Recent Waitangi Tribunal River Reports and Implications for the ECNZ Split

Marlene Thomsen

I. INTRODUCTION

This article seeks to further the understanding of Maori claims to ownership of natural resources in the context of the *Te Ika Whenua River Report 1998*[1] and the *Whanganui River Report 1999*.[2] The first part of this article will examine the varying perspectives of the Maori claimants, the Crown and the Waitangi Tribunal regarding the specifics of the Tribunal Reports, and their impact on the interpretation of the Treaty of Waitangi ("the Treaty") and the Treaty partnership. The Waitangi Tribunal can be seen as a principal forum for articulating the grievances of Maori people. However, as the second part of this work will show, the potency of the Waitangi Tribunal is undermined by the Crown's failure to take on the principal recommendations laid out in the river reports. This lack of action by the Crown will be analysed with specific reference to the privatisation of the electricity industry, and to the Electricity Corporation of New Zealand ("ECNZ") transfers which took effect on 1 April 1999.

1 Waitangi Tribunal, *Te Ika Whenua Rivers Report* (1998) 1 ("Rivers Report"). The Report centred on the mana and te tino rangatiratanga of the hapu of Te Ika Whenua over the Rangataiki, Wheao, and Whirinaki rivers in the Bay of Plenty and their tributaries. The claim concerns the middle reaches of the rivers, which extend through Te Ika Whenua's traditional rohe down to the Galatea plains.

2 Waitangi Tribunal, *Whanganui River Report – Wai 167* (1999). The Whanganui River Report concerns a claim brought to the Waitangi Tribunal by Hikaia Amohia and nine other members of the Whanganui River Maori Trust Board representing Te Iwi o Whanganui. The Trust Board, formed under the Whanganui River Trust Board Act 1988, was vested with a mandate to negotiate the settlement of outstanding claims of the Whanganui iwi to the river. The claimants were primarily seeking the reinstatement of their authority over the river and adjoining lands. See "Whanganui River Report" (June 1999) Maori LR 1 ("Whanganui River").

II. A COMPARISON OF REASONING: OWNERSHIP OF RIVERS AND WATER

1. The Stance of the Crown

The Crown in right of New Zealand is a creature of a Western legal tradition that compartmentalises resources, separates them and apportions interest to them in parts.[3] The ownership of riverbeds and lakebeds is distinct from the ownership of water. While some riverbeds and lakebeds can be owned by the adjoining landowner, ownership of the bed of a river does not bestow ownership of the water above.[4] The Crown is of the view that a pooled or fluid resource, such as water, does not by its very nature comply with land boundaries,[5] and it will not countenance the possibility that rivers can be owned because "water is free from ownership by anyone".[6]

Rivers and lakes form part of the New Zealand lifestyle. New Zealanders of all cultures and denominations value them for their conservation, scenic, recreational and intrinsic merits. They are also crucial to the economic well-being of the country through their contribution to commercial undertakings such as tourism and electricity generation.[7] It is, therefore, in the public interest to split ownership over the various parts of the rivers and lakes and outlaw private ownership of natural water altogether.

Even if Maori could successfully assert claims to rivers and lakes, the orthodox Crown position is that aboriginal title to rivers and lakes and to riverbeds and lakebeds has been extinguished or significantly altered so that no indigenous rights to them exist.[8] This has been achieved largely through legislation relating to the ownership of beds of navigable rivers and the application of the common law rule of ad medium filum aquae to title over the beds of non-navigable rivers. Section 21 of the Water and Soil Conservation Act 1967 vested in the Crown the sole right to dam, divert or discharge into and use natural water.[9] Section 261(2) of the Coal Mines Act 1979 provides that, except where the bed of a navigable river has been granted by the Crown, it is deemed the absolute property of the Crown. These Acts have been repealed, but it is arguable that the Crown intends to maintain the monopoly rights contained in them pursuant to section 354 of the Resource Management Act 1991.[10]

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3 Williams, "Maori Claims to Energy Resources" in Energy and Natural Resources Law Association of New Zealand Incorporated, *Seminar on Maori Claims & Rights to Natural Resources* (1993) 1, 3.

4 Office of the Minister in Charge of Treaty of Waitangi Negotiations, Cabinet Strategy Committee, *Treaty Settlement Strategy: Overview: Executive Summary* (2 December 1998) 1.

5 Williams, supra note 3, 3.

6 Office of Treaty Settlements, *The Crown's Policy on River Ownership* (4 February 1999) 1, 3.

7 Office of the Minister in Charge of Treaty of Waitangi Negotiations, supra note 4, 3.

8 Ibid.

9 Kenderdine, "Legal Implications of Treaty Jurisprudence" (1989) 19 VUWLR 347, 360.

10 Williams, supra note 3, 13.

The ad medium filum aquae rule has also contributed to the marginalisation of Maori claims to their rivers by divesting them of title to riverbeds when riparian lands were sold, often to the Crown.[11] The principle of the rule is that where land is bounded by a non-tidal, non-navigable river the presumption is that the boundary is the centre line of the stream. This presumption may be negated by the terms of the grant or by the surrounding circumstances. Within the rohe (tribal boundaries) of Te Ika Whenua and Whanganui, the presumption means that "the owners of riparian lands own to the middle line of the rivers".[12]

This reasoning, supported by legislation and common law, has been implemented by the Crown to deny Maori claimants authority and control over their waters.

2. The Stance of Maori Claimants

While English law permits legal possession of things not in actual physical possession, it does not recognise Maori ownership of the water in their rivers. Maori possession was referenced to what was possessed in fact. Water was seen as a central element of what was possessed, and was also capable of being possessed. The river had no meaning without it. The water, therefore, belonged to Maori until it escaped to the sea naturally. When this occurred, its mauri (life force) or properties altered.[13]

The position on the spiritual and cultural importance put forward by the Maori claimants in the *Te Ika Whenua* and *Whanganui River* reports contradicts the Crown's clinical reasoning on the issue of ownership of rivers and waters. The claimants maintained that the river was traditionally perceived as a single entity. In Whanganui, the river took on a prominent role as a unifying dynamic in the region. The metaphor "tupuna awa" was employed to explain the significance of the river as an ancestor providing a common bond between the people.[14] This metaphysical association with the river is echoed in the *Te Ika Whenua Report*. Maori objected strongly to the local power schemes erected on the rivers that diverted the Rangitaiki River into the Whaeo River. The mixing of the waters of the two rivers was described as a "great hurt" that reversed and permanently destroyed the mana and tapu, or sanctity, of the rivers.[15] If the river is diverted and the waters mixed, then the mauri of the river is extinguished. The mauri of the river is afforded utmost respect in Maori culture, and this includes all things connected to it, such as the river flats and tributaries. It flows from this that the river is seen in its entirety, not divisible into its distinct parts of water, bed, tidal and non-tidal, as advocated by the Crown. For Maori, the approach of the Crown to the ownership of rivers is completely inappropriate.[16]

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11 Waitangi Tribunal, *Rivers Report*, supra note 1, 87.

12 Ibid 83.

13 "Whanganui River", supra note 2, 3.

14 Ibid 2.

15 Waitangi Tribunal, *Rivers Report*, supra note 1, 59 per Hohepa Waiti (oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 2980-2988).

16 "Whanganui River", supra note 2, 3.

Maori claimants and the Crown share the perception of the rivers as a resource base that is, and should be, of importance to all New Zealanders. However, Maori believe that the Crown's actions negate their statements by prejudicing the well-being of the rivers and the traditional reserves it provides. The river also serves as a valuable source of food, healing and sustenance.[17] In the *Te Ika Whenua Report*, Maori outline the traditional practical uses for the rivers and the ways in which these had been undercut by the Crown. The building of the Aniwhenua and Wheao dams cost them their kaiawa (eel) by blocking the migratory routes for the kaiawa to and from the sea. The mixing of the Rangitaiki and Wheao rivers made the water more turbulent at the bottom, resulting in less food for the fish and, consequently, less fish.[18]

The river as a resource cannot be divorced from the river as a spiritual entity. This defies the notion that ownership of a river can be broken down, and supports the possibility that water and rivers can, in fact, be owned.

3. The Stance of the Waitangi Tribunal

The Waitangi Tribunal concurs with the Maori claimants on the issue of ownership. In both the *Te Ika Whenua* and *Whanganui River* reports, the Waitangi Tribunal refers to the interest of Maori in their rivers as being akin to ownership. The Waitangi Tribunal reasons that, though the molecules in the river might pass, as a water regime it continues to exist, and is subject to ownership. According to the Tribunal, the claimants' rights to retain the properties they possessed was founded on "universally accepted principles", such as emerging international human rights laws, the doctrine of native title, and the Treaty of Waitangi, which "contains the promises of the Crown".[19]

Like the claimants, the Waitangi Tribunal refuted the applicability and impact of the common law rule of ad medium filum aquae on Maori proprietary interests in the rivers. In the *Whanganui River Report*, the Tribunal stated that it did not appear that Maori understood, or even accepted, a rule that did not comply with the Maori customary view of river resources.[20] The general understanding of the Waitangi Tribunal is that very few Maori would consciously give up mana over lands and rivers. In the *Te Ika Whenua Report*, the Crown's view that land sales can result in the relinquishment of mana and control by Maori over their rivers is regarded as being totally detached from Maori culture and constitutes a misunderstanding of Maori land tenure.[21]

The Crown's contention that the Maori interest in the river equated to something less than full ownership was soundly rejected by the Tribunal.[22]

17 Waitangi Tribunal, *Rivers Report*, supra note 1, 84.
18 Ibid 69.
19 "Whanganui River", supra note 2, 9.
20 Ibid 8-9.
21 Waitangi Tribunal, *Rivers Report*, supra note 1, 93.
22 "Whanganui River", supra note 2, 8.

III. THE TREATY OF WAITANGI: CONTROL OF WATER AND RIVERS

1. The Crown and Article I of the Treaty of Waitangi

The Crown reasons that Article I of the Treaty grants it the right to ensure the management, protection and exploitation of natural resources where it is in the national interest.[23] Article II rights of Maori to te tino rangatiratanga will be given effect when it is feasible to do so. In the *Te Ika Whenua Report*, the Crown reported that tangata whenua did not have a right to prohibit power developments on the rivers. The Crown erected the dams to implement social policy to benefit the wider community.[24] Any breach of Maori rights under Article II is countered by the contention that it was justified by the "lawful exercise of the Crown's right of kawanatanga [or governorship] under the Treaty".[25] The Crown stipulates that some scenarios, including the claims to the rivers, facilitate conflict and, where compromise can not be reached, Article I must take precedence.[26]

2. Maori and Article II of the Treaty of Waitangi

In the Maori text, Article II of the Treaty of Waitangi guarantees to the chiefs, hapu and iwi tino rangatiratanga over their land, villages and taonga. When applied to the term "taonga", rangatiratanga means authority and control. For Maori, the protection of taonga by the Crown involves more than the notion of "properties" can embody. "Taonga" carries with it an "exclusive meaning of special significance".[27] It is a monumental and highly esteemed treasure. Applied to the rivers, "taonga" not only describes a food source but a representation of mana.[28] In the eyes of the claimants, rivers are part of the taonga guaranteed them by the Treaty. This was the situation in 1840 and remains the situation today.

Te Ika Whenua and Whanganui hapu state that their loss of the ownership of the beds of the rivers and control of the rivers themselves was largely involuntary. The Crown's seizure of "the management and control of the waters is a breach of the Treaty principle of active protection" ingrained in Article II.[29] In exercising its right to govern under Article I, the Crown abused the claimants' Article II right to te tino rangatiratanga over their taonga.[30] This logic is contrary to the rationale of the Crown, which advocates the general pre-eminence of its right to govern under the Treaty.

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23 Waitangi Tribunal, *Rivers Report*, supra note 1, 56.
24 Ibid.
25 Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report – Wai 212* (1993) 41.
26 Waitangi Tribunal, *Rivers Report*, supra note 1, 56.
27 Ibid 89.
28 Ibid.
29 Ibid.
30 Ibid 56.

3. The Waitangi Tribunal on the Relationship between Articles I and II

In contrast to the slanted perspectives of the Treaty partners, the Waitangi Tribunal has attempted to define the obligations under Articles I and II as a relationship of "give and take".

The Waitangi Tribunal has stated that the Maori gift of governance under Article I was given in exchange for the Crown protection of rangatiratanga. Therefore, governance is a qualified sovereignty. This requires the English legal framework to give effect to the customary interests of Maori. Ownership of the river in English law was required by the Waitangi Tribunal to echo notions of Maori ownership. Maori were guaranteed *their* possessions, not possession as defined by English law. Article II of the Treaty guaranteed Maori the continuing possession of things possessed, including taonga. Water can be defined as taonga because it is integral to the nature of the river.[31]

Te tino rangatiratanga over taonga in Treaty terms is also a qualified right. When Maori signed the Treaty, they must have realised that they would need to share resources in order for new immigrants to settle and thrive in New Zealand. This would be in exchange for participating in a growing network of trade and Christianity. The Article II guarantee of exclusive possession of resources had to be construed so that the Treaty could be understood and interpreted to accommodate existing circumstances. Rivers had to be shared by Maori, and the people of Te Ika Whenua and Whanganui were said to accede to this, though not always without objection.[32]

This relationship of reciprocal obligations provides the basic framework for the reasoning of the Waitangi Tribunal on the connection between the Treaty of Waitangi and the ownership of rivers.

IV. THE TREATY OF WAITANGI AND THE RIGHT TO DEVELOPMENT

Development rights for Maori claimants with regard to their rivers and other resources has been an emerging topic of interest, warranting close analysis.

1. The Crown on Development Rights for Maori

The Crown argues that the Treaty of Waitangi does not include a right to development. The reasoning of the Crown is confined to the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General*.[33] The case concerned the claim by Te Ika Whenua that

31 "Whanganui River", supra note 2, 7.
32 Waitangi Tribunal, *Rivers Report*, supra note 1, 89.
33 [1994] 2 NZLR 20.

aboriginal or customary title to its rivers included a right to generate hydro-electric power. The Court stipulated that Maori interests had to be understood as they were in 1840. Therefore, it found that Article II of the Treaty did not confer a right in the power schemes. Perceived in this way, the duty of the Crown to Maori with regard to their rivers is confined to an affirmation of traditional values. The Crown states that the notion that Treaty rights contain a right to generate electricity "is plainly inconsistent with the judgment of the Court".[34] The Crown's idea of fiscal redress does not entail compensation for the loss of a specific right such as a development right. The compensation the Crown has proffered for Treaty breaches concerning the loss of land and other resources incorporates all issues relating to the loss.

2. Maori Claimants on the Right to Development

In opposition to the stance of the Crown, Maori claimants contend that their interest in the rivers contains a right to development. Recognition of Maori Treaty rights should include management and development of their beneficial interest in the rivers. The Treaty does not merely preserve for Maori the customary rights they had in 1840.

In the *Te Ika Whenua Report*, it was submitted that the adaptability, flexibility and the evolving and living character of the Treaty contains, as an essential, the development of both Maori and Pakeha. This includes economic and technological developments.[35] Steps taken by the Crown in ratifying international declarations provide the minimum standard to be observed by the Crown in its exercise of kawanatanga under the Treaty. The rationale behind the United Nations Declaration on the Right to Development was given particular attention.[36] The Declaration provides international support for the rights of Indigenous Peoples to utilise and improve their resources, signifying widespread recognition of a right Maori believe is already encoded in the Treaty.

3. The Waitangi Tribunal on the Right to Development

Like the Maori claimants, the Waitangi Tribunal has openly advocated that a right to development of property or taonga is a Treaty right. The Tribunal assessed the decision of the Court of Appeal in the *Te Ika Whenua* case. It did not expressly refute the decision, but stated that the Waitangi Tribunal was more forthright than the Courts in mandating a development right. Under the Treaty, Maori are entitled to the full undisturbed possession of their resources including rivers, and the complete use of those resources, including a right to development. Electric power generation is certainly part of that right. The real issue is how this could be asserted in modern times. The Waitangi Tribunal stipulates that the

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34 Office of the Minister in Charge of Treaty of Waitangi Negotiations, Cabinet Strategy Committee, *Te Ika Whenua Rivers Report* (2 December 1998) 4.

35 Waitangi Tribunal, *Rivers Report*, supra note 1, 116.

36 Ibid.

limitation of the Court on the right to development should be understood in this context.[37]

The reasoning of Joe Williams is in line with that of the Waitangi Tribunal.[38] To Maori, rights to the use of their rivers should not be stagnated and limited to the traditional use of the taonga. This would "unfairly penalise Maori for their lack of technological development in 1840".[39] After all, Pakeha also lacked the technology to develop a great deal of resources in 1840, including the technology needed to extract energy from geothermal fields.[40] In the *Muriwhenua Fisheries Report*, the Tribunal highlighted that the Treaty represented a better life for both partners and envisaged that Maori would attain greater development opportunities from the agreement. Any rule that limits Maori to their old traditions is plainly inconsistent with the Treaty.[41]

The Waitangi Tribunal pronounces that negotiations for past and future use of the rivers should contemplate such issues as the loss of ability of Maori to partake in power production and development as a Treaty partner.

V. THE TREATY AND THE RIGHT TO CONSULTATION

Although neither the Court of Appeal nor the Crown regard a duty of consultation as being implicit in the Treaty, the Court of Appeal has stated that the good faith owed by each Treaty party to the other encompasses consultation on truly major issues.[42]

1. The Crown on Consultation

The Crown does concede that the consultation processes may not have been sufficient in giving expression to Maori spiritual and cultural values. In the *Te Ika Whenua Report*, consultation procedures were undertaken by power companies, which are not Treaty partners, and which are under no obligation to act in compliance with Treaty principles. However, delegates from local iwi were approached by the power boards. Of all three parties, the Crown is alone in its view that such consultation was sufficient consultation. While there was an opportunity to raise concerns with respect to the power developments, Te Ika Whenua as a group failed to present any objections.[43]

37 "Te Ika Whenua Rivers Report 1998" (September 1998) Maori LR 1, 5 ("Te Ika Whenua").
38 Williams, supra note 3, 10.
39 Ibid.
40 Ibid.
41 Waitangi Tribunal, *Rivers Report*, supra note 1, 116.
42 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152. See also Waitangi Tribunal, *Rivers Report*, supra note 1, 106-107.
43 Ibid 61.

2. Maori Claimants on Consultation

Maori refute the Crown's view that there was adequate consultation in both Tribunal reports. The claimants believe that the Crown failed to protect their tino rangatiratanga over the rivers under Article II. The Crown neglected to deliberate with its Treaty partner on the construction of the Aniwhenua and Wheao power schemes over their rivers, and in granting the water rights over them. Te Ika Whenua stated that consultation only took place with people from outside the area. Tangata whenua had no genuine idea what was happening to their taonga. The scope of the scheme had not been elaborated to them and could not have been foreseen.[44] This was considered disrespectful of their mana and contradictory to the rangatiratanga promised in the Treaty. This view is consistent with that submitted by the Waitangi Tribunal.[45]

3. The Waitangi Tribunal on Consultation

The reasoning of the Waitangi Tribunal diverges from the claimants' in that it places slightly more emphasis on the duty of consultation in relation to reciprocal Treaty obligations. The Waitangi Tribunal states that the level of consultation is important because it signifies the more general and fundamental issue emanating from the claimants' Article II Treaty rights to te tino rangatiratanga and the Crown's right to kawanatanga.[46] The Tribunal's view is that the good faith owed to each other by the parties to the Treaty must extend to consultation on issues of major importance.[47] Difficulties arise because the Crown is inclined to define native title conceptually in terms of English law. There is a lack of effort by the Crown to initiate a form of title that properly acknowledges Maori customary and Treaty rights to rivers. In the Te Ika Whenua case, this resulted in a failure to consult properly over actions and laws regarding the use of the rivers for power generation purposes.[48]

The Waitangi Tribunal approved of the claimants' argument that proposed developments were virtually completed before they came to their attention, and that there were no real procedures for objection from tangata whenua. Consultation was carried out generally and on an ad hoc basis, not with people possessing special rights.[49]

In general, the level of consultation required by the Waitangi Tribunal on major issues, such as those concerning the rivers, should be full discussion in the context of a comprehensive recognition of the nature of the taonga involved, including its spiritual and cultural characteristics.[50]

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44 Ibid.
45 Ibid 66.
46 Ibid 79.
47 Ibid 107.
48 "Te Ika Whenua", supra note 37, 4.
49 Waitangi Tribunal, *Rivers Report*, supra note 1, 109.
50 "Te Ika Whenua", supra note 37, 4.

This section has attempted to compare and contrast the reasoning of the Crown, Maori claimants and the Waitangi Tribunal on significant Treaty issues with regard to the use of rivers. The next part of this article will look specifically at Crown action on the recommendations of the Waitangi Tribunal and the privatisation of electricity and the ECNZ transfers.

VI. THE EXTENT TO WHICH THE TRIBUNAL'S STATEMENTS ARE MIRRORED IN CROWN ACTION

The Waitangi Tribunal's remarks are barely mirrored in Crown action at all. This is evidenced by the refusal of the Crown to accept the Tribunal's findings of special importance to Maori claimants and tangata whenua as a whole.

1. Ownership of Rivers: Waitangi Tribunal Findings on Rivers, and Crown Action

On a positive note, the former Minister in Charge of Treaty of Waitangi Negotiations, Sir Douglas Graham, has stated that the Tribunal's reports are a crucial declaration by an independent forum on the continuing ties of tangata whenua to rivers, lakes and water.[51] The Crown accepts the Tribunal's view that Maori have a special relationship with the rivers, and negotiations will decide how this relationship can be affirmed.[52]

However, this is qualified by the Crown's assertion that the Tribunal's findings relating to proprietary rights of Maori in the rivers and ongoing compensation for hydro-electric generation will never be acted upon.[53] The Tribunal is creating claimant expectations that will not be fulfilled, and contributing to uncertainty for third parties over the repercussions of settlements.[54] Sir Douglas Graham, in articulating the official stance of the Government, noted that it is "unlikely that any government would say that water flowing down the river, any river, is owned by anybody, Maori or non-Maori".[55] Any Court decision to the contrary is likely to be altered by legislation.

In the *Te Ika Whenua – Energy Assets Report 1993*, the Tribunal recommended that the Wheao and Aniwhenua power schemes, and water rights to them, be retained by the Crown until the Te Ika Whenua claim was heard and decided. The Crown acted against this finding and the then Minister of Energy approved establishment plans.[56] The Waitangi Tribunal has expressed concern

51 Office of the Minister in Charge of Treaty of Waitangi Negotiations, Cabinet Strategy Committee, *Treaty Claims Relating to Rivers, Lakes, Water and the Geothermal Resource* (2 December 1998) 1, 5.

52 "Whanganui River Claims of Atihaunui and Tamahaki" (March 1999) Maori LR 4, 5.

53 "Whanganui River", supra note 2, 11.

54 "Te Ika Whenua", supra note 37, 4.

55 "Nga Korero: April 29, 1999" (April 1999): <http://nz.com/webnz/tekorero/k99/apr99-k/kapr99-res.html> (last accessed 3 July 2000).

56 Waitangi Tribunal, *Rivers Report*, supra note 1, 49.

and even frustration at the Crown's failure to heed its proposals, questioning "the determination of successive governments in ploughing ahead with asset divestment in the face of tribunal claims".[57]

The ownership of rivers is a prime example of a situation in which strong Tribunal findings have not been reflected in Crown action. This is indicative of the powerful legislative, political and judicial fetters on the authority of the Tribunal.[58]

2. Consultation and ECNZ Transfers

The Tribunal has, in numerous reports, addressed the need for the Crown to consult with its Treaty partner on matters of importance to Maori people. Yet, the requisite level of consultation is still absent from the activities of the Crown. This is especially accurate in relation to recent split of ECNZ.

The split involved dividing the country's largest electricity producer, ECNZ, into three new State-Owned Enterprises ("SOEs") on the Waikato River. The SOEs are comprised of Mighty River Power Ltd, Genesis Power Ltd and Meridian Energy Ltd. The split was designed to encourage competition and reform in the market in order to lower the price of electricity by giving smaller consumers a choice of power suppliers.[59]

The division was seen as a potential threat to the Waikato River claim, and more seriously, to the health of the river.[60] For these reasons, Tainui filed an injunction in the High Court at Wellington to stop the split. The High Court granted the injunction despite grim warnings from the Crown that electricity and hydro-electricity supplies could be jeopardised as a result.

Tainui argued that its threat to oppose the split in Court was clearly evident, and if initiatives to carry out the split could not be reversed then they should not have been taken. The Crown's actions showed a total lack of regard for the importance of negotiation and consultation in the Treaty partnership. In granting the injunction, Nicholson J made it known that consultation with Tainui was seriously flawed.[61] His judgment stipulates that the plaintiffs sought resolution with the government up to the last minute. Proceedings were only issued when it was evident that resolution was not going to be reached. The Court accepted that Tainui had done all of the work as far as consultation and negotiation was concerned, and that the Crown appeared to recoil, indicating a reluctance to give Tainui a meaningful guarantee that their claim would not be adversely affected

57 Mikaere, "Maori Issues" [1994] NZ Recent L Rev 265, 275-276.

58 Ibid 278.

59 See "Media Release – A Better Deal for Electricity Consumers" (7 April 1998) <http://www.m-co.co.nz/H12media/industry_newsmedia98/april798betterdeal.htm> (last accessed 3 July 2000).

60 Letter to the author from Donna Flavell, Waikato Raupatu Lands Trust, 23 September 1999.

61 Weir, "Court Injunction Throws ECNZ Split into Chaos", *The Dominion*, Wellington, New Zealand, 1 April 1999, 1.

by the split. This placed the risk on Tainui, rather than "on the shoulders of those people who created it, namely the Crown".[62]

This lack of consultation is symptomatic of the Crown's continuing omission to adjust its activities to give effect to the Tribunal's statements in the river reports.

3. Development: The Right to Development and Electricity Generation

The Waitangi Tribunal explicitly affirms a Maori right to development under the Treaty.[63] The Crown's actions with regard to the development of electricity resources are, once again, in contravention of Tribunal findings. One of the chief concerns raised by Tainui was that the reform of ECNZ would impede the ability of the Crown to address the Waikato River claim in the future. This includes claims to the right to use the river to produce hydro-electricity.

Tainui contend that the new SOEs will be subject more to market forces and will aim to avert any unfavourable impacts on the financial accounts of the Crown. The SOEs will be even further removed from the influence and authority of the Crown, negatively affecting its ability to determine Tainui's river claim.[64] If this argument is valid, the transfer of ECNZ will prejudice a potential Treaty right to development by vesting control of the rivers in parties who are under no obligation to honour the Treaty and instigate development schemes for Maori claimants.

Privatisation of the SOEs will have the same effect. So far, the government says that it will not privatise any of the three baby ECNZs. The New Zealand Labour Party did not support the electricity reforms and retained the option of reunifying ECNZ.[65] This suggests that the threat of privatisation is not imminent. However, Maori should remain cynical. In April 1998, the then Treasurer and Ministers of Finance, Energy and State-Owned Enterprises issued a statement informing the public that "[t]he Coalition Government has ruled out privatisation of any of the new SOEs or Contact Energy".[66] In March 1998, another Government statement announced the sale of Contact Energy to United States-based power company, Edison Mission Energy, which will hold its investment via an indirect subsidiary, Edison Mission Energy Taupo Ltd.[67] The electricity industry has been privatised, despite Crown declarations to the contrary. The

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62 *Mahuta & Anor v Attorney-General & Ors* (31 March 1999) unreported, High Court, Wellington, CP67/99, Nicholson J, 12-13.

63 Waitangi Tribunal, *Rivers Report*, supra note 1, 120.

64 Waikato Raupatu Lands Trust, *Position Paper of the Tainui Maaori Trust Board/Waikato Raupatu Lands Trust Regarding the Proposed Reform of ECNZ* 1.

65 New Zealand Labour Party, *Changing Course: Labour on Energy* (October 1999).

66 Ryall, "Competition in Electricity Generation" (7 April 1998) <http://www.executive.govt.nz/speech.cfm?speechralph=28607&SR=0> (last accessed 3 July 2000).

67 Ryall, "Sale Of Contact Energy" (22 March 1999) <http://www.executive.govt.nz/speech.cfm?speechralph=12964&SR=1> (last accessed 3 July 2000).

Waitangi Tribunal has said that there is a strong case that tangata whenua should be given priority to share in the generation of hydro-electricity where the opportunity ensues.[68] If those opportunities are given to private firms, then Maori lose out on development rights.

4. Spiritual and Environmental Significance of the River: Further Implications of the ECNZ Split

The Waitangi Tribunal has emphasised that the Crown should recognise the spiritual and environmental value of the rivers to Maori. However, the Crown posits that the Treaty did not safeguard Maori religious convictions, and that spiritual aspects to the river claims should be distinct from the question of property interests.[69]

The Crown continues to ignore holistic conceptions of the river. This is demonstrated by the implementation and possible privatisation of the new SOEs, and the privatisation of electricity.

Like Te Ika Whenua and Whanganui hapu, Tainui have a deep respect for the river and all life that dwells in it. Tainui maintain that if you look after the river, the river will look after you.[70] This relationship has existed for aeons, beginning with the first inland discoveries by ancestors from the Tainui waka more than six centuries ago. It is evident in songs, proverbs and oral traditions. According to Tainui loyalist, Shane Solomon, what the Crown, and most people fail to comprehend is that the fundamental issue is not about ownership, or even money, but about caring for the river.[71] At present, thousands of people use the water as a waste ground,[72] and there could be further environmental repercussions. Lake Taupo is also vulnerable because the Tongariro scheme above the lake and the Waikato line of dams below the lake are allocated to different companies.[73] Sir Robert Mahuta adheres to the view that the ECNZ split is the beginning of privatisation moves, believing that when private owners assume control of the river, they will abuse it for commercial gain and "to hell with the health of the river".[74]

It is unclear what the future holds, but experience shows that the environmental and spiritual implications associated with the privatisation of electricity and the transfer of ECNZ have not been properly addressed by the Crown. This flies in the face of Tribunal recommendations that the customary norms and values of tangata whenua be considered and incorporated into legislative and political processes.

68 Waitangi Tribunal, *Rivers Report*, supra note 1, 129.
69 "Whanganui River", supra note 2, 9.
70 "River Action More than Ownership or Money", *Waikato Times*, Hamilton, New Zealand, 1 April 1999, 4.
71 Ibid.
72 Ibid.
73 New Zealand Labour Party Press Release, *ECNZ split is unremittingly dumb* (7 April 1999).
74 "Troubled Waters for ECNZ", *The Dominion,* Wellington, New Zealand, 3 April 1999, 8.

VII. CONCLUSION

The purpose of this article has been to apply the reasoning of the Waitangi Tribunal in the *Te Ika Whenua* and *Whanganui River* reports to the recent privatisation of the electricity industry and the ECNZ transfers. The first part of the article concentrated on contrasting the views of the Crown, Maori claimants and the Waitangi Tribunal, and the way they interplay on the issue of ownership of rivers, lakes and water and Treaty claims to them. The Waitangi Tribunal and the claimants are in accord on most substantive matters. In the two river reports, the Tribunal is particularly concerned to integrate the spiritual and cultural values of Maori to Western notions of ownership. The extent to which the Crown has taken these on board, and applied Tribunal recommendations to its activities relating to the rivers, has been the focus of the latter part of this work.

A discussion on the ECNZ split and the recent sale of Contact Energy seemed to be most pertinent in this context. Although the Crown has expressed support for the work and function of the Tribunal, it has almost comprehensively refrained from acting on Tribunal findings with regard to rivers.

The Treaty can be understood to represent a compact between two peoples and two cultures. For the Treaty to be given the recognition it deserves, the customs of Maori must somehow co-exist with English law. The rights of Maori under the Treaty should not exclude the right to development, and the spiritual significance of water and rivers should be properly validated by the Crown.