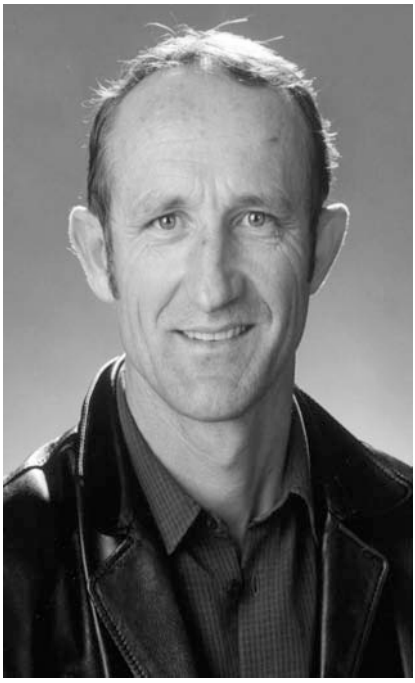
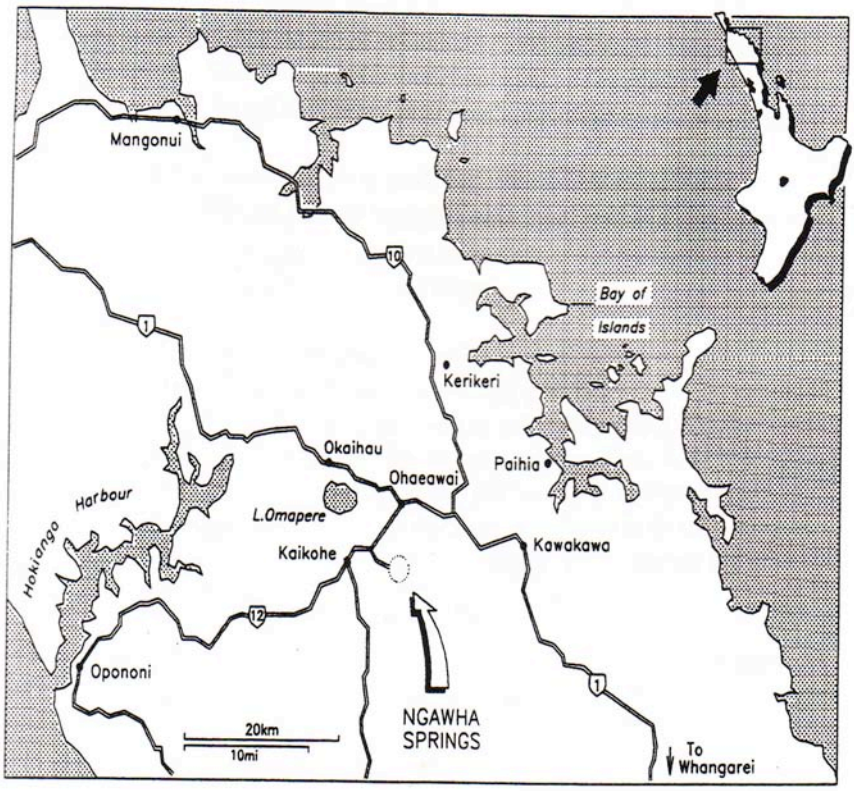
James Jackson



My name is James Jackson. I am a 4th generation New Zealander of European descent. I am a full-time Law Student, having returned to tertiary education after consecutive careers as a surveyor and utility mapper, and photographer.

My interest in law developed from my practical experience as a surveyor, wherein I became deeply concerned about the environment. Having to work with the public under various resource management laws has made me aware of the fundamental importance of reconciling Maori claims to natural resources and land with public policy and private enterprise. In the future, I intend to continue to expand my studies in these fields, especially in relation to aqua-culture and the marine environment.

LOCATION MAP
NGAWHA GEOTHERMAL CLAIM



Source: Waitangi Tribunal, *Ngawha Geothermal Resource Report*, 1993, x.

MANA WHENUA AND THE NGAWHA GEOTHERMAL RESOURCE CLAIM

JAMES JACKSON

INTRODUCTION

It is often stated that a vast gulf lies between the philosophies underlying English and Maori land tenure systems, making it difficult to reconcile the two. In Part I of this essay I will look at customary Maori land tenure, including the principle of mana whenua, to see whether an analogy can be drawn with English thinking. In Part II, I will use the Ngawha Geothermal Resource Report[1] produced by the Waitangi Tribunal ("the Tribunal") in 1993 as a case study to highlight the interconnectedness of Maori principles and concepts in the management of natural resources.

PART I: CUSTOMARY MAORI LAND TENURE

Traditional Maori concepts of land and resource use have a different philosophical basis to those enshrined in the English real property tradition. The English system of land tenure is steeped in ideas about "ownership", the most important of which are notions of the exclusive possession and enjoyment that accrue to those who are "owners".[2] In contrast, Maori custom law concepts and principles highlight a spiritual belonging to the land which is inextricably linked to the iwi social hierarchy and the complex family and political groupings of whanau (extended family), hapu (wider extended family) and iwi (affiliated hapu).[3] Rights attaching to use of land and its resources are circumscribed by notions of "tino rangatiratanga"

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1 Waitangi Tribunal, *Ngawha Geothermal Resource Report—WAI 304*, Brooker and Friend, Wellington, 1993.

2 Hinde, McMorland and Sim, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 3.

3 A Erueti "Maori Customary Law and Land Tenure: An Analysis", *Maori Land Law,* R Boast et al ed., Butterworths, Wellington, 1999, 27.

(chieftainship) and "kaitiakitanga" (stewardship). These notions over-arch Maori resource management and provide a guideline for human interaction with natural resources.[4] Accordingly, the entire concept of traditional Maori identity, as tangata whenua (people of the land), is referenced in terms of land and environmental associations. Customary rights psychosocially link "belonging to the land" to the concept of whakapapa (genealogy).[5]

This idea of connectedness, born of an ongoing ancestral relationship to the land, is fundamental to Maori thinking. Prior to colonisation, protecting this relationship ensured a durable and long-lasting tenure of landholding that was shared by the group as a whole. It also acted as a constraint on those within the group with authority to alienate the land and cautioned them to take care in watching out for the needs of others. As Andrew Erueti states, "while ruling chiefs had extensive rights in relation to the land … they did not possess the authority to transfer an absolute right in perpetuity".[6] Political conditions attaching to transfers of land between parties meant that if those conditions were not maintained any rights held would revert to the original group.

English settler mentality had difficulty bridging the conceptual gulf between Maori and English concepts of land tenure, and therefore interpreted land dealings by reference to their own systemic norms. From a Maori perspective, however, early post-colonial land gifts and even early land sales were akin to conditional licences or leases with a right of reversion if the recipient failed to comply with the conditions of transfer.[7]

Defining Mana Whenua

Divorced of physical context, the definition of "mana whenua" appears to be quite straightforward. The Resource Management Act 1991 defines it simply as "the authority held by a group".[8] Yet the concept is remarkably complex, for it involves compounding cultural, customary and political nuances that do not translate well into English. Richard Boast suggests that this is why, despite there being

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4 N Tomas, "Implementing Kaitiakitanga under the RMA 1991" (1994) *2 New Zealand Environmental Law Reporter,* 41.

5 Erueti, supra n2 at 30.

6 Ibid at 29.

7 Ibid.

8 Section 2(1) of the Resource Management Act 1991.

an extensive and elaborate body of Maori customary law, no systematic analysis of tikanga Maori (Maori jural concepts, principles and rules) has ever been undertaken.[9] Pat Hohepa suggests another reason for the resistance to codifying tikanga. He points to the fact that to do so would leave it "to languish in human created laws".[10]

The definition of mana whenua tendered by Psychologist, Dr Cleve Barlow captures its multi-faceted nature:[11]

> *Mana Whenua* … is the power associated with the possession of lands; it is also the power associated with the ability of the land to produce the bounties of nature…. There is another aspect to the power of the land: a person who possesses land has the power to produce a livelihood for family and tribe, and every effort is made to protect these rights….In addition, there were a number of other important principles associated with the *mana* of land, some of which are still applicable today, including: inherited rights, the establishment of fortresses, the power to control and protect, land confiscation, conservation, chiefly status, and sacred burial grounds.

Justice Durie states that the resources and benefits available from lands and waterways accrued to all Maori within a community. Accordingly, any individual holding extensive use rights "carried a commensurately larger obligation to the community".[12] However, while Durie correctly says that there was no English law equivalent to these concomitant duties, an English parallel can be drawn to large land-holders being accorded "influential status in their local society".[13] While the English tradition had no equivalent to the idea that kaitiaki obligations conferred status, property rights at the time of colonisation bestowed substantial "influence". They conferred the voting influence/privileges in both municipal and central government

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9 R Boast, "The Bases of Maori Claims to Natural Resources", Seminar on Maori Claims and Rights to Natural Resources, Energy and Natural Resources Law Association of New Zealand, 19 February 1993, 6.

10 P Hohepa and DV Williams, "The Taking Into Account of Te Ao Maori in Relation to Reform of the Law of Succession", *Working Paper for the New Zealand Law Commission,* Wellington, 1994, 6.

11 C Barlow, *Tikanga Whakaaro – Maori Concepts,* Oxford University Press, Auckland, 1992, 61.

12 E Durie, "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 No4 Otago LR, 454.

13 Ibid.

elections for men,[14] which gave rise to the women's suffrage movement.[15]

Durie further defines Maori land rights as a "privilege" to use resources correlative to maintaining one's obligations to both the community and the ever-present deities which protected both whenua and resources.[16] Durie's idea that privileges and rights are inextricably linked to obligations and duties echoes the early twentieth century analysis of Wesley Hohfeld. Hohfeld maintained that rights could not exist in a vacuum but that correlative duties, by necessity, attached to them.[17] Hohfeld's model becomes the philosophical equivalent to the notion in physics that every action has an equal and opposite re-action. Durie's observation fits squarely within the Hohfeldian analysis. This reciprocating aspect of mana whenua is illustrated in the Ngawha geothermal case-study which follows.[18]

PART II: THE NGAWHA GEOTHERMAL CLAIM

In Part II I wish to highlight mana whenua as a complex web of relationships that links Maori and the rest of their environment. Complex family groupings, ancestral links and unique perceptions of the land itself as a spiritual force, are all present in the Ngawha Claim.

Tangata Whenua Conceptualisation of the Ngawha Springs

The Ngawha geothermal resource claim was brought before the Waitangi Tribunal by the trustees of the Ngawha Springs Domain, acting on behalf of whanau and hapu who claimed an interest in the geothermal resource. The genealogical links and geographical spread of the claimants extended over the entire Ngapuhi confederation of

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14 *Queen v Harrald* [1872] LR7 QBD 361.

15 L Holcombe, "The Equality of Two: After the Acts", *Wives and Property,* M Robertson ed., University of Toronto Press, Toronto, 1983, 206.

16 Durie, supra n12 at 454.

17 W Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale, 1919. There is a useful summary of Hohfeld's account in J. Feinberg *Social Philosophy*, Englewood Cliffs, New Jersey, 1973, chapter 4.

18 *WAI 304*, supra n1.

iwi. Although the claimants who appeared before the Tribunal represented only ten iwi, these being Ngati Hine, Te Hikutu, Te Uri Taniwha, Te Mahurehure, Te Uriohua, Ngati Rehia, Ngai Tawake, Ngati Hau, Ngati Rangi and Ngati Tautahi, the Tribunal acknowledged that the claimants had genealogical and political ties to all 136 or more hapu of Ngapuhi.[19]

The claimants combined under the umbrella of Nga Hapu o Ngawha ("Nga Hapu"). The claim concerned the ownership and right to control an extensive geothermal resource approximately six kilometres east of Kaikohe,[20] over which Nga Hapu claimed they had never relinquished their mana rangatatira (authority/sovereignty) the retention of which was guaranteed under Article 2 of both Te Tiriti o Waitangi (Maori text) and the Treaty of Waitangi (English text). A proposed scheme to generate power from the geothermal field added considerable impetus to their attempt to legally quantify their mana whenua so that it had formal recognition under New Zealand law.[21] Unlike many other claims heard by the Tribunal, the claimants did not claim exclusive ownership of the Ngawha geothermal resource or that rangatiratanga (chieftainship) over the taonga (something of great value) was vested solely in them. Instead they asserted that the resource is, as it always has been, shared by all hapu of Ngapuhi.[22]

The geothermal resource comprises a sub-surface aquifer from which some thirty hot springs eminate. Since their discovery by the ancestress Karearikí, Ngapuhi have revered the hot springs at Ngawha, viewing them as a taonga of great value. Oral evidence from kaumatua and kuia, often in the form of ancient waiata, indicates that the hot springs have been used from time immemorial for healing purposes.[23] They are said to possess a *mauri* (life force/spirit) of miraculous healing power.[24]

Oral accounts linked the evolution of Ngapuhi from the time of their arrival in Aotearoa on the waka Takitimu, to the discovery of the springs and to the present time. Kaumatua related claims to territory that had been under continuous Ngapuhi control and authority up until the time of colonisation.

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19 Ibid at 7.
20 Ibid at 1.
21 Ibid at 3.
22 Ibid at 7.
23 Ibid at 16.
24 Ibid at 65. The pools are renown for their curative properties and particularly for providing relief for rheumatism and post-partum natal convalescence.

Ngai Tawake kaumatua, Manga Tau, related how the relationship of Ngapuhi with the springs is encapsulated in a proverb that likens the springs to the warmth of a woman's intimate embrace:[25]

Ko Moi te maunga	*Moi is the mountain*
Ko Ngawha te tangata	*Ngawha is the person*
He aroaro wahine	*The passage to the womb of a woman*
He ara mahana	*Is a warm passage*

A second metaphorical association is the Maori perception of the Springs as lying hidden, deep within the belly of Papatuanuku (earthmother).[26]

Other kaumata evidence from Te Uri Taniwha and Ngai Tawake hapu re-affirmed the ancient understanding that the underground resource is indivisible from its surface manifestations.[27]

> Ko te Ngawha te kanohi o te taonga, engari ko tona whatumanawa, ko tona mana hauora, no raro.
>
> *Ngawha is the eye of the taonga, but its heart, its life giving power, lies beneath*.

The presence of the esoteric guardian, the taniwha Takauere, in the Ngawha system was put forward as further substantiating the Ngapuhi claim to the geothermal resource in terms of tikanga Maori (Maori custom law). Although lacking in western technology, Ngapuhi ancestors nevertheless understood that there was an underground connection between the aquifer, the hot springs and nearby Lake Omapere. They related stories of the Taniwha's ability to travel below ground and re-appear at different places so that its head could be present at the Lake while its tail could simultaneously be seen whipping in the pools adjoining the hot springs.[28]

The Tribunal recognised that this rich oral history and tradition served to impart ownership rights on the basis of discovery and continuous occupation and control, this being emphasised by the notion of *ahi kaa* (home fires). The Tribunal accepted that of all the

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25 Ibid at 16.
26 Ibid at 16.
27 Ibid at 17.
28 Ibid.

available resources that were regarded as essential for the people's well-being, none was regarded as more valuable to Ngapuhi than the Ngawha hot springs.[29]

Pakeha Conceptualisations of the Ngawha Springs

The European perspective of the springs reflected a different world view. The understanding that a connection exists between geographically isolated hot springs, lakes and underground aquifers was entirely absent from the colonial mindset.[30] The colonial settlers assessed the value of the springs in terms of immediate and potential financial gains.

Early settler references to the springs indicated their only value as being as a potential source for the extraction of mercury and mineral resources.[31] Indeed, at the time of busy land buying in the area, (from 1873 onwards), the springs and surrounding environs were considered of such poor quality that the Crown was reluctant to pay more than 3 shillings an acre for them.[32] During negotiations in 1885 the Assistant Surveyor-General described the land as "sterile in the extreme and the gum which gave it value formerly is about exhausted".[33] Today, geothermal science consultants still regard the resource simply as a series of surface and sub-surface features, some of which are considered remote and "probably" unconnected.[34]

The Native Land Court And Investigations of Title

The Native Lands Act 1865 extinguished customary Maori land title by providing for its conversion into freehold title.[35] Any Maori land

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29 Ibid at 17.

30 F Hochstetter, *Geology of NZ 1864: Contributions to the Geology of the Provinces of Auckland and Nelson,* C Flemming ed., Government Printer, Wellington, 1959, 161.

31 Hochstetter, ibid at 161; also Dr Hector, the Director of the Geological Survey stated that the springs had no particular value, *WAI 304*, supra n1 at 59.

32 *WAI 304*, supra n1 at 42.

33 Ibid at 41.

34 Ibid at 27.

35 The Preamble of The Native Lands Act 1865 reads: "Whereas it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners

owner could apply to the Native Land Court for a hearing and the grant of a certificate of title to land held in collective customary ownership.[36] Once an application had been lodged the other "owners" were forced to take part in the process or risk losing their land entitlements. Once inside the process they were subjected to protracted and costly court proceedings.[37] Ancillary expenses had to be borne by Maori. Ngapuhi were seriously impacted by these provisions, losing land at every step of what turned out to be little more than an expropriating process.[38]

The Native Land Court investigation process left Maori wide open to exploitation. Ranginui Walker comments that as soon as certificates of title were dispensed "land sharks, speculators and government land purchasing officers moved in to buy the land".[39] Some rangatira became caught up in commercial opportunism. Hirini Taiwhanga, for example, became a free-ranging entrepreneur who acted as an agent between the Land Purchase Office and his whanau, and collected hefty commissions for his efforts.[40] As Maori landholdings became more deeply absorbed into the colonial system of land tenure, the land under Ngapuhi control shrank accordingly.

As a result of applications to the Native Land Court and subsequent judicial ukase, Ngawha turangawaewae was converted into valuable, privately held Maori estates, severed from any iwi obligations. The

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thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands when the title thereto is converted as foresaid and to make further provisions in reference to the matters aforesaid."

36 See sections 21-23 of the Native Lands Act 1865; DV Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909,* Huia Publishers, Wellington, 1999, 157-160; R Walker, *Ka Whawhai Tonu Matou Struggle Without End*, Penguin, Auckland, 1990, 136.

37 Duties were levied pursuant to section 55 of the Native Lands Act 1865. The result of the duty reduced net proceeds upon sale. Further Court fees were imposed under section 62 of the Act and accrued in a scale dependent upon the length of time the hearing took and how many claimants and opponents were involved in each exchange transaction. Frequently, the Court ordered a partition so that fees could be discharged. This resulted in the further loss of some part of the land. Survey was necessary under section 25 of the Act, which stipulated that land had to be surveyed and marked off prior to the order of a certificate of title. Section 68 allowed unpaid surveyors to place a lien on the title.

38 *WAI 304*, supra n1 at 21-49.

39 Ibid at 137.

40 Ibid at 23.

process set in train a series of leases and subdivisions, the granting of mining rights, and ultimately, sale. By 1894 the partitioned land around the Ngawha Springs had all been sold. No reservation had been made for the hot springs.[41] Of the several thousand acres that had been held under hapu rangatiratanga and kaitiakitanga, only 15 acres remained in Maori freehold title.[42]

Some Maori did not accept the loss and continued to occupy the land surrounding the springs. In 1926 Nga Hapu successfully petitioned the Government to reserve approximately 5 acres immediately adjacent to the springs.[43] This reserve became known as the Parahirahi C block or "the five acre springs block". Parahirahi C was set apart as a Native reservation "for the common use of the owners thereof as a village and a bathing place".[44] It was this small parcel of land and the Ngawha Springs system that became the subject of the geothermal resource claim. Nga Hapu were reluctant in the extreme to relinquish their traditional rangatiratanga and kaitiakitanga, both manifestations of mana whenua, over a resource that was central to their identity and vital to their wellbeing.

Exercising Mana Whenua

In 1929, Nga Hapu attempted to exercise mana whenua over this small domain by fencing its boundaries. The local council inspector stopped the work and a disagreement erupted as to "ownership" of the reserve.[45] A series of petitions to Parliament ensued. In December 1934, in an apparent about-face, the block was re-classified under the auspices of the Public Reserves Domains and National Parks Act 1928. The title of the block was registered in the name of Her Majesty the Queen and became known as the 'Ngawha Hot Springs Domain'.[46]

An avalanche of petitions from Ngapuhi kaumatua seeking an official inquiry into land alienation ensued and continued from 1939 to 1944. Despite positive verbal responses from Crown representatives and although Nga Hapu had maintained their ahi kaa by living in close proximity to the hot springs for centuries and exercising

41 Ibid at 22.
42 Ibid at 24.
43 Ibid at 24.
44 Ibid at 67.
45 Ibid at 67.
46 Ibid at 68.

rangatiratanga over the springs and the adjoining land, nothing came of the petitions.[47] However, in 1961 the Minister of Lands approved the eviction of those living on the Crown-owned Reserve. Finally, in 1964, after a lengthy hearing in the Kaikohe Magistrates Court, the presiding judge upheld the Crown's entitlement to the domain and declared those residing upon it to be trespassers. They were given a month to vacate the domain.[48]

Post Eviction

In 1992 the Waitangi Tribunal met to determine whether the Crown had acquired an interest in the springs domain in breach of the principles of te Tiriti o Waitangi/the Treaty of Waitangi (te Tiriti/the Treaty). Article 2 of the English text guarantees:[49]

> full exclusive ownership of their lands and Estates Forests Fisheries and other properties which they possess so long as it is their wish and desire to retain the same in their possession.

The fundamental issue deliberated by the Tribunal was whether the Maori owners had willingly and knowingly alienated the block. The claimants pointed to various defects in the deeds of purchase and to the circumstances surrounding the Crown's methods of gaining signatures and consent for sale. They maintained that these methods conflicted with the principles of te Tiriti/Treaty. In response, counsel for the Crown relied on the deeds of purchase to which it had obtained signatures during the period 1886 to 1894.[50]

In its deliberations the Tribunal stressed the importance of the duty imposed upon the Crown under te Tiriti/Treaty to actively protect Maori interests.[51] The duty to protect customary land interests has

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47 Ibid at 75.
48 Ibid at 76.
49 The Treaty of Waitangi 1840, as included in Schedule 1 of the Treaty of Waitangi Act 1975.
50 *WAI 304*, supra n1 at 58.
51 Ibid at 60.

been recognised internationally.[52] This has been affirmed in New Zealand by the Court of Appeal:[53]

> The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

The fact that the protection of indigenous customary land interests is buttressed by the Treaty has also been acknowledged: [54]

> A breach of a Treaty provision must in my view be a breach of the principles of the Treaty.

In its findings the Waitangi Tribunal stated:[55]

> the Crown had acted in breach of its Treaty duty to protect the owners' interests in Parahirahi C Block and that it had also acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C Block and the hot springs taonga located on the block.

Further to this, the Tribunal recommended that the portion of the Parahirahi block that had been acquired by the Crown and vested in the name of Her Majesty the Queen as a reserve, be returned to Maori ownership.

It is interesting that, even after their eviction in 1964, the authority of Nga Hapu as holders of mana whenua continued to be recognised by outsiders wanting to engage in commercial enterprises. At present, although the Bay of Islands County Council is the appointed administrator of the Ngawha Hot Springs Domain, it too, continues to acknowledge local hapu interest in the resource. The co-operation of local hapu was negotiated in a joint venture to develop and administer the recreational pools facility that operates today under Maori trust administration.[56]

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52 Per Dickson J, *Guerin v The Queen* [1985] 13 DLR (4th) (SCC), 321, 334. In this case Dickson J introduced the concept of the relationship between the Crown and indigenous people being "akin" to a fiduciary relationship.

53 Per Cooke P, *NZ Maori Council v Attorney General* [1987] 1 NZLR 641, 664.

54 Per Somers J, ibid at 693.

55 *WAI 304*, supra n17 at 78.

56 Ibid at 79.

The Geothermal Resource

The Tribunal also considered the rights of the hapu over the sub-surface geothermal manifestation. In its deliberations, it reflected upon the wording and intent of New Zealand legislation pertaining to water-power, geothermal steam and energy, and the Resource Management Act 1991.[57] The Tribunal found that the Crown had acted in breach of Tiriti/Treaty principles by failing to adequately ensure that the Tiriti/Treaty rights of the Ngawha claimants had been fully protected.[58]

Finally in consideration of the 1894 land alienation which disenfranchised Ngapuhi of their access rights and rangatiratanga over all but a small portion of a surface manifestation of the geothermal system, the Tribunal concluded that the hapu interest in the underlying resource was completely extinguished:[59]

> By consequence the claimants no longer own or have rangatiratanga over the entire Ngawha geothermal resource. Instead they own or have rangatiratanga over the land and springs contained in the one acre block that is part of the former Parahirahi C Block.

In conclusion the Tribunal recommended that an amendment be made to the Resource Management Act to reflect the importance of taonga such as the geothermal resource, and that all officials exercising functions and powers under the Act do so in a manner consistent with the principles of te Tiriti/Treaty.[60]

The Outcome

The Ngawha geothermal field was tapped for the production of power in 1998. The power station was constructed by Top Energy and the Tai Tokerau Maori Trust Board.[61] Accordingly, Ngapuhi still maintain a type of authority over the resource. In response to Waitangi Tribunal Findings and Recommendations, constant monitoring of the geothermal resource is undertaken by the local

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57 Ibid at 122-136.
58 Ibid at 143.
59 Ibid at 135.
60 Ibid at 148.
61 Northland Regional Council Annual Environmental Monitoring Report (2001 -2002), Northland Regional Council, 2002, 105.

council, in order to ascertain the physical impact on both the resource and the surrounding environs and to maintain compliance with the Resource Management Act. The resource is currently considered to be sustainable.

CONCLUSION

Throughout Aotearoa/New Zealand, Maori land has been alienated through a colonising process that has employed confiscation, legislation and misappropriation. In the process of alienation, philosophical differences in perceptions of land tenure made it possible for the Crown to ignore Maori, while highlighting the integrity of its own processes. As land has fallen out of Maori customary control rangatiratanga has been compromised and the physical manifestations of ahi kaa have grown cold. Yet an inseverable connection remains between tangata whenua and the land to which they belong.

The principle of mana whenua provides an excellent illustration of how tikanga is formulated through the interweaving of several principles. From Durie's introductory definition which connects privilege to obligation in a Hohfeldian sense, to the Ngawha hapu claim that their geothermal resource can only be viewed holistically, interconnectivity prevails. Everything is viewed by virtue of its relationship to everything else. Whenua, taonga, whakapapa and mauri are woven into a rich tapestry of tikanga.

The Ngawha Waitangi Tribunal Claim illustrates that as long as kaumatua are prepared to maintain the vigil, and continue petitioning to be heard, a form of authority similar to the concept of "sovereignty" is maintained over the land and other taonga. By application to the Tribunal this authority undertakes a jural metamorphosis which can successfully reinforce claims under te Tiriti/Treaty. It is apparent that so long as iwi such as Ngapuhi do not forsake their authority, the exercise of mana whenua remains as an inchoate right over the land. Even without legal recognition, it is still very much in existence.