed by the owners to represent them. The owners had quite deliberately chosen their own committee in 1969, and had resisted any idea that the Maori Trustee should be their negotiator. There had also been a long period of discussion (from September 1970 to August 1971), a number of consultation hui throughout the district to consider the proposals (led by tribal leaders such as John Rangihau), a great deal of conflict and discussion, and finally a resolution which was binding on the honour of the two sides in these negotiations: the Crown and the Maori owners of Lake Waikaremoana.

On the afternoon of 21 August 1971, Duncan MacIntyre and the committee members signed the lease. Only one point of dissent was raised with the Minister, after the lease was signed. According to Sir Rodney, the issue of hydroelectricity was not allowed to fade entirely into the background:

910. Maria Waiwai, evidence given under cross-examination, 21 October 2004 (transcript 4.11, pp 175–176)

> No compensation was ever made for the taking or use of the water. I heard an elder complain of this to the Minister after the Lake Lease had been completed but the subject was not pursued.[911]

It is not surprising, given the long history of disagreement and protest on this issue, that even though hydroelectricity had been firmly rejected as a matter for compensation, disagreement on the point could not be entirely suppressed, even at this historic occasion.

(2) *A final opportunity for dissent: the Maori Affairs Select Committee's investigation, November 1971*

Following the August 1971 meeting, the Government forged ahead with legislation 'dealing with the whole matter and declaring which [original Maori Land Court] lists are Tuhoe and which Kahungunu'. A new Bill was prepared, providing for current owners to be divided into a Tuhoe list and a Kahungunu list, which would be made available for inspection at the local Maori Affairs offices in Gisborne, Wairoa, Rotorua, and Whakatane, and possibly in the post offices at Tuai and Ruatahuna. Once these lists were ready, owners would be given six months to notify the Maori Land Court registrar at Gisborne that they wanted to swap lists. Otherwise, at the end of six months the 'lists [were] to be final, and be the basis of division of Waikaremoana [lakebed] and proceeds between the two Trust Boards'.[912]

Thus, the Crown gave way on its earlier insistence that the division must take place – and the proportions vested in each trust board be defined – before the legislation was enacted. Instead of vesting the lake in the boards, the revised Act would provide for the registrar to make vesting orders after the Act was passed. The methodology proposed by Rangihau at the August 1971 meeting was adopted. The Maori Land Court lists would 'dictate the split between the Trust Boards', but allowing for objections and people to have their names transferred to the other list. Because the assignment of owners would determine the split of rent between the boards, it appears owners could not recognise dual whakapapa and opt to belong to both boards; they had to be on one list or the other.[913] The work of preparing up-to-date lists began in September 1971, and Gallen made arrangements for the Government to pay for this work in the meantime, to be repaid out of the rent.[914]

Duncan MacIntyre introduced the Lake Waikaremoana Bill on 4 November 1971. It was referred to the Maori Affairs Select Committee. Whetu Tirikatene-Sullivan told the House that the majority of the Maori owners agreed that the Bill needed to go to a select committee 'even though they are almost entirely satisfied with it'. This was because, she explained,

---

911. Gallen, brief of evidence (doc H1), para 58

912. E W Williams, Assistant Maori Trustee, to District Officer, Gisborne, 1 September 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc (A73(c)), p 1293)

913. Nikora, 'Waikaremoana' (doc H25), p 127

914. Gallen to Secretary of Maori Affairs, 6 September 1971 (Walzl, comp, supporting papers to 'Waikaremoana' (doc (A73(c)), p 1292)

Mrs Tirikatene-Sullivan Speaks on the Lake Waikaremoana Bill, 4 November 1971

'We must accept that any unsettled Maori land matters will always be a matter of concern and even bitterness to the beneficial owners in the tribes concerned. Some have even said there could never be complete biracial harmony until all Maori land grievances have been settled. However, in this Bill, the Lake Waikaremoana issue has been settled. . . . This Bill respects the wishes for self-determination of the beneficial owners of Maori land. This has been the central point of my concern. In this Bill recognition is given to the self-determination and decision-making abilities of the beneficial owners or their leaders. Here I should like to pay tribute to the logical rationality, to the business acumen, and to the astute leadership of Sir Turi Carroll. With a man of such calibre willing and able to lead his tribal people in their decisions there is no need for an officer like the Maori Trustee. In recognising the self-determination of the Lake Waikaremoana owners, as this Bill does, I hope it creates a precedent by which the Government will always pursue decisions relating to Maori land. . . .

'In negotiations on this measure there was adequate consultation with the people involved. The matter was discussed in some detail before the Bill was introduced. The Government has established a vital precedent. From the owners' response, and the degree of satisfaction that this Bill has already gained – and I spoke about the Bill to Sir Turi Carroll only a few moments ago – I know that the Minister will realise that consultation with the Maori owners concerned on legislation affecting their land is both a necessary and wise prerequisite to legislative proposals. In Maoridom it is highly ideal. This Bill recognises the need felt by Maoris to retain their land. It is their inalienable right and they have the ability to decide what shall be done with their own land . . .'

Source: NZPD, 1971, vol 376, p 4333

'they wish to reconsider the drawing up of separate lists for the Kahungunu tribal beneficiaries and the Tuhoe beneficiaries'.[915] The select committee, however, only recommended one small amendment, that the rent should be paid to the Maori Trustee until the shares of the respective trust boards were finalised. According to Te Puni Kokiri's report for the ministerial inquiry in 1998, none of the submissions to the Maori Affairs committee have

915. Duncan MacIntyre, 4 November 1971, NZPD, 1971, vol 376, p 4332 ('Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 141))

Section 13 of the Lake Waikaremoana Act 1971: Vesting the Lake in the Boards

13. Vesting in Maori Trust Boards of Lake Waikaremoana

(1) Upon completing the compilation of the final list of owners of Lake Waikaremoana [meaning 'that piece of Maori freehold land known as Lake Waikaremoana'] pursuant to subsection (3) of section 9, the Registrar shall calculate the aggregate share in the land of each of the two groups of owners, and shall express the share of each of the two groups as a proportion of the whole.

(2) The Registrar shall thereupon make an order vesting Lake Waikaremoana in the Wairoa-Waikaremoana Maori Trust Board and in the Tuhoe-Waikaremoana Maori Trust Board for an estate of freehold in fee simple (but subject to the lease to the Crown validated by section 3 of this Act) as tenants in common in stated shares which shares shall be as expressed by the Registrar pursuant to subsection (1) of this section for the Ngati Kahungunu group of owners and for the Tuhoe group of owners respectively.

(3) The order made pursuant to subsection (2) of this section shall have effect as if it were an order of the Maori Land Court, and the District Land Registrar is hereby authorised and directed upon the application of the Registrar of the Maori Land Court to register it accordingly under the Land Transfer Act 1952.

survived, although the records show that John Rangihau and Sir Rodney Gallen appeared and gave evidence.[916]

On 15 December 1971, the Bill was reported back to the House. Duncan MacIntyre stated:

> The Bill has been to the [select] committee, where the representatives of the Tuhoe and Ngati Kahungunu tribes said they were happy with its provisions. . . . The Bill has been drafted in close consultation with the representatives of the owners and without reservation they agree it does precisely what they want.[917]

The select committee process was the last chance for any dissenters to object to the provisions of the Bill. Unfortunately, we have no information as to what lay behind Tirikatene-Sullivan's statement that, although the majority of owners supported the Bill, they wanted the select committee to reconsider the making of separate tribal lists. Was this a last ditch attempt to overturn the decision to have two trust boards? Given that the select commit-

916. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 141)

917. Duncan MacIntyre, 15 December 1971, NZPD, 1971, vol 377, pp 5347–5348 ()

tee's records have not survived, all we have is the report back to Parliament that the owners' representatives had told the committee that they were 'happy with its provisions . . . and without reservation they agree it does precisely what they want'. In our view, it is inconceivable that the Minister of Maori Affairs could make this statement in Parliament without contradiction, if that was not what had actually happened in the select committee.

Section 13 of the Act provided that, after the two lists of owners were finalised, the Maori Land Court registrar would calculate the aggregate share of each of the two groups. The registrar would then make an order vesting the lake in the two trust boards 'for an estate of freehold in fee simple . . . as tenants in common'. This order would have effect as if it were a vesting order of the Maori Land Court, and could be registered under the Land Transfer Act.

Section 14 of the Lake Waikaremoana Act made the rent an asset of the trust boards, for the purposes of section 24 of the Maori Trust Boards Act 1955. As was later explained by TPK officials to a ministerial inquiry in 1998:

> This meant that the rent from the lake could be applied to a number of purposes including the promotion of health, social and economic welfare and education, for the benefit of trust board beneficiaries. The Act made no distinction between those persons who had become trust board beneficiaries by virtue of their previous ownership of Lake Waikaremoana, and other trust board beneficiaries.[918]

On 5 September 1972, the division of owners between the two trust boards was finally completed. The Maori Land Court vested 148,000 shares in the Wairoa Waikaremoana Maori Trust Board and 387,000 shares in the Tuhoe Waikaremoana Maori Trust Board. The Te Puni Kokiri report noted the outcome, which was a matter of significant complaint before the 1998 ministerial inquiry:

> The trust boards received a freehold estate in fee simple as tenants in common; they did not take the lake bed on trust. A certificate of title in the names of the trust boards was issued by the Gisborne District Land Registrar on 15 June 1977.
>
> Descendants of the previous owners of Lake Waikaremoana can no longer succeed to shares in the lake bed. The list of owners referred to in sections 8 and 9 of the Lake Waikaremoana Act 1971 is now simply a reference to enable persons on the list and their descendants to establish their right to enrol as a beneficiary of one of the two trust boards.[919]

Duncan MacIntyre, the Maori Affairs Committee, and Parliament were all satisfied that these arrangements (and the Act which gave effect to them) did exactly what the Maori

---

918. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 142)

919. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), pp 142–143)

owners wanted. From the evidence available to us, they had no reason to think otherwise. Tama Nikora's evidence supports this conclusion. In his view, the owners' representatives made a deliberate attempt to restore tribal ownership and control by means of the trust boards. At the time, tribal leaders saw this as a major victory in their long struggle with the Crown over Lake Waikaremoana, as well as (in effect) a treaty between Tuhoe and Ngati Kahungunu.[920]

We accept the Crown's submissions:

> The legislation drafted by the Crown was designed to give effect to the lease, and to the owners' arrangement that title would be vested in the two trust boards. As noted above, the owners were consulted with and agreed to that legislation. There was no dissent or complaint from any lake owner.
>
> There was no reason why the Crown should have done anything in respect of the lease other than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill.[921]

In his evidence at our Waikaremoana hearing, Professor Pou Temara told us that one effect of the new arrangement, in contrast to the 1918 title, has been to include the whole tribe in the ownership of the tribal taonga.[922] Soon after the passage of the 1971 Act, however, it emerged that some owners may not have understood or intended that their legal ownership would be transferred to the trust boards. That was certainly the perspective put to us by many claimant witnesses. This brings us to the third point raised in this section: whether the protections of the Maori Affairs Act 1953, including Maori Land Court examination and confirmation of the lease, were evaded when Parliament validated the lease. In essence, the argument is that a Maori Land Court hearing would have clarified before it was too late that many owners – perhaps a majority – did not intend to divest themselves of their ownership or their specific entitlement to the benefits of the lease, when the lease was signed in August 1971. We now turn to consider this question.

(3) *Would a Maori Land Court hearing have exposed that some owners (perhaps many) did not intend to divest themselves of their legal ownership as part of the lease agreement?*

For this issue, we have relied mainly on the documentary sources cited in Emma Stevens' report.[923] We begin by testing what that evidence shows about the level of understanding among the owners at the time. For the most part, the evidence comes from soon after the vesting of the lakebed in the trust boards, yet close enough in time to illuminate what might have been exposed at a 1971 Maori Land Court hearing on the lease, had one occurred. As

920. Nikora, 'Waikaremoana' (doc H25), pp 124–128
921. Crown counsel, closing submissions (doc N20), topic 28, p 11
922. William Rangiua (Pou) Temara, brief of evidence, 2004 (doc H61), paras 15–20
923. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 60–63. The documentary sources cited in Stevens' report are located in MA 8/3/484 vols 2–3, Maori Land Court, Gisborne.

a result, the first question for us to consider is: What does post-1971 evidence show about the level of agreement or understanding in respect of vesting the lakebed in the trust boards?

The Crown admits that there may have been a 'misunderstanding' on the part of some owners.[924] Counsel for the Wai 36 Tuhoe claimants denies that there was any misunderstanding:

> The complaint that there was a 'misunderstanding' has arisen approximately 30 years since the discussions took place and by a different generation of owners and beneficiaries who were not party to the solemn decision that was made in 1970. Sir Rodney Gallen confirmed that the legislation reflected what was agreed to.[925]

But counsel for Nga Rauru o Nga Potiki, relying on the research of Emma Stevens, asserts that the evidence is clear that many owners did not intend or agree to transfer their legal ownership to the trust boards.[926]

In our view, the answer to this question is revealed by debate soon after the passing of the Act, which occurred because the Maori Affairs Department tried to have the lakebed classified as 'European' land, and because individual owners sought succession orders from the Maori Land Court.[927]

In between the passage of the Maori Affairs Amendment Act 1967 and Labour's Maori Affairs Amendment Act 1974, it was Government policy to promote the reclassification of Maori land as general land. For Lake Waikaremoana, this policy came into play at the beginning of 1973, after the registrar and the court had completed the statutory process of dividing the owners between the trust boards in 1972. Part 1 of the 1967 Act provided for Maori land 'owned by not more than four persons' to cease to be Maori land after an investigation of its circumstances and a status declaration by the Registrar.[928] The Maori Affairs Department in 1973 considered that the bed of the lake remained Maori freehold land but that there were 'two ways of arranging for the land [the bed of Lake Waikaremoana] to be recorded as European land'.[929] One was for the Registrar to make a status declaration, as provided for in Part 1 of the 1967 Act. The other was to use section 30(1)(i) of the Maori Affairs Act 1953, which gave the Court (not the Registrar) the jurisdiction to 'determine for the purposes of any proceedings in the Court or any other purpose whether any specified land is Maori freehold land or is European land'. Officials considered that an application should be made to the Court under section 30, but perhaps after consultation with the chairs of the

924. Crown counsel, closing submissions (doc N20), topic 28, p 10
925. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 30–31
926. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219
927. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), pp 60–63
928. Maori Affairs Amendment Act 1967, ss 3, 4, 6
929. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 60

two trust boards.[930] There is no evidence of such a possibility having been discussed during the pre-1972 negotiations. From the evidence available to us, this is the first mention of it.

The registrar consulted Judge Gillanders Scott, who responded in a crucial memorandum, dated 2 May 1973, pointing to widespread misunderstandings among Maori about the effect of the 1971 Act:

> A large section of the Maori persons whose names appeared in the Maori Land Court Title schedules of ownership prior to implementation by Registrar's order of the vestitive provisions of the Lake Waikaremoana Act 1971 firmly expect to be paid out each half year their entitlement of the rent in direct proportion to the shares now held by them in the present Tuhoe and Kahungunu lists. Another section of the Maori persons hold the view that the 1971 Act precludes such individual distributions of rent, and that the Lake bed alike the rents form part of the assets of the two respective Trust Boards. Another section of the Maori persons hold the view that the land comprising the bed of the Lake is still owned by them subject only to the lease, whereof the rents go to the Trust Boards for its general purposes and not for individual distribution. In addition there are variations of these understandings . . .
>
> Put broadly, but I think accurately, the only thing certain is the uncertainty of thinking and understanding on the part of probably the majority of the Maori persons concerned with Lake Waikaremoana.
>
> The sooner all questions (not merely the question of Status of land) are cleared up the better.[931]

Judge Gillanders Scott thought that there were two routes for clearing up these questions. First, he suggested that either the Government or the trust boards could make a public statement, although this would only be 'persuasive' and have 'no binding legal significance'. The second route was to test the meaning of the Lake Waikaremoana Act 1971 in the Maori Land Court or the general courts. The Government should, in his view, take responsibility for carrying this out. The Minister, the Secretary for Maori Affairs, or the registrar all had the ability to apply to the Maori Land Court for a status declaration. The judge also suggested that the Government or anyone interested could apply to the court to make vesting orders in respect of the estates of deceased owners. Alternatively, matters could be sorted out by application to the Supreme Court under the Declaratory Judgments Act. In Gillanders Scott's view, the courts were the preferable route for resolving these matters, but legislation might be necessary to fix them:

930. JH Dark, for the Maori Trustee, to R Graham, Deputy Registrar, 14 March 1973, and annotations, MA 8/3/484, vol 2

931. K Gillanders Scott to Registrar, 2 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne

> The Lake Waikaremoana Act 1971 has had its mixed genesis in the Lands Department and the Department of Maori Affairs. With the gravest respect, if there is doubt as to Status of Land and/or as to the effect of the legislation, then it should be resolved (so far as that is possible) under para 5(c) and para 5(d) [by applications to the courts] – though some if not all of the other aspects may very well have to be resolved by Legislation.
>
> I intend to keep an open mind on these matters. Lake Waikaremoana lies within Tairawhiti Judicial District and I have no intention of going into the merits or demerits of the situation save upon a formal hearing in open Court.[932]

Officials were puzzled by this advice from the judge because it seemed to them that the statute very clearly vested ownership of the lakebed in the boards, and did so at the deliberate request of the owners' committee. On 25 May, E W Williams, writing for the Secretary for Maori Affairs, told the District Officer in Gisborne: 'With the greatest respect to all concerned, this matter seems to be getting well away into the realms of phantasy.'[933] The 'Head Office views' were:

(a) The land is vested effectively in the two Maori Trust Boards free of any trust. It forms part of the Boards' general assets and no beneficiary has any vested interest in it.
(b) Since there are no beneficial interests remaining in the former owners, there is no scope for vesting or other orders of the Court. The question of status is unimportant.
(c) However, since no share in the land is now owned by a Maori the land is, by the ordinary definition (s. 2(1) 1953) European land.
(d) The land was vested in the Boards by an order which, though it was to take effect as if it were an order of the Court, is not said to be such an order. Accordingly, the land must be deemed by section 2(2)(f) [1953] to be European land.[934]

Williams added:

> Perhaps these views are wrong, but I can see no reason why, in the meantime, our actions should not be framed in accordance with them. If anyone else objects, then it is up to them to put the wheels in motion for authoritative rulings by a Court. In the meantime, individual Maoris making inquiries should be referred to the appropriate Trust Board. I might say that the intention of those who played a part in the arrangement was along the lines of (a) above. The question of future status of the land [whether Maori freehold land or not] was not adverted to. . . . In short, this Department is quite happy with things as they are

932. K Gillanders Scott to Registrar, 2 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne
933. E W Williams, for the Secretary, to District Officer, Gisborne, 25 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne
934. E W Williams, for the Secretary, to District Officer, Gisborne, 25 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne

and is not at all likely to be lodging any applications. No applications from or in respect of former owners should be accepted in respect of the land.[935]

The following year, the matter was debated between the Maori Land Court and the Tuhoe Waikaremoana Maori Trust Board. On 26 March 1974, the registrar wrote to the secretary of the Trust Board:

> In recent correspondence with [the board's solicitors] it was mentioned by them that you still regard the title to the Lake (bed) as being Maori freehold land and as such is still subject to vesting orders on succession. If I have been correctly advised, then it is pointed out that:
>
> (a) Since there are no beneficial interests remaining in the former owners, there is no scope for vesting or other orders of the Court;
>
> (b) Since no share in the land is now owned by a Maori the land is, by the ordinary definition (Sec.2(1)/1953) European land;
>
> (c) The land was vested in the two Trust Boards by an Order which, though it was to take effect as if it were an Order of the Court, is not said to be such an order. Accordingly the land must be deemed by Section 2 (2)(f) /1953 to be European land.
>
> I trust that, if applicable, these views will be of interest to you and will explain why applications to determine succession to the interests of former owners in the title are not being accepted by this Registry.[936]

The Trust Board's new solicitors replied to this letter on 16 May 1974. Emma Stevens in her evidence for Ngati Ruapani, and also the Nga Rauru o Nga Potiki claimants in their submissions, have emphasised the trust board's reply.[937] It shows that even the board in which the lakebed had been vested misunderstood the intent (and therefore the effect) of the 1971 legislation.

After discussing it with the board, and also with the board's former solicitors, their response was:

> Our view is that the correct interpretation of the Lake Waikaremoana Act 1971 is that the owners intended that only the revenues from the Lake should go to the Trust Boards and not the ownership of the lake itself. It was this intention of the owners to which the statute gives effect.
>
> A European lay person might well think that since the Lake is let on perpetual lease there is nothing left to the owners. However, because of the special feeling that Maori people have for their ancestral land it is quite understandable that they should wish to retain ownership

935. E W Williams, for the Secretary, to District Officer, Gisborne, 25 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne

936. B E Attewell, for Registrar, to the Secretary, Tuhoe-Waikaremoana Maori Trust Board, 26 March 1974, MA 8/3/484, vol 3, Maori Land Court, Gisborne

937. Stevens, 'Report on the History of the Title to the Lake-bed' (doc A85), p 62; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 209

of the land itself even though neither they nor any of their descendants would ever derive any monetary benefit from such ownership.

From a legal point of view we think that it is clear that the Act did not intend to take away the owners' interest in the land because if this was the intention of the Legislature then the Act would have made the Lake itself an asset of the Board and not just the income.

If our views set out above are correct then the owners are still the equitable owners of the land itself subject only to the Trust in respect of all revenues derived from the land.[938]

This matter was referred to the Maori Affairs head office for advice, and received the following response from J H Dark:

We cannot, of course, say definitely why the law is, but it does seem to us clear that the intention was to vest the land in the Trust Boards absolutely, i.e., not in trust. In our view this is what has been done. The former owners, after the passing of the Act, became beneficiaries of the Boards, whose prime object is to deal with the income (i.e., rental) from the Boards' share of their 'asset' for the benefit of their respective beneficiaries (as decided by the Act) and their descendants. This follows the usual practise of boards and their beneficiaries.

If anyone wishes to argue the matter it is suggested that they raise it with Mr R G Gallen of the legal firm of Lusk, Willis, Sproule and Gallen . . .[939]

The Maori Land Court continued to refer all applicants to the trust boards. In 1979, the Maori Affairs Department's District Officer commented:

Many people still regard the list referred to in Sections 8 & 9 of the 1971 Act as the list of owners and shareholding in the Lake and are surprised and disappointed to find that they cannot succeed to or otherwise deal with the interests and shares shown in that list which is now simply a reference one to enable the persons shown therein and their descendants to establish their claim to enrol on the roll to be prepared in accordance with Sections 42 & 43 of the Maori Trust Boards Act 1955.[940]

It was clear in the 1998 ministerial inquiry, and in claims to this Tribunal, that many people still believe that the Lake Waikaremoana Act was to be interpreted as vesting admin-

938. Urqhart, Roe and Partners to the Registrar, 16 May 1974, MA 8/3/484 vol 3, Maori Land Court, Gisborne
939. J H Dark, for Maori Trustee, to Gisborne office, 29 May 1974, MA 8/3/484 vol 3, Maori Land Court, Gisborne
940. This 1979 statement was quoted in: M J Fryer, Registrar, to Secretary, Wairoa Waikaremoana Maori Trust Board, 5 September 1995, MA 8/3/484 vol 3, Maori Land Court, Gisborne.

istration of the rentals in the boards (and nothing else), because any other interpretation did not give effect to what had been agreed in 1971.[941]

In our view, the evidence is compelling. The committee of owners' representatives intended that the lakebed should be vested in the boards, and this intention was given effect by the Lake Waikaremoana Act. But the revelation immediately afterwards in 1973 and 1974 that many owners saw it differently, the Tuhoe Waikaremoana Trust Board understood it differently, and that Judge Gillanders Scott thought that there were serious issues in need of resolution, raised a major quandary. Two paths were identified at the time: the Government or the boards could issue statements (and inform the beneficiaries fully) about the legal position; or the matters could be clarified and resolved in the courts, and mended by legislation if necessary. The Government chose the first path, explaining the legal position to the Tuhoe Waikaremoana Maori Trust Board and leaving it to the board or former owners to take whatever action they thought necessary. As far as we are aware, the board took no action – presumably it accepted the Government's explanation of the meaning and effect of the Act, although it continued to resist any suggestion that the lakebed had become 'European' or general land. Individual owners continued to apply to the Maori Land Court for successions, and continued to be referred to the trust board. While the Government could, perhaps, have done more to assist in the resolution of this matter, it was properly an internal issue for the trust boards and the Waikaremoana peoples to resolve.

It was very clear to the Tribunal that this has not happened. Claimant witnesses spoke on both sides, some arguing that the lake is a tribal taonga that rightly belonged to all and should be administered as such, while others maintained that ownership and authority should be vested in those who lived on the lake's shores, and that benefits should flow directly to them. We note this ongoing division and the bitterness it has caused. Both, in our view, had their origins decades before in the Native Land Court's decision to award shares in the lakebed to individuals, which was the only option available to it under the native land laws of that time.

Back in 1917, Judge Gilfedder had referred to the difficulty of investigating the title 'to an area of water of such dimensions as Lake Waikaremoana'; how then could there be evidence of 'occupation'? He concluded that 'hapus or persons that had the best right to the surrounding lands bordering on the Lake [would] have a better title to the Lake than those whose occupatory rights are in lands more remote'. The decisive factor would thus be occupation of the lands adjacent to the lake.[942]

941. 'Joint Ministerial Inquiry – Lake Waikaremoana: Report to the Minister of Maori Affairs, Hon Tau Henare, Minister of Conservation, Hon Dr Nick Smith', 27 August 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), pp 149–150); Maria Waiwai, brief of evidence, undated (2004) (doc H18), pp 23–25; Maria Waiwai, evidence given under cross-examination, 21 October 2004 (transcript 4.11, p 176)

942. Wairoa Native Land Court, Minute Book 29, 25 August 1917 (Niania, brief of evidence (doc 138), app 3, p 121)

The court had no means of awarding tribal title to a lake. In 1918 Judge Gilfedder thus awarded ownership of the lakebed to lists of individual owners, specifying their relative shares. On the one hand, this meant that those awarded shares in accordance with the court's criteria had – by 1971 – waited a very long time for any benefits that might accrue, and had defended those shares as representing the only tangible legal recognition of the rights of their tupuna. Many owners of very small shares in land throughout the country found themselves in exactly that position by the mid-twentieth century. On the other hand, many belonging to the hapu and the wider iwi who had not been afforded any form of legal recognition of their relationship with and their rights to the lake, may have considered the vesting of Waikaremoana in trust as finally offering benefits to the wider tribal communities. We understand the positions of those on both sides, and we reiterate that both positions, ultimately, were the result of the limitations of the native land legislation, and its failure to provide for collective, tribal titles for taonga such as Lake Waikaremoana.

Tuhoe kaumatua Professor Pou Temara explained the issue and its effect, as he saw it:

> the land under Crown rules, has been divided into hea (shares) and that has made the apportioning of the land heahea, or confusing. We are certainly confused by this Crown custom.
>
> However, this rule is advantageous for those who have big shares in Waikaremoana. Next to Kui Wano, I am a significant shareholder and that should please both Kui and me.
>
> The only problem is, it is Crown-imposed tenure and it excludes others. If you are not descended from an owner on the original lists, then you don't have a foothold in Waikaremoana – and here you were thinking that you were part of Waikaremoana.
>
> Further, 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.
>
> There are in my estimation 8,000 shareholders to the lake at present [calculating the descendants of the owners named in the 1971 lists]. If we were to localise that figure as being Tuhoe, then let me point out to the Tribunal that there are 30,000 Tuhoe people. Under this Crown imposed tenure, we have managed to exclude 22,000 Tuhoe.
>
> 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.[943]

Thus, the seeds of the bitterness that arose after 1971 were sown in 1918, and the destructive impact of the native land laws is still a source of distress, grievance, and division today for the claimants who appeared in our inquiry.

There was some possibility that the Crown's failure as at 1918 to provide for tribal title could have been remedied in 1944 when the Appellate Court made its orders. By then the

943. William Rangiua (Pou) Temara, brief of evidence (doc H61), paras 15–20

Labour Government had provided an option to create Native Reservations, which could be vested in trust for 'any persons or *classes of persons*' [emphasis added].[944] This form of title came closest at the time to providing for a tribal title. Indeed, Ngapuhi tried to take advantage of it in 1940; rather than submitting names of individuals in whom title might be vested, they sought to make Lake Omapere a Native Reservation for all of Ngapuhi.[945]

This option of a Native Reservation was not pursued by the owners of Lake Waikaremoana when their appeals were heard in 1946–1947. We have no direct evidence from the claimants or the Crown on this point but we can make what we believe is a fully justified inference.

The court in the Omapere case had not yet determined lists of owners in 1940. The Appellate Court's task for Waikaremoana, on the other hand, was to hear appeals that had been lodged for the inclusion or exclusion of persons from the lists approved in 1918.[946] The Appellate Court did make some comments indicating its general views: it considered that Ngati Ruapani were a hapu of Ngati Kahungunu, and that Tuhoe claims which were not also sourced from Ruapani had no validity because the boundary between Kahungunu and Tuhoe was the Huiarau Range.[947] These aspects of the Appellate Court's decision caused anger that was still evident among the witnesses in our inquiry.[948] As we discussed in chapter 7, however, the Appellate Court's decision in this respect was mistaken. It had failed to understand the unusual circumstances in which the Crown successfully pressured Tuhoe and Ngati Ruapani, under threat of confiscation, to withdraw their case seeking recognition of their ownership of the four southern blocks from the Land Court, and instead sell their rights to the Crown (see section 7.5.7(2)(a)).

Nonetheless, the practical effect of the Appellate Court's disagreement with the lower court was quite limited in respect of changes to the 1918 lists of owners. The court saw its task strictly as the granting or denying of the filed appeals. Lists that had not been appealed were not before the court.[949] Nor was the court willing to include anyone who had not filed an appeal in 1918, even where the owners had agreed to their admission. Turning down a '[r]equest by counsel for both parties to admit additional persons as owners, by consent', the court found:

> The proceedings of the lower Court extended over a long period, and all persons entitled had ample opportunity of putting in claims or of having their names included in lists.

944. Native Purposes Act 1937, s 5
945. White, *Inland Waterways* (doc A113), pp 240–241
946. Tairawhiti Native Appellate Court, Minute Book 27, 22 April 1947, fol 50
947. Young and Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (doc A129), pp 194–202
948. See, for example, Te Wharehuia Milroy and Hirini Melbourne, 'Te Roi o Te Whenua: Tuhoe claims under the Treaty before the Waitangi Tribunal', 1995 (doc A33), p 281
949. Tairawhiti Native Appellate Court, Minute Book 27, 22 April 1947, fols 46–58; see also Niania, brief of evidence (doc 138), app 2, pp 91–100.

> If any claimants considered that they had been wrongly excluded they should have appealed against the decision, as was done in some cases.
>
> This Court cannot now admit as owners persons who made no claim for admission before the lower Court. To do so would be to allow for a reopening of the claims.[950]

We do not, therefore, see how the circumstances of this hearing of appeals in 1946–1947 would have enabled the owners to apply to change the lakebed title to that of a native reservation. Once the appeals had been heard and determined, it was theoretically possible for the finalised, listed owers to have applied to establish a tribal reservation. But the Appellate Court in 1947 would not have allowed Tuhoe to be a 'class of persons' for whom a tribal reservation could be made. That, too, would have prevented any such application from being made by the owners as then constituted.

Ultimately, therefore, the owners were stuck with the only form of title that had been available in 1918. By 1971, they had been defending their possession of that title for a long time indeed.

The question for the Tribunal in this section of our chapter is whether the Crown was at fault in 1971 for failing to have the Maori Land Court vet and confirm the lease. If the Crown had proceeded in accordance with this protective provision in the Maori Affairs Act 1953, the confusion of some owners (and perhaps fundamental lack of agreement) about the relinquishment of individual title might have been exposed before the 1971 Act was passed. We now turn to consider that question.

From the evidence available to us, there was no specific design on the part of the Crown to avoid Maori Land Court scrutiny of the lease. There was no mention of the Maori Land Court by Ministers and officials or by the owners' committee in any of the documents that have been supplied for our inquiry. Back in 1969, when a purchase was planned, the Government clearly intended to follow the steps prescribed in the Maori Affairs Acts. The Lands and Survey Department accepted that Maori Land Court confirmation of a sale would be required, and might – it was feared – result in the Court enforcing a higher price than the Crown had offered.[951] The application to the Board of Maori Affairs in July 1969, to call a meeting of owners, clearly anticipated obtaining Maori Land Court confirmation of any resolution to sell.[952] When it came to a lease in 1970, there was specific debate about whether the approval of the Maori Affairs Board was still needed, since the lease would be

950. Tairawhiti Native Appellate Court, Minute Book 27, 22 April 1947, fols 57–58; see also Niania, brief of evidence (doc 138), app 2, p 99.

951. Barber for Director-General to Minister of Lands, 12 November 1968 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1092)

952. Board of Maori Affairs, 'Proposed Crown Purchase of Lake Waikaremoana', July 1969 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1066)

validated by legislation anyway.[953] Although it was not strictly necessary, the Government went ahead and got the approval of the Maori Affairs Board for the lease.[954]

In the Government's draft 1970 Bill, there was a clear intention to dispense with the Maori Land Court confirmation. The lease was:

> declared to be a valid and effectual lease of the land therein described and to have effect according to its tenor as if it had been granted by the Maori Trustee pursuant to a *duly confirmed* resolution of a meeting of assembled owners under Part xxiii of the Maori Affairs Act 1953. [Emphasis added.][955]

As will be recalled from section 20.9.4, this draft Bill was sent to the owners' committee, which had full input into its redrafting as the eventual Lake Waikaremoana Act 1971. The final version stated:

> The lease is hereby declared to be a valid and effectual lease of Lake Waikaremoana and to have effect according to its tenor as if it had been granted in due form by the Maori Trustee pursuant to a duly confirmed resolution of a meeting of assembled owners under Part xxiii of the Maori Affairs Act 1953.[956]

As that wording suggests, there was not actually a resolution of a meeting of assembled owners for the Maori Land Court to confirm. The meeting of owners in 1970 had passed a resolution that the Crown be offered a lease (with certain terms), that the Maori Trustee not be appointed to act as their agent in negotiating the lease, and that an elected committee negotiate on their behalf instead. After that, the terms of both the lease and the validating Bill were negotiated and agreed by the Crown and the owners' committee. Although the lease was discussed by a large gathering of the owners at its signing in August 1971, this was not a formal meeting of assembled owners to endorse or confirm the committee's arrangements.

A Brief Summary of the Relevant Provisions of the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967

Part 19 [1953]: No alienation could be confirmed unless the court was satisfied (among other things) that the alienation was not 'contrary to equity or good faith, or to the interests of the Maori alienating', that the alienation was not in breach of any trust, and that the 'consideration (if any) for the alienation is adequate' (s 227). Except in special circumstances, the instrument of alienation had

953. E W Williams, Assistant Maori Trustee, to Director-General, 5 June 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1043)
954. Lake Waikaremoana Act 1971, preamble (which states that the Board of Maori Affairs approved the lease)
955. 'Lake Waikaremoana Act', 1970 (Walzl, comp, supporting papers to 'Waikaremoana' (doc A73(b)), p 1040)
956. Lake Waikaremoana Act 1971, s 3

to be accompanied by a special Government Valuation, although the court was not bound by the valuation (s 228). On hearing the application for confirmation, the court could make any modification whatsoever to any aspect of the alienation, if it seemed that 'some modification in favour of the Maori owners should in justice be made'. This could include increasing the amount of rent in a lease. The alienee had to consent to any such modification – if that consent was withheld, the court could refuse confirmation (s 229). The court could also direct that rents be paid otherwise than to the Maori Trustee for distribution to individual owners (s 231).

These protective powers of the court were greatly reduced by the Maori Affairs Amendment Act 1967. First, the original section 227 was completely replaced by a new section 227, which reduced the circumstances in which the court could refuse confirmation to two: the inadequacy of the consideration or the undue aggregation of farmland. Otherwise, alienations had to be confirmed 'as a matter of right'. The power of the court to refuse confirmation if the alienation was contrary to equity or good faith, or not in the interests of the Maori owners, was repealed (1967, s 100). Secondly, section 229 of the 1953 Act was amended so that the only term of an alienation that the court could modify was the purchase price, which it could increase. This meant that the court could not modify the terms of a proposed lease at all, let alone with the previous broad discretion to modify the terms in any way whatsoever (1967, s 102).

Part 20 [1953]: Unless provided for in any other Act, no lease of Maori freehold land could be for a longer term than 50 years (including any renewals to which the lessee was entitled) (s 235). The Maori Trustee was to be the agent of the Maori owners for all renewals of leases (s 237).

In 1967, section 235 was amended so that leases could not exceed 42 years, but introducing new exceptions (including leases that were the subject of a resolution of a meeting of owners) (1967, s 108). Thus, a lease for longer than 42 years did not require validation by special legislation in 1971 so long as it had been granted by a duly confirmed resolution of a meeting of assembled owners. In 1974, three years after the Waikaremoana lease was validated, the Maori Affairs Amendment Act introduced a new, stringent restriction. It required a quorum of 75 per cent at any such meeting to consider a resolution to lease for longer than 42 years. (Maori Affairs Amendment Act 1974, s 36)

Part 21 [1953]: The Crown may acquire (by purchase, lease, exchange, or otherwise) Maori land through a resolution of the assembled owners, passed and confirmed in accordance with Part 23. When any resolution has been confirmed by the court, it will be submitted to the Board of Maori Affairs for final approval (in other words, the Crown was not committed to the alienation until after the court had confirmed and possibly modified the resolution) (s 259).

Part 23 [1953]: After the court has confirmed a resolution of the assembled owners for the alienation of any land, the Maori Trustee would become the statutory agent of the owners to execute all instruments and 'to do on their behalf all such other things as may be necessary to give effect to the resolution' (s 323).

Thus, although there is no evidence that the Crown (or the owners' committee) actively wanted to avoid a Maori Land Court hearing, the effect was that the protective provisions of the Maori Affairs Acts were not followed.[957] Counsel for Nga Rauru o Nga Potiki stressed that the lease arrangements should have been confirmed by the Maori Land Court.[958]

The Maori Land Court's power to refuse to confirm a lease and its power to modify the terms of a lease had been significantly reduced by the Maori Affairs Amendment Act in 1967 (see box). The Act had previously provided for the court to review all the details and circumstances of a transaction, and to withhold confirmation if it emerged that a lease (or an aspect of it) was contrary to equity or good conscience, or not in the best interests of the owners. But the 1967 amendment Act restricted the subject of inquiry to a very narrow focus on the amount of remuneration. We cannot be certain that such an inquiry would have uncovered the fact that the lakebed was to be vested in the trust boards. The deed of lease made no mention of this point, which was effected later by the Lake Waikaremoana Act. The deed of lease stated that the lessor was 'the Committee appointed by the owners of the land'. Under its terms, payment of rent was to be made to the committee as lessor. Revaluation was to be the subject of agreement with this lessor. There was no mention of the boards anywhere in the lease.[959] It seems unlikely that an inquiry into the lease, focused on the fairness of the rent provisions, would have uncovered the intention to replace this lessor with the trust boards by legislation. But it may have done. It was, after all, a major component of the May 1970 agreement that the money would be administered by a trust board.[960]

There was, however, no risk for the Crown. MacIntyre had already accepted that the owners should decide how they wanted the rent paid and to whom. Although officials thought it would be more straightforward to negotiate revaluations and renewals with a settled board, the Crown had no real interest either way. As we mentioned earlier, MacIntyre was prepared to pass legislation which paid the rent to the boards but left the underlying ownership unchanged. On this matter, the Government simply accepted the decision of the owners' committee. It is difficult to see, therefore, that there was any reason for the Crown to have avoided placing the lease under the scrutiny of the Maori Land Court. We do not accept the argument that the validating legislation was enacted (even in part) for the purpose of evading any protections in the Maori Affairs Acts.

The Nga Rauru o Nga Potiki claimants have also suggested that the Crown avoided protections in the Maori Affairs Act 1953 by the nature of the vesting provision itself (section

957. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 213–216
958. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 215
959. The lease is reproduced as a schedule to the Lake Waikaremoana Act 1971.
960. Counsel for Nga Rauru o Nga Potiki submitted that the Crown also evaded the requirement that a lease for longer than 42 years could not be granted without a 75 per cent quorum at the meeting of assembled owners, but this requirement was not introduced until 1974. See counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 217–218.

13). Originally, the Government intended the Lake Waikaremoana Act to vest the lakebed in the trust board(s). The owners' revisions to the Bill meant that the vesting had to take place after it was enacted, because the exact proportions to be vested in each board were yet to be calculated. Thus, in a compromise negotiated with the owners' committee, section 13 stated that the registrar would calculate the aggregate shares of each list of owners and then make an order vesting the lake in the boards, which would 'have effect as if it were an order of the Maori Land Court'.

Counsel for Nga Rauru o Nga Potiki examined the protections for owners in the Maori Affairs Act 1953, which applied whenever the court transferred ownership by means of a vesting order. They submitted that under sections 213 and 222, there had to be a voluntary arrangement to make the transfer, signed by the owners and witnessed in due form, before the court could make an order vesting land in a trust board.[961] They submitted:

> Firstly, it is contended that there was no agreement or arrangement between the true owners and the Trust Boards to transfer land to the latter in accordance with s 213(1). Secondly, even if there was such an agreement, it was not recorded in writing, the owners did not execute it and it was not attested to.[962]

In essence, the Crown is said to have avoided these protections by legislating for the registrar to make an order as if it were an order of the court, but without the requirement (which the court was supposed to enforce) for the owners to first sign a written agreement. Counsel also argued that the 'purported transfer' may be invalid, because it did not comply with these sections of the Maori Affairs Act 1953. We note, however, that these arguments fail because the statutory protections on which claimant counsel relied[963] were inserted in the Maori Affairs Act by amendments introduced in 1974 and 1975.[964] More broadly, vesting by the registrar (as if by the court) was a compromise on the Government's part, in order to meet the owners' committee's wish to have the vesting come after the Act, so that time could be given for the process of assigning owners between the two trusts. In our view, there was no intention to evade the protections of the 1953 Act, such as they were at the time of the validating legislation in 1971. Fundamentally, as we have said, the Crown was entitled to rely on the deliberate and informed decisions of the owners' representatives.

961. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 218–219
962. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 219
963. Subsection 1(d) of section 213 was inserted in 1975. Subsection 7 of section 213 was inserted in 1974. Before that, section 213 did not apply to vesting in a trust board (introduced by the addition of subsection 1(d) in 1975), and the requirements of section 222 regarding written and witnessed voluntary arrangements did not apply to section 213 until introduced by the addition of subsection 7 to section 213 in 1974.
964. See Maori Affairs Amendment Act 1974, s 28; Maori Purposes Act 1975, s 3(2).

20.9.5 What adjustments have been made since 1971, and with what results?

(1) *Lease variations*

As we mentioned earlier, some owners accepted what they considered to be a valuation and rent that was too low in 1970, in the belief that the paramount concern was to get the Crown to agree to a lease at all. With provision for regular rent reviews, and for the resolution of disputes by the Land Valuation Court, it was hoped that a more satisfactory rent could be negotiated in future.

At the close of our hearings in 2005, there had been three rent reviews:

- In 1977, the rental value was increased to $430,000 and the rent was set at $23,650 per annum from 1 July 1977.[965] The Tuhoe Waikaremoana Maori Trust Board's share was $17,107 a year.[966] The variation to the lease was signed on 11 October 1977 by V S Young, Minister of Lands, for the Queen, and by the chairpersons, secretaries, and one member each of the Tuhoe Waikaremoana Maori Trust Board and the Wairoa Waikaremoana Maori Trust Board.[967]
- In 1988, the rental value was increased to $1,412,180, with the rent set at $77,669 per annum, backdated to 1 July 1987.[968] This variation to the lease was signed on 21 December 1988 by D A Field, Regional Manager of the Department of Conservation, for the Queen, and the chairpersons, secretaries, and one member each of the two trust boards.[969]
- In 1998, the rental value was increased to $2,251,000, with an annual rent of $123,805, backdated to 1 July 1997. Although the Crown began paying the new rental in 1998, the variation of the lease was not formalised until 2001.[970]

Although there will have been a further rent review in 2008, after the close of our hearings, we have not been provided with the outcome of that review.

965. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 143)

966. A B Atkinson, for Secretary of Maori Affairs, to Minister of Maori Affairs, 28 January 1980 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 177)

967. Variation of lease, 11 October 1977, 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998, app 2 (doc H13)

968. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 143)

969. Variation of lease, 21 December 1988, 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998, app 2 (doc H13)

970. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 150); Peter Williamson, 'Documentation provided in response to questioning during first Crown hearing week', 12 May 2005 (doc M34), para 5; Variation of lease, 30 April 2001 (doc M34(e))

Did Rental Values Keep Pace with Inflation?

Year	Rental value	Previous rental value adjusted for inflation (CPI)
1967	$143,000	
1977	$430,000	$365,485 (= $143,000 after 10 years' inflation)
1987	$1,412,180	$1,467,987 (= $430,000 after 10 years' inflation)
1997	$2,251,000	$1,914,588 (= $1,412,180 after 10 years' inflation)

These figures have been calculated using the Reserve Bank of New Zealand's consumer price index calculator as the measure of inflation and the backdated start date (1 July) as the reference point. The consumer price index uses the cost of 'a basket of goods and services' and so does not include land values. On this measure, the rental value of Lake Waikaremoana kept ahead of inflation in 1977, lagged behind it in 1987, and outstripped it in 1997.

Source: http://www.rbnz.govt.nz/monetary_policy/inflation_calculator

In their closing submissions, the claimants made no comment about these rent revaluations, or the question of whether the increased rentals now represent a fair annual payment. Counsel for Nga Rauru o Nga Potiki pointed out that there was no evidence on the record about 'the changing nature of the valuation of conservation land, something that has been incorporated into the new state services regime, and its impact on the current rent reviews'. In the absence of evidence, this matter could not be taken further.[971] The Crown's position is that the lease is (and has always been) a fair and Treaty-consistent arrangement, and that the rental revaluations have been negotiated by informed agreement. No recourse to the courts has been necessary. The information about the 1998 rent review was provided by Mr Peter Williamson, Conservator, in his evidence for the Crown.[972] Mr Williamson gave the Tribunal the details of the special Government Valuation, on which the renegotiated rental value was based.[973]

In January 1998, Valuation New Zealand carried out a 'valuation of bed of Lake Waikaremoana for lease rental renewal purposes'. The valuation was completed and forwarded to the Department of Conservation on 18 February 1998.

The valuers noted certain conditions which defined the parameters of the valuation. First, the lease restricted the uses and control of the bed to those authorised by the National Parks

971. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 177

972. Peter Williamson, brief of evidence, 8 February 2005 (doc L10), pp 21–22

973. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

Act 1952. The dry land component of the bed was designated 'National Park' in the district plan. The valuation was therefore made on the basis that if the title area was sold, it would be with the dry land designated 'National Park' (and underlying zone of 'rural' for the rest). The valuers added that there was 'no suggestion that the National Park zoning or designation has a detrimental effect upon values as such', but it did mean that the property would have to be sold on the basis that it could only be used in ways 'complementary to the aims and ideals behind the National Park concept', which was also a stipulation in the lease itself.[974]

Secondly, the valuation still excluded hydroelectricity (as in 1968), relying on section 306 of the Public Works Act 1928, which vested the sole right to use 'waters in lakes, falls, rivers or streams for the purpose of generating or storing electricity' in the Crown. The valuers concluded: 'No account can, therefore, be taken of the value of the water of the lake for the generation of electricity, and this factor has been excluded from the valuation.'[975]

The legal position at the time was actually more complex than this (possibly erroneous) statement suggests, since the Crown had given up its sole statutory right to use water for the generation of hydroelectricity back in 1987, during the corporatisation of the electricity sector.[976] Also, the Public Works Act 1928 had itself been repealed in 1981. Nonetheless, the valuers stated that they were relying on it for the exclusion of hydroelectricity from the valuation.

Thirdly, the principle of deriving the value of the submerged bed from capitalisation of profits was continued as before. The valuers noted that there were 'no recorded sales of comparable bodies of water within New Zealand. In the absence of market comparison the only option available is the capitalisation of profits.'[977]

In that respect, there were no separate fishing licences for Lake Waikaremoana. The valuers relied on data from back in 1970, which suggested that 10 to 12 per cent of the Rotorua fishing licences were for Waikaremoana. Visitor and camping numbers were high in the mid-1990s but profits from boating and camping were not necessarily reflective of that fact.[978] The commercial launch operating from Home Bay for tourists had been going for 12 years but was not 'showing profitability', while the high cost of removing all waste from the national park had impacted on economic returns for the motel and camping grounds: 'It is

974. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

975. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

976. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 223

977. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

978. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

unlikely that the motel and camping ground facilities show an economic return on replacement cost despite the high level of occupancy during the holiday period.'[979]

The valuation was as follows:

- Zoning was taken into account. The Crown as an adjoining owner was a potential purchaser, and 'overseas interests' could not be ruled out as potential purchasers either. But the 'zoning and designation would discourage most forms of intensive commercial development'.
- Improvements were valued because this was a requirement of the Valuation of Land Act, but they had been 'ignored when determining the Rental Value'. Although clause 3 of the lease 'does not specify the manner in which the Rental Value is to be determined', 'natural justice would suggest that Lessees should not pay rent on their own improvements'.[980] Structural improvements were valued at $300,000.[981]
- Fishing licence revenue: for the last six years, the income from Rotorua fishing licences had averaged $805,503. Relying on the one 1970 statistic, the valuers estimated that a 10 per cent share for Lake Waikaremoana would amount to $80,550 per annum.[982] This value was capitalised at 7 per cent, 'leaving 1.5% administrative costs', to arrive at a rental 'value of lake' at $1,150,714, rounded to $1,151,000.[983] Revenue of $5709 from the launch and boat hire was not counted, because of a '7% return on asset value of $85,000 being in advance of the revenue'. So the value of the submerged lakebed was calculated solely on the basis of a guessed 10 per cent of Rotorua fishing licence revenue. We note, however, that the valuer's doubt back in 1968 that a 5 per cent capitalisation was too low was rectified in this 1998 valuation, where a figure of 7 per cent was used.[984]
- 'Value of land': two commercial sites at Home Bay and Mokau valued at $300,000; '20 separate blocks around lake @$40,000', totalling $800,000, giving a dry land value of $1,100,000.[985] We note that the value of the ring of dry land around the lake was no longer the higher of the two valuation figures by 1998.

979. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
980. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
981. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
982. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
983. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
984. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
985. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)

These calculations gave a rental value of $2,251,000 at 5.5 per cent, giving a recommended annual rental of $123,805, which was an increase of 59.4 per cent to the annual rental.[986] Although the Crown appears to have started paying this new rental in 1998, backdated to 1 July 1997,[987] a variation of the lease was not formalised until 2001.[988]

As we noted above, the claimants have not raised any issues about the rental revaluations, nor have they commented on whether or not the current rental (as it was at the time of our hearings) had reached a figure more acceptable to them. The Crown, on the other hand, has pointed out that the 1998 valuation was accepted by all parties as the agreed basis for a renegotiated rental. In the Crown's view, the rental value was a fair one, and this was not contradicted by the claimants. We have no information as to why this process took until 2001 to complete, although it may have been delayed by the ever-recurrent issue of hydroelectricity.

We turn to consider that point next.

(2) *Negotiations and agreement about hydroelectricity in the 1990s*

The Crown's stance that it did not need to pay for using the lake for hydroelectricity, including use of the Maori land on which the intake structure and siphons were located, was finally overturned in 1998. This was one of the consequences of the corporatisation of the electricity sector in the 1980s and 1990s. The trigger was the creation of the Electricity Corporation of New Zealand (Electricorp or ECNZ) and the sale of 'all of the Crown's interests in certain assets and contracts' to the corporation in 1988. The three Waikaremoana power stations were included. Tama Nikora told us that there was no consultation with 'the two Trust Boards which by then owned the lake'. As part of what Mr Nikora called the 'tidying up of the "loose ends" of transfer of assets to ECNZ', the Crown 'realised that it had a problem with the structures on the bed of Waikaremoana'.[989]

Five years after the sale, on 10 February 1993, the Department of Survey and Land Information wrote to the Tuhoe Waikaremoana Maori Trust Board:

> When the three power stations near Waikaremoana were constructed a few of the structures and access to them was on land that was not Crown land. Some of these are on the bed of Lake Waikaremoana and it is about these that I am writing to you. The structures are parts of the outlet (a large concrete bay) and part of the spillway/siphon at the start of the Waikaretaheke River. . . . The Crown would like to obtain easements over both of these areas.[990]

986. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment K)
987. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), p 150)
988. Williamson, 'Documentation' (doc M34), para 5
989. Nikora, 'Waikaremoana' (doc H25), p 131
990. Nikora, 'Waikaremoana' (doc H25), pp 131–132

Mr Nikora commented:

> The effect of this letter was to finally clarify for the Trust Board that the structures were located on the title of the lake. . . . The Trust Board had never been clear as to what had taken place with the construction of the outlet and siphon, i.e. whether they were within the boundaries of the title, whether they were authorised by law and whether any compensation had been paid in respect of them.[991]

As a result of this approach from the Crown, the two boards met in Wairoa on 22 February 1993. They agreed to act together and to hire a Wellington lawyer to represent their interests, which led to 'much correspondence and communications with the Crown and finally a meeting with Treasury in Wellington on 9 July 1993'. Tama Nikora explained what happened at that meeting:

> The Trust Boards' aim was to begin negotiations with the aim of securing from the Crown payment for past and present use of the lake for hydro electric purposes. The Treasury staff said that they only had authority to obtain security for ECNZ assets and to determine what was sold to ECNZ on 1 April 1988. They claimed that the Crown had a power to sublease to ECNZ. We learnt at the meeting that two Treasury officials had no authority to negotiate any further. I objected to the Treasury position and stated that it would be an absolute misuse by the Crown of its powers if it were to sublease given that the lake was not leased for hydro electric generation purposes. Treasury offered to discuss the matter further. As it transpired the discussions did not proceed any further until 1995.[992]

In the meantime, the Government was planning further reforms to the electricity sector. Its intention was to set up a free market in electricity and to break up ECNZ into competing companies. Further, the Government intended that ECNZ would divest itself of 'non-core' assets in the process, which was held to include the three Waikaremoana power stations.[993] This changed the situation considerably. Suddenly, not only did the Crown have to resolve the question of what had been sold to ECNZ in 1988, but now it wanted to on-sell the stations (including the siphons and intake structure which supplied the water) to private enterprise.

In July 1995, the Tuhoe Waikaremoana Maori Trust Board wrote to the Minister of Finance, advising him that a claim had been lodged with the Waitangi Tribunal (Wai 133). This claim concerned the use of the lake for electricity generation without consent or compensation. The board suggested to the Minister that the transfer of the three power stations to the two trust boards was 'an obvious solution to compensation for past and future use of the lake'. In the board's view, section 27B memorials would not provide any real protection,

991. Nikora, 'Waikaremoana' (doc H25), p 132
992. Nikora, 'Waikaremoana' (doc H25), p 132
993. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 225

and the power stations should form part of any Treaty settlement.[994] In the same month, Rose Pere wrote to the local Maori member, Koro Wetere, on behalf of the Haumapuhia Waikaremoana Authority, which was based at Tuai. The Authority objected to any privatisation of the power stations until 'everything has been properly accounted for between the Crown as one Waitangi Treaty Partner, and ourselves as representing the Maori Partner'.[995] The Wai 621 claim, filed for the Wairoa Waikaremoana Maori Trust Board in 1996, and Te Okoro Joe Runga's claim Wai 687 in 1997, also argued that the power stations should not be sold until Treaty claims had been settled.[996]

In July 1995, the trust boards also resumed their pressure on the Government about ownership of structures on the lakebed, which had been left in abeyance since the unsuccessful discussions with the Department of Survey and Land Information and Treasury in 1993. The Tuhoe Waikaremoana Maori Trust Board advised Bill Birch, the Minister of Finance, that the Crown was 'fully aware that it did "not have a legal right to have its structures on the bed of Lake Waikaremoana"'.[997] Negotiations for easements had gone nowhere.[998] In August 1995, the boards began proceedings in the Maori Land Court against the Crown (as lessee) and ECNZ. They claimed that 'the Crown was in breach of the lease in allowing the structures to be on the bed of the lake and that ECNZ was trespassing on the bed of the lake'.[999] The boards sought the removal of the structures as well as damages. Tama Nikora commented: 'This brought the Crown and ECNZ to the negotiation table.'[1000]

The result was a mediation, which began in December 1995. The parties did not reach agreement until 1997. According to Mr Nikora, the mediation resulted in a variation to the lease, which provided 'that the Crown could not sublease the lake or any part of it without the prior consent of the Trust Boards (the original lease had not provided any restriction on subleasing)'.[1001] The 1998 Te Puni Kokiri report for the ministerial inquiry clarified that there could be no subleasing for electricity purposes: 'a clause was added to the lease. It provides that the lessee shall not sublet any part of the lake to any person for electricity

994. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 226

995. Haumapuhia Waikaremoana Authority to Koro Wetere, 7 July 1995 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 226)

996. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 227; Elizabeth Cox, 'Lake Waikaremoana and District Scoping Report', report commissioned by the Waitangi Tribunal, December 2001 (doc A8), p 6

997. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 226

998. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 226

999. Nikora, 'Waikaremoana' (doc H25), p 133

1000. Nikora, 'Waikaremoana' (doc H25), p 133

1001. Nikora, 'Waikaremoana' (doc H25), p 133

purposes without the prior written consent of the lessor.'[1002] This variation to the lease was signed on 20 June 1997.[1003]

In the meantime, negotiations continued between the boards and ECNZ about its structures on the lakebed. These negotiations took from 1996 to 1998. Mr Nikora explained:

> While the Trust Boards believed that they had a good case to take and that the Crown's refusal to pay for use of the lake for hydro electric purposes was wrong, it soon became clear to the Trust Boards that pursuing the case would be extremely expensive and success could not be guaranteed. We attempted to find a precedent for the valuation of a lake for hydro electric purposes, but could find none. This made the valuation task very difficult.[1004]

Quite apart from these problems, there appeared to be a key weakness in the boards' case: 'we were faced with the realisation that the Crown could rely on the State Owned Enterprises Act 1986 to grant the easements required by ECNZ with or without the consent of the Trust Boards'.[1005] ECNZ told the boards that it would rely on section 23(1) of the 1986 Act, which stated that, notwithstanding 'any Act, rule of law, or agreement', the Ministers could grant to the State enterprise 'leases, licences, easements, permits, or rights of any kind in respect of any assets or liabilities of the Crown'. The boards' response was to point to section 9 of the Act, which provided that nothing in the Act 'shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'.[1006]

Mr Nikora characterised the conclusion of negotiations in 1998 as follows:

> Ultimately the Trust Boards and ECNZ reached an agreement and the Court proceedings were settled. The easements were granted to ECNZ and from 1998 onward ECNZ has paid for the use of the lake for hydro electric purposes.[1007]

In his evidence for the Wai 621 Ngati Kahungunu claimants, Mr Richard Niania stated that Tama Nikora's evidence on these points had been prepared in discussion with the Wairoa Waikaremoana Maori Trust Board, and that Mr Nikora's account also stood for them.[1008]

Hence, the position of the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants is that the Crown has failed to pay for the use of the lake for hydroelectricity purposes between 1946 and 1998. In the claimants' submissions, the economic potential of the lake should not have been expropriated, and the hydro works could have proceeded by means of a fair and

1002. 'Lake Waikaremoana: background paper prepared by Te Puni Kokiri', 1998 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 143)
1003. Variation to Lease, 20 June 1997 (Peter Williamson, comp, supporting papers to brief of evidence (doc L10(a)), attachment L)
1004. Nikora, 'Waikaremoana' (doc H25), pp 133–134
1005. Nikora, 'Waikaremoana' (doc H25), p 134
1006. Nikora, 'Waikaremoana' (doc H25), p 134
1007. Nikora, 'Waikaremoana' (doc H25), p 135
1008. Richard Renata Niania, brief of evidence, 22 November 2004 (doc I38), p 78

equitable arrangement with the lake's owners. Leasing and easements were and are 'commercially viable'. Since 1998, ECNZ and Genesis have recognised that there is such an obligation. In doing so, the claimants' view is that they have confirmed that the Crown has had an obligation ever since 1946.[1009]

We received evidence from Tracey Hickman for Genesis Energy. Her evidence focused on environmental management and the renewal of resource consents, which was happening at the same time as negotiations over the easements. Ms Hickman did not mention the 1998 agreement.[1010] The parties did not advise us as to the detail of what was negotiatied in 1998, either in terms of exactly what was acknowledged by the parties as being paid for or settled, or in terms of the amount which ECNZ (and its successor Genesis) has paid to the Maori owners. Instead, we received a joint statement from the Tuhoe Waikaremoana Maori Trust Board, the Wairoa Waikaremoana Maori Trust Board, and Genesis Energy:

> In 1998 the Trust Boards and ECNZ entered into an agreement in principle ('the settlement') whereby the Trust Boards would grant an easement to ECNZ in relation to the structures on the lake for a period of 100 years from 26 March 1998 in return for a licence regime. The agreement in principle expressly provided that the settlement did not settle any claims against the Crown in the Waitangi Tribunal.[1011]

A supplementary deed in January 1999 created the proposed licence regime, backdated to 1 March 1998, 'the details of which are and remain confidential'.[1012] The Maori Land Court then made orders creating the easements in November 1999, and a new deed was signed in 2001 to transfer ECNZ's rights and obligations to Genesis. The Wai 36 Tuhoe claimants and the Wai 621 Ngati Kahungunu claimants state that 'the deed resolved issues as between the Trust Boards and Genesis Power Limited in relation to use of the Lake for hydro electricity purposes from 1 March 1998 until the end of the term of the easements and any payment for such use'.[1013] But the claimants note that this was not a settlement of their Treaty claims, and that they still seek findings of Crown 'liability' (to have paid for use of the lake for electricity prior to 1998).[1014]

In response to a question from Crown counsel, Tama Nikora clarified what it was that the claimants believe the Crown should have been paying for, between 1946 and 1998:

1009. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 134

1010. Tracey Hickman, brief of evidence, 7 February 2005 (doc L11)

1011. Counsel for Wai 36 Tuhoe, counsel for Wai 621 Ngati Kahungunu, and counsel for Genesis Power Ltd, joint memorandum, 25 February 2005 (paper 2.782), p 3

1012. Counsel for Wai 36 Tuhoe, counsel for Wai 621 Ngati Kahungunu, and counsel for Genesis Power Ltd, joint memorandum (paper 2.782), p 4

1013. Counsel for Wai 36 Tuhoe, counsel for Wai 621 Ngati Kahungunu, and counsel for Genesis Power Ltd, joint memorandum (paper 2.782), p 4

1014. Counsel for Wai 36 Tuhoe, counsel for Wai 621 Ngati Kahungunu, and counsel for Genesis Power Ltd, joint memorandum (paper 2.782), pp 1, 4–5

> It is in fact for right of access, over private land, for right of access to the lake by the power stations as first obtained about 1945 when the tunnel was completed and activated. It is for use of the Lake as a dam, the sealing of holes belonging to the lake and use of extra water obtained via the bypass tunnel to the power stations. It therefore includes use of water for generation and the structures on the bed of the lake.[1015]

While the boards were negotiating the 1998 agreement with ECNZ, the sale of the Waikaremoana power stations had been put on hold from 1996 to 1998. This was because of the National Government's coalition with New Zealand First, which was opposed to asset sales. When the coalition ended in 1998, the Government resumed plans to privatise Contact Energy and to split ECNZ into Genesis, Meridian, and Mighty River Power. With the sale of 'non-core' assets back on the agenda, consultation took place between the Crown and Maori groups in the Waikaremoana district. The Government's plan was to sell the Waikaremoana stations to either a power company or to 'Maori within the region of the power station'. According to the evidence of Dr Cant's research team, the two trust boards formed a consortium and supported the idea of an immediate sale to them as part of a joint venture, but it appears that Ngati Ruapani and the Waikaremoana Maori Komiti wanted Treaty claims settled first before the power stations could be sold.[1016] Ultimately, however, the new Labour Government cancelled the privatisation of the Waikaremoana power stations in 2000. Instead, the stations were transferred to one of the new State-owned enterprises, Genesis Energy, in order to increase its generating capacity.[1017] Thus, the stations remained publicly owned at that time, and – it seemed – still potentially available for consideration in settlement of Treaty claims.[1018] Hence, the proposed sale process did not figure in the claims as presented at our hearings in 2003 to 2005 because the issue appeared to have been resolved.

20.9.6 Our conclusions about the 1971 lease

In sum, the Crown has made four major arguments about the lease, which have been explored in the preceding discussion:

- First, that the Crown agreed to a lease, thus compromising on its earlier position that an absolute alienation was required.
- Secondly, that the terms of the lease were first proposed by the Maori owners, were arrived at by reasonable compromises, were fair to both sides, and were achieved by a

1015. Tamaroa Raymond Nikora, Answers to questions of clarification from the Crown, 30 March 2005 (doc H26(a)), p 16

1016. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 227

1017. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 227

1018. Cox, 'Lake Waikaremoana and District Scoping Report' (doc A8), p 6

robust process resulting in the free and informed consent of senior owners' representatives. This included full consultation about (and agreement to) the terms of the lease itself and the validating statute. All rent revaluations have been reached by free and informed agreement.[1019]

- Thirdly, that some owners may have misunderstood that the bed of the lake was to be vested in the two trust boards. Nonetheless, the decision to use the two existing trust boards instead of a Waikaremoana board, and to vest the bed in those trust boards, was made by senior representatives of the owners and had nothing whatsoever to do with the Crown.[1020]
- Fourthly, that there was retrospective payment of rents back to 1967. Nonetheless, the Crown considered (and still considers) its past use of the lake caused virtually no losses to the owners, and so expectation of compensation was 'unreal'. But, to the extent that compensation was appropriate, it must be held to have been discharged by the arrangement that was reached in 1971: that is, the annual rental and lease (paid back to 1967) settled all claims.[1021]

The claimants have accepted the first of these points but dispute aspects of the other three, as we have discussed above.

Overall, we accept that the 1971 lease was the result of negotiated compromises on the part of the Maori owners and the Crown, which reflected creditably on both sides. There were many positives. The Crown, for example, agreed to a lease instead of insisting on a purchase. This enabled Maori to retain their taonga while protecting it as part of the national park and deriving an ongoing commercial benefit from it. This was a significant victory for the owners. The Crown also decided to pay the rates, abided by the results of a professional valuation, and consulted the owners' committee about all points in the lease and Lake Waikaremoana Bill. For their part, the owners agreed not to insist on backdating the lease to 1957, to accept a perpetual lease, and to accept a lower rental rate (5.5 per cent) and lower valuation than they would have liked. We presume that any weaknesses in the 1968 valuation, such as the possible under-valuing of the submerged bed, have since been corrected by agreement in the revaluation negotiations. In the absence of any claimant submissions on that point, we take it no further.

From the evidence considered in sections 20.9.2 to 20.9.5, it is very clear to us that the agreement forged in 1970 and 1971 cannot be considered as settling all prior claims about the lake. Compensation for past use was an explicit part of the negotiations from 1961 until the Crown's final purchase offer was rejected in 1969. The owners' counter-offer of a lease, backdated to 1957, was clearly a compromise proposal to secure part of what was owed for the Crown's prior use of the lake. The Crown agreed to backdate the lease but only to

1019. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9, 11
1020. Crown counsel, closing submissions (doc N20), topic 28, p 11
1021. Crown counsel, closing submissions (doc N20), topic 28, p 12

1967. There was no specific negotiation about or settlement in respect of past use of the lake in 1970 or 1971. Sir Rodney Gallen's evidence confirmed this point. No such settlement was recorded in the terms of the lease or the Lake Waikaremoana Act. Further, the 1968 valuation, on which the agreement was based, was conceived of solely as giving the lakebed's current value. As counsel for the Wai 945 Ngati Ruapani claimants pointed out, this Government Valuation was supposed to have been followed by a commission to set an overall value. Instead, the Government Valuation was used on its own, 'based simply on existing values with no acknowledgement of past use or damage'.[1022]

We do not, therefore, accept the Crown's submission that there is 'no outstanding issue concerning lakebed use prior to 1971, and no further payment for the use of the lakebed prior to 1971 is warranted'.[1023] Rather, we accept the claimants' submission that the lease and rental remain unfair because the Crown has not paid for use of the lake for hydroelectricity between 1946 and 1998, and has not paid for use of the lake 'for scenic and conservation purposes and as part of the National Park prior to 1967'.[1024] We agree with the claimants that the 1998 hydroelectricity settlement was both long overdue and is evidence that there was something to settle. We accept, too, that the 1998 hydroelectricity agreement did not settle past claims or Treaty claims. We will return to these points in our Treaty Analysis and Findings section.

On the question of the switch from a Waikaremoana-specific trust board to the two tribal trust boards, the evidence is clear that this was a choice made first by the owners' negotiating committee in September 1970, and then delegated to that committee for a final decision at the August 1971 meeting. The issue of the vesting of the bed, however, is less clear cut. The idea seems to have been proposed first by the Crown, as a way of simplifying future rental revaluation and lease renewal negotiations. But the owners' committee certainly adopted the idea, if they did not originate it. The legislative vesting of the bed in 1971 was the deliberate wish of the owners' representatives. But the evidence from 1973 to 1979 is clear that many owners did not understand this or expect it – indeed, in 1974 the Tuhoe Waikaremoana Maori Trust Board denied that it had happened at all.

We accept the Crown's submissions in respect of this point, that there was 'no reason why the Crown should have done anything in respect of the lease other than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill'.[1025] There had been a lengthy period of consultation on the draft lease and the Bill, between the Government and the owners' committee, and also internally among the claimant communities. The Government was entitled to rely on the committee's decisions in August 1971, and on the expressions of support for and acceptance of the Bill as it passed through Parliament. We do

1022. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 50–51
1023. Crown counsel, closing submissions (doc N20), topic 28, p 12
1024. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146
1025. Crown counsel, closing submissions (doc N20), topic 28, p 11

not discount the evidence from the 1970s that a significant number of owners had neither understood nor intended that their legal ownership would be extinguished by the Act, but our view is that this was an internal matter for the trust boards and beneficiaries to resolve.

We add, however, that the difficulties caused by this issue, so long after ownership had been decided by the Native Land Court, underline the limitations of the title options available to the court in 1918. Had it been able to vest the lake itself in community title, perhaps in a single trust at that time, neither the tribal representatives nor the descendants of those deemed individual owners of the bed would have faced the problems they did in 1970–71. The Crown's failure to provide forms of title that took account of and gave effect to Maori relationships with waterways that were their taonga would, in the case of Lake Waikaremoana, have long-term prejudicial effects.

Finally, we note that it took 19 months from the May 1970 agreement to the passage of the Lake Waikaremoana Act in December 1971. Much of this final delay – in a negotiations process marked by chronic delays – was caused by disagreement between the Crown and the owners' committee on one crucial point: the exact mechanism by which owners should be assigned to one or other of the trust boards. After examining the details of the dispute in section 20.9.4.(1) we think that it is to the Crown's credit that it did not force the issue, and that time was allowed for working out an appropriate mechanism. Ultimately, it took over a year but the owners found a solution acceptable to both parties.

20.10 What Role have Maori Played in the Management of Lake Waikaremoana after Entering into the Lease? The Claims of Nga Rauru o Nga Potiki and Ngati Ruapani

Summary answer: *The Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants made no allegations about the post-1971 management of Lake Waikaremoana, preferring to resolve matters directly with the Crown as lessee. The Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants, however, made allegations about (a) the Crown's management of water levels for hydroelectricity, (b) its management of the lake as part of the national park (allowing pollution and an infestation of exotic weeds), and (c) their exclusion from the co-governance and co-management which, they said, ought to have followed upon the lease. The Crown denied these claims, although it accepted that lowering the lake in 1946 had long-term effects on fisheries and shoreline erosion. In the Crown's view, this was the inevitable price of the nation's need for power, and current effects are being managed appropriately under the Resource Management Act.*

We deal with each of the claim issues in turn.

(a) The Crown's management of water levels

In the 1970s and early 1980s, the aspirations of the Maori owners and the national park authorities on this matter were the same: both wanted tight management of water levels within strict limits. During this period, the owners were content to let the park board(s) speak for them on this issue. The lake's water levels, however, were not managed by the park authorities but the New Zealand Electricity Department. At first, all seemed well because the 'Gentleman's Agreement' served to keep the lake within agreed limits, and the park authorities – despite their commitment to preserving the park in as natural a state as possible – agreed that the prior manipulation of lake levels for electricity must continue now that Lake Waikaremoana was part of the national park. When the department sought to carry out additional sealing of leaks, Maori and the park authorities remained aligned and they objected to the proposed sealing. The park board then applied to replace the 'Gentleman's Agreement' with enforceable limits and a return to a more natural, seasonal regime, which Maori supported.

It was not until the 1990s that the park authorities and local Maori appeared to diverge on the issue. Electricorp's application for resource consents in that decade resulted in a major consultation exercise which set conditions designed to prevent or mitigate the effects of erosion, and to restore cultural losses – principally of eels in the Waikaretaheke River. Electricorp's working party process succeeded in resolving many issues about the immediate effects of the power scheme, although its longer term effects (and the need for compensation and to settle Treaty grievances) remained unresolved. Water levels were to be managed more tightly than ever under the resource consent conditions. Again, there was some congruence between Maori and DOC aspirations, but discontent on the part of some Maori was revealed by the lakeside occupation in 1998. In particular, erosion and the failure to settle Treaty grievances were burning issues, although questions of authority and ownership were paramount. The ministerial inquiry in 1998 agreed that erosion as a result of lake-level manipulation was 'excessive' but hoped that it could be reduced by keeping the range tightly controlled and constant, and urged Maori and DOC to use RMA processes to get Electricorp to 'avoid, mitigate, or remedy the erosion that is occurring'.

The evidence is that Electricorp and then Genesis have been careful since 1998 to operate within the agreed limits, but that erosion remains a serious concern – as, for example, in the case of the oxidation pond. Nonetheless, the effects of lowering the lake permanently in 1946, and then of raising and lowering it to control the flow of water for electricity, have been immense. The Crown did not deny the evidence that reduced fisheries and shoreline erosion have been long-term consequences, but argued that effects can now be managed and mitigated through RMA processes. We note that the shoreline will become more stable over generations, once the lake has been held within stable limits for sufficient time, but that the reduction of nearshore habitat (and thus of aquatic life) seems to be permanent or at least very long-term. Also, the taonga has been permanently altered,

with a new shoreline that is being eroded, and the spiritual consequences for the taonga and its kaitiaki have been significant.

a. The management of the lake as part of the national park (pollution and weeds)

The claimants' main concerns under this head were (i) the pollution of Lake Waikaremoana by sewage; (ii) the presence of giardia in the lake; and (iii) current or potential infestation by exotic weeds.

(i). During the period of the lease, untreated or partially treated effluent from Lake House (until it was closed down) and the Government's motor camp flowed into the lake until 1980. Witnesses agreed that the Crown was aware of the problem and of the remedial action necessary, but delayed taking it for a decade. The new treatment plant (an oxidation pond) was not completed until 1980. Contamination of a taonga by human waste carries physical and spiritual consequences for the taonga and its kaitiaki. The Crown accepted in our inquiry that preventing pollution was of paramount importance to the claimants, and argued that significant attempts had been made to fix the problem in recent times. We agree but note that the new treatment plant itself became problematic for the claimants, who objected to its location and feared leakage or even a breach as a result of erosion. The Crown denied that there was a problem or risk for many years (notably also in the ministerial inquiry in 1998) but took emergency action in 2004 as a result of a discovered leak and severe erosion. We accept that local Waikaremoana Maori have been involved in managing the problem since then, particularly through the vehicle of the Waikaremoana Maori Komiti. Nonetheless, the effects of long-term pollution by human waste have been serious, and – during the period of the lease, at least – were avoidable if the Crown had taken the necessary action. Steady improvement is now evident.

(ii). Giardia is present in Lake Waikaremoana, and its spread is likely related to the pollution of parts of the lake by human waste. Nonetheless, giardia is also spread by animals and birds. Its presence in Lake Waikaremoana was probably unpreventable.

(iii). Although the national park ethos requires the preservation of Lake Waikaremoana in as natural a state as possible, an aspiration shared by the claimants, it appears that the exotic weeds currently in the lake are incapable of being removed, but are not a significant threat to indigenous aquatic life. There is, however, a risk of invasion by more aggressive exotic species – the Crown and Maori agree that this requires careful monitoring and swift remedial action, so as to prevent the enormous harm that could occur to the taonga. Local Maori are involved through the Aniwaniwa system of cooperative management (see c below).

b. The exclusion of Maori from governance and management

As we found in chapter 16, Maori had no formal or statutory representation on the park's various governance boards. In the 1970s, their influence was at its height due to informal representation – three of the nine park board members were Maori who were

understood to represent Tuhoe, Ngati Ruapani, and Ngati Kahungunu. But their influence was progressively reduced once the number of Maori members dropped from three to two and the Te Urewera board was replaced by regional boards responsible for multiple parks and reserves. In our view, an important opportunity was also missed in the 1970s: just as Waikaremoana representatives were added to the Maori Trust Boards as a result of the lease and the Lake Waikaremoana Act 1971, so too should representatives of the lessors have been given statutory seats on the park's governance boards. Nonetheless, the practical effects were mitigated for a time by the congruence of views between Maori and park authorities as to the protection and preservation of Lake Waikaremoana in its natural state. Also, there were fewer occasions for conflict: Maori customary uses did not clash with preservationist aspirations in the way they did for other parts of the national park.

Nonetheless, there was growing anger among some Maori communities in the 1990s at what they saw as mismanagement of the lake (see the above discussion regarding erosion, pollution, and exotic weeds), resulting in the lakeside occupation of 1998 and Treaty claims to this Tribunal. The occupation interrupted a promising new initiative, called the 'Aniwaniwa model', which involved informal joint or cooperative management by DOC field staff and local Maori bodies, primarily (for the lake) the Waikaremoana Maori Komiti. After the Aniwaniwa model was restored by late 1999 or 2000, cooperative management resumed and the relationship between DOC and local Maori groups improved. Although there were weaknesses – under-funded, informal (and therefore impermanent) systems, and restricted to arrangements and decisions in the field – the model showed great promise. The kiwi restoration programme demonstrated what can be achieved. It also suggests that similar 'partnership' arrangements could work with Genesis as the manager of lake levels, with potential for expanding the Aniwaniwa model to include Genesis when necessary. Again, the Electricorp working party of the 1990s shows what works and what can be achieved. One-off projects such as the kiwi restoration programme are capable of replication, so long as Maori have an appropriate role in governance and management.

20.10.1 Introduction

In 1971, the Maori owners leased Lake Waikaremoana to the Crown for inclusion in Te Urewera National Park. In the terms of the lease, the Crown and the Te Urewera National Park Board covenanted with the Maori lessors to 'administer control and maintain the said [lake] in accordance with the powers and provisions of the National Parks Act 1952.'[1026] As counsel for Nga Rauru o Nga Potiki pointed out, this undertaking required the lake to be managed (as far as possible) in such a way as to preserve it in its natural state, to preserve

1026. Lake Waikaremoana Act 1971, schedule: 'Lease of Lake Waikaremoana'

its indigenous flora and fauna, to exterminate exotic flora and fauna, and to maintain its value for soil and water conservation.[1027] Unfortunately, however, neither the lease nor its validating legislation prescribed any role for the Maori lessors in the governance or management of the lake. Although the lessors were given statutory representation on the reconstituted Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards, they were not accorded representation on the park board. As a result, the lessors became – we were told – submitters to other authorities.

Such authorities have been many and varied since the lease was signed. The park board was replaced by four other boards in succession between 1981 and 2009. Nor was the lake solely managed by the park authorities, which did not control the water. Instead, the water was subject to the Government's electricity authorities and to local councils. The Electricity Department became the Electricity Division became Electricorp became Genesis, while catchment boards were replaced by regional councils, as statute followed statute in swift succession.

Te Urewera Maori communities, meanwhile, continued to struggle with the problems brought by urbanisation, corporatisation, and poverty, yet trying to engage as a Treaty partner with this complex, ever-shifting landscape of management and authority over their lake. For them, it did not matter which department or council or board had responsibility for any one particular issue; they wanted their taonga preserved and protected in its natural state, as they were promised in 1969 when they offered to lease it to the nation for that purpose as part of a national park. When they saw shoreline erosion apparently unchecked; when they saw effluent running into the lake from the Government's tourist facilities; when they saw exotic weeds growing thick in Home Bay; when they saw freedom campers disposing of waste on the lake shores; when they grew sick from drinking lake water; and when they saw that they had little or no voice in the authorities responsible for preventing these things; then some of the claimants in our inquiry came to regret the 1970 agreement and sought to re-enter the lease. It is their claims which we consider in this section of our chapter.

20.10.2 Differing opinions among the claimants

Before we begin our analysis of the claims about post-1971 management of Lake Waikaremoana, we need to note that there was a variety of opinions among the claimants.

In the 1990s, some Waikaremoana hapu were critical of the Tuhoe Waikaremoana Maori Trust Board, as one of the two bodies which owned the lake and administered the rental. They felt that the local hapu were the proper kaitiaki of the lake, yet they had little or no input to the decisions of the Government and the board. They also felt that the lake's ecology had been mismanaged by the Government. The trust board, on the other hand, con-

1027. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220

sidered itself to be acting on behalf of all its beneficiaries, and appears to have had no serious concerns about the way in which the lessee (effectively DOC) was managing the lake.

These divergent views were brought to light in the 1998 lakebed occupation and ministerial inquiry. The occupiers brought 22 specific charges against the Crown as lessee, which fundamentally amounted to a charge that DOC was not managing the lake properly under the terms of the National Parks Act 1980.[1028] The two trust boards, on the other hand, were supportive of DOC at the 1998 inquiry.[1029] The boards 'asserted a good relationship between themselves and the Department of Conservation and recorded that neither believed there to be any breach of the lease or basis for the complaint'.[1030] This divergence of views was very important, not least because the boards were the legal owners and lessors of the lake, responsible for the lease that – it was alleged – had been repeatedly breached by the Crown as lessee.

The positions were slightly different at the time of our hearings. Counsel for the Wai 36 Tuhoe claimants and counsel for the Wai 621 Ngati Kahungunu claimants made no submissions about the post-1971 management of the lake. They neither supported nor denied others' claims of Crown mismanagement. Counsel for Wai 36 Tuhoe explained: 'The Trust Boards have separately addressed issues directly with the Crown in relation to the lease and have not pursued lease issues before this Tribunal (aside from issues of payments for use of the lake).'[1031] The exception to this position was a claim about damage to the lake from its use for hydroelectricity (which was related to the claim about the Crown's failure to pay for use of the lake).[1032] Further, counsel for the Wai 36 Tuhoe claimants submitted that the trust board is not an agent of the Crown: disagreements about the lake between the board and its beneficiaries are not the business of this Tribunal.[1033]

The Wai 621 claimants did not mention post-1971 management of the lake in their statement of claim or their closing submissions.[1034] Clearly, they shared a general claimant view that tangata whenua have not been sufficiently included in the governance and management of the national park.[1035] In research interviews with Dr Cant's team, Reay Paku and Te Ariki Mei also shared general concerns about issues of shoreline erosion, pollution, and lake

1028. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 6–7. The specific allegations are numbered (a) to (v): see pp 7–15.

1029. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 10, 16

1030. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 10

1031. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 194

1032. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 31

1033. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 81–84

1034. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1); Wai 621, second amended statement of claim, 15 August 2003 (paper 1.2.6); Wai 621, addition to second amended statement of claim: environmental pleadings, 12 April 2004 (paper 1.2.6(a))

1035. Reay Paku, brief of evidence, 22 November 2004 (doc I35), paras 4.3–5.3

weeds. But, in respect of pollution and weeds, Paku and Mei considered DOC was doing a good job.[1036]

The Nga Rauru o Nga Potiki and Ngati Ruapani claimants, on the other hand, brought evidence and submissions that the lake had been mismanaged since the signing of the lease, and that they had been excluded from the Government's decision-making about the lake. They were particularly concerned about the issues of lakeshore erosion, pollution, and resultant harm to their taonga, which they said were the result of the Crown's mismanagement.[1037] The Ngai Tamaterangi claimants shared these concerns, although they did not present detailed evidence or submissions about them.[1038]

In summary, the Nga Rauru o Nga Potiki and Ngati Ruapani claimants have made two specific claims and a third, overarching, claim:

- the Crown's management of water levels for electricity purposes has harmed the ecology and mauri of the lake (addressed in section 20.10.3);
- the Crown's management of the lake for national park purposes has allowed it to become polluted, as well as contaminated with giardia and infested with exotic weeds (addressed in section 20.10.4); and
- the Crown's governance and management of the lake has largely excluded Maori when the Treaty required – and the lease implied – nothing less than partnership and co-management (addressed in section 20.10.5).

It is these claims which we discuss in this section of our chapter. We begin our analysis with the Crown's management of lake levels in the post-lease period to 2004.

20.10.3 The management of lake levels

As we have already discussed in chapters 16, 18, and 19, the 1970s was a decade of intensive work for the Tuhoe Waikaremoana Maori Trust Board. It was involved in protracted negotiations with the Crown over forestry development, amalgamation of land titles, land-exchange or leasing of land to the national park, and – in the early part of the decade – the Waikaremoana reserves. During the 1970s, management of the lake itself was a matter left to the Te Urewera National Park Board. Both Maori trust boards relied on their (unofficial) representatives on the park board; they had few resources otherwise to devote to government planning and processes affecting the lake, and were confident that John Rangihau and Tama Nikora, as well as Reay Paku, would have influence and receive a sympathetic hearing from the Pakeha majority on the board. This situation did not change until the 1980s, after

1036. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 115–116, 139, 207, 239

1037. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 79–83, 96–99, 104–108; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 220–222, 237, 239

1038. See counsel for Ngai Tamaterangi, closing submissions (doc N2), esp pp 62–64, 66–68; counsel for Ngai Tamaterangi, closing submissions, attachment A (doc N2(a)), pp 66–67, 92–95, 108

the disestablishment of the Te Urewera park board and the beginnings of significant disagreement as to how the lake should be managed.

In terms of managing the lake as part of the national park, there were two key issues in the 1970s and 1980s:

- fluctuating water levels (and consequential shoreline erosion and harm to aquatic species dependent on the littoral zone); and
- pollution from the park's visitors, especially in the form of sewerage from Lake House and the motor camp.

We deal with pollution in the following section. Here, we are concerned with how the Crown managed lake levels for hydroelectricity purposes, now that the lake was officially part of the national park.

(1) *From sole management to dual management: the Electricity Department and the Te Urewera National Park Board, 1965 to 1980*

Before 1967, the Electricity Department had sole authority to manage lake levels. As we saw above, this coincided with 'wild' fluctuations and periodic, drastic draw-downs of the lake. From 1967, however, the Water and Soil Conservation Act allowed for regulatory oversight, in this case by the Hawke's Bay Catchment Board. Ironically, it did so just after the department began to maintain more stable lake levels. With the creation of the national grid, the three Waikaremoana stations only generated a small proportion of the country's electricity, and there was enough supply to prevent the extremes in lake management that had been such a feature of the 1950s and early 1960s. Yet the issue of fluctuations was still considered a problem, despite maintaining the lake in a more stable range. A high level in 1968 (2008 feet) had caused serious erosion to lakeshore facilities. The park board, which still had no authority over the lake at that time, complained to the department about the need to control 'undue fluctuation' in the future.[1039]

The result was negotiations between the Electricity Department, the park board, and the Nature Conservation Council. Other than through their informal representatives on the park board (John Rangihau and T C Nikora), the Maori owners do not appear to have been consulted. The board tried to get the department to agree to keep the lake between 1996 feet and 2004 feet. Electricity officials wanted a much larger range (between 1970 feet and 2006 feet). Even so, the department acknowledged that it tried in practice to keep within the limits sought by the board. This enabled a 'Gentleman's Agreement' to be reached in 1970: as far as possible, the lake would be kept between 1994 feet and 2004 feet, and the department had to discharge water if the level rose to 2006 feet. This made fluctuations more controlled and predictable for all concerned. Also this annual range of 10 feet was close to what it had been

1039. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 198–199

in nature (although at a lower height, and in a pattern the reverse of the natural, seasonal pattern).[1040]

The following year, the Maori owners leased the lake to the Crown and it became a formal part of the national park. The park board at once assumed authority over boating and lakeside structures, including ramps, marinas, jetties, house boats, water-skiing, and jet-boating.[1041] In 1977, it published the blueprint for its management of the lake:

> (a) Maintenance of the value of the lake as a soil, forest, and water conservation area.
>
> (b) Protection of the remote and peaceful character of the lake in its natural wilderness setting of a National Park.
>
> (c) Freedom for the public to enjoy as fully as possible all forms of recreation that do not conflict with the above aims.[1042]

The question for the board, and in particular its Maori members, was whether these aims could be delivered while the lake was also managed by the Electricity Department for quite different purposes. As the claimants have observed, the board's responsibility was to give effect to the National Parks Act, with its emphasis on preserving the lake in its natural state 'as far as possible'.[1043] Maori park board members had to represent the values and aspirations of their people to their fellow board members,[1044] but they also had to act conscientiously to 'obtain the objectives of the National Parks Act'.[1045] In the particular case of managing the lake, the claimants' view is that their aspirations and those of the National Parks Acts coincided: both sought the preservation of the lake's ecology in its natural state.[1046] But could this be reconciled with lowering and raising the lake to control flows to downstream power stations? In the claimants' view, it could not because the 'natural character of the foreshore which coastal ecosystems rely so heavily upon for survival and growth has been detrimentally affected through the ECNZ's power station reducing dramatically the lake levels'.[1047]

The Park Board offered its answer to this question in 1976. The Te Urewera National Park management plan of that year stated:

> Although the use of Park waters for power generation is generally not in keeping with the national park concept, in this case the construction of the hydro scheme preceded the

1040. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 199

1041. Brad Coombes, 'Cultural Ecologies of Te Urewera [II]: Preserving "a great national playing area" – Conservation Conflicts and Contradictions in Te Urewera, 1954–2003', report commissioned by the Crown Forestry Rental Trust, 2003 (doc A133), pp 86–87

1042. 'Urewera National Park Board: News, No 20, April 1977 (Coombes, 'Cultural Ecologies II' (doc A133), p 87)

1043. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220

1044. Reay Paku, brief of evidence (doc I35), paras 4.1–5.3

1045. T R Nikora to Chairman of Te Urewera National Park Board, 'Composition of Te Urewera Park Board', 18 June 1973 (Coombes, comp, supporting papers to 'Cultural Ecologies of Te Urewera' (doc A121(a)), p 140)

1046. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 117–118, 220–222

1047. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220

creation of the Urewera National Park. It may also be said the generation of hydro-electric power, provided it does not cause permanent ecological or physical damage, may be in the greater public interest despite the conflict with national park objectives.

In the circumstances it is the policy of the Park Board to ensure adequate and close co-operation with the NZ Electricity Department in order to keep fluctuations in lake levels to a minimum and to seek compensation and/or remedial work if and when damage to the resource or public facilities occurs.[1048]

Thus, the board considered that the key issue was the manipulation of lake levels. Hence, its stated policy was to cooperate with the Electricity Department to try to keep fluctuations to a minimum, and to seek compensation or remedy where necessary. This was based on a philosophical position that the lake could be part of a national park and still be used and modified for hydroelectricity within certain bounds. Damage would inevitably occur but the board saw its task as to prevent any new damage from becoming 'permanent'. This position was only possible because physical modification of the lakebed had long been a fait accompli by the 1970s, when the lake formally became part of the national park. To the extent that there was ongoing modification of the natural state of the lake, it was understood to be limited to the regular manipulation of lake levels. And, by means of the 'Gentleman's Agreement', the board thought that lake levels would be controlled and stable.

In the late 1970s, however, the Electricity Department and the Ministry of Works destabilised the 'Gentleman's Agreement', because they proposed to carry out further physical modification of the lakebed. New technology had identified deeper leaks north of Te Wharawhara, which the Ministry planned to stop by creating a new sealing blanket. Less water would then escape from the lake, and officials estimated that $650,000 worth of power generation elsewhere would be saved by this more efficient use of Lake Waikaremoana. Capacity could be improved in this way without necessarily changing the existing water levels regime. But the proposal aroused strong resistance. Local hapu were very opposed to any further modification of the lakebed. Locals were also worried that stopping these natural leaks would reduce their water supply. The park board and the Conservator of Wildlife also objected. These authorities were concerned that more sealing would allow the department to keep the lake even higher in summer, which was unnatural for that time of year. Springs and streams would be further reduced, and the natural character of the lake and its environs further altered. This was unacceptable to the park board.[1049]

1048. Te Urewera National Park Board, *Urewera National Park Management Plan 1976*, pp 35–36

1049. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 155, 174–175, 220

From 1974 to 1977, fisheries scientist Peter Mylechreest had been studying the impact of water level fluctuations on species in the littoral zone.[1050] His purpose was:

> to try and determine a suitable regime for hydro lakes aimed at utilising their inherent power-generating capabilities to maximum effect with minimal damage to recreational fisheries. Failing this, it was to lessen the effects of such fluctuations, coupled with suggestions for adjusting lake levels compatible with periods of highest angling use.[1051]

Mylechreest's final results in 1978 identified 'historical' changes, which included 'a disproportionately great loss of littoral area' when the lake's level had been permanently lowered, and a reduction in all aquatic species as a result.[1052] But there were also concerns about the current management of lake levels, because of the way in which the lake was kept high in summer and lower in winter. This reversed the natural seasonal state of the lake ('reversed seasonal periodicity'). Mylechreest suggested that the effect was to reduce the productivity of the littoral zone in summer, reduce species diversity in that zone, and reduce trout populations. While further research was needed, he recommended restoring the natural seasonal 'periodicity': higher levels in the wetter, winter months and lower levels in summer. If necessary, he argued that the country could use more thermal power stations to help meet winter demand.[1053] In 1979, Mylechreest suggested that 'reversed seasonal periodicity' would become even worse if the sealing project was allowed to go ahead.[1054]

In November 1979, Ministry of Energy[1055] staff met with the park board to discuss its concerns. Mylechreest was present at the meeting. Ministry officials told the board that less summer storage was likely in future, and that it planned to restore the seasonal pattern of rising levels in winter. This was apparently now possible because the Pukaki dam in the South Island had been completed, and the Huntly thermal station was about to come on line, reducing the need to store so much water in Lake Waikaremoana in summer. Officials assured the park board that lake levels would stay within the limits set by the Gentleman's Agreement, but they refused to give up on the sealing project. Instead, the Ministry of

1050. This work was commissioned by the Internal Affairs Department and the New Zealand Electricity Department – see Te Urewera National Park Board, minutes of meeting, 12 September 1974 (Edwards, comp, papers in support of 'Select Issues' (doc L12(a), p 417)

1051. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 84–85

1052. P Mylechreest, 'Some Effects of a Unique Hydroelectric Development on the Littoral–Benthic Community and Ecology of Trout in a Large New Zealand Lake' (MA thesis, University of British Columbia, 1978), fols 97–98 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 85)

1053. P H W Mylechreest, 'Hydroelectric-induced Changes in Lake Waikaremoana', *Wildlife: A Review*, 10, 1979, pp 46–47 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 85, 199)

1054. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 201

1055. In 1978, the New Zealand Electricity Department became the Electricity Division of the new Ministry of Energy.

Works carried out testing in 1980 to try to determine how much water would be lost to farms and waterways if more leaks were sealed.[1056]

In the meantime, the park board decided that a formal arrangement would have to be made, to control how the Electricity Division managed the lake's water levels.[1057] Under the Water and Soil Conservation Act 1967, the National Water and Soil Conservation Authority or a regional water board[1058] had the power to set maximum and minimum lake levels. This power could be exercised 'where the action seems warranted in the circumstances'. If it chose to exercise its power, the board or the Authority had to consult representatives of 'all interested bodies and persons' when making its decision. As well as setting lake levels, the Act provided for setting water quality standards in lakes and rivers, and flow rates for rivers. The water board's power was recommendatory; the final decision rested with the Authority.[1059] In 1980, the park board invoked this jurisdiction and sought a formal ruling from the Hawke's Bay Catchment Board.[1060]

As required by section 20(5)(d) of the Water and Soil Conservation Act, the catchment board requested submissions from parties that it knew to be interested. This included the lake's Maori owners. The board approached Tama Nikora and Reay Paku, the two members of the park board who were understood to represent the Tuhoe and Ngati Kahungunu trust boards respectively. It also sought a submission from Sam Rerehe of Waimako Pa. According to Dr Cant's evidence, all three 'indicated verbally that with respect to lake levels, the interests of their respective groups would be served by the statutory interests of the Urewera National Park Board'.[1061] As members of the park board, Nikora and Paku had confidence that its submissions would take account of local iwi concerns.[1062] Apart from this point, there was also the constant problem that Maori organisations of the time were overstretched and under-resourced. The Tuhoe Waikaremoana Maori Trust Board advised the park board that it simply did not have the time and resources to come up with its own submission, and asked that the park board's submission 'stand for it as well'.[1063]

In brief, the park board's position was that it was happy with the current operating range (1994 feet to 2004 feet) but it wanted the maximum and minimum set formally under the

1056. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 175, 199–201

1057. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 201

1058. The Act provided for catchment boards to be regional water boards. The Hawke's Bay Catchment Board acted as a regional water board for the purposes of this Act.

1059. Water and Soil Conservation Act 1967, ss 14(3)(o), 19(1)-(2), 20(5)(d)

1060. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 201

1061. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 221

1062. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 221

1063. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 202

Act. It also wanted to ensure that maximum generation of power from the lake 'commenced well before the 2004ft (610.8m) limit be reached'.[1064] Other submitters included the Rotorua Conservator, an angling club, and the Nature Conservation Council. Of these, two groups wanted to set 2000 feet as the summer maximum, while the Nature Conservation Council called for a return to 'natural periodicity' (that is, lower in summer, higher in winter). The Electricity Division was already trying to restore something closer to natural seasonal patterns anyway, but it objected to setting 2000 feet as a summer limit.[1065]

The catchment board appointed a special tribunal to consider the submissions and decide the matter. This tribunal decided to keep the now normal operating band of 10 feet (3 metres) but lowered it by two feet overall to a new minimum of 1992 feet (with a maximum of 2002 feet). Catchment board staff had advised that the threat of erosion was significantly greater above 2002 feet, especially for tourist facilities in Home Bay. The need to prevent further erosion seems to have resulted in this setting of levels significantly lower than in the Gentleman's Agreement. The mandatory discharge level was also dropped by two feet to 2004 feet. The tribunal's decision allowed the Ministry of Energy to breach the minimum in urgent circumstances. The lake could be lowered to 1990 feet if there was a 'recognised national shortage of energy'. Any drop below 1990 feet was only allowed if the national shortage was 'extreme'. The National Water and Soil Conservation Authority ratified these formal limits in November 1980.[1066]

(2) *Regulated management, 1981–86*

In 1983, with the new rules in place, the Ministry tried to proceed with the sealing of the lakebed. It proposed to start removing rock outcrops from the bed so that the sealing could start. Dr Cant's research team was unable to find out what happened next, but the Ministry apparently abandoned its plans and no new sealing work ever took place.[1067] According to Tracey Hickman, it was 'strong opposition to the proposals' which brought them to an end, and she noted that 'Genesis Energy has no intention to undertake additional lake sealing'.[1068] In any case, Dr Cant suggested that the Ministry did in fact keep its assurances to the park board and the catchment board about trying to restore (as far as possible) natural sea-

1064. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 202

1065. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 202

1066. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 202–203

1067. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 175–176

1068. Hickman, brief of evidence (doc L11), p 8

sonal patterns.[1069] Its efforts still did not go far enough for Mylechreest and the Rotorua Conservator, who later called for more to be done.[1070]

The catchment board reviewed the new rules in 1986. This time, nine submissions were made by interested organisations or individuals, but again there were no submissions from Maori groups.[1071] By then, the Te Urewera National Park Board had been replaced by the East Coast National Parks and Reserves Board, and day-to-day management had become the responsibility of Lands and Survey. This department's view was that the lease provided for Maori interests because the owners 'retain a management role through membership on the parks and reserves board responsible for the national park as well as the leased area'.[1072] Thus, the park administrators' view in 1985 was that board membership gave the lake's owners a sufficient voice in its management. As we noted in chapter 16, however, the replacement of a Te Urewera park board by an East Coast board had reduced Maori influence, already limited because Maori members were a minority. Dr Cant commented:

> It is interesting to note that none of the submissions came from Waikaremoana iwi or their representatives; possibly they may have voiced their opinions via the East Coast National Parks and Reserves Board submission, but even if they did – unfortuntately no correspondence has been seen on this issue – the dilution of Urewera governance in the new enlarged body probably meant that Waikaremoana iwi had less input into the 1986 lake level determinations than they had in 1980.[1073]

Submitters were mostly unhappy with the new lake levels as set in 1980. There were a range of complaints from the Wildlife Service, Lands and Survey, and 'the Friends of the Urewera Association', in particular that the lower regime was more erratic, that it risked holing boats again, and that it had actually increased erosion instead of helping prevent it. According to these submitters, the fairly constant regime from 1965 to 1980 had started to stabilise the shoreline, but this was undone when the whole regime was lowered by two feet.[1074] Crown counsel questioned Dr Cant on this point, as to how long the lake levels needed to be stable before the shoreline itself would also stabilise. Dr Cant replied that it

1069. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 203

1070. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 222

1071. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 222

1072. Lands and Survey Department, 'New Zealand Case Study: traditional rights and protected areas', Third South Pacific National Parks and Reserves Conference, Apia, June-July 1985 (Coombes 'Cultural Ecologies II'(doc A133), p 162

1073. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 222

1074. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 203

would actually take several generations to complete, but that 'most of the stabilisation might take place within say 15 to 25 years.'[1075]

The Electricity Division was neutral on the issue of the 1980 levels. So long as it could retain an operating range of 10 feet, with a buffer of two feet either side, the department was not concerned as to whether the minimum was 1992 feet or 1994 feet.[1076]

As a result of the near unanimity of all parties, the catchment board and the Authority agreed to return to the pre-1980 lake levels for Waikaremoana.[1077]

(3) *New management and regulatory regimes*

The lake levels set in 1986 were due for review at the end of 1990. In the meantime, new management regimes had been established and a new regulatory regime was in the process of being set up. The fourth Labour Government had begun to corporatise various state enterprises, including electricity production, alongside a process of resource management law reform.

In 1987, the Electricity Corporation of New Zealand (Electricorp) took over the Waikaremoana power scheme, including management of lake levels. At the same time, the Crown's monopoly on electricity generation was removed – the possibility of privatising this power scheme was now open, as we discussed in section 20.9.5(2) In the same year, the Conservation Act was passed. The Government established the Department of Conservation (DOC), which replaced Lands and Survey as the day-to-day manager of Te Urewera National Park. Management practice began to change soon after, with the creation of Kaupapa Atawhai staff to liaise between DOC and iwi in the early 1990s.[1078] The East Coast National Parks and Reserves Board was replaced in 1990 by a conservation advisory board,[1079] and DOC became the primary management authority for the park (see chapter 16).

In the late 1980s, the East Coast board was in the process of reviewing the Te Urewera National Park management plan, which had been in place since 1976. Submissions from local Maori noted restoration of a natural regime for lake levels as a high priority for them.[1080] In its final form, the new 1989 management plan stated that DOC would negotiate with 'the appropriate catchment authority, the Ministry of Energy and Electricorp, to seek an operating regime that will minimise the effects of hydro-electric power generation on the ecology of the lake and lakeshore, shoreline stability, the interests of the Maori people

1075. Garth Cant, under cross-examination by Crown counsel, 20 October 2004 (transcript 4.11, p 133)

1076. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 203

1077. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 204

1078. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 223

1079. Specifically: 1990 – the East Coast Conservation Board; 1998 – the East Coast Hawke's Bay Conservation Board; 2009 – the East Coast Bay of Plenty Conservation Board.

1080. Coombes, 'Cultural Ecologies II' (doc A133), p 381

and the use of the lake for boating and other public uses'.[1081] Dr Cant's research team called this a 'slight advance' on the 1976 plan, because 'the National Park "manager" was now seeking to minimise the effects of fluctuations, rather than the fluctuations themselves, and there was now a clearer statement of what was meant to be protected'.[1082] Also, the new plan provided that 'the owners of the bed of Lake Waikaremoana will be consulted through their Trust Boards on any matters affecting their interests in and around the lake'.[1083]

It seemed as if the scene was set for DOC to consult with Maori so as to ensure the protection of their interests during the upcoming review of lake levels in late 1990. This did not occur, however, because the review was overtaken by the resource management law reform process. As part of replacing the Water and Soil Conservation Act (and other laws) with the RMA, all existing use conditions were allowed to remain in place for up to 10 years. This meant that Electricorp's management of lake levels did not need to be reviewed until 2001. But the standard to be met was also much higher than under the Water and Soil Conservation Act: Electricorp would have to apply to the regional council for resource consents to keep using the lake and its outflowing rivers, and it would have to prove that environmental effects from its use of the lake were 'either avoided or mitigated'.[1084] Also, while the previous law had made the catchment board responsible for identifying and consulting with all interested parties, the RMA placed this responsibility on Electricorp. As an applicant, it had to notify and consult all relevant Maori organisations and groups.[1085] Both the applicant and the regional council (in making its decision) had to provide for the relationship of Maori with their waters and their ancestral taonga as a matter of national importance. They also had to have particular regard to kaitiakitanga, and to take into account the principles of the Treaty.[1086]

The result was a three-year research and consultation process unparalleled under the previous legislation. Electricorp began consultation and commissioning research in 1995. It seems to have begun this process much earlier than allowed because the new National Government wanted to break the corporation up, transfer its power stations to competing State-owned companies, and to privatise 'non-core' generating assets. As we discussed

1081. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999*, February 1989, p 63 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 223–224)

1082. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 224

1083. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999*, p 63 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 224)

1084. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 224

1085. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 224–225

1086. Resource Management Act 1991, ss 6–8. For a summary of the relevant obligations under the Resource Managment Act, see Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 54–63).

earlier, the Waikaremoana power stations generated a very low share of the nation's power by this time, and were slated for privatisation.[1087] Electricorp's application for resource consents, and the trust boards' response on behalf of the lake's Maori owners, were both coloured by the expectation that the power stations would soon be transferred to new state entities or sold. For the Maori trust boards, the focus was on the Crown's long-standing use of the lake for electricity without payment, its structures on the bed of the lake, and the 'obvious solution' that the power stations should be transferred to the owners of Lake Waikaremoana in compensation.[1088]

Although corporatisation and privatisation were put on hold from January 1997 to August 1998 (as a result of the National coalition with New Zealand First), they remained likely in future. The process resumed in late 1998 after the coalition fell apart. As we discussed earlier, the two trust boards and Ngati Ruapani then formed consortiums and bid for the Waikaremoana stations.[1089] Throughout the resource consents process, therefore, the attitudes of a significant component of the Maori community may have been influenced by the fact that they might become the owners and operators of the power scheme. As Electricorp's project manager for the resource consents noted, however, consultation with the trust boards gave 'no indication that they would put business interests ahead of their interest in the environment around Lake Waikaremoana.'[1090]

(4) *Electricorp and the resource consents process*

The RMA required Electricorp to consult with affected parties and local Maori, and to undertake a process to identify possible effects and propose means by which they could be avoided, remedied, or mitigated. In practice, as Dr Cant noted, these two processes were combined, so that consultation was designed to identify effects and agree on solutions.[1091]

A key early development was the establishment of a Working Party in April 1995, to supervise research and debate the results. It provided a forum for Electricorp to iron out issues with interested organisations before the formal consent hearings took place. A number of organisations were represented on the Working Party. Local Waikaremoana hapu, Ngati Hinekura and Te Whanau Pani, authorised the Haumapuhia Waikaremoana Authority to take part on their behalf, and Electricorp also held a series of separate meet-

1087. In her evidence for Genesis, Tracey Hickman noted that the Waikaremoana power scheme is of vital local importance to the East Coast. It is the only major source of electricity in that region. If the East Coast is cut off from the national grid, which happens from time to time, the Waikaremoana power scheme maintains electricity supply for the region. (Hickman, brief of evidence (doc L11), p 7)

1088. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 225–226

1089. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 227, 242

1090. Peter Anthony Canvin, brief of evidence to Hawkes Bay Regional Council, undated (1998), p 20 (Tracey Hickman, comp, supporting papers to brief of evidence (doc L11(a)), [p 34]

1091. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 228

ings with the Authority.[1092] The Wairoa Waikaremoana Maori Trust Board was the other Maori organisation represented on the Working Party. Although the Tuhoe Waikaremoana board did not sit on the Working Party, it was also involved in consultation and had meetings with Electricorp. There were also meetings and discussions with the Waikaremoana Maori Committee and the Panekiri Tribal Trust Board (see box).[1093] Apart from Electricorp and the various Maori representatives, the Working Party also had members from DOC, the

The Waikaremoana Maori Committee

Kararaina Rangihau described the Waikaremoana Maori Committee as the central body for all of the Waikaremoana hapu:

> This forum is the people's mandated reporting entity in the community. It is made up of nominated delegates of our Hapu.
>
> Community, Iwi and Hapu issues are discussed and recommendations and decisions are made on behalf of the people at monthly Hui. All activities, projects, visitors, Officials are reported to this forum. Reports are then relayed back to Hapu/Whanau and discussed for the next monthly Hui.
>
> The Waikaremoana Maori Committee has a functional relationship with all community, Iwi, Hapu, people and land-based, organisations here in Waikaremoana.

Source: Kararaina Rangihau, 'Waikaremoana Housing Project Community Profile', October 2003, pp 13–14, appended to Kararaina Rangihau, brief of evidence, 18 October 2004 (doc H43)

Panekiri Tribal Trust Board

Vernon Winitana stated that the Panekiri Tribal Trust Board was established by Ngati Ruapani in 1982 as a result of a hui held in 1981. At that hui, he said, John Rangihau proposed that 'we form our own organisation to manage our own affairs'. The trust had nine elected trustees, three to represent Kuha Marae, three to represent Waimako Marae, and three 'to represent those living outside Waikaremoana'. Mr Winitana added:

1092. Hickman, brief of evidence (doc L11), pp 12–13
1093. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), pp 6–8, 12

> John Rangihau gave us our name and kaupapa, which was to look after the last remaining lands of Ruapani at Te Kopani and Heiotahoka. The focus on our maunga [mountain] "Panekire" allowed it to be quite specific as to whom it represented. The role of the Trust expanded quickly, and soon it was the first port of call for any issues that came up in Waikaremoana.
>
> **Source:** Vernon Winitana, brief of evidence, undated (2005) (doc H28), pp 4–5

local councils, the Eastern Fish and Game Council, Federated Farmers, the Hawkes Bay Canoe Club, and (later) Forest and Bird.[1094]

Dr Cant suggested that the 'working party process was an important opportunity for Waikaremoana Maori and ECNZ to contribute face to face and seek solutions to environmental problems'.[1095] It certainly helped identify potential adverse effects. From research and from the various consultation initiatives, environmental effects were found to include erosion, decreased nearshore habitat, and impeded fish migration in the Waikaretaheke River.[1096]

But a number of other issues were exposed, related to Electricorp's exploitation of the lake, which Electricorp did not necessarily have to deal with in order to get resource consents. The Haumapuhia Waikaremoana Authority, for example, raised issues of compensation for past and present losses, and the provision of free electricity.[1097] In theory, 'mitigation' could cover a number of different remedies for the damage that came from permanently lowering the lake. Electricorp, however, seems to have ruled out any possibility of compensating the Maori owners. Its focus was on preventing avoidable ecological damage in the future, remedying or mitigating unavoidable damage, and restoring lost opportunities for cultural and recreational use of the lake and its outflowing waterways. To help restore the environment, Electricorp pledged $100,000 a year to DOC for 10 years, to be spent on

1094. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 228

1095. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 229

1096. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 231; see also Emma Christmas, William Chisholm, Mark James, and Clive Howard-Williams, 'Review of the Effects of Lake Level Fluctuations on the Ecology of Lake Waikaremoana: Report to the Lake Waikaremoana Working Party', December 1995; Emma Christmas, William Chisholm, and Jennifer McQuaid-Cook, 'Lake Waikaremoana Power Scheme: Report on the Scoping of Environmental Effects – Report to the Lake Waikaremoana Working Party', February 1996

1097. Hickman, brief of evidence (doc L11), p 14

local projects.[1098] It also undertook to construct works that would prevent further erosion at Home Bay and Mokau Landing, and to repair boat ramps.[1099]

The $1 million for 'ecosystem restoration' was seen by DOC as a contribution towards redressing damage from the original and permanent lowering of the lake, as well as the ongoing 'rising and lowering of the lake'.[1100] But Electricorp considered it a matter of 'ecological enhancement', not 'restoration', and did not formally accept that there had been 'significant adverse effects on the environment as a result of the level of water in Lake Waikaremoana being lowered some 50 years ago'.[1101] According to Electricorp, the 'shoreline ecosystem [had] largely recovered from the 1946 lake lowering'.[1102]

By the time of our hearings, however, Genesis Energy (Electricorp's successor) had a different position. In response to questions from counsel for Wai 144 Ngati Ruapani, Tracey Hickman stated:

> The agreement in general (in my understanding) was to offset historic effects related to the lowering of the lake in the [19]40s, which I guess created a corridor around the margin of the lake and had some impact over that time on the ecological status of the shoreline and associated margins of the lake. So my understanding was that there was an agreement reached between ECNZ and DOC to mitigate that effect and to contribute funding toward a number of aspects, including kiwi recovery and a number of other ecological species around the lake, and vegetation as well. So that's broadly my understanding of that agreement.[1103]

Claimant counsel raised the issue of who should have received and administered payments in mitigation of historical damage: DOC or the resource-owners who suffered the damage? Ms Hickman replied that she was not sure but that the damage to be mitigated was ongoing, and DOC was responsible for managing the national park.[1104]

In any case, according to Ms Hickman, the Working Party reached consensus in 1998 over all issues except for the management of lake levels.[1105] Here, the primary clash was between Electricorp and DOC. The department wanted to confine Electricorp more tightly within the set limits, so as to stabilise the lake and prevent further damage by lake levels going too high or too low. Electricorp would have to discharge water earlier, thus prevent-

1098. Hickman, brief of evidence (doc L11), p 20
1099. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), pp 4, 10
1100. Peter Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005
1101. 'Agreement between Genesis Power Limited and the Minister of Conservation', 23 September 1999 (Williamson, comp, papers in support of brief of evidence (doc L10(a)), doc M)
1102. Electricity Corporation of New Zealand, 'Waikaremoana Power Scheme: Assessment of Effects on the Environment', April 1998, p 86
1103. Tracey Hickman, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, first Crown hearing week, 28 February 2005
1104. Tracey Hickman, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, first Crown hearing week, 28 February 2005
1105. Hickman, brief of evidence (doc L11), p 14

ing increased erosion and damage to fauna in the littoral zone. DOC also wanted an absolute prohibition on lowering the lake below the set minimum, which had previously been permitted in times of electricity shortage. Electricorp suggested that shoreline profiles and vegetation were gradually adapting to the current operating range, and so the tighter limits would actually start a new cycle of erosion.[1106]

This issue was still unresolved in April 1998, when Electricorp applied to the Hawke's Bay Regional Council for the 45 consents necessary to operate the Waikaremoana power scheme. But further discussions between DOC and Electricorp resulted in agreement before the regional council held its hearings. In essence, Electricorp agreed never to discharge water from the lake once it reached the minimum level or fell below that level. It also agreed to mandatory discharge at prescribed rates at the upper level, which would begin as soon as the lake reached the maximum limit and would increase if the lake rose higher. Under the previous (1986) conditions, there had been a 'buffer': compulsory discharge had not been required until the lake rose two feet above the maximum, and there had been no prescribed rates of discharge. Electricorp also agreed that it would manage water levels so that – 'insofar as this is practicable' – the lake never went outside the upper or lower limits. In turn, DOC conceded that Electricorp should be left to manage this for itself, reporting any infringements within 24 hours. But Electricorp agreed that if any avoidable 'excursions' were allowed within the next five years, then it would submit to prescribed mandatory discharges even before the lake reached the upper limit.[1107]

This tight control of the water levels so as to minimise erosion and further harm to the littoral zone was a goal supported by Maori. In his evidence for DOC, Peter Williamson understood that Maori had shared 'common concerns' with his department in the consents process: 'the wellbeing of the environment, the wellbeing of the lake edge, potential erosion issues, [and] general common concern for the ecological issues inherent in having a power scheme, and the water rising and falling'.[1108] DOC had also known of Maori spiritual concerns, including the effects of the scheme on the taniwha Haumapuhia, but those had not figured in its objections to the consents.[1109] As far as we are aware, the lake's legal owners (the two trust boards) were satisfied with what DOC had achieved in respect of lake levels. As Electricorp's project manager noted, the boards made no submissions to the Regional Council, neither supporting nor opposing the consents.[1110]

1106. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 231–232

1107. Canvin, brief of evidence to Hawkes Bay Regional Council, not dated (doc L11(a)), pp 14–15

1108. Peter Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005

1109. Peter Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005

1110. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), p 20

As part of developing the conditions for its consents, Electricorp agreed to annual monitoring of shoreline erosion, and, as noted earlier, it pledged $1 million (over 10 years) for DOC projects around the lake.[1111] It undertook to remedy or mitigate any adverse future effect, which would include any actual or potential erosion.[1112] Also, in order to restore lost cultural and recreational uses, conditions were agreed to restore 'residual flows' to assist 'native fish passage below a number of WPS structures'.[1113] An 'Eel Passage Management Plan' was developed in consultation with Maori, to capture elvers and release them above the artificial obstacles, and to research 'downstream passage for eels'.[1114] Maori supported this plan, in the hope of restoring the natural cycle of the eels. It was not considered entirely satisfactory because it only got eels up – and not back down – the rivers: 'they have yet to get the whole cycle sorted out'.[1115] This plan related to the rivers, not the lake itself.

The consultation process appeared to have satisfied almost all Maori groups, and there were few objections during the resource consents hearing. The exceptions were Vern Winitana (on behalf of the Wai 144 Ngati Ruapani claimants and the trustees of Te Kopani and Heiotahoka reserves) and Wayne Taylor. The Te Moana o Waikaremoana Trust also objected, but its objection was withdrawn after further consultation with Electricorp.[1116]

Vern Winitana did not refer to these matters in his evidence to the Tribunal, and Wayne Taylor was not a witness in our inquiry. Dr Cant provided the following summary and analysis of their objections:

> Vern Winitana and Wayne Taylor raised a range of Maori concerns, some addressing the legality of the ECNZ position and others the practicalities of kaitiakitanga and resource management. To begin with, Winitana noted that the lakebed hydro-electric works had never been legalised – a point that could also be raised relative to the Mangaone Diversion – and hence he argued that no resource consents should be granted until the settlement of the Wai-144 Treaty claim he had lodged for the Panekiri Tribal Trust. Winitana went on to raise issues to do with the extent of consultation with Ruapani landowners (notwithstanding the discussions with the Haumapuhia Waikaremoana Authority), and then addressed a number of very specific environmental issues including the lake level regime at Waikaremoana, the control of lake weeds, minimum flows and eel and fish passage in the affected watercourses, and impacts on water supply downstream from the Mangaone Diversion, and at Lake Whakamarino. Taylor's main concern, was that tangata whenua should have more

1111. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 233

1112. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), pp 21–22

1113. Hickman, brief of evidence (doc L11), p 14

1114. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), p 11

1115. James Anthony Waiwai, brief of evidence (doc H14), p 25. Tracey Hickman noted that the eel management plan required a mechanism for safe downstream passage to be developed within 10 years (Hickman, brief of evidence (doc L11), p 19).

1116. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), pp 18–25

> say in assessing the consents, and that the 'true' tangata whenua had not been consulted. In August 1998 ECNZ obtained a legal opinion on the matters raised by Winitana and, on the basis that it did not own the Mangaone Diversion dam, withdrew four of the related consents.[1117]

We would add to this summary that the importance of iwi deciding consents (rather than appearing as submitters) was also raised, as were issues about compensation, royalties for the use of water, and the protection of wahi tapu and important sites around the lake and its environs.[1118]

As noted, Electricorp withdrew the four of its 45 applications related to the Mangaone diversion, which was then discontinued. Trainor Tait considered this a significant benefit.[1119] DOC supported the remaining applications, and the Hawke's Bay Regional Council granted the 41 consents for a period of 35 years, subject to 'numerous conditions'. In relation to lake levels, Electricorp had to come up with procedures to avoid 'reverse seasonal periodicity', to record the level every 30 minutes, to provide detailed reports on any 'excursions', and to undertake surveys on shoreline vegetation (above water level) and shoreline morphology. These had to be reported annually to the two Maori trust boards, the regional council, DOC, and the Eastern Fish and Game Council. In respect of the issues of Treaty settlements and consultation, raised by Winitana and Taylor, the regional council 'made it clear that it could not take Treaty claims into account'. Also, the council was satisfied that adequate consultation had taken place 'with the appropriate Iwi parties'. Its own decisions, it said, had paid 'adequate regard' to kaitiakitanga and the principles of the Treaty.[1120] There were no appeals to the Environment Court.[1121]

In essence, iwi in 1998 had to live with the permanent alteration of the lake and its ongoing effects, but these would now be 'mitigated' (although not compensated). Also, all parties – especially Electricorp, DOC, and the trust board-lessors – would monitor things closely and work hard to prevent any new or avoidable damage to the lake and its ecology. We are impressed with the effort undertaken to consult Maori groups and devise consent conditions to address some of their concerns about how the lake was being used, and the harmful effects on their taonga. None of the claimants appearing before us have made submissions criticising the consents process.

But all was not as well as might have seemed from the relative lack of objections, and the extensive consultation and solutions worked out by Electricorp and the Working Party. In

1117. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 234

1118. Canvin, brief of evidence to Hawkes Bay Regional Council (doc L11(a)), pp 7, 19–25

1119. Tahuri o Te Rangi Trainor Tait, brief of evidence, 18 October 2004 (doc H29), p 20

1120. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 235

1121. 'Agreement between Genesis Power Limited and the Minister of Conservation', 23 September 1999 (Williamson, comp, papers in support of brief of evidence, document 'M' (doc L10)a))

early 1998, while consultation was still in process, a group of Maori occupied the lakebed. Supported by Bill Waiwai, the last surviving signatory of the lease,[1122] the occupiers claimed that they were re-entering their land because the Crown had failed to meet the conditions of the lease.[1123] The occupation, and the ministerial inquiry that followed, exposed deep concerns and grievances about the lake, which the consultation process had not solved. Trainor Tait called them 'deep rooted scars'.[1124] The many points raised by Vern Winitana and Wayne Taylor, especially about the need to settle Treaty grievances, would not go away simply because Electricorp was not responsible for resolving them.

As we will discuss later, issues of authority and ownership were paramount for many of the occupiers and their supporters. But there also very specific concerns about the environment, erosion, and the fact that the permanent lowering of the lake had had long-term, ongoing effects on the lake and its people – effects which could not be 'mitigated' by the kinds of solutions devised in the resource consents process.[1125] As James Waiwai put it:

> The Power Dams have had a huge effect on our people. The effects are still seen today in their descendants. People here had received little or no benefit from these schemes – there's so much unemployment. Our community has had our backyard ruined, we've paid the environmental price, and we've received nothing in return.[1126]

In respect of the specific complaint about erosion and lake levels, the ministerial inquiry understood it to be a present-focused concern and reported accordingly, recommending that it be dealt with through RMA processes:

> *Allegation: 'Erosion'* – It is alleged by reason of its management of the lakeshore the Department of Conservation has been allowing erosion to occur in a way that could have been avoided.
>
> *Department of Conservation Response:* The Department of Conservation agrees that lakeshore erosion is occurring in a number of places at an excessive rate. The principal cause of this is the Lake having been lowered below its natural operating range, and variations and fluctuations in range that now occur as a result of the use of the Lake as a hydro electricity reservoir.
>
> *Our Comment:* We understand that erosion can be minimised if the present mean lake level and fluctuation range is kept constant. The Electricity Corporation of New Zealand Limited as the manager of water levels at Lake Waikaremoana should be further encouraged by the participation of tangata whenua and the Department of Conservation in Resource

1122. Anaru Paine, brief of evidence (doc H39), p 10
1123. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 236
1124. Trainor Tait, brief of evidence (doc H29), p 20
1125. Joseph Takuta Moses, brief of evidence (doc H15), pp 6–7; Anaru Paine, brief of evidence (doc H39), pp 5–12; 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 7–8
1126. James Waiwai, brief of evidence (doc H14), p 25

> Management Act 1991 processes, to take steps to avoid, mitigate or remedy the erosion that is occurring, particularly at Mokau Landing and Home Bay. [Emphasis in original].[1127]

While this did not remove the underlying grievance, Dr Cant suggested that the management of lake levels has been 'fairly uneventful since 1998' – in contrast to DOC's management of other issues.[1128] The monitoring set up under the resource consents shows that Electricorp and its successor, Genesis, have 'generally met the standards' set by the Regional Council. By 2004, the time at which Dr Cant's evidence was prepared, Genesis had been 'cautious' in its operating range and there had been no 'excursions' outside a high rainfall event in 2001. This meant that the lake was being managed carefully within the tight constraints set for it in 1998. As a result, Genesis had even come in for criticism from the Government in 2002, for not storing enough water in the lake during the energy crisis of that year.[1129] Tracey Hickman emphasised Genesis' 'excellent' compliance record, and noted that the 2001 event was managed as required by the mandatory discharge of water as soon as the lake reached the maximum level.[1130] But, according to Dr Cant, the period between 1999 and 2003 had been less positive in respect of natural seasonal levels.[1131]

(5) *What have been the effects for the claimants?*

Although it is difficult to untangle some of our claimants' concerns from wider issues about the impacts of the power scheme on outflowing rivers and the Waikaretaheke catchment, we note that they were distressed about the specific effects on their taonga, Lake Waikaremoana. Kuini Beattie (also known as Kui Wano) expressed to us in most eloquent terms the effects of manipulating the lake's level for its kaitiaki. She told us that tampering with the water in this way is a form of contamination, which can result in sickness or even death for the kaitiaki. Harm to the wairua of the lake is seen as poisoning the people's mother (the lake), and the mana and mauri of the lake's guardians are inevitably affected by it. In particular, Mrs Beattie stressed that manipulating lake levels for electricity is symptomatic of a larger cultural disjunction: it is about *managing* rather than *caring for* waterways.[1132]

Other witnesses were also concerned about ecological effects, including shoreline erosion, the reduction of aquatic life (especially in the near-shore zone), the invasion of the new shoreline by non-native plants and pests, and the unnatural state of the lake and its

1127. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 7–8
1128. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 240
1129. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 240–241
1130. Hickman, brief of evidence (doc L11), pp 17–18
1131. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 241
1132. Kuini Te Iwa Beattie, brief of evidence, 11 December 2003 (doc B30), pp 6–7

waters.[1133] The ancestral landscape has been permanently altered; not only are there now a road, tracks, and buildings on land that used to be covered by water, but Patekaha Island has ceased to be an island and is now a peninsula.[1134] Wahi tapu have also been affected on the lake's shores, although details were not shared with the Tribunal. As claimant counsel noted, witnesses such as Dr Rose Pere struggled with whether to reveal the locations and ancient names of wahi tapu, for fear that the information could be coopted or misused.[1135]

In their report for the Tribunal, Dr Cant's research team concluded that the key effects of abruptly and permanently lowering the lake were:

- serious shoreline erosion;
- invasion of parts of the newly exposed lakebed by weeds and species which provide an ideal habitat for mustelids, which has increased the threat to Waikaremoana kiwi and other native birds;
- reduction of nearshore habitat; and
- reduction of aquatic life.

The shoreline and aquatic life will eventually become more stable once the lake has been held so for sufficient time, but the reduction of nearshore habitat (and its effects) appears to be permanent or at least very long-term.[1136] Claimant counsel concluded that 'the Crown has failed to protect the lands, waters and areas of special ancestral importance of Waikaremoana Maori' from devastation and harm in the process of developing and using the lake for hydroelectricity.[1137]

Under cross-examination by counsel for Nga Rauru o Nga Potiki, the regional conservator, Peter Williamson, explained DOC's view that ecological harm has been done to the lake and its catchment, and that it must be redressed. In referring to the payment of $1 million over 10 years, which was the subject of a formal agreement with Genesis in 1999, Mr Williamson stated:

> We made a point [during resource consent consultation] that the rising and lowering of the lake, and, indeed, the original lowering of the lake, had contributed, in our view, to detrimental ecological conditions for some of the species in that catchment. And we were proposing that we would embark upon a plan to restore the ecosystem of the lake, and

1133. Joseph Takuta Moses, brief of evidence (doc H15), pp 6–7; James Waiwai, brief of evidence (doc H14), pp 20–21, 23–25; Lorna Taylor, brief of evidence (doc H17), p 13; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 32–38, 206–213

1134. Rose Pere, evidence given under cross-examination by counsel for Wai 36 Tuhoe, 18 October 2004 (transcript 4.11, p 51); counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

1135. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 200; see also Coombes, 'Cultural Ecologies II' (doc A133), pp 145–149

1136. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 206–213

1137. Counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), p 54; see also counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 226–229

Genesis, at the end of the day, were happy to contribute to that as a contribution to that ecosystem restoration.[1138]

In our inquiry, the Crown was not really in a position to deny that the lake has been significantly altered for hydroelectricity purposes, or that this has had damaging effects. Crown counsel commented: 'Clearly, the Kaitawa station had an impact on lake levels.' The Crown also accepted that its actions have permanently lowered the lake: 'In general, the lake level has remained approximately five metres below the natural lake level since 1946.'[1139] Initial impacts were: the 'reduction of fish food and fish numbers due to lower lake levels'; fish getting caught in the intake pipes; 'erosion of the exposed lakebed'; and the destruction of freshwater shellfish.[1140] The Crown also accepted that lower lake levels in the 1950s 'are thought to have affected access to spawning grounds' for trout and bullies.[1141]

The situation varied in the 1950s and 1960s. There were some favourable years for fishing, but the Crown accepted that shoreline erosion was happening – in part, because of major draw-downs at that time. In response to Maori complaints about the effects of low lake levels on fishing, a Government investigation in the 1960s found that alterations and fluctuations in the lake levels had created problems for fisheries, but that the trout fishery was nonetheless capable of sustaining a greater amount of angling. One long-term effect, the Crown conceded, has been the growth of new forms of shoreline vegetation around the lake edge, which has created an 'excellent habitat' for animals that prey on native birds, including kiwi.[1142]

Relying on Dr Cant's evidence, the Crown suggested that the lake's level 'has been fairly stable from 1965 onwards'. Even so, Crown counsel accepted that the power scheme continues to have a variety of effects on the lake. But the power scheme can only keep operating today if it has the necessary resource consents under the RMA. In the Crown's submission, Electricorp conducted a long and thorough consultation process in the 1990s, with Maori groups represented on the Working Party and participating through other meetings and discussions. As a result, options for mitigation or remedy were developed cooperatively with Maori and others, and the resource consents were granted accordingly. The regional council was satisfied that the conditions to mitigate adverse effects had been agreed with stakeholders, and that adequate consultation had occurred with 'appropriate iwi parties'. The council monitors compliance and undertakes regular inspection, including monitoring of shoreline erosion.[1143]

1138. Peter Williamson, evidence given under cross-examination, first Crown hearing, 1 March 2005
1139. Crown counsel, closing submissions (doc N20), topic 28, p 14
1140. Crown counsel, closing submissions (doc N20), topic 28, pp 14–15
1141. Crown counsel, closing submissions (doc N20), topic 28, p 15
1142. Crown counsel, closing submissions (doc N20), topic 28, pp 15–16
1143. Crown counsel, closing submissions (doc N20), topic 28, pp 16–17

Based on this view of the evidence, Crown counsel submitted that there is no longer an issue for the Tribunal to be concerned about:

> Clearly the Tuai, Piripaua, and Kaitawa power stations have had an effect on Lake Waikaremoana, perhaps most significantly on lake levels. The principal consequential effects have been on native and introduced fish stocks, and on shoreline erosion.
>
> However, these issues are currently being managed by Genesis Energy with input from tangata whenua and other groups.[1144]

In respect of past damage to the lake, counsel summarised the Crown's argument as:

> 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.[1145]

In other words, the Crown saw no problem – in Treaty terms or otherwise – if the lake and its people paid an environmental price for the nation's power, now that present-day effects are being managed more appropriately under the RMA.

We will return to these arguments later in the chapter, when we analyse these matters in light of Treaty principles and make our findings.

Next, we consider the second specific issue of great importance to the claimants: the claim that the Crown has allowed the lake to become infested with giardia and exotic weeds, and polluted by human waste, despite its supposed protection as part of the national park.

20.10.4 Pollution and contamination

In some claimants' view, the Crown's management under the lease has allowed the lake to become infested with giardia and exotic weeds, and polluted by sewage. That is the opposite, they said, of what they wanted and expected when they leased the lake for a national park in 1971. Lorna Taylor told us:

> Successive Government action has led to contamination of our waters, controlling and changing the flows, and opening Waikaremoana up for general public usage has introduced boats, weeds, giardia, and cryptosporidium. The uncorrupted relationship we once had is under constant threat as people that are not of its water violate our mauri life force.[1146]

As the primary manager of the lake since 1990, most of the blame has been focused on DOC. Indeed, many witnesses believed that DOC had been administering the lake long before the department was created, reflecting a degree of continuity between DOC and its

1144. Crown counsel, closing submissions (doc N20), topic 28, p 17
1145. Crown counsel, closing submissions (doc N20), topic 28, p 17
1146. Taylor, brief of evidence (doc H17), p 13

predecessor, Lands and Survey. Matekino Hita explained the 1998 occupation (or noho whenua) in the following way:

> I was one of the protestors involved in an occupation here a few years ago. We were just trying to convey to the Department of Conservation that they had breached their obligations. There were many obligations that they breached and they were having a significant, negative impact on our lake. They were using poisons, toxins and allowing sewage to be distributed directly into the lake. They had also affected the level of the water in the lake; and had deliberately lowered it.[1147]

There was a widespread belief that DOC had been using 1080, which might enter the lake, despite DOC's denial at the 1998 ministerial inquiry that it had ever used this poison in the lake catchment.[1148] This is indicative of a degree of underlying mistrust which persisted at the time of our hearings, despite improved relationships in recent years.

The Tribunal commissioned technical research to examine the claimants' concerns about the contamination of the lake by giardia, exotic weeds, and sewage. Dr Cant's team concluded:

- Giardia is present in almost all water bodies, and it is spread by animals and birds as well as human beings: there was virtually no way to prevent its introduction to Lake Waikaremoana, even if sewage from Lake House, 'freedom campers', and other national park visitors had been stopped from entering the lake.
- Exotic weeds may have been present in the lake since the nineteenth century but the primary threat to native aquatic species was quite recent – *Lagarosiphon major*, a very invasive noxious weed. It was most likely spread by boats and fishing equipment, and was first discovered in the lake at Rosie Bay in 1999. After its discovery, DOC implemented a very aggressive policy of removal and monitoring, which appears to be succeeding. Signage at camping and boating facilities warns that all equipment must be checked before use in the lake.
- For 50 years, sewage was deposited in the lake from septic tanks at Lake House and other visitors' sites around its shores. Efforts to improve this situation in the 1970s did not succeed until 1980, after the closure of Lake House and the upgrading of sewerage facilities at Home Bay, but sewage has continued to leak into the lake nonetheless. This was a major grievance for local hapu at the time of the 1998 occupation. Before the late 1980s, the authorities resisted public participation, including that by Maori, in decisions about these facilities. But that situation has changed and – with ongoing sewerage

1147. Matekino Hita, brief of evidence, 11 October 2004 (doc H58), p 10
1148. 'Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 7

leaks an admitted problem – new prevention measures were being developed by DOC and the Waikaremoana Maori Committee in 2004, at the time of our hearings.[1149]

(1) *Exotic weeds*

We begin our analysis with the issue of exotic weeds. The evidence available to the Tribunal does not establish when or how different varieties of weeds were introduced to Lake Waikaremoana, or what effects they have had on the ecology of the lake.

As a general point, it has been acknowledged that native weeds are not usually problematic, whereas introduced weeds can overwhelm and choke waterways and their fisheries. According to Dr Cant's team, the main species of exotic weed in Lake Waikaremoana are Canadian pondweed (*Elodea canadensis*); curly pondweed (*Potamogeton crispus*); and water buttercup (*Ranunculus tricophyllus*).[1150]

All three species are 'well established", with *Elodea* dominant among these exotic plants. *Elodea* may have been introduced with trout at the end of the nineteenth century, since its introduction to New Zealand came with fish ova in the 1860s.[1151] Alternatively, it may have been introduced as a result of a fish bowl at Lake House.[1152] Dr Cant considered it 'likely' that all three weeds have been in the lake since the nineteenth century, well before the establishment of the national park.[1153]

Clearly, the national park ethos and strategies required the removal of exotic species wherever possible, but we received no evidence from DOC witnesses as to what – if anything – the park's managers have done over the years to control or remove these species. According to the 2003 management plan, native plants are dominant in the lake and DOC had no strategies to remove the existing exotic weeds. This contrasted with the control measures in the plan for excluding or eradicating any new, 'more vigorous' species of weed.[1154] In 1998, DOC officials advised the ministerial inquiry that *Elodea* (the most common species) was not a threat to native plants or fish, and that it was too widespread for any practical chance of removing it.[1155] Riripeti Haley-Paine, however, told the ministerial inquiry that 'aquatic weed had become overwhelming in and around Lake Waikaremoana; that locals could

1149. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 92–142; Garth Cant and Robin Hodge, summary of 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera', undated (2004) (doc H11), pp 7–10, 12–14, 33–34; Robin Hodge, Answers to Crown questions of clarification, undated (2004) (doc H65), p 3. For the question of public participation and Maori ability to have input, see also Coombes, 'Cultural Ecologies II' (doc A133), p 368, as cited by Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 109.

1150. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 136; Cant and Hodge, summary (doc H11), p 13

1151. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 136

1152. Neuton Lambert, brief of evidence (doc H57), p 9

1153. Cant and Hodge, summary (doc H11), p 13

1154. Department of Conservation, *Te Urewera National Park Management Plan*, 2003, pp 18, 23, 25, 71–72

1155. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 139

recall a time when it did not exist; and that it was rampant in bays like Home Bay where boats were moored for long periods.'[1156]

Dr Cant's evidence focused on *Lagarosiphon major*,[1157] which appeared to be a very significant threat in Lake Waikaremoana. It is a noxious weed and can rapidly overwhelm an ecosystem. Once introduced, it is extremely difficult to eradicate. *Lagarosiphon* was first discovered in Rosie Bay in 1999, as a result of DOC's regular diving checks. As soon as it was discovered, DOC took a very aggressive approach to eradicating it. Divers removed it by hand ('by the truckload') from Rosie Bay, and then regular checks were carried out to ensure that any new presence was immediately removed.[1158] By the time of our hearings in 2005, *Lagarosiphon* appeared to have been eradicated but ongoing monitoring showed occasional plants from time to time. Evidence has established that the plant is not spread by waterfowl: it appears that boats and fishing nets are to blame. In the claimants' view, *Lagarosiphon* (and other weeds) have got into the lake because national park visitor activities – in this case boating – have been poorly managed by the Government.[1159] Dr Cant commented:

> The department undertakes an education programme at the lake. Signs are in place at boat ramps and at Waikareiti to warn users to check their equipment. Notices in the motor camp kitchen, store and Aniwaniwa visitor centre provide information about the main weed threats.[1160]

Peter Williamson advised that DOC can close parts of the lake to boating if necessary, to help control and eradicate any new outbreak.[1161] He reassured claimant counsel that DOC would not use chemicals in the lake to combat *Lagarosiphon*.[1162]

Although some claimant witnesses mentioned a general concern about aquatic weeds, no one spoke in detail on the matter.[1163] Nor did claimant counsel make any closing submissions about exotic lake weeds. Clearly, the Waikaremoana Maori Committee and others

1156. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 138

1157. Lagarosiphon is the common name as well as the Latin name for this species.

1158. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 136–139, 141; Peter Williamson, under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005

1159. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 136–139, 141

1160. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 138

1161. Williamson, brief of evidence (doc L10), p 31

1162. Peter Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005

1163. See, for example, Neuton Lambert, brief of evidence (doc H57), p 9.

were worried by the discovery of *Lagarosiphon*, but, according to the evidence of Dr Cant, Waikaremoana hapu were satisfied with the way that DOC was handling that threat.[1164]

It is difficult, therefore, to address the issue of aquatic weeds at any but the most general level. The main exotic species have most likely been present in the lake since the nineteenth century, long before the establishment of the national park in 1954 or the leasing of the lake in 1971. DOC's view is that these aquatic weeds are not dominant, that they pose no threat to native species (or, presumably, the ecology of the lake), and that it would be impractical to try to remove them at this late stage. We received no technical evidence or submissions on these points. The predominant issue now appears to be protecting the lake from new, more invasive species. The claimants did not provide us with evidence or submissions on that issue. Dr Cant's team suggested that, at the time of our hearings, DOC was managing this threat capably and had responded successfully to the discovery of *Lagarosiphon* in recent years. Waikaremoana hapu were reportedly satisfied with DOC's efforts to eradicate this threat. Dr Cant's and Dr Hodge's evidence on this matter was not challenged in cross-examination, other evidence, or submissions.

This leaves us with the question of authority and decision-making. Peter Williamson told us, in respect of DOC's measures to control and prevent invasive aquatic weeds: 'We have kept the Waikaremoana Maori Committee informed of all actions to date and will continue to do so.'[1165] Here, perhaps, is a key point. Who is to decide whether boating should be restricted so as to prevent the spread of exotic weed, and how is that decision to be made? The claimants in our inquiry wanted to be part of all such decision-making in respect of the lake and the national park; they did not wish merely to be informed. According to Glenn Mitchell, who was interviewed by Cant's research team in 2004, the control of *Lagarosiphon* had become one of the issues 'discussed' by DOC and hapu leaders through the Aniwaniwa model of consultation and decision-making.[1166] We will return to that point below.

(2) *Pollution by sewage*

Many claimant witnesses expressed their abhorrence at the pollution of the lake by sewage, which made it impossible for them to use the affected areas as a food source: treating their taonga as a toilet bowl, as Anaru Paine put it.[1167] The most detailed account came from James Waiwai, who explained that the problem had been of concern for decades:

> The sewerage problems have been around for years – I've heard stories from the koroua that back in the 1950s and 60s grey water ran straight out there and raw sewerage would be

1164. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 139

1165. Williamson, brief of evidence (doc L10), p 31

1166. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 139

1167. Anaru Paine, brief of evidence (doc H39), p 7

pumped straight into the Lake. Sewerage would be tipped on to the bank, and the run off from that would make its way to the Lake as well.[1168]

Dr Cant's evidence confirmed that partially-treated sewage from septic tanks flowed into the lake from the 1920s to the 1970s, 'through the commercial operations of various Crown agencies relating to tourism.'[1169] At first, Lake House managed to operate without discharging into the lake, but by the late 1920s or 1930s it was piping effluent directly into the water. The other main source was the motor camp in Home Bay. Here, again, discharge into the lake was avoided at first, by the use of Kemico toilets. But from the 1930s, the camp used a septic tank with a pipe which ran into the lake. By the beginning of the 1970s, the Lake House and motor camp facilities were so overloaded that raw sewage was being pumped into the lake. The Health Department threatened to close Lake House for this reason in the summer of 1970–71. In addition, there were many huts with long drops, and some visitors who simply used the lake shore.[1170]

Dr Cant and Dr Hodge commented: 'It has not been possible to judge whether the Crown should, or could, have provided more adequate systems at the time prior to the 1970s.'[1171] But at the beginning of the 1970s, when the lease was signed, the Government recognised that there was a serious problem which needed to be addressed. The proposed remedy in 1971 was 'a pumping station to a soakage area', at a likely cost of $15,000. Lake House was closed in 1972 but the motor camp continued to discharge sewage into the lake until 1980. The main reason for the delay in fixing the problem seems to have been Cabinet's decision in 1972 to halt the planned redevelopment of tourist accommodation at the lake, in favour of allowing private enterprise the opportunity.[1172] As we discussed in chapter 16, there was a bid from John Rangihau and Rodney Gallen to establish a new tourist facility and to re-establish accommodation for Maori owners of the Waikaremoana reserves. This bid was rejected on the grounds that new buildings must not be established on the lake shore – inexplicable, since the whole point for the Government was to redevelop or substitute for Lake House and the motor camp (see section 16.6.2).[1173]

From 1972 onwards, there were debates between the Tourism and Health Corporation (which owned the visitor facilities), Te Urewera National Park Board, and the Wairoa council about who should own and develop new facilities, and what standard of sewage treatment and disposal was acceptable. In 1975, the Wairoa council ruled out any further use of septic tanks. In the meantime, sewage continued to flow into the lake from the camping

1168. James Waiwai, brief of evidence (doc H14), p 18
1169. Cant and Hodge, summary (doc H11), p 33
1170. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 101, 247–248
1171. Cant and Hodge, summary (doc H11), p 8
1172. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 101–102
1173. Coombes, 'Cultural Ecologies II' (doc A133), pp 57–59

grounds. Dr Mylechreest's studies suggested that nutrient enrichment was encouraging the growth of exotic weed and changing the natural character of the lake even further. By the mid-1970s, the Government had rejected all private bids to develop tourist facilities and was once again planning its own revamp of the motor camp. The park board preferred the permanent closure of Lake House, and the restriction of visitor accommodation to Home Bay, and this view prevailed. After a series of further delays, work finally began on building a new sewerage treatment plant in 1979, which was completed and became operational in 1980.[1174]

The new plant consisted of 'a holding tank and pump in the camping ground, an oxidation pond half-a-kilometre along the lake edge from the camp, and an irrigation system to spray treated effluent onto forested ground on the Ngamoko Range'.[1175] Glenn Mitchell, in his evidence for DOC, clarified that the treated effluent is piped two kilometres away from the lake, where it is dispersed by sprinklers. Tree roots absorb and finally dispose of it 'via their leaves in the process of photosynthesis'.[1176] 'A visitor to the sprinkler field site', he told us, is 'unlikely to notice anything different to the surrounding vegetation or forest floor'.[1177] Testing at Rosie Bay, the closest part of the lake to the distribution site, has confirmed that effluent is not reaching the lake by means of any underground water movement.[1178]

Dr Cant and Dr Hodge concluded: 'Until the erection of the new treatment plant in 1979–80, the Crown did not take every precaution to avoid pollution of Lake Waikaremoana'.[1179] Also, the Maori people of Waikaremoana had been excluded from all input to decisions about visitors' facilities and sewerage schemes at that time, unless they were able to have a say through the park board.[1180]

Maori concerns did not disappear with the construction of the new sewerage system. From the mid-1980s, DOC began to replace all long drop toilets around the lake with sealed vault toilets, 'to avoid contamination and particularly to recognise the concerns of Tangata Whenua'.[1181] This has proven a lengthy and costly exercise, which was not entirely completed by the time of our hearings. It involved the design and construction of a barge, special tanks, and also sealed dump stations for the use of visitors. In Glenn Mitchell's evidence, DOC shared hapu concerns about sewage and did its best to eliminate all possibility of contamination.[1182]

1174. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 102–107
1175. Cant and Hodge, summary (doc H11), p 33
1176. Glenn Mitchell, brief of evidence, 7 February 2005 (doc L9), p 5
1177. Mitchell, brief of evidence (doc L9), p 5
1178. Mitchell, brief of evidence (doc L9), pp 7–8
1179. Cant and Hodge, summary (doc H11), p 34
1180. Cant and Hodge, summary (doc H11), p 34
1181. Williamson, brief of evidence (doc L10), p 28
1182. Mitchell, brief of evidence (doc L9), pp 9–11

What the DOC Management Plan said in 1989

'The intensive use made of Lake Waikaremoana poses the problem of pollution. For example, in the Home Bay area scientific research . . . indicates that sewage enrichment of the lake waters has already occurred. Steps have been taken to correct this. A sewage scheme has been installed for the Motor Camp to divert effluent away from the lake. An oxidation pond is located next to Home Bay. The effluent is initially treated at Home Bay and then pumped out of the lake catchment over the Ngamoko Range to be dispersed by spray irrigation. . . .'

In spite of a sewage scheme for Home Bay some of the anomalies in the bay's flora and fauna persist. An example of this is the expansion and increasing density of *Elodea* beds in Home Bay in comparison with the static growth patterns observed elsewhere in the lake . . . This means that some effects of the Home Bay pollution may be long term and that nutrient enrichment is still occurring on a reduced scale. For example, Vincent *et al*, (1980) noted high phosphate and ammonium values at concentrations expected for sewage, from a small discharge beneath the oxidation ponds into Home Bay. This suggests that there is leakage from the oxidation ponds . . .'

Source: Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989), p 14

James Waiwai explained that the claimants' main concern was with the oxidation pond, which was installed close to the lake shore:

> There is an oxidation pond only about 40 metres away from the shore of Lake Waikaremoana, hidden by the toetoe but seeping into our Lake. We've been concerned for many years about the closeness of the oxidation ponds to the Lake and the leakage that occurs.
>
> We were concerned that the pond might crack, but DOC told us that the clay in the bottom of the pond would prevent that. Not long after that, in about 2000, DOC found a leak.[1183]

Ongoing concerns about sewage and pollution were a key motivator in the 1998 occupation. Dr Cant's team has reproduced material from Nga Tamariki o Te Kohu submissions to the ministerial inquiry, showing their belief that the oxidation pond was leaking, that there were large cracks in the lining which might result in additional leaks, that erosion might cause the pond to collapse and spill into the lake, and that waterfowl were swimming

1183. James Waiwai, brief of evidence (doc H14), pp 18–19

in the uncovered pond and then in the lake.[1184] DOC's 1989 management plan seemed to confirm that sewage was leaking into the lake from the oxidation pond.[1185] Maori were also distressed at the pumping of treated effluent into the forest, and the use of the leased lakebed for sewerage and camping ground facilities. By this time, DOC had virtually finished replacing long drop toilets around the lake with sealed vault units, but there was concern that waste from these was transported across the lake by barge, with risks of contaminating the lake.[1186] Overall, it appeared that nothing less than the transportation of all human waste out of the Waikaremoana district for disposal could ensure the safety of the lake from any contamination.

In 1998, the ministerial inquiry accepted DOC's assurances that the oxidation pond was not leaking, and was not at risk of leaking in the future. There was a concrete wave band designed to protect the pond from erosion – although cracks did not carry a risk of leaks, they had nonetheless been repaired.[1187] Dr Cant's team could find no information as to why DOC officials had changed their minds, since the statements made about leakage in the 1989 management plan.[1188] The ministerial inquiry concluded:

> We are satisfied that the plant works efficiently and that contamination of nearby lake waters from the sewage treatment plant is not shown to be occurring.
>
> The significance for tangata whenua of the contamination of the waters of the Lake with sewage effluent is of paramount significance and the Department should continually be alert to ensuring that its system is working efficiently, that pollution is not occurring and that technology upgrades are committed to as soon as they can be justified in terms of both capital and the importance of the Lake to Maori.[1189]

In 2000, DOC discovered that sewage was seeping out of the oxidation pond and had likely entered the lake.[1190] Glenn Mitchell contacted James Waiwai and arranged for a joint inspection of the site with members of the Waikaremoana Maori Committee. Consultants AgFirst recommended immediate remedial action, as well as replacing the pond altogether. A 'joint DOC-hapu team' was formed to deal with the issue. It was agreed to install a soak-

1184. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 110–111

1185. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 107; Department of Conservation, *Te Urewera National Park Management Plan 1989–1999*, p 14

1186. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 108, 112–113

1187. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 12–13; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 113–114

1188. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 107

1189. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 12–13

1190. Mitchell, brief of evidence (doc L9), p 6

age field and a submersible pump to recycle the leak back into the pond, which monitoring showed was a successful interim solution. DOC also finally agreed to relocate the pond away from the lakeshore. After investigating sites, the 'joint DOC-hapu team' decided that Okereru (the former Lake House farm), 400 metres from the lakeshore, was the safest option in all the circumstances. At the time of our hearings in 2005, plans to build the new oxidation pond and treatment plant were still in progress. James Waiwai appeared satisfied that local hapu had been properly involved in the decision-making on this matter.[1191] The alternative of transporting all waste out of the district by truck was, as Te Ariki Mei and Reay Paku explained, simply not feasible.[1192]

In the meantime, further concerns about the existing oxidation pond had arisen: by 2004, DOC agreed that 'rapid erosion' posed a serious risk to the pond. The risk was considered so great that DOC officials could not wait for a process to determine Genesis' liability or to put remedial work out to tender. Instead, DOC immediately contracted for 'emergency works' to protect the pond from the effects of erosion in the interim. Genesis agreed to pay half the costs until its final responsibility could be decided.[1193] The claimants were critical of the time it took for DOC to accept that erosion was a significant threat, and were concerned that only a temporary fix had been made. To them, it appeared that DOC and Genesis were not taking

The Vexed Issue of the Emergency Outlet Pipe

The Home Bay sewage treatment system, installed in 1980, had a pipe running out into the lake so that effluent could be discharged 'into deep parts of the lake in emergencies'.[1] The existence of this pipe, and whether or not it had actually been used, was a sore point between DOC and claimant witnesses in our inquiry. James Waiwai told us that he had not realised that the pipe existed until the Waikaremoana Maori Committee inspected the site of the oxidation pond leak in 2000. He found it difficult to believe DOC's assurances that the pipe had been unhooked back in 1996, and was

1. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999*, 1989, p 14

1191. Mitchell, brief of evidence (doc L9), pp 6–9; James Waiwai, brief of evidence (doc H14), pp 19–20; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 114–116

1192. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 115–116

1193. Williamson, brief of evidence (doc L10), p 24; 'Signed Contract for Remedial Work at Lake Waikaremoana', 15 January 2004 (Williamson, comp, papers in support of brief of evidence, document 'O' (doc L10(a))

understandably appalled that '[w]hen the sewerage pond overflows, it goes straight into our Lake'.[2] Glenn Mitchell, in his evidence for DOC, confirmed that the pipe had been disconnected in 1996. Although he could not be sure, Mitchell believed that the pipe had never been used, with the possible exception of 1988 when Cyclone Bola caused extreme weather conditions.[3]

2. James Anthony Waiwai, brief of evidence, undated (2004) (doc H14), p 19
3. Glenn Mitchell, brief of evidence, 7 February 2005 (doc L9), p 9

the problems of erosion seriously enough in general, and that the focus in the 1990s on protecting sites at Home Bay had been too narrow.[1194]

(3) *Giardia*

Closely related to the issue of sewage, some claimants expressed concern that drinking water has to be boiled, because of the presence of *Giardia intestinalis* in the lake. Dr Cant's research team reported:

> Members of Nga Rauru o Nga Potiki, in explaining that Waikaremoana was their lifeline, the source of their water at Tuai and the Wairoa, resented the need to boil it, which they had not done in the past.[1195]

Giardia is a parasite which infects the intestines of humans, animals, and birds. It forms cysts, which are then excreted and can survive for months in cold water. Dr Cant and Dr Hodge explained:

> Giardia can be transferred from person to person, by contaminated food, inadequately treated water, and poorly disposed human waste. It is also spread by animals and birds. Clinical manifestations of the disease include diarrhoea, nausea, lethargy, and weight loss.[1196]

For the claimants, giardia was closely connected to the contamination of the lake with sewage.[1197] Anaru Paine told us: 'Not only have they allowed our lake to be contaminated but so too the springs which are fed from it and many of us have experienced the explosive short term symptoms.'[1198] The connection between giardia and pollution of the lake by

1194. James Waiwai, brief of evidence (doc H14), pp 20–21; see also James Waiwai, evidence given under cross-examination by Crown counsel, 21 October 2004 (transcript 4.11, pp 171–172)
1195. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 135–136
1196. Cant and Hodge, summary (doc H11), p 13
1197. Anaru Paine, brief of evidence (doc H39), pp 6–7
1198. Anaru Paine, brief of evidence (doc H39), p 7

human waste was one of the grievances in the 1998 lakebed occupation. Cant and Hodge summarised the issue as follows:

> The presence of giardia was one cause in the 1998 lakeside occupation by Nga Tamariki o Te Kohu. Various Waikaremoana claimants allege that the Department of Conservation was responsible for giardia's introduction to the Waikaremoana environment through poor control of tourism. Included under this general heading are toilet facilities in private huts and camps, unthinking waste disposal by freedom campers and trampers, and by sewage effluent flow into Lake Waikaremoana. The department rejects the allegation. The Area Manager, Glenn Mitchell, said that giardia has been discussed by the department and Waikaremoana hapu within the Aniwaniwa agreement and that hapu representatives now accept that giardia is carried by animals and birds as well as humans. Therefore, he added, even if the spread of the parasite by human campers could be prevented, birds and animals would continue to disperse it in their droppings.[1199]

In other words, it was beyond the power of any government agency to stop the spread of giardia to Lake Waikaremoana, even if contamination by human waste had been prevented. Giardia is now considered to be present in 'almost all' New Zealand waterways: animals and birds will spread it even if humans do not.[1200] This was also the conclusion of the 1998 ministerial inquiry, based on the evidence available to it.[1201] Nonetheless, we understand why the claimants find it difficult to dismiss pollution as a cause of giardia in their waters. Dr Cant noted that, as at 2004, DOC's website advised the public that giardia 'is mainly spread as a result of poorly disposed toilet waste'.[1202]

The argument we are required to consider is this:

- giardia is 'mainly spread' by human waste but is also spread by animals and birds;
- giardia is present in Lake Waikaremoana, as it is in 'almost all' of our waterways; and
- giardia could not have been prevented from entering Lake Waikaremoana, because – even if there had been no discharge of partially treated effluent into the lake – it would have been introduced by animal and bird droppings.

Although we have no doubt that pollution by human waste contributed to the presence of giardia in Lake Waikaremoana, we accept that the parasite's introduction to the lake could not have been prevented.

(4) *What have been or could be the effects for the claimants?*

If an invasive exotic weed such as *Lagarosiphon* took hold in Lake Waikaremoana, the results would be devastating – both for the kaitiaki and for their ancestral taonga. Although

1199. Cant and Hodge, summary (doc H11), p 13
1200. Cant and Hodge, summary (doc H11), p 13
1201. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 8–9
1202. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 134

the claimants (and the national park ethos) would prefer no exotic plants at all, it seems that the three main species of exotic weed have probably been in the lake since the nineteenth century, and would be too difficult to eradicate by today's technology. If, as DOC claimed, those species do not threaten the predominance of native plants, then the impact on the taonga (and its kaitiaki) must be minimal. Today recreational use for boating and fishing makes Lake Waikaremoana vulnerable to invasive exotic weeds, and the impact of such weeds, if they became established, would be very significant; a point upon which the evidence of DOC and the claimants was in agreement.

In respect of pollution, Crown counsel maintained that it was not possible to keep the lake absolutely 'pollution-free', but also accepted that pollution by sewage was 'of paramount significance' to the claimants. Further, the Crown accepted that long-term discharge of effluent into the lake had occurred, but it argued that significant attempts – 'particularly in more recent times' – had been made to 'ameliorate and prevent this sort of damage'.[1203] Overall, the Crown's assessment was that the effects had not been severe: 'It is submitted that "devastation" has not occurred, and that any pollution that has occurred does not amount to Treaty breach.'[1204]

The evidence of DOC and the claimants agreed that pollution of the lake by human waste must be avoided, although their perceptions differed as to consequences.[1205] DOC was concerned purely with the biological consequences. In 1989, for example, DOC identified nutrient enrichment and denser lake weed at Home Bay as persistent and possibly long-term effects of sewage discharge.[1206] For the claimants, however, the consequences were not merely the physical dangers that came from a contaminated water source, or the ecological effects of nutrient enrichment. There were also spiritual effects, particular to Maori culture, from mixing effluent with a waterway that is also a taonga and a food source. The water, the plants growing in the water, the fish, and the waterfowl – none could be consumed, even if scientifically 'safe' for consumption. Also, as claimant counsel noted, lakeside wahi tapu would have been 'detrimentally affected'.[1207] One problem for the claimants has been a lack of certainty. Freedom campers could have been disposing of waste on the lakeshore without anyone knowing where, and the claimants had also been concerned for many years that the oxidation pond either was or could be leaking into the lake. In addition, given the period of time in which effluent was discharged directly into the lake (50 years), and the claimants' long-standing concerns about it, the impacts on the claimants have been occurring for generations. We agree with the Crown that 'devastation' to the lake has not occurred – but,

1203. Crown counsel, closing submissions (doc N20), topic 29, pp 45–48
1204. Crown counsel, closing submissions (doc N20), topic 29, p 42
1205. See, for example, Glenn Mitchell, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, 1 March 2005.
1206. Department of Conservation, *Te Urewera National Park Management Plan 1989–1999*, p 14
1207. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 67

again, this was based solely on a biological view of matters. The effects for the claimants have been long-term and highly unacceptable.

20.10.5 Questions of authority

We have already considered issues of authority and management for Te Urewera National Park in chapter 16. We do not intend to repeat that analysis here. In brief, we found that:

- Despite attempts to provide for greater and statutorily guaranteed representation on the Te Urewera National Park Board in the 1970s, Maori members of this governance and management body remained a minority and only informally representative of their constituencies. Although Maori board members did contribute to decision-making and represented Maori views to the board (and vice versa), their influence was limited and the results were mixed.
- This situation worsened in the 1980s. Again, attempts to secure greater numbers and more formal representation were defeated. At the same time, without consulting Maori communities or the Maori trust boards, the local park board was replaced by a distant, regional board with a much larger area and an advisory/planning role. Maori influence in decision-making was reduced. The imbalance was not redressed by the increased ability of Maori to contribute to the national park's management plan.
- The situation improved in the 1990s and 2000s after the transfer of management to DOC, which was formally committed to acting in accordance with the Treaty, and which instituted the Aniwaniwa 'informal joint management' model from 1994. We found, however, that the Aniwaniwa model was too limited in its geographical scope (it only covered part of the park), and too insecure (it operated outside formal DOC policies and institutions, and depended on particular local DOC staff for its success and continuation).
- Overall, we found that Maori had far too little influence, given the unique circumstances of this national park, which was such a profound presence in their lives and lands. We also considered that there was a fundamental divergence between the preservationist–recreational model established by the National Parks Acts, and the interests and values of the Maori people of Te Urewera. This divergence was revealed by clashes over customary uses, access, trespass, park management of hunting and pest-destruction, and many other issues. It was the fundamental reason why, despite the Treaty clause in the Conservation Act 1987, DOC could not administer Te Urewera National Park in a manner consistent with Treaty principles.

There are some particular or unique aspects of the management and governance of Lake Waikaremoana, which require additional comment.

(1) *Formal representation and co-management: a lost opportunity*

First, we note the significance of legal ownership, and what it meant for the feasibility of co-management arrangements. According to Brad Coombes, indigenous ownership of land that was part of a reserve or national park made it much harder for third parties to oppose or prevent the adoption of co-management provisions for that land.[1208] The 1971 lease of Lake Waikaremoana, however, contained no provisions for the lessors to be involved in the management of the lake, once it was leased for the national park.[1209]

This was an important missed opportunity, in our view. As Tama Nikora observed in the early 1970s, world opinion at that time was moving in favour of including indigenous peoples in the management of national parks.[1210] We received detailed evidence on that point from Brad Coombes, who explored developments in Australia and Canada at that time.[1211] The owners' committee had provided in 1971 for the Waikaremoana people to be formally represented on the Maori trust boards, which were about to become the owners of the lakebed. The Crown should have provided for the owners to be similarly represented on the park board. As we discussed in chapter 16, the formal representation of Maori on Te Urewera National Park Board was sought by Tuhoe in the 1970s and debated throughout the decade, but was ultimately rejected. Instead, Reay Paku joined Nikora and Rangihau on the board as a member who was understood to represent the views of the Wairoa Waikaremoana Maori Trust Board, presumably in recognition of Ngati Kahungunu's increased presence in the park after the lake was added to it. Attempts to secure formal, statutory representation of Maori groups also failed in the 1980s.[1212]

In Chapter 16, we noted that even if there had been formal Maori representatives on the park boards (and in greater numbers), it would not have improved matters so long as western-style conservation and recreational interests were predominant. National park objectives remained fundamentally incompatible with those of Maori and always outweighed them. Only occasionally, when national park and Maori objectives coincided, was there really an opportunity for Maori to take a more active role in policy or decision making (see section 16.9.5). We turn next to consider the unique situation of Lake Waikaremoana in its national park context, which gave rise to just such a rare coincidence of national park and Maori objectives. But, because of their formal exclusion from governanance and management, and the lack of consultation, the opportunity for Maori came mainly from 'working in' with the park boards.

1208. Coombes, 'Cultural Ecologies II' (doc A133), pp 17–20
1209. Lake Waikaremoana Act 1971, schedule: lease of Lake Waikaremoana
1210. T R Nikora to Chairman of Te Urewera National Park Board, 'Composition of Te Urewera Park Board', 18 June 1973 (Coombes, comp, supporting papers to 'Cultural Ecologies of Te Urewera' (doc A121(a)), pp 138–140)
1211. Coombes, 'Cultural Ecologies II' (doc A133), pp 17–20
1212. See also Coombes, 'Cultural Ecologies II' (doc A133), pp 162–172.

(2) *'Working in' with park boards: how successful was this strategy for Maori influence on the management of Lake Waikaremoana?*

As we discussed earlier in this chapter, Maori organisations were under-resourced and struggling in the 1970s, even where participation was possible or allowed. In that circumstance, Maori leaders relied on the Te Urewera National Park Board to represent their views in respect of lake levels during the Hawke's Bay Catchment Board's inquiry in 1980. In our view, that was an important demonstration of confidence in the park board, and in the fact of convergent interests, such that the board's submissions could 'stand for [theirs] as well'.[1213]

As we see it, this was in part a reflection of informal Maori representation on the park board. But it was more than that. There was a convergence of views and interests in Lake Waikaremoana, which can be seen as early as the 1960s, even though the park board of that time wanted to secure full control of the lake and its ring of recently-exposed Maori land. It is quite clear that many Maori wanted to protect and preserve the lake and its surrounds in their natural state. There was strong support for the removal of unauthorised huts from Maori land and the leasing of the lake for the national park.[1214] This view is perhaps epitomised by John Rangihau, who told the park board (after the offer of the lease) in 1969: 'Speaking for the Maori people he felt sure that they were completely with the Board in its endeavours to preserve the park in all its beauty.'[1215]

In other parts of the park, where Maori land had been lost in breach of Treaty principles, we have identified a significant conflict between preservationism and customary use, in which recreational pursuits were the only uses prioritised by the national parks legislation (see chapter 16).[1216] At Lake Waikaremoana, we consider that the situation was different. The evidence before us did not identify any clash between park authorities and Maori over customary use of the lake and its resources. That clash was mostly over by the time of the lease. As we discussed in chapter 16, the lakeside communities had had to move away from the Waikaremoana block to live on the southern reserves at Te Kuha and Waimako. A long Crown campaign to prevent any alienation or use of the Waikaremoana block reserves culminated in the early 1970s, soon after the signing of the lease, when the reserves were made historic and scenic reservations (see section 16.6.2(3)). Although there were issues about access and trout fishing, there was no clash over the lake between national park 'preservationism' and customary uses, of the kinds which were so problematic in other parts of the park.

1213. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 202

1214. Coombes, 'Cultural Ecologies II' (doc A133), pp 56–57, 83–87, 94; Gallen, brief of evidence (doc H1), paras 9–10, 28, 30–31, 39–40, 43–47; Sir Rodney Gallen, affidavit, 9 April 1997, appended to 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13)

1215. Coombes, 'Cultural Ecologies II' (doc A133), p 56

1216. See also Coombes, 'Cultural Ecologies II' (doc A133), p 69.

As the claimants explained, Lake Waikaremoana was a taonga of the utmost importance, requiring the most stringent of protections:

> The Waitangi Tribunal has previously established that if the taonga in question is 'highly valued, rare and irreplaceable', and 'of great spiritual and physical importance', then the Crown is under an 'affirmative obligation' to ensure its protection 'to the fullest extent reasonably practicable'. Many of the natural landmarks and resources within the Te Urewera national park estate must surely meet this threshold – in many instances the resources are, after all, considered tipuna. The obvious examples are Maungapohatu and [Lake] Waikaremoana which have been variously described as the 'father' and the 'mother' of the hapu that are nestled beneath and within their embrace and who are sustained by them.[1217]

In our inquiry, the claimants' position was that the park authorities had not been stringent enough in preserving the lake in its natural state, and in controlling or minimising other uses of the lake. DOC, we were told, had failed to meet its strict obligations under the National Parks Act.[1218] In particular, the claimants' critique of Crown actions relied on its 'undertaking' as lessee to manage the lake (according to the requirements of the Act) in a way that:

(a) Preserves as far as possible National Parks in their natural state.
(b) Preserves as far as possible native flora and fauna, and exterminate as far as possible introduced flora and fauna.
(c) Maintain the Park's value of soil, water and forest conservation.[1219]

Throughout the period under review in this section, both Maori and the park's managers wanted to preserve Lake Waikaremoana in as close to its natural state as possible. Differences between them, therefore, were differences of degree. Both sides were prepared to at least consider limited development for tourism and (recreational and customary) use, consistent with their own particular values.[1220] Maori, however, became increasingly impatient with what they saw as visitors' actions despoiling their lake. Also, both sides wanted to exert authority over the lake in order to ensure its protection from inappropriate or damaging uses. For the claimants in our inquiry, such uses included the discharge of effluent, artificial fluctuation of lake levels, infestations of exotic weeds, the possibility of 1080 poison entering the lake, and many other management or visitor-related activities. Some wanted to turn the clock back to before 1946, to restore the natural flow of water from the lake to Haumapuhia and the Waikaretaheke River. Above all, kaitiaki wanted to restore the ecological health and the mauri of the lake and ensure its protection into the future.

1217. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 108–109
1218. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 117–118, 220–222
1219. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220
1220. See, for example, counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 103–104; Vernon Winitana, brief of evidence (doc H28), p 6.

The question was: who would control the use (and abuse) of the lake? Having negotiated the 1971 lease, Maori leaders of the time saw it as a matter of influencing and working through the park board. In 1973, John Rangihau spoke at a meeting between the park board and the Tuhoe Waikaremoana Maori Trust Board. A record of the meeting reveals:

> He considered that the Urewera National Park was not just a national park, but an international park. It was unique in that the Tuhoe people had inhabited it for more than 1,000 years. Due mainly to their remoteness they had had less contact with modern civilisation than other tribes, they had retained strong tribal and family ties and had preserved their Maori language. They were most interested in the Park because for them it was a living thing, part of their life-being; and they, therefore, wanted to work in with the Park Board to ensure that it is preserved for further centuries to come.[1221]

The most obvious opportunity to 'work in with the Park Board' was through Maori membership of that board. As discussed earlier, Tuhoe sought formal, statutory representation on the park board in the 1970s. They wanted to exercise authority 'as of right'. Although the Government did not agree to these requests, its process of informal representation ensured that Maori members made up one-third of the board by the mid-1970s. The number of Maori board members was lower in the late 1970s, however, when the Tuhoe 'representatives' were reduced from two to one. This underlined the insecurity of informal representation, and the defeat of the Tuhoe initiative to obtain two statutory board members as their formal representatives. Nonetheless, Maori leaders of the time were confident that their views would have influence on the board.[1222]

The witnesses in our inquiry did not reveal any clashes between Maori and the board about Lake Waikaremoana in the 1970s. Instead, as noted, Maori leaders relied on the board representing their views in respect of lake levels. Similarly, the park board strongly opposed any additional sealing of the lakebed, which was in accord with Maori wishes (see above, section 20.10.3). One potential source of conflict in the 1970s was the decade-long delay in stopping the discharge of effluent into the lake. Here, too, there seems to have been a convergence of Maori and park board views. In the early 1970s, the board pressed for the closure of Lake House. Then, from 1974, it worked with the Tourist Hotel Corporation to try to solve the sewage problem, upgrade facilities at the motor camp, and develop a completely new sewage treatment system. There was a five-year delay until construction began, but ultimately the park board's goal appears to have remained aligned with that of Maori: to stop effluent being pumped into the lake.[1223] Brad Coombes emphasised, however, the

1221. 'Notes on meeting between the Urewera National Park Board and the Tuhoe Maori Trust Board held at the Tatahoata marae at Ruatahuna on 16 March 1973' (Coombes, 'Cultural Ecologies II' (doc A133), p 161)

1222. Coombes, 'Cultural Ecologies II' (doc A133), pp 161–172; Edwards, 'Selected Issues: Te Urewera National Park' (doc L12), pp 73–77

1223. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 101–109

point that consultation was limited in the 1970s and that local hapu had no other avenue to express their strong concerns about sewage.[1224]

There was an exception to the Maori–park board alignment in 1972, when John Rangihau proposed development of a conference centre and tourist accommodation, with facilities for the home people as well, on Maori land near the lake, which the park board opposed.[1225] Otherwise, park board and Maori aspirations for Lake Waikaremoana seemed closely aligned in the 1970s.

This situation changed in the 1980s when Lands and Survey assumed the day-to-day management of the park, and the local park board was replaced by a new, more distant board with an advisory role for a number of parks and reserves. Within this new structure, officials considered that the Maori lessors participated in management of their lake through the new East Coast National Parks and Reserves Board. The Lands and Survey Department argued in 1985:

> Because of their traditional links with the area, the Maori owners were not prepared to sell. They . . . did however agree to lease the lake to the Crown for 50 years from 1/7/1967 renewable for similar terms . . . This is an example of where broad society goals have been achieved while the Maori owners have retained ownership and *retain a management role through membership on the parks and reserves board responsible for the national park as well as the leased area*. In addition, the rent paid for the lake can be channelled into the work of the two tribal trust boards. [Emphasis added.][1226]

Dr Coombes, however, argued that minority, non-statutory membership of the new board did not amount to 'the retention of a management role'.[1227] Reay Paku, in defending the East Coast board to his people in 1983, stressed that its Maori members did look after Maori interests: 'He has known all the Maori members of the Urewera National Park Boards and could assure the people that their interests were always looked after, and always would be so long as there was a Maori member on the Board.'[1228] Coombes described this as:

> one of many instances wherein a Maori representative of the UNP Board or ECNPRB was confident that their role on a conservation authority made a difference for local Maori. On many other occasions, however, tangata whenua representatives argued that they were out-

1224. Coombes, 'Cultural Ecologies II' (doc A133), p 368; see also Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 109.

1225. Coombes, 'Cultural Ecologies II' (doc A133), pp 57–59

1226. Lands and Survey Department, 'New Zealand Case Study: traditional rights and protected areas', Third South Pacific National Parks and Reserves Conference, Apia, June-July 1985 (Coombes 'Cultural Ecologies II' (doc A133), p 162

1227. Coombes, 'Cultural Ecologies II' (doc A133), p 162

1228. 'Notes from meeting with Whirinaki Action Council and Minginui residents held at Minginui on 30 August 1983' (Coombes, 'Cultural Ecologies II' (doc A133), p 164)

numbered by other 'stakeholder' groups, and that their position was fraught with political difficulty.[1229]

In his evidence to the Tribunal, Reay Paku told us that he did not want to criticise the 'many fine men and women' who had worked in the park or for organisations such as the 'Friends of the Urewera Park'. Those people shared with local Maori 'a reverence akin to love of Mother Nature'.[1230] He also noted that the majority of board members did try to 'show respect for tikanga Maori'.[1231] Nonetheless, his experience during 15 years' of board membership was that official 'policy and practice', driven by non-Maori values, usually prevailed over the views of Maori board members.[1232] Questioned on this point by counsel for Nga Rauru o Nga Potiki, Mr Paku gave the use of 1080 as an example, noting that the Maori members of the board were outnumbered and that it was common for the other members to support the officials on such matters.[1233] Maori were not 'equal co-managers' on the Te Urewera National Park Board; and that, Mr Paku said, was not 'fair and right'.[1234]

But the Government had then replaced the local board with a wider regional body in 1981, without consulting local Maori or the Maori trust boards. The result was a 'dissipation of Tangata Whenua input' in a distant board focused on a much larger region.[1235] Thus, in Mr Paku's view, the situation was significantly worse in the 1980s, at a time when the official climate was, in theory, more receptive to Maori input.

Dr Coombes' evidence agreed with that of Mr Paku. Coombes argued that local farmers, and to a lesser extent environmental and recreational groups, dominated the Te Urewera National Park Board from 1962 to 1981.[1236] There were also two Government officials on that board. Tamaroa Nikora, who was a Tuhoe 'representative' on the board, told Coombes that the Maori members were 'outnumbered by English gentleman farmers . . . We were there, but not equal'.[1237] Dr Coombes' evidence was also in agreement with Mr Paku over the change in the 1980s, when Maori (and local Te Urewera) influence was significantly reduced in the management of the park.[1238] This must have had an impact on the growing divergence of views between park authorities and local Maori by the 1990s, over how to manage Lake Waikaremoana.

As we discussed in chapter 16, relationships between the park staff, park boards, and Maori communities were strained in the 1970s and 1980s, despite Maori board membership

1229. Coombes, 'Cultural Ecologies II' (doc A133), p 164
1230. Reay Paku, brief of evidence (doc I35), para 5.1
1231. Reay Paku, brief of evidence (doc I35), para 4.3
1232. Reay Paku, brief of evidence (doc I35), para 4.3
1233. Reay Paku, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, 2 December 2004 (transcript 4.12, p 207)
1234. Reay Paku, brief of evidence (doc I35), para 5.3
1235. Reay Paku, brief of evidence (doc I35), paras 4.5–4.6
1236. Coombes, 'Cultural Ecologies II' (doc A133), pp 164–167
1237. Coombes, 'Cultural Ecologies II' (doc A133), p 168
1238. Coombes, 'Cultural Ecologies II' (doc A133), pp 204–209, 214–218, 222

and some honorary Maori rangers. It was impossible to get away from what the chief ranger called the underlying 'history of suspicion and doubt', which was aggravated by issues with permits, hunting, access, and other flash points for conflict. These included the long, slow failure of the negotiations for land exchange as a means for economic development.[1239] As a general point, however, most of the conflict in values and practice between park administrators and Maori arose from conflicts over land and bush, not over the lake, where Maori and park managers seemed quite well aligned. Behind the scenes, however, local Maori discontent about aspects of the management of Lake Waikaremoana was apparently growing. Some people felt divorced from the Maori trust boards, which were – in effect – the bodies which both owned the lakebed and were informally represented on park boards. Anger was growing, as we have seen, about a lack of authority at the lake, the management of its levels by the Electricity Department, the apparent invasion of Home Bay by exotic weeds, the pollution of the lake by sewage and other poisons, and other issues. (There was also concern in the 1980s about jet boats and DOC's boating policy for the lake, but that issue was not raised with the Tribunal.[1240]) It seemed as if tourism, electricity and visitors' rights were prevailing over the protection and preservation of the lake and its ecology, and over the Maori relationship with their ancestral taonga. This growing anger was in evidence by the time of the Electricorp consents process and DOC's attempt to establish the Aniwaniwa model. We turn next, therefore, to the fraught decade of the 1990s, when open conflict emerged about the management and control of Lake Waikaremoana.

(3) *The Aniwaniwa model at Lake Waikaremoana: 'our relationship with DOC is getting better all the time, but of course there's still room for improvement'*

According to the evidence of Brad Coombes, changes after the Conservation Act 1987 made little difference as far as boards were concerned – the new conservation boards were advisory in nature and remained focused on a large region.[1241] But DOC's commitment to Treaty principles, and the appointment of a Kaupapa Atawhai manager in the 1990s, potentially improved the situation on the ground. In particular, DOC hoped for conservation partnerships with local people.[1242] At the same time, there still seemed to be a congruence of views about the ultimate goal of managing Lake Waikaremoana. That is, DOC's goal of restoring the Waikaremoana ecosystem 'concur[red] with Maori desires to restore parts of Te Urewera *and, in particular, the lake catchment*' (emphasis added).[1243] We see this as an ongoing theme: both the Crown and Maori wanted to preserve Lake Waikaremoana in its natural state. By the 1990s, 'restoration' had become an essential part of 'preservation'.

1239. Coombes, 'Cultural Ecologies II' (doc A133), pp 182–184
1240. Coombes, 'Cultural Ecologies II' (doc A133), p 381; see also p 431, where the issue was raised again by the Tuhoe Waikaremoana Maori Trust Board during consultation on the 2003 management plan.
1241. Coombes, 'Cultural Ecologies II' (doc A133), p 222
1242. Coombes, 'Cultural Ecologies II' (doc A133), pp 228–229
1243. Coombes, 'Cultural Ecologies II' (doc A133), p 243

Coombes pointed to two concrete results in the 1990s: the Puketukutuku Peninsula kiwi recovery programme; and the Aniwaniwa model of 'informal joint management'.[1244] We have already discussed the latter in some detail in chapter 16. Here, we consider its operation at the lake.

In 2002, Glenn Mitchell described the Aniwaniwa model to a DOC colleague as a 'working party', which was the vehicle for 'a continuous programme of consultation with Tangata Whenua'.[1245] It included representatives from two local Maori bodies, the Waikaremoana Maori Committee and a Ruatahuna tribal committee. Its purpose was:

> to provide an opportunity for the tangata whenua to have an equal say in our management of the Area. They are involved in all we do, including management planning; and are part of one-off groups set up for specific projects (including Strategies) as well.[1246]

Another DOC description called it 'partnership in practice'.[1247] According to Coombes' analysis, the collaboration was focused on day-to-day management and decision-making, but had less of a role in strategy-making and finance, because those decisions were made higher up in the departmental chain of authority. Coombes believed that the model gave Maori greater influence on DOC management and decisions, and also had the potential for expansion (in terms of joint decision-making as well as in area).[1248] DOC staff acknowledged that this system was 'a major step outside common departmental practice to establish a real working partnership with tangata whenua'.[1249] Coombes agreed with DOC's assessment that a 'high level of trust' was developing by the time he wrote his report in 2003.[1250] Aubrey Temara, in a submission on the Te Urewera management plan in 2001, said Maori applauded this co-management but wanted to know why it was not happening in other parts of the park.[1251] Crown counsel acknowledged that the Aniwaniwa system had gone beyond the usual consultation practised by DOC towards 'encouraging inclusiveness of tangata whenua in decision-making, and into creating management partnerships with tangata whenua'.[1252]

1244. Coombes, 'Cultural Ecologies II' (doc A133), pp 243–244
1245. G Mitchell, Aniwaniwa Area Office, to V Seaton, East Coast Hawkes Bay Conservancy, 12 March 2002 (Coombes, 'Cultural Ecologies II' (doc A133), p 244)
1246. G Mitchell, Aniwaniwa Area Office, to V Seaton, East Coast Hawkes Bay Conservancy, 12 March 2002 (Coombes, 'Cultural Ecologies II' (doc A133), p 244)
1247. Coombes, 'Cultural Ecologies II' (doc A133), p 245
1248. Coombes, 'Cultural Ecologies II' (doc A133), pp 245–247
1249. Department of Conservation, file note, 'Partnership in practice: the Aniwaniwa area office and Tuhoe', undated (Coombes, 'Cultural Ecologies II' (doc A133), p 247)
1250. Coombes, 'Cultural Ecologies II' (doc A133), p 247
1251. Coombes, 'Cultural Ecologies II' (doc A133), p 247; see also Aubrey Temara, brief of evidence, 16 February 2005 (doc K15), p 10
1252. Crown counsel, closing submissions (doc N20), topic 33, p 8

'Partnership in Practice': DOC's Analysis of the Aniwaniwa System of Management

'Key factors for this successful partnership:

- Honest, open-book policy – knowledge that there are no exclusions, nothing hidden.
- Standing invitation to be part of strategy planning and daily management.
- Open door policy to enable tangata whenua to sit with Glenn [Mitchell, the Area Manager] to discuss issues of concern and work through issues.
- Mutual respect.
- The department doesn't rush things; they are comfortable with the pace.
- All the Area staff and the Conservator together with tangata whenua own the structure.

Conclusions:

The partnership between the Aniwaniwa Area Office and tangata whenua has proved to be very successful and of real value to everyone involved. From this brief analysis, the significant factors in the development and maintenance of this partnership are:

- The employment of a local person who was able to see a possible way to avoid a significant breakdown in what seemed to be a tenuous relationship.
- The Area Manager was prepared to take a major step outside common departmental practice to establish a real working partnership with tangata whenua.
- The Area Manager was prepared to be flexible, completely open and to accommodate a style of working that recognised the wishes, aspirations and principles of the tangata whenua.
- Staff and tangata whenua 'own' the partnership.
- The tangata whenua live in and on the margins of the National Park and have maintained very close links with the land (their homeland) and their culture.
- Tangata whenua have been involved in most planning undertaken by the Area since the arrangement was established.
- There is now a high level of trust between all parties.
- There is acknowledgement by both parties that the process is still evolving and growing.'

Source: Department of Conservation file note, 'Partnership in Practice: the Aniwaniwa Area Office and Tuhoe', [1998?] (Coombes, papers in support of 'Cutural Ecologies' (doc A121(a), pp 272–273)

The Aniwaniwa system was conceived and planned by Neuton Lambert and Glenn Mitchell in 1994, in response to the 'them and us' divisions between DOC and local Maori communities.[1253] According to Brad Coombes, it was created in an atmosphere of 'enduring tensions', and it did not suffice to prevent the lakebed occupation in 1997–98. Coombes noted that the occupation reflected 'perceived disenfranchisement from both park and iwi management structures' (that is, from the Maori trust boards as well as the park authorities).[1254] Indeed, the Aniwaniwa system was new and untested at the time, and it had already begun to break down before the occupation. The report of the ministerial inquiry commented:

> The submissions received from tangata whenua, and particularly the community around Lake Waikaremoana, showed that the people felt disenfranchised from the management of the leased area which they considered themselves to be the 'owners' of.
>
> We also heard of tangata whenua representatives attending planning and monthly management meetings but then withdrawing for reasons unknown to the Department and of those representatives not being replaced. We understand these actions to be consistent with the tangata whenua perception that they were disenfranchised from the decision making process.[1255]

In part, this was a reflection of the newness of the system, and the time and effort it would take to even begin overcoming local distrust. But there was also an ongoing concern about what was happening higher up the chain above the Aniwaniwa office. As DOC officials themselves noted in 1998, Waikaremoana Maori communities were excluded from national planning processes, and they were concerned about conflicts between national and local priorities, nationally-allocated funding, and 'strategic processes that affect the Lake but are done outside and without tangata whenua input.'[1256]

In the 1998 ministerial inquiry, DOC argued that it was faithfully carrying out its statutory obligations, and its obligation under the lease to 'administer, control and maintain the land in accordance with the powers and provisions of the National Parks Act 1980.'[1257] DOC also defended itself on the grounds that it was being consultative, as required by the Conservation Act, and its management practices were 'at the leading edge of iwi involvement in conservation management.'[1258]

1253. Coombes, 'Cultural Ecologies II' (doc A133), p 244

1254. Coombes, 'Cultural Ecologies II' (doc A133), pp 244, 248

1255. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 17

1256. Department of Conservation, file note, 'Partnership in Practice: the Aniwaniwa Area Office and Tuhoe', [1998] (Coombes, papers in support of 'Cultural Ecologies' (doc A121(a), p 271–273). Coombes dates this document to 1998.

1257. Department of Conservation, submission to the Lake Waikaremoana inquiry, 18 May 1998 (Coombes, 'Cultural Ecologies II' (doc A133), p 249)

1258. Department of Conservation, submission to the Lake Waikaremoana inquiry, 18 May 1998 (Coombes, 'Cultural Ecologies II' (doc A133), p 250)

The ministerial inquiry was not satisfied on this point. In their report, Paki and Guthrie referred to Duncan MacIntyre's comments in 1971, as the Minister entering into the lease. MacIntyre had reminded the owners of Lake Waikaremoana that the Maori people were 'equal partners in the 33 million acres' of Crown land, and that he protected the interests of all New Zealanders in the administration of those lands, Maori and non-Maori. Guthrie and Paki found that MacIntyre's references to partnership and protection covered 'all the elements of the Treaty relationship':

> The lease established a partnership between Maori and the Crown. While ownership of the Lake remained with Maori, the partners would work together to actively protect the lake to ensure it remained in its pristine state for the benefit of all New Zealanders.[1259]

Pointing to recent developments at the time, such as the Ngai Tahu Treaty settlement, Guthrie and Paki found that more could be done to involve the tangata whenua of Lake Waikaremoana in its management. It was possible to establish 'joint or co-management' by statute, but that would require a specific Act or a change to the National Parks Act.[1260] Although this kind of legislative solution was not 'immediately available', the ministerial inquiry expressed a hope that one would soon be enacted through a Treaty settlement or through proposed changes to the national parks legislation.[1261] In the meantime, Paki and Guthrie thought that the present laws were sufficient to 'facilitate co-operative approaches to conservation management of the leased area at Waikaremoana.'[1262] They made the following recommendation:

> To achieve this we recommend that the Department, tangata whenua, and the Trust Boards agree on more inclusive and transparent ways in which the tangata whenua can participate and bring their knowledge and relationship with the Lake to bear in the Department's duties and responsibilities both as lessee and the Crown's manager of Te Urewera National Park. We recommend that an agreement setting out the respective duties, functions, responsibilities and ways for co-operating between the parties, be negotiated and formalised so that the expectations of all parties are clear.
>
> We hope that with the goodwill that we have seen during the inquiry that the greater involvement of the tangata whenua in the management and decision making processes affecting the Lake can become a reality. There is no reason not to strive even further toward the achievement of partnership, acting in good faith where conservation and national park values are paramount.[1263]

1259. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 18
1260. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 18
1261. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 18–19
1262. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 19
1263. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 19

It is important to note, however, that this was seen an interim measure. To achieve 'joint or co-management', the ministerial inquiry found that law changes were also needed.

These recommendations had not been carried out by the time of our hearings in 2005, and DOC witnesses explained that a deliberate decision had been made not to do so. According to the conservator, Peter Williamson, a formal arrangement was unnecessary:

> Our Aniwaniwa project and business planning interaction involves both Waikaremoana Maori Committee and the Ruatahuna Tribal Committee.
>
> This, while in place prior to the Inquiry, in my view gives effect to that recommendation of the Inquiry. The reaction to date from local people has to date indicated satisfaction. For example Mr [James] Waiwai in discussion with Glenn Mitchell has indicated a formal agreement is not required.
>
> Given the expressed satisfaction we have never sought a formal memorandum of understanding.[1264]

Dr Coombes suggested a number of reasons why DOC preferred to restore the Aniwaniwa system for managing the lake, rather than negotiating a formal co-management agreement with local hapu and the Maori trust boards:

- DOC did not want to get involved in trying to resolve the fraught situation between local Maori communities and their trust boards;
- DOC understood that the trust boards did not want to enter into discussions, and that the local communities preferred to keep the informal Aniwaniwa system;
- DOC was concerned about the budgetary implications of formal co-management, in which it might have to help fund Maori participation; and
- DOC feared how much of its authority might have to be given up in a formal co-management arrangement, and was also unsure of the legality of entering into such an arrangement.[1265]

After examining the evidence, Coombes confirmed DOC's view that local Maori communities were also hesitant to enter into a formal agreement about the lake. They feared that:

- DOC would pick a single management partner (the trust boards) to the formal exclusion of local communities; and
- a co-management arrangement in advance of a Treaty settlement might compromise their quest for the return of land, and might unfairly legitimise what they saw as an illegitimate conservation space.[1266]

As a result, discussions between DOC and local Waikaremoana leaders resulted in restoring the Aniwaniwa system by late 1999 or 2000.[1267] This was seen by some as putting off

1264. Williamson, brief of evidence (doc L10), p 18
1265. Coombes, 'Cultural Ecologies II' (doc A133), pp 254–256
1266. Coombes, 'Cultural Ecologies II' (doc A133), pp 254–257
1267. Coombes, 'Cultural Ecologies II' (doc A133), p 256

resolution of the major issues. In a 2001 submission about the new National Park management plan, the chair of the Tuhoe Waikaremoana Maori Trust Board observed: 'meaningful engagement and better park management' could only come after conflict between Maori groups had been sorted out, and a co-governance board had been established for the park. Until then, the informal Aniwaniwa system would not resolve the underlying problems that bedevilled park management for both Maori and DOC.[1268]

But it seems to be working at Lake Waikaremoana, where its focus is on local community leaders in a situation where there is a congruent goal: that the lake must be preserved in (or restored to) its natural state. In his evidence to the Tribunal, the Aniwaniwa area manager, Glenn Mitchell, suggested that the informal joint management regime worked well between 2000 and 2005. He pointed to:

- the successful management of sewage issues, the joint DOC–hapu team to monitor the old oxidation pond and establish a new one, and the Waikaremoana Maori Committee's support for a resource consent to spray the treated effluent into a distant forest area;
- the kiwi recovery programme; and
- the development of a Waikaremoana ecosystem restoration plan.[1269]

The evidence of James Waiwai and Maria Waiwai was in agreement with that of Mr Mitchell. Maria Waiwai emphasised that the system had been built by working hard on the relationship:

> We have a better relationship with DOC now than ever, but this has come about as a direct result of hard work by the Ruapani families in building up a meaningful relationship with DOC.
>
> Now, DOC consults with us first before undertaking any works up here. We can meet and discuss tikanga, we have a better understanding in achieving a goal.[1270]

James Waiwai, chair of the Waikaremoana Maori Committee, agreed that the relationship with DOC was 'getting better all the time'.[1271] He told us that their joint work on the kiwi recovery programme at Puketukutuku Peninsula was a 'partnership model' that was being 'emulated across the country'.[1272] He also accepted that the Waikaremoana Maori Committee was (finally) playing a full role in managing sewage issues, and that his committee had input into forward planning and DOC activities. But he cautioned that there was still 'room for improvement'. The arrangement was still too informal, insecure, and dependent on par-

1268. Coombes, 'Cultural Ecologies II' (doc A133), pp 257–259
1269. Mitchell, brief of evidence (doc I9), pp 4–30
1270. Maria Waiwai, brief of evidence (doc H18), p 23
1271. James Waiwai, brief of evidence (doc H14), p 15
1272. James Waiwai, brief of evidence (doc H14), p 14

ticular individuals: outside of it, he saw DOC distrust of tangata whenua, and there were still areas of disagreement to be resolved.[1273]

One such area was the need for a permit to handle kiwi, which caused some concern in respect of the Puketukutuku kiwi recovery programme.[1274] Another area of disagreement was the use of 1080 poison. As we mentioned earlier, local Maori were worried that DOC had allowed the use of 1080 within the Waikaremoana catchment, a point which DOC denied at the 1998 ministerial inquiry.[1275] The lakebed occupiers were very concerned that this poison could enter the lake, with unknown effects on future generations.[1276] In his evidence to the Tribunal, Peter Williamson made it clear that DOC considered 1080 to pose no threat to the environment, and would be using it more extensively were it not for Maori opposition.[1277] In 2002, however, a proposal to use 1080 on national park land (including the Waikaremoana catchment) was put forward by the Hawke's Bay Regional Council and the Animal Health Board. Its purpose was to control the spread of bovine tuberculosis by possums. Consultation began with a hui-a-hapu at Waimako Marae in 2002, organised by the council and the Waikaremoana Maori Committee. Although the lead was taken by the regional council, DOC supported the proposal, and a number of subsequent hui between 'hapu representatives, council staff and DOC were held at the Aniwaniwa DOC office' to discuss and agree the details of the scheme. DOC also facilitated aerial inspection of the proposed treatment area.[1278] In response to Maori concerns, it was agreed that no 1080 would be dropped in the lake catchment (except for 'a narrow strip at the foot of the Panekiri bluffs that was too steep for ground control').[1279]

Glenn Mitchell commented:

> The eventual result was that the programme proceeded [in 2004] with mixed blessings from members of the community, and employment opportunities were gained by the Lake Waikaremoana Hapu Restoration Trust for ground-based control contracts for a number of local people.[1280]

Mr Mitchell did not deny that there were difficulties in making the Aniwaniwa system work to achieve such outcomes:

> Both DOC and the people of Ruatahuna and Waikaremoana over the past 10 years or more have made a genuine effort to work together. Their joint objective has been to find

1273. James Waiwai, brief of evidence (doc H14), pp 13–14, 18–20; see also counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 108
1274. James Waiwai, brief of evidence (doc H14), pp 16–17
1275. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 7
1276. Anaru Paine, brief of evidence (doc H39), pp 7–8
1277. Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki (Pou), 1 March 2005
1278. Mitchell, brief of evidence (doc L9), pp 19–20
1279. Mitchell, brief of evidence (doc L9), p 19
1280. Mitchell, brief of evidence (doc L9), p 20

> a way to work together in the management of this part of the Park, in a meaningful and inclusive manner. In doing so we have come to gain an understanding of each other's aims, aspirations, and responsibilities. Our path hasn't always been smooth and nor will it be in the future. However we have shown that with commitment, trust and respect for each other's viewpoint, it can be done.[1281]

Vernon Winitana expressed a common view when he told us that the relationship with DOC was 'improving' but that its successes were hard won, and sometimes seemed like 'two steps forward and one step back'.[1282] The example he gave was the discovery in 2003 of a DOC rubbish dump at Kaitawa, which resulted in a squabble with DOC and the eventual closure of the dump.[1283] Frustration was rife among Waikaremoana witnesses at the time of our hearings, some of it still directed at DOC but much of it directed at Genesis and the Tuhoe Waikaremoana Maori Trust Board.[1284] In addition, national park systemic issues not involving the lake – including hunting, wildlife, trespass on Maori land, and permits – remained grievances for Waikaremoana communities, despite improved management systems.[1285] DOC field staff could not manage away departmental policies or the requirements of the National Parks Act.[1286] In respect of permits for handling kiwi, for example, Mr Williamson stated that the Department had its duties and responsibilities, and he could not 'rapidly rearrange departmental policy nationally in relation to kiwi handling.'[1287]

Vernon Winitana commented:

> What is also clear is that contradictions abound with DOC and their role in management of the land. The relationship with Ruapani appears to be improving and we view our role as kaitiakitanga of our region seriously having formed the Lake Waikaremoana Restoration Trust.[1288]

We are conscious that there have been some very positive initiatives in recent years, including the establishment of this Lake Waikaremoana Hapu Restoration Trust. As James Waiwai explained, the kiwi recovery programme began in the early 1990s as a project involving DOC, Manaaki Whenua (Landcare Research), and local hapu. For Mr Waiwai, it had a dual goal of restoring kiwi and restoring kaitiakitanga – it was an opportunity for his people to 'reassume our role as kaitiaki', and to get 'a foothold into management of our

1281. Mitchell, brief of evidence (doc L9), p 30
1282. Vernon Winitana, brief of evidence (doc H28), pp 11–13
1283. Vernon Winitana, brief of evidence (doc H28), pp 11–12
1284. See, for example, Trainor Tait, brief of evidence (doc H29), pp 18–24
1285. See, for example, Pari Winitana, brief of evidence (doc H24), p 12; Trainor Tait, brief of evidence (doc H29), pp 18–23; Nicky Kirikiri, brief of evidence (doc H59), pp 9–10
1286. Coombes, 'Cultural Ecologies II' (doc A133), p 245
1287. Peter Williamson, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, first Crown hearing, 1 March 2005
1288. Vernon Winitana, brief of evidence (doc H28), pp 12–13

whenua, and a place at the management table'.[1289] The aim was to make one of the lake's peninsulas, Puketukutuku, a predator-free haven for kiwi. The work was divided between DOC, which cared for and monitored the birds, the hapu, who managed predator trapping and established a kiwi chick enclosure on Te Puna reserve, and Manaaki Whenua, which carried out research on kiwi and the effectiveness of the programme. Lines of traps had to be laid across the neck of the peninsula and also around the lake shore (as predators such as stoats can swim). As a result of intensive trapping and later the ability to confine chicks in the safe area, the programme had achieved significant results by the time of our hearings.[1290] Once Puketukutuku reached carrying capacity, DOC and the local hapu planned to expand the protected area to include another of the lake's peninsulas, Whareama.[1291]

When Manaaki Whenua completed its 10-year research programme in 2002, hapu established the Lake Waikaremoana Hapu Restoration Trust to take over and manage the kiwi programme in conjunction with DOC. The new trust, however, had a wider focus than just kiwi:

> The vision of the Trust is to facilitate in the restoration of the Lake, the catchment, the surrounding lands, the waterways and the flora and fauna. The Trust is also about the restoration of our people, who had been disenfranchised and driven from the Lake.
>
> The Trust works with other parties (DOC, Local Councils and Manaaki Whenua) to undertake research, to carry out pest and predator control work and to restore threatened species of flora and fauna in the Waikaremoana Catchment.
>
> When the Trust started, the plan was that we would work in partnership with DOC at the beginning on the kiwi recovery program, and within five years the Trust would be in a position to manage the program outright, and DOC could move their resources elsewhere.[1292]

Mr Waiwai explained that the trust had since obtained a possum trapping contract from the regional council (as noted above), and had established Nga Tipu a Tane, two native tree nurseries, at local schools, to help with 'restocking the ngahere'. Using the schools was also to get the next generation interested in caring for their taonga – 'another area where we're sowing the seeds for the future'.[1293] Many hapu members had been involved over the years, and it had become 'an important part of the community'.[1294] In addition to financial backing

1289. James Waiwai, brief of evidence (doc H14), p 4; see also p 2
1290. James Waiwai, brief of evidence (doc H14), pp 3–11
1291. Lake Waikaremoana Hapu Restoration Trust and Department of Conservation, 'Lake Waikaremoana Kiwi Project Management Plan 2004 to 2012', October 2004 (Mitchell, comp, papers in support of brief of evidence (doc L9(a)), document "I")
1292. James Waiwai, brief of evidence (doc H14), pp 10–11
1293. James Waiwai, brief of evidence (doc H14), p 11
1294. James Waiwai, brief of evidence (doc H14), p 5

from a number of public and private sources,[1295] the Hapu Restoration Trust was attempting to get sponsorship from Genesis at the time Mr Waiwai gave his evidence in 2004.[1296] Tracey Hickman confirmed that Genesis was in the process of negotiating a 'partnership' agreement with the trust in 2005, to support the kiwi restoration project.[1297] Alongside the Waikaremoana Maori Committee, the Hapu Restoration Trust also became another forum for working with DOC – for example, in the preparation of DOC's Waikaremoana ecosystem restoration strategy.[1298] The original vision of 1992 – that kaitiakitanga would be restored along with kiwi – was beginning to be fulfilled.

But it was only a beginning. More was necessary. Mr Waiwai and other witnesses suggested:

- increased funding for ecosystem restoration;[1299]
- DOC had to be educated in 'our cultural beliefs and practices' – 'for them to see first hand how we do things and how we want things done';[1300]
- young Maori of the district needed to 'upskill' technically so that, as kaitiaki, they would have the necessary knowledge of 'the ecology of our lands';[1301]
- secure sources of funding had to be obtained by Maori organisations, which did not compromise their independence or their ability to dissent from the objectives of such bodies as DOC or Genesis;[1302]
- Maori had to work on sorting out their internal differences;[1303]
- Maori had to work on relationships with other groups who asserted interests in the park;[1304]

1295. Providers of financial support included Te Puni Kokiri, the New Zealand Lottery Grants Board's Environment and Heritage Fund, the Bank of New Zealand Kiwi Recovery Trust, Manaaki Whenua, and the Eastern and Central Community Trust.

1296. James Waiwai, brief of evidence (doc H14), pp 12–13

1297. Hickman, brief of evidence (doc L11), p 20

1298. David King, *Waikaremoana Ecosystem Restoration Project Strategy, 2003–2013* (Gisborne: Department of Conservation, East Coast Hawke's Bay Conservancy, 2003), executive summary, pp 8–10 (Mitchell, comp, papers in support of brief of evidence (doc L9(a)), doc H)

1299. Peter Williamson, evidence given under re-examination by Crown counsel, first Crown hearing, 1 March 2005. See also Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005, pointing out that the $100,000 a year from Electricorp and Genesis had been spent on ecosystem restoration work that the Department of Conservation would not otherwise have been able to carry out, but that such a sum was not a large one in respect of the work needing to be done.

1300. James Waiwai, brief of evidence (doc H14), p 14

1301. James Waiwai, brief of evidence (doc H14), pp 25–26. Peter Williamson also expressed this view, when asked by the presiding officer what changes could be made to make the Department of Conservation more compliant with the Treaty: that the local people 'take over the management', having upskilled themselves in this way – Williamson, evidence given in response to questions from the Tribunal, first Crown hearing, 1 March 2005.

1302. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 106, 202; James Waiwai, brief of evidence (doc H14), pp 12–13

1303. James Waiwai, brief of evidence (doc H14), pp 22–23; Coombes, 'Cultural Ecologies II' (doc A133), p 257, citing Aubrey Temara to C Hart, East Coast Hawkes Bay Conservancy, 2 November 1999

1304. James Waiwai, brief of evidence (doc H14), p 25

- although the informality of the Aniwaniwa system of management was in some ways a strength, it was also a risk because it depended on individual staff who had gone outside departmental practice and policy, and therefore needed to be entrenched within the Department;[1305] and
- Maori needed to be involved in decision-making at all levels, including in the governance of the park.[1306]

(4) *Managing Lake Waikaremoana for electricity: from NZED to Genesis*

The Aniwaniwa model created a management structure for the lake which included local hapu in local decision-making. But DOC did not have sole management responsibility for Lake Waikaremoana. As we discussed earlier, the Government managed lake levels separately from the national park management structures. From 1971 to 1978, lake levels were controlled by the New Zealand Electricity Department. Then, as a result of the oil crisis in the 1970s, the department was turned into a division of the new Ministry of Energy in 1978. This allowed integrated management and control of the Government's various energy projects. The Electricity Division managed Waikaremoana lake levels until 1987, when it was turned into a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).[1307] Although the Government contemplated selling the Waikaremoana power scheme to private enterprise, it was ultimately transferred from Electricorp to another State-owned enterprise, Genesis, in 1999.

Thus, the Government has not been directly responsible for the management of lake levels since 1987. While subject to a degree of ministerial oversight and direction, it was

Organisational Changes in the Government's Management of Electricity Generation, 1911–99

1911: The Hydro-electric Branch of Public Works Department was established

1946: The Hydro-electric Branch was separated from Public Works and became the State Hydro-electric Department.

1958: In recognition of the Department's broadening role in developing thermal and geothermal electricity, it was renamed the New Zealand Electricity Department.

1978: The Ministry of Energy was established, with an Electricity Division which replaced the former New Zealand Electricity Department.

when I meet with other DOC staff in other capacities, they are really hesitant about giving tangata whenua as much involvement as we have in this area.'

1306. Coombes, 'Cultural Ecologies II' (doc A133), pp 245, 257–258; Reay Paku, brief of evidence (doc I35), para 5.3; Aubrey Temara, brief of evidence (doc K15), pp 8, 10

1307. For a brief outline of the changes in Government agencies, see John Martin, *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880–1990* (Wellington: Bridget Williams Books and Electricity Corporation of New Zealand, 1991), pp 291–292.

1987: The Electricity Division was turned into a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).

1988: Electricorp was divided into four trading units: Electricorp Production, Transpower, Electricorp Marketing, and Power-DesignBuild Group Ltd.

1990: The Ministry of Energy was abolished. It became the Energy and Resources Division in the Ministry of Commerce.

1994: Transpower was separated from ECNZ and became a standalone State-owned enterprise.

1996: ECNZ was split into two competing State-owned enterprises: ECNZ and Contact Energy.

1999: Contact Energy was sold to private investors. ECNZ was split into three competing State-owned enterprises: Genesis, Meridian, and Mighty River Power.

commonly understood that Electricorp and its successors were intended to operate as independent businesses, although with a high degree of social responsibility. In other words, they were not agents of the Crown in the legal or Treaty sense, and no one argued otherwise in our inquiry.

From the evidence available to us, the Electricity Department and the Ministry of Energy never once consulted local Maori communities or the Maori trust boards about the management of lake levels. The Electricity Department did, however, negotiate the 'Gentleman's Agreement' with the park board and the Nature Conservation Council, the year before the lease was signed. The Maori owners of the lake were not consulted or included, except insofar as they could make their wishes known through the park board. At that point, there were two Maori members of the board, T C Nikora and John Rangihau, but no Ngati Kahungunu representatives. In practice, as we have explained, Maori and the park board were well aligned on this issue. Common goals included tighter control of lake levels, a stable operating regime, mandatory discharge if the lake rose too high, more natural seasonal levels, and no new sealing work. Hence, as we discussed earlier, Tama Nikora, Reay Paku, and Sam Rerehe declined to provide evidence for the Hawke's Bay Catchment Board inquiry in 1980, and the Tuhoe Waikaremoana Maori Trust Board relied on the park board's submission to 'stand for it as well' (see above).

The situation changed in the 1980s. First, the park board was replaced by an East Coast advisory board, with Lands and Survey as managers of the park. As we discussed earlier, Maori felt more distanced from and less influential in the management of the lake as a result. Secondly, the Government divested itself of the direct management and control of lake levels when it handed the Waikaremoana power scheme to Electricorp in 1987. Thirdly,

DOC's consultation on the Te Urewera National Park management plan showed that restoration of more natural lake levels was a very important concern for local Maori communities. As a result, the department undertook in 1989 to negotiate with 'the appropriate catchment authority, the Ministry of Energy and Electricorp, to seek an operating regime for Lake Waikaremoana that will minimise the effects of hydro-electric power generation on the ecology of the lake and lakeshore, shoreline stability, the interests of the Maori people and the use of the lake for boating and other public uses'.[1308] From this, it would appear that DOC became the government agency responsible for the active protection of Maori interests in lake level management, now that the Waikaremoana stations had been transferred to Electricorp. And, fourthly, the resource management law reform process intervened and stopped the 1990 review of lake levels, granting users a 10-year continuance of their existing terms of use.

All of this meant that the first real engagement with Maori on the management of lake levels took place in the mid-1990s, under the requirements of the Resource Management Act. We have already described that process earlier in the chapter, and noted that Electricorp's consultation with Maori was thorough and inclusive, and that the claimants have not challenged the process or its conduct in their submissions. The result, however, was a management regime set in stone by the resource consents for 35 years, so long as council monitoring confirmed compliance. The Working Party, through which local Maori organisations had been involved in deciding conditions for the consents, was then discontinued. The 1994–1998 level and mechanisms of engagement fell away. This meant that – to the extent that management partnership in lake levels was possible – Maori either had to work with DOC to monitor and manage the effects, or they had to try to work directly with Electricorp (later Genesis) through some new means. Claimant counsel emphasised an incident in 2003, when DOC and Genesis dealt directly with each other over the erosion threatening the oxidation pond.[1309] Ms Hickman's evidence confirmed that DOC and Genesis worked together on this.[1310] Peter Williamson suggested that the issue was so urgent that he felt it necessary to act immediately.[1311] Local Maori felt excluded, and were worried that the two organisations were shuffling blame and not getting the job done.[1312]

The most obvious requirements for consultative or cooperative management were those set as conditions of the resource consents in 1998. Some of these arrangements were made solely with DOC, such as 10 years' funding for ecosystem restoration. This angered the

1308. Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999*, p 63 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 223–224)
1309. Counsel for Ngati Ruapani, closing submissions (doc N19), p 66; app A, pp 98–99
1310. Hickman, brief of evidence (doc L11), p 20
1311. Williamson, brief of evidence (doc L10), p 24
1312. James Waiwai, brief of evidence (doc H14), pp 20–21

claimants in our inquiry. In their view, such payments should have been made to – and managed by – the people whose taonga had been damaged.[1313]

From the evidence supplied to the Tribunal by Genesis, we note that Electricorp undertook to consult the two Maori trust boards (and DOC) in:

- designing and building works to protect the lakeshore from erosion at Home Bay and Mokau Landing;
- repairing boat ramps; and
- replanting land near the intake structure and tunnels.

Genesis also undertook to inform the Maori trust boards and DOC as soon as the lake went outside the maximum or minimum levels. Further, the trust boards, the Panekiri Tribal Trust Board, and the Haumapuhia Waikaremoana Authority were involved in the eel management plan (which was for the outflowing rivers, not Lake Waikaremoana itself).[1314] From the evidence presented to us, these few requirements could not be said to amount to a management partnership.

According to the evidence of Tracey Hickman, Genesis Energy was bound by the State-Owned Enterprises Act to operate both as a commercial business and a 'good corporate citizen'. The latter required it to work 'in partnership with stakeholders' on environmental matters, and to understand, avoid, remedy, or mitigate harmful effects on the environment. To that end, we were told, Genesis wanted to 'maintain and enhance' long term relationships with stakeholders, of whom local Maori were one.[1315] The aim was to involve stakeholders in 'environmental decision-making' through dialogue: Genesis would find out what stakeholders wanted and try to incorporate their views in its decisions. In other words, what was on offer was consultation but not a role in decision-making, which was quite different from the more collaborative approach that had marked the Working Group between 1995 and 1998. Ms Hickman used words like 'input', 'feedback', 'dialogue', 'information', 'learn[ing] from others': these were all words to describe consultation. For those iwi and hapu who had 'energy operations located within their rohe', Genesis sought a 'dialogue to seek a better understanding of the effects of Genesis Energy's activities on tangata whenua, and to assist them to exercise kaitiakitanga.'[1316]

In practical terms, Ms Hickman told us that Genesis has held a consultation meeting once a year at Tuai (since 2001), to 'update the community' on monitoring and other activities, and to enable 'the public to ask questions and seek feedback'. Ms Hickman suggested that these annual meetings were well attended by iwi, and that Genesis had received 'considerable positive feedback from the meetings'. Environmental newsletters were also sent to stakeholders in 2001 and 2003, and information was provided on a website. Through these

1313. James Waiwai, brief of evidence (doc H14), pp 12–13
1314. See Hickman, comp, supporting papers to brief of evidence (doc L11(a)), [p 24].
1315. Hickman, brief of evidence (doc L11), pp 4, 14
1316. Hickman, brief of evidence (doc L11), p 5

'forums', Genesis 'stresses its open door approach to addressing issues or questions as they arise'. Dialogue, in other words, took the form of newsletters, an annual public meeting, and an open-door policy for one-off meetings and discussions as necessary.[1317] Dr Cant's research team commented that the 'management record' of ECNZ and Genesis had been 'fairly uneventful' since 1998. They referred to six-monthly hui between Genesis and iwi to discuss changes in the lake, such as shoreline erosion, which Ms Hickman did not mention in her evidence.[1318] They also referred to the eel management plan as a 'co-management' arrangement,[1319] which suggested that – at least for particular issues – Genesis was able to enter into such arrangements.

One-off projects such as the eel management plan were capable of replication. As James Waiwai described in his evidence, the Lake Waikaremoana Hapu Restoration Trust approached Genesis about the kiwi restoration project:

> we're looking at the corporate sponsorship option. Here in Waikaremoana, Genesis is linked in with the people and the environment, so we're looking at them as a potential partner. We've had initial meetings with them to put forward the idea of sponsoring the Lake Waikaremoana Hapu Restoration Trust. Genesis says that it is 'working towards environmental excellence' and 'opportunities to work with tangata whenua in their kaitiaki role.' We believe we are offering them the perfect opportunity to put into practice what they are saying.
>
> The money is there – Genesis pays DOC mitigation money for the land they use, one million dollars over ten years. Tangata whenua aren't seeing any of that, the money's going to the tenants (DOC), not the landlords (Tangata whenua). DOC uses that money to pay for the kiwi workers – I guess that's kei te pai with me, at least they're employing some of our people in the environment, indirectly looking after our Lake, our ngahere and our kiwi.
>
> We are saying to Genesis this is not about you owing us, it's not about grievance, we don't want mitigation money, this is corporate sponsorship. We want to form a partnership that is based on honesty and integrity – no baggage. We're giving you an opportunity to back up your words and ideals. This is a straight up business proposal, ensuring that the Trust has financial security – at least for the kiwi program. It's not about past grievances or mitigation, we'll take care of that in the Waitangi Tribunal.[1320]

At the time that Mr Waiwai gave his evidence in 2004, he was not optimistic about the prospect of forming such a partnership with Genesis:

1317. Hickman, brief of evidence (doc L11), p 18

1318. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 240

1319. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 240

1320. James Waiwai, brief of evidence (doc H14), pp 12–13

> So we talked with Genesis about the kind of relationship we could have, and they responded that they already give all this money to DOC. You get the feeling that they're happier dealing with a government department rather than the kaitiaki. You can hardly blame them, this is the kind of thinking that's been drummed into them over the years.[1321]

As we noted earlier, however, Tracey Hickman reported in February 2005 that negotiations had been successful. A 'partnership' agreement between Genesis and the Hapu Restoration Trust was in the process of being established, covering the kiwi recovery programme.[1322]

This begged the question: could DOC have formed a management partnership with Waikaremoana Maori communities which included Genesis (when appropriate), thus covering a broader spectrum of activities at the lake? And should DOC have facilitated such a tripartite partnership? Could Electricorp's Working Party model have been amalgamated with DOC's Aniwaniwa model (both were developed at the same time), to provide for inclusive management decision-making on lake levels, erosion, and other issues in common? We note Glenn Mitchell's evidence about how DOC facilitated hui at Aniwaniwa with the Hawke's Bay Regional Council.[1323] This resulted in a relationship which James Waiwai said had 'gone from strength to strength after a shaky start'.[1324] (The shaky start was due to the nature of the council's proposal at first, which was to drop 1080 in the Waikaremoana catchment.[1325]) The Aniwaniwa system, it would seem, could be expanded where necessary, to take in regional councils and possibly Genesis.

We note a qualifying point, that the Maori trust boards had a licensing arrangement with Genesis (inherited from Electricorp), and that we have no details about the content of this licensing regime. Also, the claimants associated with the trust boards have not raised issues about Genesis or the present-day management of lake levels.

20.11 Treaty Analysis and Findings

20.11.1 An overview of the contest between Maori and the Crown over the lake

From 1903 to 1971, Maori and the Crown were locked in a contest over the ownership and control of Lake Waikaremoana. It originated when the Crown established a tourism enterprise at the lake in 1903, appointed rangers to enforce acclimatisation regulations, and banned hunting for indigenous as well as imported game. In 1905, Maori attempted dialogue with the Native Minister, asserting that the Crown must accept their authority over Lake Waikaremoana and pay them for its use. When this failed, they tried petitioning

1321. James Waiwai, brief of evidence (doc H14), p 13
1322. Hickman, brief of evidence (doc L11), p 20
1323. Mitchell, brief of evidence (doc L9), p 19
1324. James Waiwai, brief of evidence (doc H14), p 21
1325. James Waiwai, brief of evidence (doc H14), p 21

Parliament in 1912, seeking to bring the lake inside the Urewera District Native Reserve. When that, too, failed, the arena for the contest shifted to the Native Land Court where it remained for the next 31 years.

From 1915 to 1918, the Crown denied Maori claims for legal ownership in the Native Land Court, and attempted to prevent the Court from sitting until the issue of Crown or Maori ownership of large, navigable lakes could be settled in principle by a court comprising all the Native Land Court judges. When this attempt failed in 1917 and Judge Gilfedder made final orders in 1918, vesting the bed of Lake Waikaremoana as freehold land in individual Maori owners, the Crown appealed the decision. While the Crown genuinely sought to prosecute its appeal in the early 1920s, it no longer did so after 1926 (having settled what it considered the more important Rotorua and Taupo lake claims). Nor did it withdraw its appeal after 1929, when Judge Acheson's Omapere decision rejected the Crown's arguments about lakes, finding that 'Maori custom and usage recognised full ownership of lakes themselves', and that the Treaty of Waitangi protected Maori ownership of lakes.[1326] Instead the Crown negated increasingly urgent attempts by the Maori respondents and the Court to have the Waikaremoana appeal heard or dismissed. Finally, in 1944, the Appellate Court insisted on proceeding despite a Crown application for adjournment sine die, and dismissed the Crown's appeal, giving it 'very short shrift', as the claimants put it.

During the next 10 years, the contest continued in multiple arenas: the Maori Land Court (which was stopped from completing the titles in 1950 when the Government withheld the requisite plan), the general courts, and (for a brief interlude) the realm of direct negotiations between the Prime Minister and the Maori owners. Ironically, the contest in the general courts was not actually about Lake Waikaremoana at all, since the Crown held the prospect of proceedings over the heads of its Maori owners but never actually instituted them, finally accepting at the very last minute in 1954 that they should be 'permitted to retain the benefit of their declared ownership of the bed'. From 1950 to 1954, the Government awaited the outcome of the Whanganui River commission and then its subsequent challenge to that commission in the Court of Appeal. It was mainly because this litigation did not go the Crown's way (up to the deadline for Lake Waikaremoana in 1954), and because it no longer feared any practical consequences for its hydro power scheme, that the Crown finally abandoned the option of challenging the Appellate Court's decision in the general courts.

After 1954, the arena for the contest shifted from the courts to the political realm of negotiations between the Crown and the Maori owners. For several years, Ministers had to chivy reluctant officials. Genuine uncertainty about how to value a lake sat alongside officials' belief that the Crown no longer needed to own the lake in order to protect its interests. They saw little incentive to negotiate (not even fairness to the owners, in light of other lake

1326. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, Minute Book 11, fols 7, 19, 24 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 39–41)

settlements, which was noted but did not weigh with officials),[1327] until a perceived risk to the national park began to have an impact in the 1960s. At the beginning of negotiations, from 1957 to 1959, Electricity Department officials convinced other departments (and persuaded Ministers) that no payment should be made for use of the lake in the Waikaremoana power scheme. This was by no means inevitable at the time but it has remained the Crown's view ever since.

From 1957 to 1969, Labour and National Ministers in turn sought an outright purchase of the lake for the national park, by means of a one-off lump sum payment, and for what could fairly be described as derisory or 'ludicrous' values based on fishing revenues, with a component for past use. In 1949, the owners (having had their appeals resolved in 1947) approached the Government, asking for it to settle with them 'for the future use of the Lake for hydro electric, fishing and tourist purposes'. From this point on, the owners sought Crown recognition of their ongoing relationship with their ancestral lake by means of a perpetual annuity, paid to a Waikaremoana Maori trust board, and payment for the Government's past as well as future use of the lake. The high monetary value that they put on their lake was confirmed in 1968 by the special Government Valuation, which showed that the Government offers to that point had been extremely low in light of current values, let alone a component for past use. Despite the pressures of poverty and growing desperation, the Maori owners refused to give in to the Crown's insistence that they sell their lake for a low lump sum payment.

As we discussed in detail above, the negotiations stalled between 1961 and 1967. A breakthrough finally came with a new Minister, Duncan MacIntyre, in 1967 and again in 1969, resulting at long last in appropriate Crown concessions and an agreement in 1970, given effect by legislation in 1971. Under that agreement, the Crown leased and managed Lake Waikaremoana as part of Te Urewera National Park.

For all that time, from 1903 to 1971, the Crown had continued to use the lake without permission or payment, at first for tourism purposes and then for hydroelectricity (from 1946) and the national park (from 1954). The Crown's 1971 lease was backdated to 1967, thus paying for only four years' past use of the lake in the national park. This could not, we found, be considered a full and final settlement of all uses prior to 1967, nor for use for hydroelectricity (which was excluded from the agreement altogether). The resulting lease was fundamentally unfair to the claimants in those respects.

For the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants, the contest could be said to have ended in 1971, apart from the outstanding issues of hydroelectricity and payment for past use. For other claimants, however, the contest over authority and management – and, they said, ownership – continued unabated until the time of our hearings. It focused on the environmental management of Lake Waikaremoana as part of the national park, and on

1327. See, for example, Director-General to Commissioner of Works, 18 June 1958 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(b), p 970), discussed in section 20.8.3.2.

their grievance about the vesting of the lakebed in the trust boards as a result of the Lake Waikaremoana Act 1971.

20.11.2 The contest between Maori and the Crown over ownership of lakes, and the Crown's reponse to the Maori claim for legal ownership of Lake Waikaremoana

(1) *The Crown's failure to provide for a title that recognised tribal kaitiakitanga and tino rangatiratanga over the taonga, Lake Waikaremoana*

According to the claimants, there should never have been a contest over Lake Waikaremoana in the first place. 'In terms of the Treaty,' they argued, 'the Crown should not have been an active ligitant attempting to defeat Maori title to the lake.'[1328] We agree with the claimants that the Crown's obligation under article 2 of the Treaty was to recognise, protect, and give legal effect (where necessary) to their tino rangatiratanga over the lake, which included their customary title and their authority over the lake and its resources. It also required the Crown to recognise, protect, and give legal effect (where necessary) to their kaitiakitanga of their taonga.

In our view, these obligations might have been met within an introduced title system; but the Crown's system failed to take adequate account of Maori relationships with their land and resources, and of the nature of Maori 'property rights'. That system, as the Tribunal has found in successive inquiries, imposed a land court which usurped Maori communities' right to determine and control their own titles, introduced a form of individualised land title which was in breach of Treaty principle, and failed to provide for collective management of Maori land. Our conclusions earlier in the report on the failure of the Crown's title system to ensure that Maori communities controlled and managed their own land apply no less in respect of waterways that are taonga.

Maori tikanga in relation to Lake Waikaremoana was and is that it is a taonga, an ancestral treasure, a water system of which the constituent parts are an indivisible whole. The claimants spoke of the central importance of the lake to their cultural, spiritual and physical well-being; they carry deeply felt responsibilities and authority as kaitiaki of Waikaremoana. And this taonga is a lake, not land covered with water, one part of which can be possessed under the Treaty and the other of which cannot. Yet those who sought to protect their rights to the lake, and to protect the lake itself, had to do so in the Land Court, where the introduced law, including the tenure system it established, provided only for recognition of individual rights to the lake bed. It is axiomatic, in our view, that if we are considering Maori 'possession' of a lake in accordance with tikanga, as protected by the Treaty, we cannot be talking about individual ownership. It may be the case that individuals and whanau exercised particular rights. But, as the Whanganui River Tribunal found in respect of another

1328. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 68–69

tribal taonga, such rights were limited by 'the proprietal right of the hapu to control use and access in the area'. Those rights in turn were subject to the collective authority of the people, in whom control and rangatiratanga ultimately vested.[1329] Just as the Whanganui River was possessed as a whole, so also was Lake Waikaremoana. The award of title to individual owners in the land that comprised the bed of a lake was totally at odds with Maori concepts of Lake Waikaremoana and of their relationship with their taonga.

Yet Maori titles to waterways need not have been so restricted. In our hearings, the claimants' view was that the Treaty required the Crown – as the Tribunal found in its *Te Ika Whenua Rivers Report* – to ascertain and recognise tikanga in relation to 'the Waikaremoana water system', which included a proprietary interest akin to English-style ownership. The Crown's Treaty obligation at 1840, it was argued, was to create a form of title that would recognise their rights, including the 'proprietary interest . . . that could be practically encapsulated within the legal notion of the ownership of the waters'.[1330] The claimants also pointed to the Privy Council decision in *Amodu Tijani*, which saw the necessity of recognising customary title (including its spiritual dimension) in the terms of indigenous, not English, law.[1331] We agree with the claimants on these key points, which the Tribunal has also upheld in its *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, *He Maunga Rongo: Report on Central North Island Claims*, and, most recently, in *The Stage 1 Report on the National Freshwater and Geothermal Claims* and *Te Kahui Maunga: Report on the National Park Claims*.

The Whanganui River Tribunal, for example, considered this question of the 'interplay' of Maori and English customs, and stressed the importance of positing Maori river interests within their own social fabric, the philosophy of their own culture. Thus rivers were not 'owned' in the English sense of the term, just as land was not: 'Maori made no distinction between land and water regimes – they were all part of that which the tribe possessed.'[1332] Maori saw themselves as 'permitted users of ancestral resources'. Their rights in both land and waterways were based on usage and possession – and in post-Treaty New Zealand 'it was obvious and sensible that English "ownership" was to be equated with Maori "possession"'.[1333]

The Central North Island Tribunal, expressing its agreement with the *Whanganui River Report* that waterways were and are taonga, also rejected the relevance of the common law presumption that there can be no ownership of running water:

> Waters that are part of a water body such as a spring, lake, lagoon, or river were possessed by Maori. In Maori thought, the water could not be divided out, as the taonga would

1329. Waitangi Tribunal, *The Whanganui River Report*, pp 33–34
1330. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68
1331. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 184
1332. Waitangi Tribunal, *The Whanganui River Report*, p 48
1333. Waitangi Tribunal, *The Whanganui River Report*, p 49

> be meaningless without it. Our views on this matter are consistent with the *Whanganui River Report* . . . We accept that where, on the evidence, Central North Island iwi and hapu can establish their waterways and geothermal resources to be taonga, the waters cannot be divided out and must be considered a component part of that taonga. The issue in relation to water is about the holistic nature of the resources in Maori custom and the relationships of the people with those resources. It is also about possession akin to ownership and the rights to control access to the water.[1334]

The Tribunal concluded that the Crown's Treaty breach in failing to provide for the grant of community titles was 'compounded when we consider that such titles might have included tribal taonga'. In its view, the legal titles available to Maori in the new system 'could not protect the full range of their resources', and Maori 'were prejudicially affected by the failure to provide for a community title to important natural resources'.[1335]

In fact the new tenure system, as the Central North Island Tribunal noted, did not need to follow English norms; it was required to recognise differing circumstances in new colonies. In New Zealand, the Treaty was a standing qualification on the application of the common law.[1336] And we note that in the Lake Omapere decision (1929), Judge Acheson both recognised 'differing circumstances' – the circumstances of Maori relationships with their lakes – and also cited the protections of the Treaty for Maori 'ownership' of lakes.

The judge had a great deal to say about the significance to tribes of their lakes:

> To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from his childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people . . . To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige, to his tribe and to himself. On that account alone it would be highly prized, and defended.[1337]

A lake, in short, was a taonga. Maori custom and usage, the judge stated, 'recognised full ownership of lakes themselves'.[1338] And that meant that ownership of lakes was protected by the Treaty of Waitangi. The judge stated that:

1334. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1251–1252
1335. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 532, 534, 535
1336. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 534
1337. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, Minute Book 11, fols 8–9 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 39)
1338. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1254

> the parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed.[1339]

Judge Acheson's decision demonstrates judicial recognition of Maori rights to their lakes in the 1920s, and that the Treaty guarantee extended to lakes within a tribal territory. The court did not vest the lake in individual owners. By the time title to Lake Omapere was finalised, the Maori land laws allowed greater options in terms of corporate titles. After a long delay (caused by a non-prosecuted Crown appeal), the court in 1955–56 made Lake Omapere – 'the land and the water thereon' – a reservation for the general purposes of the Ngapuhi tribe, and vested it in trustees under section 438 of the Maori Affairs Act 1953.[1340]

Our first finding of Treaty breach is that, in not providing for legal recognition of the relationships of the tribal owners with their taonga, Lake Waikaremoana, through a form of title that recognised their kaitiakitanga and tino rangatiratanga, the Crown was in breach of article 2, and of the principles of partnership and active protection. It failed to provide such a title when it was clear, at least by the first two decades of the twentieth century, that Maori sought legal protection for their lakes. As we have seen, the claimants in our inquiry were prejudiced in two ways: first, by the award of title only to the bed; and, secondly, by title being awarded to individuals. The award of title only to the bed enabled the Crown to ignore its obligation to pay the owners for use of the waters of the lake for hydroelectricity, particularly from 1954 to 1998, as we discuss further below. The consequence of individualised title was that descendants of some who had been awarded ownership by the court in 1918 considered they were prejudiced by the later re-vesting of ownership in the tribal trust boards. This was a prejudice that arose ultimately from the perceived arbitrary removal of property rights which the court had awarded 50 years before, and for the benefits of which these owners had waited a very long time. As we have noted earlier in this report, owners of shares – however small – awarded by the court, often the only legal recognition accorded their ancestral rights to land and resources, might defend them vigorously. We return to this point below.

(2) *The contest for title to Lake Waikaremoana in the courts*

From the outset, the Crown opposed the claimants' attempts to secure a legal title to their taonga.

First, it refused to agree to the petition of Waikaremoana leaders in 1912, seeking to include the lake within the UDNR. Because of the changes that had occurred to the UDNR by

1339. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, Minute Book 11, fol 20 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, pp 40–41)

1340. White, Inland Waterways: Lakes', pp 242–243; Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p 12

then, however, inclusion in the UDNR would not likely have resulted in the protection envisaged by the petitioners; purchase of individual interests was about to engulf the reserve and would lead to the loss of the Waikaremoana block in the 1920s. The lake might well have suffered the same fate had it been added to the reserve.

Secondly, when the Native Affairs Committee pointed out that they had not exhausted their existing legal remedies, Waikaremoana leaders filed a claim with the Native Land Court. The Crown's response to this was remarkable, especially in light of the decision in *Tamihana Korokai v Attorney-General* that the Native Land Court had jurisdiction to decide Maori lake claims. The Government, rather than respecting the court's process, attempted (by withholding the plan) to prevent it from sitting to decide the title to Lake Waikaremoana. It was just such an interference that had led to the *Tamihana Korokai* case in the first place. We agree with the claimants that the Crown behaved improperly in trying to prevent the Court from sitting. We note, however, that the Government was not attempting at that time to prevent an investigation per se, but rather to have it conducted at a generic level, by a special sitting of the full bench of the Native Land Court. In any case, the Government's interference had no prejudicial effects: the Court proceeded in the absence of the plan, and – when the special sitting never eventuated – it recognised Maori ownership and, in accordance with the law, made freehold orders in favour of individual Maori as the owners of Lake Waikaremoana – that is, of the bed of the lake.

The claimants were particularly critical of the sequel. The Crown did not appear or present its case at the final hearing in 1918 (as both Maori and the Court had expected it would), yet lodged an appeal as soon as the Court's decision was known. We do not, however, find the Crown to have been at fault for its failure to appear at the 1918 hearing. Due to some unexplained breakdown in communication, the instructing department (the Lands Department) and the Solicitor-General were evidently unaware of the 1918 hearing until after it was over. While there may have been an omission or perhaps even negligence on someone's part, there may also have been a misconception that the Solicitor-General wished to be notified after final orders had been made. Either way, there is no evidence of bad faith by the Crown in its failure to appear at the 1918 hearing.

The question then becomes this: the Maori owners having had their title confirmed by the court tasked by Parliament with that responsibility, was it consistent with Treaty principles for the Crown to have challenged that title by way of appeal? Here, we do not accept the claimants' position. There had been no opportunity (or, as it turned out, no sufficient opportunity) for the Crown to present its case in the lower court. Also, if we discount the Wairarapa case back in the 1870s, this was the first Native Land Court decision that Maori were customarily the owners of a large, inland, North Island lake. While many officials were driven by a 'nebulous (even subconscious) imperative' that the Crown should own all large, navigable lakes, so as to protect public 'rights' of fishing and navigation, the Crown Law

Office had developed legal theories as to why that was so. Its advice to the Government was that such lakes must belong to the Crown because they could not belong to Maori – either (a) because Maori customary law recognised fishing rights but not a separate ownership of lakebeds, or (b) because Maori customary law and the Treaty only had effect insofar as the Native Land Acts gave them effect, and neither the Treaty nor Parliament could have intended harm to the public by recognising Maori ownership of lakebeds. These arguments were to fail repeatedly in the courts, but that was not known in 1918. The Rotorua lakes case in the Native Land Court was abandoned in the early 1920s, in favour of negotiations, before the Court came to a decision, and Lake Taupo was not put through the Court. So the first authoritative Native Land Court decision on the Crown's arguments came with Lake Omapere in 1929. Given these circumstances, we do not consider that the Crown breached the Treaty by appealing the lower court's Lake Waikaremoana decision in 1918.

The next question is: ought the Crown to have persisted in its appeal after the Rotorua and Taupo settlements and the Omapere decision, and ought it to have ensured minimal delay by prosecuting its appeal with all reasonable dispatch? In light of our extensive discussion of these issues in sections 20.6 and 20.7, we think that the Crown's behaviour in the conduct of its appeal did breach Treaty principles.

No one could have predicted in 1918 that the Crown's Waikaremoana appeal would not be heard for a quarter of a century. Yet the first time that the Crown seriously considered whether or not to proceed with its appeal did not come until 1944, when – faced with an unavoidable fixture – the Solicitor-General recommended negotiating a settlement with the Maori owners. The Crown had had many other opportunities to reconsider its position along the way. We agree with the Crown that it was serious about prosecuting its appeal in the 1920s. It made reasonable attempts to do so until 1926. After that, however, the Crown favoured the status quo (that is, leaving its appeal in abeyance). It agreed not to proceed during the Depression because the Maori owners could not afford the cost of representation. After the Depression, however, the Crown negated all attempts by the Maori respondents and the Court to get the appeal heard (until 1944, when the Court would no longer take 'not yet' for an answer). It is not always possible to pinpoint how the decision was made within government – once, in the 1930s, the Prime Minister did decide to proceed but nothing actually happened.

Our findings on these matters are as follows. First, from 1926 to 1929, the Crown made no attempt to prosecute its appeal, being satisfied that it had successfully negotiated the Rotorua and Taupo lake settlements, securing the outcome it sought, and deterred – perhaps – by its loss of the Omapere case in the Native Land Court in 1929. Waikaremoana, on the other hand, was not a priority for it. Secondly, the Crown agreed to the Maori owners' request (through Ngata) not to proceed during the Depression. We accept that the Crown

could not have assisted the respondents with their legal costs during such a financial and economic crisis.

Thirdly, from the early 1930s through to 1944, the Maori owners (and the Court) tried to get the Crown to prosecute or abandon its appeal without success. The owners' preference was for the Crown to 'make permanent' their title to the lake, as they put it in 1938, but the Crown refused. It refused (again) in 1939 when the owners sought to have its appeal struck out for non-prosecution. The Government ignored petitions and requests from the owners. It failed to act on requests from the Court that it prosecute its appeal. Crown Law Office advice at the time was that the Court would not strike out the appeal for non-prosecution, and this proved to be the case. In that circumstance, the Crown was comfortable with the status quo and negated all attempts to get it to proceed with the appeal between 1933 and 1943.

This left the lake and its owners in limbo from 1918 to 1944 – while they could draw no benefit from their declared ownership of the lake, the Crown continued to use the lake and draw revenues as though it were the owner.

This situation was bad enough when attention is confined to Waikaremoana, but it was more reprehensible if we take a wider view of lake claims at the time. We agree with the claimants that the Crown acted unfairly towards them. It negotiated substantial settlements of the Rotorua and Taupo claims in the 1920s. The tribes in those districts were receiving annual lake payments from 1921 and 1926 respectively. We see no principled reason for the Crown to have negotiated and settled those Maori lake claims on the one hand, while continuing to oppose the Lake Waikaremoana claim for many years to come.

Our view of the significance of the Lake Omapere decision, however, differs from that of the claimants'. Although it would be fair to say that the Crown suffered a comprehensive defeat in the Omapere case, it had filed an appeal of the Omapere decision and there was still no authoritative Appellate Court judgment on a lake claim. We do not think, therefore, that the Crown was unjustified in persisting with its Waikaremoana appeal, simply because it had lost the Omapere case in the lower court. We thus do not accept the claimants' argument that the Crown proceeded in bad faith in 1944 with a case that it knew to be untenable, although we do accept that it knew it was acting inconsistently with past recognition of Maori lake claims: the Crown Law Office advised the Government in 1944 that it was acting inconsistently with the ways in which it had dealt with the Wairarapa, Tarawera, Horowhenua, Rotorua, and Taupo lake claims. Further, our view is that this inconsistency was untenable for the Crown as a Treaty partner; it should have acted fairly as between these various Maori lake claimants.

Thus, we come to our second finding of Treaty breach.

We find the Crown in breach of the principles of partnership and active protection for failing to either prosecute or abandon its appeal during the period from the early 1930s

to 1943, negating the efforts of the claimants and the Court to get it to do so. The Crown used the owners' lack of counsel as its excuse, when it explained its position in 1939. But justice delayed was indeed, as the claimants argued, justice denied; they were prejudicially affected because they were denied their rights as citizens to have access to the courts as a pathway for declaration of their rights. We also find the Crown in breach of the principles of active protection and equal treatment for persisting in its Waikaremoana appeal after 1926, by which time it had prioritised and negotiated settlements with Te Arawa and Ngati Tuwharetoa for the Rotorua and Taupo lakes. This was not treating Maori equally or fairly.

Some prejudice to the Maori owners could have been avoided if the Crown had taken its lawyers' advice in 1944 and negotiated a settlement (as it had for Te Arawa and Tuwharetoa) instead of proceeding with the appeal, which itself would be followed by a further long delay. In the event, the Crown chose courses of action that were prejudicial to the mana, the tino rangatiratanga, and the economic well-being of the Maori owners, denying them the status of owners, any authority over their taonga, and any economic benefit from it.

Astoundingly, this situation persisted for at least a further 10 years after 1944 because the Crown took advantage of section 51 of the Native Land Act 1931 to hold open the possibility of challenging the Appellate Court's decision in the general courts. The owners complained in 1957 that the Crown 'took full advantage of this section and intimated from time to time that proceedings were in contemplation to quash the order of the Appellate Court'. Prime Minister Fraser's approach (1947–49) was the correct one. Although he disagreed with the courts' decision, he decided that the Government must accept that the decision of two courts had gone against it, and should negotiate a settlement with the Maori owners for the use of their lake. Instead, the new National Government interfered with the Maori Land Court from 1950 to 1954, withholding the plan so that the titles could not be completed, yet held off taking action in the general courts until the Whanganui River litigation came to a favourable outcome for the Crown – which it failed to do during that period.

This was not the behaviour expected of a Treaty partner. The Crown was entitled to question the title issued as a consequence of a wrong court decision, as it was perceived, but it was not entitled to subvert or delay the legal process, as we find that it did. We agree with the claimants that, if the Crown had doubts about jurisdiction such that the decisions should be quashed by the general courts, then it should have sought a judicial review in 1918 or 1944, immediately after the jurisdiction had been exercised. What followed until 1954, on the other hand, was purely expedient, neither principled in itself nor consistent with the treatment of other Maori lake claims. The Crown even withdrew its Omapere appeal in 1953, yet continued to hold out the prospect of litigation to overturn the Appellate Court's Waikaremoana decision until September 1954.

This brings us to our third finding of Treaty breach. As we see it, a Treaty-compliant Crown, acting in good faith, would have filed proceedings in the Supreme Court in 1944

or, when the Maori Land Court moved to complete the titles, in 1950. In our view, the Crown's conduct from 1944 to 1947 and from 1950 to 1954 did not meet the standards of active protection and scrupulous good faith required of it as a Treaty partner. Rather than actively protecting the rights of the Maori owners and negotiating a settlement with them, the Crown procrastinated during those years, actively denying them the completion and registration of their titles from 1950 to 1954, and denying them any rights as owners for the whole of the decade. We note the exception of Prime Minister Peter Fraser in the years 1947 to 1949, although even he took no action to recognise or negotiate with the Maori owners until pressed by them in 1949. For the most part, the Crown's behaviour was unprincipled. The possibility of court proceedings was used as a tactic to avoid dealing with the Maori owners. But, in reality, the Crown failed to institute proceedings because there was little likelihood of success.

The Maori owners of Lake Waikaremoana were prejudiced by the continued denial of their mana, their tino rangatiratanga, and their legal ownership of the lake. Their rights remained in limbo. They had no way of challenging the Crown or seeking compensation when it drove a tunnel through the natural dam and installed its hydro works on their lakebed. Their authority was set at nought and they received no economic return from their property, while the Crown continued to use that property without permission or payment.

In the event, only two things led the Crown in 1954 to reverse its long denial of Maori ownership of Lake Waikaremoana, and they had little to do with the Treaty: first, the statutory time limit for taking action in the Supreme Court was about to expire; and, secondly, officials had come to the view that the Crown did not actually need to own the bed of Lake Waikaremoana in order to protect its interests. This was a complete turn-around from the view that had prevailed in the 1940s, when the Crown was advised that if it lost the case in the Appellate Court, it would have no choice but to buy the lakebed to secure its hydro-electricity scheme. Ironically, while this change of mind on the part of officials enabled the abandonment of further litigation in 1954, it proved problematic in its turn when Ministers then sought to negotiate an agreement with the Maori owners of Lake Waikaremoana, while officials saw little incentive for the Government to do so.

20.11.3 The negotiation of the 1971 lease

Once the Crown had accepted Maori ownership of Lake Waikaremoana in 1954, the question became: would it negotiate an agreement with the owners, or would it continue to use the lake as before (without permission or payment)? In the event, it did both.

As we discussed in detail in section 20.8, there were many obstacles in the path of Crown–Maori negotiations, resulting in a tortuous history of offer and counter-offer that ended in deadlock until 1967–70, when statesmanship on the part of the Waikaremoana Maori lead-

ers and Duncan MacIntyre enabled a breakthrough and the negotiation of a settlement that was, in many respects, a just and fair one.

In our inquiry, the Crown's position was that the successful negotiation of an agreement in 1970–71 was a fair, full, and final settlement of all that had gone before, and that there were no Treaty breaches either in respect of the negotiations or the resultant lease agreement. The claimants' position, on the other hand, was that: (a) the negotiations took far too long because of the Crown's stubborn refusal to compromise or to value their lake properly, and its consequently 'ludicrous' and unacceptable purchase offers; and (b) the lease was not fair because it excluded payment for past use (earlier than 1967) and payment for hydroelectricity. We deal with the issue of hydroelectricity in the next section (20.11.4).

Broadly speaking, we agree with the claimants that the long, tortuous failure of negotiations (from 1957 to 1967) was largely the Crown's responsibility. From the beginning, the Maori owners made it clear that they wanted to retain a tangible connection to their taonga by means of a perpetual annuity and a trust board to administer it for community purposes (rather than payments to individuals), both of which the Crown had done for the Maori owners of the Rotorua and Taupo lakes. These were reasonable aspirations under article 2 of the Treaty. They also wanted the Crown to pay for its past use of their taonga. The latter point was the only common ground between Crown and claimants from 1961 to 1967 – all Crown and Maori offers and counter-offers included a payment for past use during that time. As it was explained to the owners, half of the Crown's 1961 offer, for example, was made up of a payment for past use, backdated to 1947 when the Maori owners' title was finalised after the hearing of appeals. It was this point, however, on which the Crown was to reverse its position in 1969 when it (rightly) gave way on the other points. For their part, the Maori owners had been prepared to compromise by accepting lower and lower sums for their annuity, but they considered that the Crown had drastically under-valued their lake, and they were not prepared to compromise on other essentials.

We agree with the claimants that the Crown's insistence on absolute alienation and payment of a one-off lump sum (at an unfairly low value) prevented any progress from being made in the negotiations from 1957 to 1967. We also note the slow start to negotiations; it appears that Native Minister Corbett would not engage with the owners between 1954 and 1957. But we also observe that the Crown did not resort to coercion when faced with an intractable deadlock. It did not, as was proposed within government, try to take the lakebed under the public works legislation. Nor did it attempt to bypass community leaders and buy individual interests. The Crown did not use coercive tactics of any kind. And, after MacIntyre agreed to a special commission in 1967 and the owners agreed to a special GV, the final negotiations in 1969 and 1970 were conducted in a fair and Treaty-consistent manner. The owners' representatives had the benefit of legal advice and they made free and informed

choices. They were fully consulted about the draft lease and the validating legislation, which they played a large part in shaping and approving.

For the most part, therefore, we accept the Crown's argument that no Treaty breaches arise from the negotiation of the 1971 lease. The exception is this: unexpectedly, in 1969 and 1970, the Crown went back on its previous agreement that it should pay for past use of the lake. The fact that it took a long time for the parties to negotiate an agreement, from 1954 to 1970, would not have prejudiced the owners if payment had been backdated to the beginning of the negotiations, as they had reasonable cause to expect. After all, the Crown had continued to deny them any practical benefits from their ownership throughout this period. It continued to use the lake without permission or payment. It deliberately avoided treating them as owners – as, for example, when the Marine Department was overruled in its wish to negotiate boating regulations with the owners in late 1966.

The Crown argued in our inquiry that both sides in a negotiation must make reasonable compromises, and that the selection of 1967 for (four years of) backpayment was a reasonable compromise to which the owners's committee made a free and informed agreement. We do not accept this argument for the following reasons.

First, it is important to note that the parties were not negotiating on an even playing field. The Crown had had all the benefits of ownership since 1903 and was continuing to act as the (virtual) owner right up to 1971, whereas the real owners had received no benefit, were extremely poor, and were desperate to reach an agreement. The owners' representatives were, in fact, ready to make reasonable compromises: they were prepared to accept 5.5 per cent as the rental value instead of their negotiating position of 6 per cent; they were prepared to accept a valuation that they still considered was too low; and they were prepared to accept backdating to 1957 instead of to 1954, when the Crown formally accepted Maori ownership, or to 1947, when their ownership had been finalised by the Court, or to 1944, when the Court had dismissed the Crown's appeal. These were reasonable compromises for the owners to have made, although not (in our view) completely fair to them, but a backpayment of only four years was neither reasonable nor fair.

Secondly, it is important to note that the Crown's position in the final negotiations reversed what had previously been a fixed point of agreement between the parties: that the Crown must pay for its past use of the lake. In our view, that fixed point of agreement had been correct and appropriate in Treaty terms.

This brings us to our fourth finding of Treaty breach. We find that it was not consistent with the principles of partnership and active protection for the Crown to insist that the rent would only be backdated to 1967. In doing so, it reversed the previous understanding between the Crown and the Maori owners that the Crown must pay for its past use of the lake, and it did so in a way that was fundamentally unfair to the owners. What this meant, in effect, was that the Crown had used the Maori owners' property with impunity for 13

years after it formally accepted that they, not the Crown, were its true owners. It also meant that the mana and tino rangatiratanga of the owners was infringed; they were denied any of the rights or benefits of ownership from 1954 to 1967, to their significant prejudice.

20.11.4 Hydroelectricity

The negotiation of the 1971 lease was inextricably bound up with the issue of hydroelectricity, which has been a source of major grievances for the claimants in our inquiry from 1944 to the time of our hearings. There were two main grievances: (a) that the Crown failed to recognise their proprietary rights and pay them for the use of their lake and its water to generate electricity; and (b) that the Crown modified and damaged their taonga in 1946, without consultation or compensation, when it permanently lowered Lake Waikaremoana by 15 feet, which has had long-term prejudicial effects for the taonga and for its kaitiaki. We deal with these claims in turn.

(1) *The Crown's failure to pay for the use of Lake Waikaremoana for hydroelectricity*

First, we accept the Crown's argument that it had legal authority under an order in council under the Public Works Act to construct its hydro works, including installing a tunnel, intake structure, and siphons on the lakebed, and to use Lake Waikaremoana for hydroelectricity. This likely included authority to construct the sealing blanket, although that is not entirely clear. Nonetheless, we agree with the claimants that the Crown's installation of its hydro works, and its use of the lake from then on for electricity (including lowering the lake and then manipulating its levels) breached their Treaty guarantee of full, exclusive, and undisturbed possession. This is so regardless of whether water can be owned.

Secondly, we accept the claimants' argument that the Crown should have paid them for the use of their taonga to generate electricity, particularly after it took active control of their taonga in 1946, modified it by permanently lowering its water levels, and commenced active manipulation of the lake. Lake Waikaremoana was a taonga to its peoples; they owned the lake. They therefore had a proprietary interest in the water akin to ownership. Earlier, we found the Crown in breach of the Treaty and its principles for failing to provide a title which recognised this.

The particular question of whether Maori should have been paid for the use of their lakes in hydroelectric schemes has been considered by the Tribunal in its central North Island and Tongariro National Park inquiries. In both cases, the Tribunal answered the question in the affirmative.[1341]

1341. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1168–1191, vol 4, pp 1310–1326, 1330–1333, 1343–1345; Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2012), vol 3, pp 1150–1167

The Central North Island Tribunal made general as well as specific findings, which we consider apply in our inquiry district :

> There is a Maori property right in water resources, capable of development for profit, which was guaranteed and protected by the Treaty of Waitangi.
>
> This development right included the right to develop the resource for hydroelectricity *or to profit from that development*.
>
> . . . . .
>
> There is a Treaty right of development in hydroelectric power today, and a right to compensation for present and past use of Maori taonga for hydroelectricity. [Emphasis added.][1342]

The National Park Tribunal found : 'Maori were entitled to be paid for the use of their proprietary interests in their waterways to generate power. This would have constituted a mininum interference with their property rights, if the generation of power was essential in the national interest.'[1343] We agree with this finding.

The National Park Tribunal went on to say :

> the owners of Lake Rotoaira, in common with all claimants whose proprietary interests have been used to generate electricity in the TPD [Tongariro power development scheme], are owed compensation for the past use of their taonga without payment. Maori have a unique property right in their waters, nga iwi o te kahui maunga have a development right in their properties (including their waters), and the Crown has breached that right in its construction and operation of the TPD. This is of concern when the public derives great benefit at the expense of the Crown's Treaty partner, especially when the Maori Treaty partner had so few other development opportunities.[1344]

We agree and adopt that finding in respect of Lake Waikaremoana and its Maori owners.

We note, too, that there was no foregone conclusion that the Crown would refuse to pay the Maori owners for its use of Lake Waikaremoana for hydroelectricity. As we set out in some detail in section 20.8, the Maori owners' requests for negotiations from 1949 onwards (when they first approached Peter Fraser) sought payment for hydroelectricity. The Government took some time to decide whether or not it would include electricity in its value or price for Lake Waikaremoana. This was debated by officials and Ministers from 1957 to 1959. At that time, the Electricity Department convinced other departments (and Ministers) that the Crown did not need to compensate the owners for its hydro structures or pay them for the use of their lake for electricity. This was part of a wider pattern in which the department opposed other Maori claims to payment for the use of lakes. There

1342. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1219
1343. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1153
1344. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1161

was some resistance from other departments and from Ministers, who did not want to come up with the full price of Waikaremoana from their own budgets, and the Electricity Department's position on Waikaremoana was not finally accepted by the Government until 1959 (see section 20.8.3). It was revisited briefly in 1968, when the parameters for the special GV were worked out. At that time, officials' concern was focused more particularly on the ownership of water. Despite a legal opinion from the Lands and Survey office solicitor that Maori owned the water in the lake, the advice was that the Crown's statutory power to use the water for electricity precluded any need for payment. Ultimately, in both 1959 and 1968, the Government based its decision on the Crown's statutory powers under the 1903 Water Power Act and its successors; the Crown had the statutory power to use the water of Lake Waikaremoana, and – in its view – did not need to pay for it.

We agree with the claimants that the Crown's refusal to pay them for the use of their lake for hydroelectricity was a breach of Treaty principles. This breach occurred when the Crown refused to include payment for hydroelectricity in its negotiations for the 1971 lease. We also agree with the claimants that the water power and public works statutes on which the Crown relied infringed their tino rangatiratanga and their article 2 rights to the full, exclusive, and undisturbed possession of their taonga. In particular, we agree with the claimants that, if the Crown could argue 'necessity' in its use of the lake for electricity, such that 'the Crown was prepared to actively breach the [Treaty] right of undisturbed possession of the lake, . . . then it should have paid for it'.[1345]

This brings us to our fifth finding of Treaty breach. We find that the Crown acted inconsistently with the plain meaning of article 2 and the principle of active protection in its refusal to include payment for hydroelectricity in the negotiations for the 1971 lease. We also find that the claimants have been prejudiced economically by this refusal, and that their mana and tino rangatiratanga have been infringed. Although the trust boards have since made an arrangement with Electricorp and its successor, Genesis, dating from 1998 (see section 20.9.5.(2)), that does not remove the prejudice arising from the long-term deprivation of recognition and economic return between 1946 and 1998.

(2) *The modification and control of Lake Waikaremoana for hydroelectricity*

The next issue is the question of damage to the taonga, which arose from the permanent lowering of the lake in 1946, the 'wild' fluctuations and massive draw-downs in the 1950s and early 1960s when the Crown controlled the lake for electricity purposes, and then the ongoing manipulation of lake levels under a variety of regimes since the 'Gentleman's Agreement' in 1970. We deal with the latter issue – control of the lake since 1970 – in section 20.11.6.

1345. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73

First, the Crown does not deny that the hydro works were installed and the lake was lowered without consulting or obtaining the agreement of the Maori owners. The Crown maintained that it had the statutory power to do so, and emphasised its reliance on the 1943 order in council, but that is not a sufficient answer in Treaty terms. Even if the Crown had been found to be the owner of Lake Waikaremoana by the Appellate Court in 1944, it still ought to have consulted Maori about such a drastic, permanent, and harmful modification of their taonga. No compensation was ever paid, whether for modifying the lake, installing structures, or 'injurious affection'. In our view, Maori were entitled to such compensation under the Treaty, and – it seems to us – under parts of the public works legislation as well.

Secondly, the Crown accepts that the permanent lowering of the lake has had serious long-term effects, namely shoreline erosion and reduction of fisheries. But, in its view, such effects were justified by the national interest in electricity supply, and can now be managed or mitigated through RMA processes. In our view, this position is deficient in Treaty terms. Quite apart from the need to compensate the Maori owners for the *use* of their taonga, it should also have compensated them for the *damage* to it. The claimants do not dispute that the use of their lake for electricity was necessary in the national interest, but they do seek removal (or reduction, so far as that is possible) of the prejudice it has caused them and their taonga. We note, in that respect, DOC witness Peter Williamson's comment that Electricorp/Genesis' $1 million for ecosystem restoration at the lake was not much money considering the work that had (and has) to be done (see section 20.10.5).

This brings us to our sixth finding of Treaty breach. The Crown acted inconsistently with Treaty principles when it permanently modified Lake Waikaremoana for electricity purposes in 1946 without consulting the lake's kaitiaki, and when it failed to pay compensation due them under the public works legislation. The prejudicial effects are of long standing. They include harm to the taonga, spiritual harm to its kaitiaki, the long-term reduction of littoral habitat and fisheries, and excessive, long-term shoreline erosion. Wahi tapu have been exposed, Patekaha has ceased to be an island, and the flow of water has changed. We consider impacts on the Waikaretaheke River in a later chapter. Some effects are more recently being managed and 'mitigated' under the RMA but we have no evidence as to how far (if at all) that has removed the prejudice.

We note that the lowering of the lake did give a high value to the exposed lakebed (and thus increased its rental value considerably), but this was balanced in part by the reduction of fisheries (which affected the rental value of the submerged bed), and did not, in any case, suffice to remove the prejudice.

20.11.5 The validation of the lease by the Lake Waikaremoana Act

The 1971 lease was validated by the Lake Waikaremoana Act in December 1971. As part of the agreement between the owners' committee and the Crown, the Act provided for the registrar to make orders vesting the bed of Lake Waikaremoana in the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards. We accept the Crown's argument that no Treaty breach arises from the validating of the lease or from the passage and terms of the Lake Waikaremoana Act. We agree with the Crown that its Treaty obligation was to give effect to the express wishes of the owners' representatives, who sought – as we understand it – to restore tribal ownership and control by means of the trust boards. While we understand the hurt and anger of those who may not have realised that property rights awarded them 50 years earlier were to be removed by the Act, this is a matter for the claimants to resolve among themselves. It does not arise from any act or omission on the part of the Crown during the time of the negotiations in 1971. We do, however, consider it to be a prejudicial effect of the Crown's earlier breach in imposing its native title system, which made individualised tenure the only option in 1918 for a tribal taonga such as Lake Waikaremoana. Had a special taonga title or community title been available at that time, there would have been no occasion for the divisions and bitterness which the 1970s' revesting has caused.

20.11.6 Management and governance of Lake Waikaremoana under the 1971 lease

In chapter 16, we found the Crown in breach of Treaty principles for its failure to provide the peoples of Te Urewera with a partnership role in the management and governance of Te Urewera National Park. We repeat that finding here, as it applies to the governance and management of Lake Waikaremoana as part of the national park. In particular, we find that the Crown could and should have provided the lake's kaitiaki with formal representation on the park's governing boards from 1971, just as Waikaremoana representatives were added to the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards at that time.

We note two points in mitigation: first, the strategy adopted by Maori leaders in the 1970s of 'working in' with the park boards had some success until the 1990s, because Maori and park authorities shared an aspiration to protect and preserve the lake in its natural state; and, secondly, the development of cooperative or consultative management through the Aniwaniwa model meant that, especially from 1999 onwards, the Waikaremoana Maori komiti has begun to play something approaching a partnership role in the management of the lake.

There were limits to both of these mitigating points. Until the RMA, for example, the managers of the national park lacked the clout to enforce really tight controls on manipulation of (and fluctuations of) lake levels. Thus, there was always a two-foot buffer either side of the maximum and minimum levels until 1998, when the RMA resource consents no

longer allowed it. Working in with the park boards, therefore, could only achieve so much when authority to manage lake levels rested with others. Also, Maori influence on the park boards was significantly reduced when the number of Maori members was lowered from three to two, and the Te Urewera board was replaced by a regional board with responsibility for multiple parks and reserves. There was, too, as witness Reay Paku told us, a tendency for majority views and values to prevail when there was a clash.

In terms of the Aniwaniwa model, there were weaknesses in its operation and security: it only operated at field level (not at governance level); it had no formal entrenchment in the department and depended on particular officials; and the work it could do suffered from under-funding. Also, as claimant witnesses explained, the Maori Treaty partner needed to be well-resourced and independent, so as to participate from a position of mana and integrity. Nonetheless, the Aniwaniwa model in action showed how an issue like sewage and the oxidation pond could be resolved in partnership by DOC and local Maori leaders.

This brings us to our seventh finding of Treaty breach. We find that the Crown failed to give effect to the Treaty principles of partnership and autonomy in its governance and management of Lake Waikaremoana during its lease to the Crown for the national park. This finding of Treaty breach is mitigated in part by the establishment of the Aniwaniwa management model (more particularly in its operation after 1998). The claimants have been prejudiced by their effective exclusion from management and governance. They have had to 'work in' with processes controlled by others, both in the park boards and under the RMA, seeking to have influence and not always succeeding. Their values and aspirations have not had their due effect in management of their taonga. Their relationship with their taonga has been infringed and harmed as a result. They have been powerless, for example, to stop situations like pollution by sewage from Lake House and the motorcamp, which was extremely offensive to their values and was also entirely avoidable in the 1970s, yet continued uncontrolled until 1980. Although the Aniwaniwa model has improved the situation, it has weaknesses, as we discussed above, and there are no partnership mechanisms with Genesis or any other authorities which make decisions about Lake Waikaremoana.

These particular findings only apply to Nga Rauru o Nga Potiki, Ngati Ruapani, and Ngai Tamaterangi – other claimants preferred to resolve governance and management matters directly with the Crown as lessee.

It is fitting to conclude with the words of the late Sir Rodney Gallen, who had a long association with Waikaremoana kaumatua and, as a result, a deep understanding of the significance of the lake to the people, and of their often distressing history. He was, as we have noted, the last surviving member of the committee which was involved in negotiating the lease of the bed of Lake Waikaremoana. Sir Rodney concluded his evidence to us at Waikaremoana with these words: 'The history of the relationship of the Crown to the

people of Waikaremoana has been a sorry one for a very long time."[1346] He expressed the view that the Crown had made some attempt, with the lease in 1971, to provide redress, but its attempt was 'partial and inadequate'. Clearly he hoped that the Crown would meet the concerns of the people, and set things right. We share that view.

1346. Gallen, brief of evidence (doc H1), para 63

Dated at Wellington this 12th day of December 2014

Judge Patrick J Savage, presiding officer

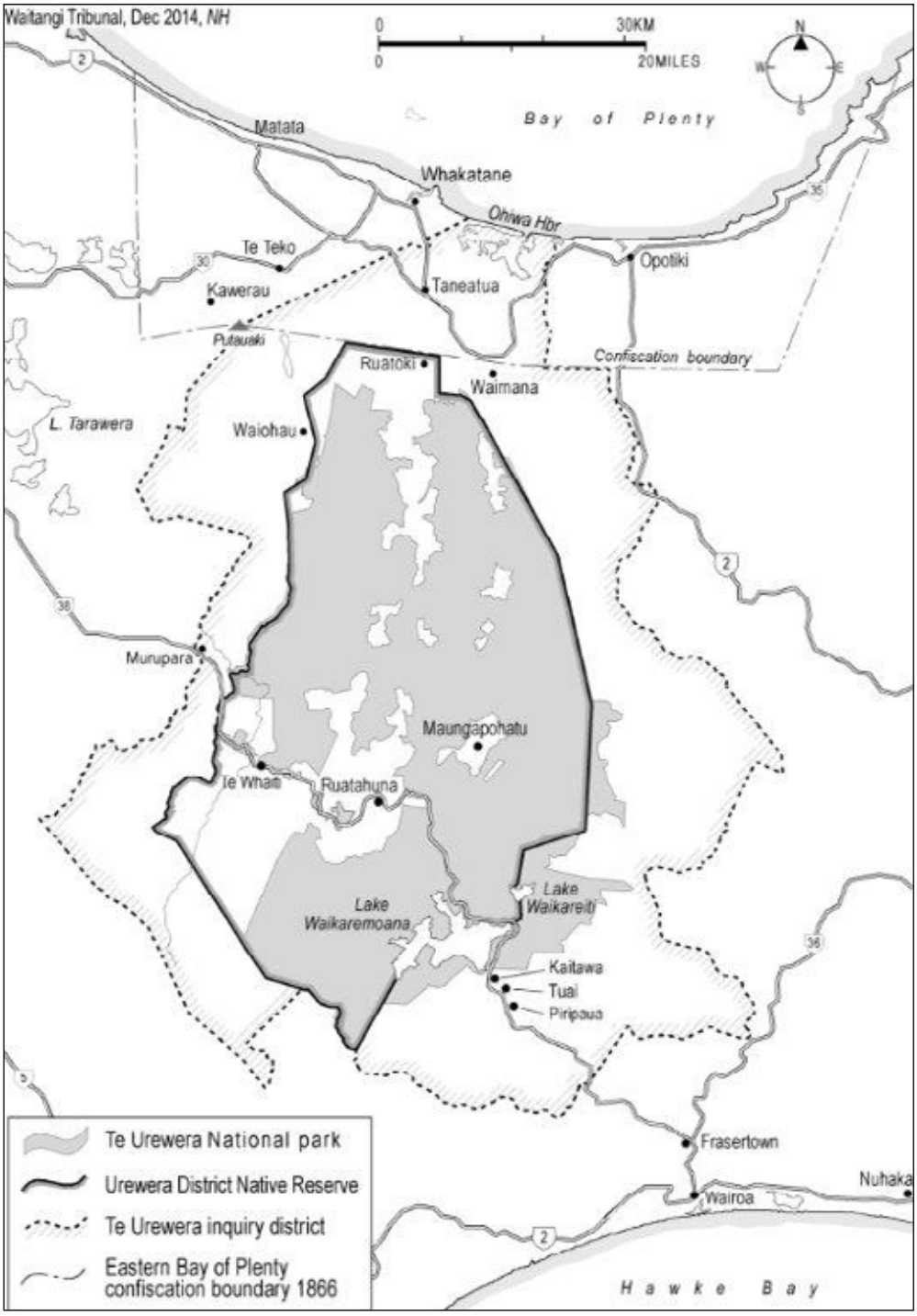
Joanne R Morris OBE, member

Dr Ann R Parsonson, member

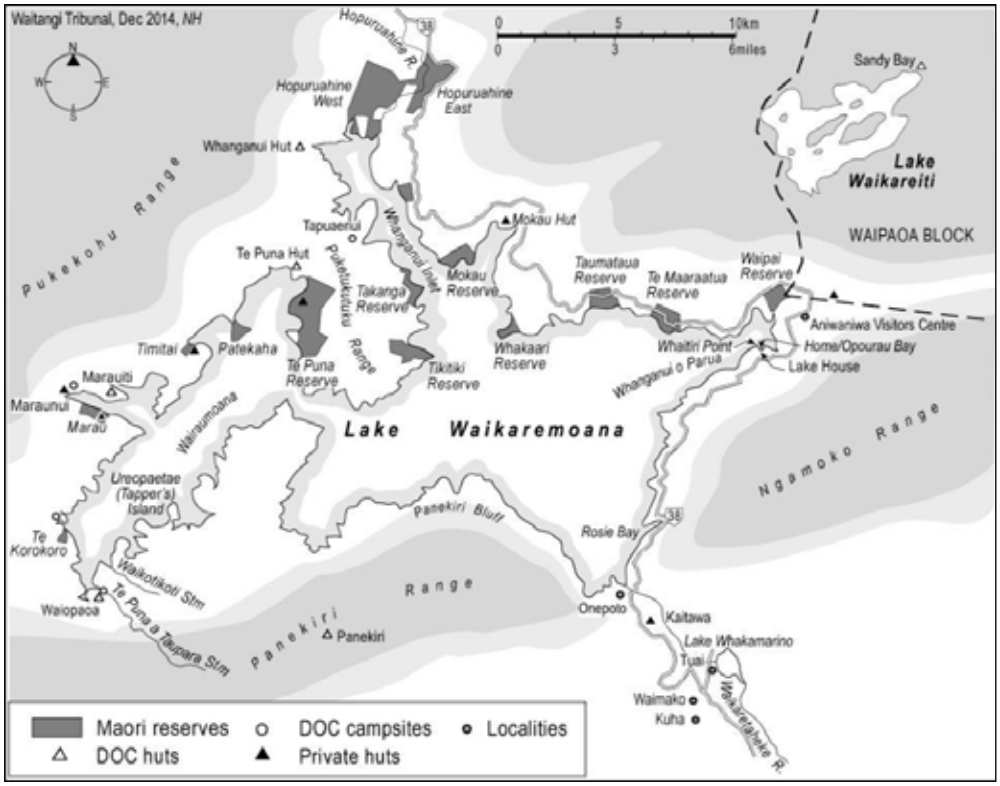
Downloaded from www.waitangitribunal.govt.nz

APPENDIX

MAPS

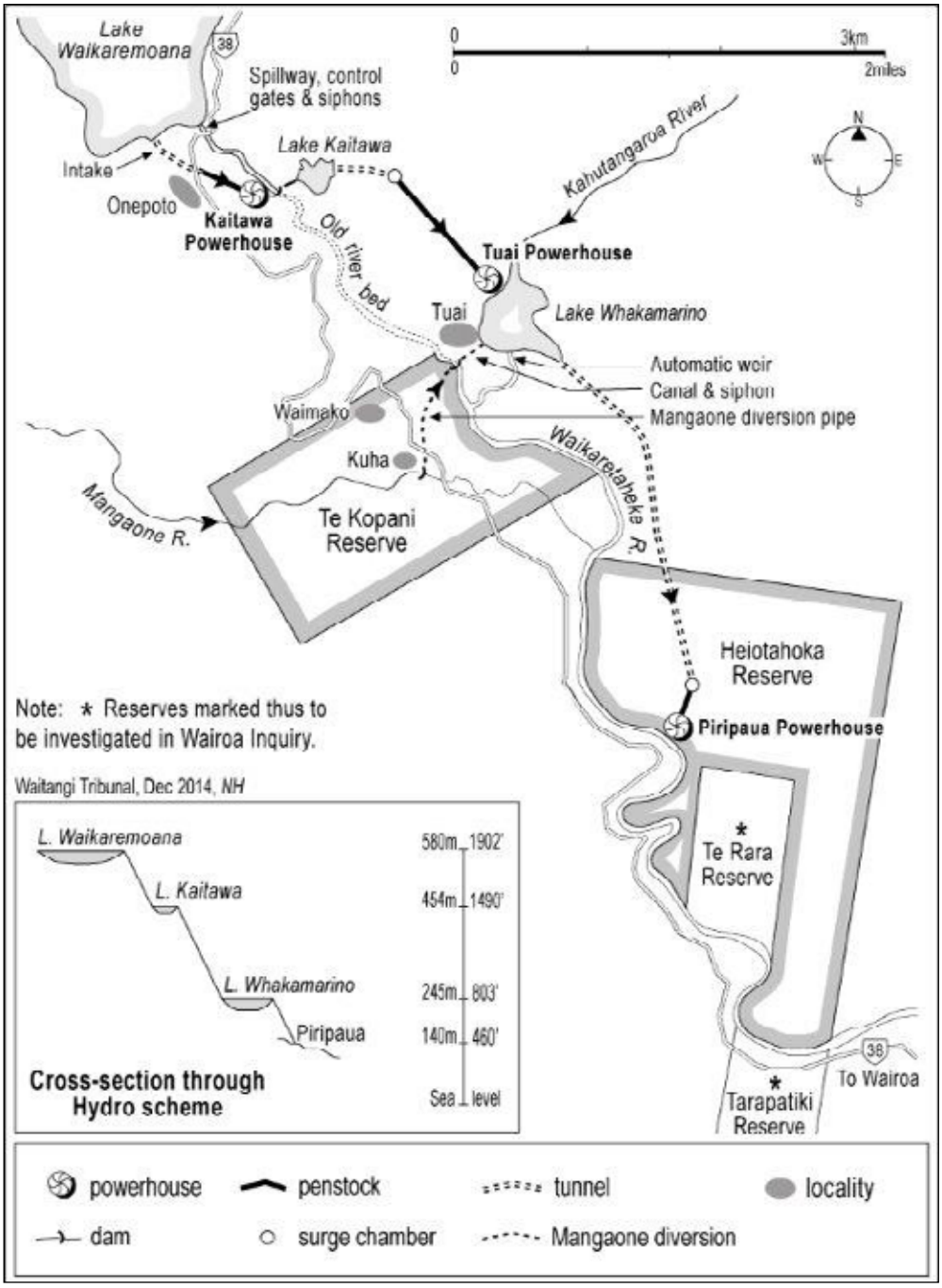


Location map



Lake Waikaremoana

App1



Lake Waikaremoana hydro scheme