



NGAROMA TAHANA

Ka karanga nga hau o te muri
Ka karanga nga hau o te tonga
Kei te whakapuke nga ngaru i te moana Rotoiti kite a Ihenga
Kei te here nga potiki a Hinehopu i te matarae i o rehu

A he uri ahau o Hinehopu. My family hails from the shores of Lake Rotoiti, which is the home of Ngati Pikiao. Lake Rotoiti is one of several Arawa lakes. The lakes are an integral part of Te Arawa identity and remain strong cultural and economic forces for Te Arawa.

My family have always had a strong commitment toward iwi nation building. As the middle child of three, I attended Hato Hohepa Boarding School. While at school my commitment toward building community strength was further reinforced. The strength of being a Maori woman and social obligations owed to others and to the environment, were highlighted by the teachers at Hato Hohepa.

Before attending Auckland Law School, I lectured in marketing and tourism at Waiariki Polytechnical Institute in Rotorua. I am now a solicitor in the Local Government and Environment Team at Simpson Grierson, specialising in resource management, public law and Maori land matters.

My family and school background, together with my studies in law, have left me with a sense of obligation to do my best to contribute toward a more balanced society in Aotearoa/New Zealand. That society will be one in which tikanga Maori is overtly recognised and respected by others. This essay, written while I was a student of Maori Land Law in 2004, is part of that effort. Noho ora mai.

TIKANGA MAORI CONCEPTS AND ARAWA RANGATIRATANGA AND KAITIAKITANGA OF ARAWA LAKES

NGAROMA TAHANA

INTRODUCTION

Rangatiratanga and kaitiakitanga are conventional principles of Tikanga Maori (Maori custom law) applicable to land. As such, they can be contrasted with common English legal conceptualisations of “ownership” as either an enforceable bundle of rights or a series of incidents of title.

This essay offers a tikanga-based view of “ownership” of the Rotorua Lakes by the Te Arawa people. The lakes are in the central North Island of Aotearoa/New Zealand, an area traditionally claimed by the Te Arawa iwi. The underlying assertion of this essay is that Tikanga Maori offers an alternative conceptual basis for land (including lakes) use and control in Aotearoa/New Zealand that is as legitimate as that offered by English-based New Zealand law, and, arguably, one which is more enduring.

Part 1 of this essay discusses Tikanga relating to whenua/land/territory in Aotearoa/New Zealand. It is explanatory in nature. Part 2 includes a brief reference to Te Tiriti o Waitangi (te Tiriti), the Native Land Court and the New Zealand legal system and their impact on Te Arawa lakes ownership. Part 3 is the story of how the traditional tikanga relationships of my people to the Rotorua lakes have been fought for, maintained and eventually recognised under New Zealand law.

**PART I – TIKANGA MAORI – RANGATIRATANGA AND
KAITIAKITANGA IN CONTEXT**

Rangatiratanga and kaitiakitanga are best understood as part of a broader cultural context. According to Joe Williams, Chief Judge of the Maori Land Court, five tikanga provide the underlying value system for Maori custom law. They are:¹

- i Whanaungatanga – the centrality of relationships and in particular kin relationships to tikanga;
- ii Mana – the values associated with leadership;
- iii Kaitiakitanga – the obligation of stewardship;
- iv Utu – the value of balance and reciprocity; and
- v Tapu – the spiritual value in all things.

Acknowledgement of whenua (land) and its whakapapa (ancestral connections) are vital to the continuing cultural and physical survival of Maori people generally. The recitation of place names, iwi histories, whakatauki (proverbs) and waiata (songs) speak of the bond between tangata (people) and whenua. Examples that demonstrate this are set out below:

Taku aroha ki taku whenua I te ahiahi kauruku nei; He waka ia ra kia toia	My love, alas, for my native land As evening shadows draw nigh; Would there was a canoe being launched
Nga matarae ki Rautahi ra; Omanga waka Te Ruawai,	At the headland at Rautahi yonder; Where oft sped the canoe, Te Ruawai'
Ka hokai au, kei marutata, i.	Urged onward by me, ere the fall of eventide.
Moea iho nei e au Ko Manuhiri, ko Te Wharekura; Oho rawa ake nei ki te ao, Au anake te tuohu nei.	In my dreaming I saw Manuhiri and Te Wharekura Awakening to this world There was I alone, bowed down.

¹ J Williams, "He Aha Te Tikanga Maori", New Zealand Law Commission, Wellington, 1996.

E hia hoki! E kuika nei,
Matua ia ra e tahuri mai?
'Wai e mea ka rukupopo

Ka whakamate ki tona whenua, i.

He whenua, he wahine
ka mate ai te tangata
Te oranga o te tangata, he whenua
Ko Papatuanuku te matua
o te tangata
Whatu ngarongaro he tangata,
toi tu he whenua

O friend! In this great longing,
Is there no one who will share it?
For there is no one more
melancholy
Than he who yearns for his own
native land.

Men die for land and women
The welfare of people is the land
Papatuanuku is parent to people
People disappear, land remains

These examples provide a glimpse of a Maori worldview in which the environment is perceived through the inter-relationship between the spiritual and physical dimensions of being. The concept of “whenua” is central to this perception. Its significance is best described in emotional language expressing the passion with which my people have traditionally viewed their lands.

Whakapapa and Whanaungatanga

Whakapapa (genealogical connections) and Whanaungatanga (kinship) are key concepts holding the Maori worldview together.² The whakapapa link between the primordial parents Ranginui and Papatuanuku and their offspring explains the connection between everything contained in the universe.³ In the creation stories, after the separation of the parents by their atua (deity) children, Papatuanuku took physical form as the earth. This explains the connection in traditional Maori thinking that whenua is "ukaipo" (the breast suckled in the night).⁴ Two things arise from this “mother” perception of land as whenua. First,

² New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, 2001, 30.

³ P Hohepa and DV Williams, *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession*, New Zealand Law Commission, Wellington, 1996, 14.

⁴ Ministry of Justice, *He Hinatore ki te Ao Maori*, Government Press, Wellington, 2001. Part 1 “Traditional Maori Concepts” discusses a number of relevant Maori concepts.

is an obligation to treat Papatuanuku/whenua/earth⁵ with the respect owed to a mother by her dependant children. Second, is that imbued with this mother – earth perception, “whenua” is the main source of Maori identity as tangata whenua (people of the land). This attachment is permanent and ongoing. Home territories are referred to as turangawaewae (standing place for the feet), and significant land features become identity links to land.⁶ Group identity as hapu and iwi allows us to speak with collective authority for our lands and territories.

Te reo Maori (Maori language) reflects the relationship between tangata and whenua by using the possessive marker “o” to indicate the superior status of Papatuanuku/whenua. The understanding inherent in the language is that people do not control the relationship between whenua and tangata, even though they may control relationships amongst themselves. It says, “we belong to the land” – the land is not a chattel that belongs to us.⁷

The continuing relationship between Maori and whenua is also reflected in birthing and burial processes.⁸

Te whenua (the land) nourishes the people, as does the whenua (placenta) of the woman. Maori are born of the whenua (placenta) and upon birth the whenua and the pito (umbilical cord) are returned to the whenua (land). Burying the whenua and the pito within the whenua (land) of the whanau (family) establishes a personal, spiritual, symbolic and sacred link between the land and the child, where their whenua (placenta)

⁵ In this essay I have used “()” to indicate translated terms which carry different cultural values, and “/” to signify that even though different languages are used to refer to a thing the ideas and values conveyed remain Maori.

⁶ For example, a common pepeha from the Ngati Pikiao region which notifies this association between land and people to others is:

Ka karanga nga hau o te muri,
Ka karanga nga hau o te tonga,
Kei te whakapuke nga ngaru o te moana Rotoiti kite a Ihenga,
Kei te herenga Potiki a Hinehopu i te Matarae i o Rehu.

⁷ Supra n4 at 25.

⁸ NZ Law Commission, supra n2 at 51; see also E Best, *Maori Marriage Customs*, Auckland Institute Lecture Series, 5 October 1903, 59. Best claims “when a child is born to a Pakeha, the doctor or nurse burns the afterbirth, the Maori did not do this it would be against the mana of that child, it would destroy the child’s mauri. Burning a corpse did not destroy its mana as its mauri was already gone, but burning the whenua of a child born alive was destroying its mana, the mauri of the living child would be gone. Therefore the whenua was never burnt, but buried in the whenua and so the child’s mana and mauri were preserved.”

is part of the whenua (land). This follows on from the law of utu (reciprocity) of what is given is returned or that taken is retrieved.

The interrelatedness of Maori with the environment included waterways as well as dry land. The Waitangi Tribunal has described the relationship of tangata whenua and their waterways as:⁹

The river system was possessed as a taonga (treasure) of central significance to Atihaunui. ... The river was conceptualised as a whole and indivisible entity, not separated into beds, banks and waters, nor into tidal and non-tidal, navigable and non navigable parts. Through creation beliefs, it is a living being, an ancestor with its own mauri, mana and tapu.

To attribute taonga status to whenua and wai (water) not only recognises the Maori worldview in purely conceptual terms but also highlights the importance of physical resources to the Maori economy.

Mana

Mana has been variously defined as “authority, control, influence, prestige, power and psychic force”.¹⁰ Mana was a force that drove the development of the world through the phases of Te Po (darkness) and through to Te Ao Marama (the world of light).¹¹ The ultimate source of mana is the atua children of Ranginui and Papatuanuku. Mana is also an attribute of humans. Although expressed through successful individual endeavours, it is also a manifestation of direct ties to the “whenua” through whakapapa.

Rangatiratanga

“Te tino rangatiratanga” derives from Article II of te Tiriti.¹² There are two language texts of Te Tiriti/the Treaty. Under Article II of the Maori text, Maori retained “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”.¹³ Over five hundred Maori signed the

⁹ Waitangi Tribunal, *The Whanganui River Report – WAI 167*, GP Publications, Wellington, 1999.

¹⁰ HW Williams, *A Dictionary of the Maori Language*, 7th edn, Legislation Direct, Wellington, 2000, 172.

¹¹ R Taylor, *Te Ika a Maui*, Wertheim and MacIntosh, London, 1855, 13-14.

¹² See Appendix 1 of this Section.

¹³ Ibid, Maori text of Te Tiriti o Waitangi.

Maori version of te Tiriti. Under the English text Maori were guaranteed “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”. A close translation for “tino rangatiratanga” is “absolute chieftainship”. In 1840 rangatiratanga was exercised by rangatira, as the recognised heads of the hapu and iwi.

That the rangatira who signed te Tiriti reserved the right to make decisions over our lands, our communities and matters related to the preservation and advancement of our culture, is indisputable. As noted by Richard Hill and Vincent O’Malley:¹⁴

The rangatira (chiefs) of the hapu were traditionally chosen on the basis of both descent lines and demonstrated leadership skills, and were usually expected to guide their people towards consensus-based decisions rather than make unilateral ones. In negotiations leading up to the signing of the Treaty the chiefs had been assured that their mana (prestige, authority) would be protected and enhanced through allying their fortunes with those of the British Crown. The recognition of the right of rangatiratanga (chieftainship, generally interpreted by Maori as autonomy) contained in the Treaty’s Article Two suggested to them that little would change for their people after annexation by Britain.

Roger Maaka and Augie Fleras, while citing other notable authors, describe the Maori perception of tino rangatiratanga as follows:¹⁵

The principles and practice of tino rangatiratanga conjure up a host of reassuring images for restoring “independent Maori/iwi authority” to its rightful place in a post-colonising society (Mead 1997). The essence of rangatiratanga is sovereignty driven: For some, this sovereignty prevails over the entirety of Aotearoa, for others, it entails some degree of autonomy from the state, for still others, it consists of shared jurisdictions

¹⁴ R Hill and V O’Malley, *The Maori Quest for Rangatiratanga/Autonomy 1840-2000*, Occasional Papers Series 4, Treaty of Waitangi Research Unit, Wellington, 2000, 2.

¹⁵ R Maaka and A Fleras, “Politicizing Customary Rights: Tino Rangatiratanga and the Re-Contouring of Aotearoa New Zealand”, paper delivered at the Conference on Indigenous Rights, Political Theory and Reshaping Australian Institutions, Australian National University, 1997.

within a single framework. To one side are claims for control over culture under tino rangatiratanga (Smith and Smith 1996); to the other are arrangements for economic development as a spearhead for cultural growth and political autonomy (Mahuta 1996). To be sure, the relationship between rangatiratanga and sovereignty is complex and poly-textured: That is, tino rangatiratanga serves as a precursor *of* Maori assertions for sovereignty; it also provides the basis *for*, derives *from*, and is strengthened *by* claims to self-determination. In all cases, however, tino rangatiratanga is inseparable from Maori challenges to the once undisputed sovereignty of the Crown as sole source of authority.

While rangatiratanga has received little statutory recognition, it is the underlying rationale for most land claims and litigation brought by Maori claimants against the Crown for breaching the Principles of the te Tiriti.¹⁶

In the above discussion I have tried to highlight the mutually interdependent nature of the concepts of “mana”, “tino rangatiratanga” and “whenua”. Exercising authority of this nature is legitimised amongst Maori, by according mana whenua status to different groups of tangata whenua who live in particular areas.¹⁷

Kaitiakitanga

“Kaitiakitanga” is a term used to describe the mutual guardianship relationship that exists between Maori and their lands/territories. Whanaungatanga obliges humans who share acknowledged whakapapa to respect each other. Papatuanuku, as common ancestor and source of mana and physical nourishment and sustenance, is deserving of respect above all other things. In this regard, whakapapa and whanaungatanga place an obligation on people to accord respect to the land and kawai tupuna (ancestors) while simultaneously providing a foundation for traditional Maori land tenure and kaitiakitanga.¹⁸ Kaitiakitanga involves

¹⁶ See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 662 (CA); *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

¹⁷ A number of statutes, including the Resource Management Act 1991 and the Conservation Act 1987, include definitions of “mana whenua” as being the iwi with authority in an area. Later statutes such as the Hauraki Gulf Marine Park Act 2000, refer to tangata whenua in relation to their areas but not to mana whenua.

¹⁸ P Clarke, “Te Mana Whenua o Ngati Whatua o Orakei”, (2000) AULR, 571.

the obligation of the kaitiaki to guard and protect.¹⁹ Tangata whenua, as kaitiaki, carry a group obligation to manage their territorial resources, for their future generations.

The granting of individual ownership of pieces of land by awarding individual, legally sanctioned titles under New Zealand law does not release kaitiaki from their protective role. As Durie notes, however, it makes the task far more difficult.²⁰ Kaitiakitanga places an obligation on Maori to maintain a strong link between the natural world and successive generations, and to ensure the generations to come inherit a productive livelihood.²¹

PART II – TIKANGA MAORI AND RECOGNITION OF TE ARAWA LAKES OWNERSHIP UNDER NZ LAW

Western philosophy has a different idea of whenua/land to that traditionally held by Maori. It is based on concepts of “ownership” that have developed in another time and place and which have only recently been transplanted into Aotearoa/New Zealand. In this section I will discuss the ongoing relationship of Te Arawa with our lakes to illustrate one of many ongoing iwi-whenua associations. Despite the advent of Tikanga Pakeha (English-based laws) we still understand our relationship as being principally that of kaitiaki. That relationship is forged upon the bond that exists between tangata and whenua.

Tikanga Maori and the Treaty of Waitangi

Te Tiriti o Waitangi was signed in 1840 between chiefs and the Crown in order to establish an English colony and guarantee protection of Maori property and sovereignty. Article 2 of the Maori version provides that Maori should have “te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa”. Literally translated this means that Maori were guaranteed chieftainship (sovereignty) in respect of their land, homes and all other precious things. In the English version of te Tiriti Maori were guaranteed “full exclusive and undisturbed possession of the lands and estates, forests, fisheries and other properties which they may collectively or individually possess”. There has been a lot of debate over which text ought to prevail. Whether one accepts the English or

¹⁹ NZ Law Commission, supra n2 at 40.

²⁰ M Durie, *Te Mana Te Kawanatanga – The Politics of Maori Self-Determination*, Oxford University Press, Auckland, 1998, 23.

²¹ S Hayes, “Defining Kaitiakitanga and the Resource Management Act 1991”, (1998) 8 AULR 893-899 at 894.

Maori version as prevailing, however, there is clear recognition in both of protection for Maori rights in the fisheries and respective waterways.²²



Tikanga Maori and the Native Land Court

The Native Land Court was established in 1862 in order to change communal title held under tikanga Maori into a form of title cognisable by the English common law. According to early Native Land Court records sources of rights under which Maori could lay customary claim were:²³

1. Take tupuna - ancestral right by descent
2. Take raupatu - conquest
3. Take tuku - gift
4. Take taunaha – discovery

The translation of Maori concepts and principles into existing English terms hid the complex relationships that Maori had with their lands and reduced them to four English legal conceptualisations. The notion of individual ownership quickly replaced the broader concept of a group of people existing on the land and collectively drawing their identity and wellbeing through acknowledging their reciprocal relationships with each other and their obligations and dependence to the land. The notion of being able to completely extinguish one's whakapapa link to the land through the process of "sale" replaced the conceptualisation of incorporating newcomer's into existing arrangements without displacing oneself in the process because "ahi ka roa" (the long burning fire) remained alight.²⁴ Later on, the introduction of the Torrens System of land tenure into Aotearoa/New Zealand in 1953 cemented this. It provides that proof of ownership of land is complete upon registration of

²² See Appendix 1 of this Section for the full text of Te Tiriti o Waitangi and a translation.

²³ N Smith, *Maori Land Law*, Reed Publishing, Wellington, 1960.

²⁴ Examples of this can be found in Pompallier, *Early History of the Catholic Church in Oceania*, JH Brett, Auckland, 1888, 49; W Martin, *The Taranaki Question*, WH Dalton, London, 1861, 33 and D Alves, *The Maori and the Crown an Indigenous Peoples Struggle for self-determination*, Greenwood Press, Westport, 1999, 6.

title with the Land Transfer Office and that the title of a bona fide purchaser for value is sacrosanct.²⁵

PART III – TIKANGA MAORI AND THE TE ARAWA LAKES OWNERSHIP

Te Arawa has continuously asserted our position under tikanga Maori as being protected by te Tiriti even though we were not signatories and despite investigations carried out by the Native Land Court which sought to dispossess us of our lakes and lands. The reaction of Te Pokiha Taranui, a member of Ngati Pikiāo,²⁶ to the selling of land and the workings of the Native Land Court are recorded in the Dictionary of New Zealand Biography.²⁷

He [Te Pokiha] was not in favour of the sale of land to Europeans. In 1871 he spoke to an assembly at Kawatapu-a-Rangi against the fees and surveys of the Native Land Court. He was furious when land he believed belonged to Ngati Pikiāo was awarded to Ngati Whakaue, and threatened to occupy the land and commence cultivation.

Similarly, a petition taken by rangatira to the Native Affairs Select Committee of Parliament in 1874 gives a clear indication of Te Arawa's concerns during the early years of the Court's operations.²⁸

The Arawa people have from the foundation of the colony consistently refused to lease or sell their lands; while all the other great tribes have divested themselves of the greater portion of their tribal lands, the Arawa country has remained almost untouched in the hands of the aboriginal owners. When the Native Land Court was established, the tribe refused to take advantage of it for a long time, ultimately, upon the repeated assurances of the Government that the survey and investigation of titles to their lands would not facilitate leases or sales, they allowed one or two pieces to be

²⁵ *Frazer v Walker* [1967] NZLR 1069.

²⁶ Te Pokiha Taranui belonged to Ngati Pikiāo of Te Arawa. He later took the name Te Pokiha (Fox), probably after his baptism by CMS missionaries at Rotorua.

²⁷ S Oliver, "Taranui, Te Pokiha ? – 1901", *Dictionary of New Zealand Biography* <<http://www.dnzb.govt/dnzb/>> 28 July 2004.

²⁸ V O'Malley, *The Crown and Te Arawa, circa 1840–1910*, Report commissioned by the Whakarewarewa Forest Trust, Rotorua, 1995, 248.

surveyed and put through the court. At once trouble and confusion arose. Men of no standing in the tribe began to lease or sell without the knowledge or consent of the acknowledged leaders of the people. The result was, that at subsequent sittings of the Court no lands were allowed to be put through. Then the tribe complained to the Government, and asked that their lands should be entirely tied up, so that in future no sales or lease could take place. The Government did this, but at the same time land buyers and surveyors were sent into the district on Government account, and commenced leasing, selling, and surveying on all sides.

Te Arawa authority over the lakes was acknowledged by Parliament in the Thermal Springs Districts Act 1881.²⁹ The basis of that legislation was “the Fenton Agreement”. Chief Judge Fenton had been called upon by the ministers of the Crown to negotiate with Te Arawa hapu to obtain government control of land at Rotorua for a township, despite opposition from iwi leaders to alienation.³⁰ Fenton signed the agreement on behalf of the Crown. Having achieved the Crown’s objectives in writing, his position as Chief Judge ensured the land a clear passage through the Native Land Court.³¹ The Fenton Agreement was the catalyst for

²⁹ The Thermal Springs Districts Act 1881 provided for the settlement and establishment of Rotorua township. It was enacted in response to Te Arawa refusal to sell land considered favourable for tourism. Section 5 of the Act states:

As soon as may be after the issue of an proclamation under this Act, and after the land has passed through the Native Land Court, the Governor may make arrangements with the Native proprietors for rendering available the territory of the district for settlement by Europeans, and he may from time to time exercise any of the powers following within the district:

(a) Treat and agree for the gratuitous cession or for the purchase, or for the lease of any land which he deems necessary for the purposes of this Act, and enter into any contract which he thinks fit; ...Treat (c) and agree with the Native proprietors for the use and enjoyment by the public of all mineral or other springs, *lakes*, rivers, and waters; (emphasis added).

³⁰ DV Williams, *Te Kooti Tango Whenua – The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999, 239.

³¹ In reaching the agreement the Crown’s negotiators openly recognised Te Arawa’s ownership of the lakes and the land. As far as Te Arawa was concerned their contract was now complete. They had agreed to allow part of their land to be opened up for settlement and had made a considerable area available as public reserves. These were, in effect, gifts from the owners to those who would ultimately settle there. There was also an essential aspect in the gifting of these reserves, that the township would become more desirable to would-be investors, thus ensuring the best possible prices for the land and leases. The owners waited with confidence on the understanding that government would handle all matters

individualising land in the area and set the tone for the Crown assuming greater ownership of lands within Arawa territory.

During the late 19th century, the Crown began to assume greater rights in the lakes, which Te Arawa viewed as a breach of te Tiriti guarantees and earlier recognition of Te Arawa ownership. The concern of Te Arawa and other iwi at the Crown's encroaching entitlements over several North Island lakes is recorded by the Waitangi Tribunal:³²

Generally the law was the instrument used by the Crown to assert control and in many cases the ownership of New Zealand's waterways. From the mid nineteenth century it is apparent that the Crown was attempting to establish itself as the owner of New Zealand waterways. In pursuing this policy a pattern is apparent. English common law presumptions were asserted insofar as they could be relied upon to secure rights for the Crown.

This assumed ownership was illustrated by the Government's efforts to promote tourism through the introduction of trout which had a significant impact on the customary fisheries of Te Arawa. The Rotorua region is an attractive hunting ground for sportsmen and in 1883 rainbow trout were introduced to the lakes in an attempt to attract more visitors. By 1889 brown trout had also been put into the lakes. The trout destroyed most of the indigenous fish that lived there and "in an indirect way sparked off a prolonged court case to determine the ownership of the beds of the lakes."³³

related to leasing and that in due course they, as owners, would reap the benefits of regular rentals. The Crown breached the Agreement by failing to maintain responsibility for the leasing scheme and by disposing of the gifted reserves. These breaches later formed the basis of a claim to the Waitangi Tribunal by Ngati Whakaue. See *Ngati Whakaue Endowment Lands Claim – WAI 94* settled in 1993. In similar fashion, Te Arawa was denied ownership of their lakes.

³² B White, *Theme Report Q Inland Waterways: Lakes*, Waitangi Tribunal, Wellington, 95.

³³ See *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. Also see D Stafford, *The Romantic Past of Rotorua*, AW and AH Reed, Wellington, 1976, 44. The case arose out of a number of Te Arawa receiving convictions for fishing without a licence. On each occasion the offenders argued that it was their customary right as owners of the lakes. In addition they claimed that Te Arawa never agreed to the introduction of the trout which had destroyed the indigenous species Te Arawa would traditionally have caught.

In 1908 submissions were made to the Stout-Ngata Native Land Commission by Te Arawa, stating that:³⁴

Te Arawa had come to regard the Thermal Springs Districts Act 1881 as the ‘Magna Charta’ of their liberties; the Act assumed in us a right to the properties enumerated, for which the Government had to treat with us, and that clearly included the Rotorua lakes.

It was further contended that lakes were within the ambit of properties guaranteed to Māori under te Tiriti/the Treaty. The memorandum appealed for Te Arawa to be able to take any fish from the lakes for food, as of right. The commission’s recommendations were reflected in the Native Land Amendment Bill 1908³⁵ which allowed Te Arawa 20 fishing licences at a cost of 5 shillings each. The Crown’s resolution was not acceptable and Te Arawa set about obtaining due recognition for the “ownership” of their lakes and fisheries.

The Native Land Court Inquiry

Around 1910 an application was made to the NLC for an investigation of title to the Rotorua lakes.³⁶ From the outset the application was met with Crown resistance; the first blow struck when the Chief Surveyor refused outright to supply the necessary plans. In response, Te Arawa (on advice from Ngata) requested the matter be shifted to the Supreme Court. Around the same time a plea was made on Te Arawa’s behalf to the English Attorney-General to intervene and support the rights assured by te Tiriti/the Treaty. The Attorney-General’s reply indicated that there could be no intervention in a matter that was to come before the Privy Council.³⁷ Commentators have since concluded that no evidence has been uncovered as to what Privy Council case the Attorney-General’s office was referring to and in White’s words “it remains a mystery”.³⁸

³⁴ “Te Arawa Memorandum on general matters affecting the Arawa Tribe for the information and consideration of the Native Land Commission, now sitting at Rotorua” [1908] AJHR 5.

³⁵ The fishing licences were not provided for in the statute. The Fisheries Amendment Act 1908 was enacted specifically for this purpose.

³⁶ Manutu Māori, *History of the Rotorua Lakes Settlement and resource materials*, Manutu Māori Research Unit, Wellington, 1990, 13.

³⁷ Letter from the English Attorney General’s office to the Government dated 21 July 1911.

³⁸ *White*, supra n32 at 108.

The proceedings filed with the Supreme Court were shifted³⁹ to the Court of Appeal and became known as the *Tamihana Korokai* case.⁴⁰ The Court of Appeal unanimously rejected the Crown contention that the lake bed was Crown land. It held that the plaintiff had a right to go to the NLC to have the title investigated, and that the NLC could only be prevented from performing its duty under the Native Land Act, on proof that the lands were freed by proclamation or otherwise from the customary title or where there was a Crown title to the land. Following the *Tamihana Korokai* decision a second application was lodged with the NLC. It was not, however, until 1918 that the hearing began. The delay was a consequence of both the First World War and, according to White, an instruction to the Lands Department to not furnish the Court with the necessary information.⁴¹

Ngati Pikiiao Lakes Ownership

During the NLC inquiries, evidence was given by various hapu members to prove Ngati Pikiiao's ownership stakes in Lake Rotoiti. The evidence submitted comprised description of various land marks and pou (stakes) that delineated the hapu divisions and ownership of the lake according to tikanga Maori.⁴² But the language used to describe the incidents of title was framed in terms of English legal concepts. Tiera Tikao described the divisions between the different groups with rights in Rotoiti stressing that divisions were "owned exclusively by each hapu" and that, "unless by special permission," one hapu could not fish on the grounds of another. All the points he mentioned were on the lake shore; the dividing boundaries extend from the midpoint of the lake to the shoreline.⁴³

Our elders have always told us that the tauas of both sides [of the lake] only went as far as the middle of the lake and no further. If it is found by one party that the other party's nets or tauas go over the centre of the lake there are objections made.

Tikao went on to recount how a battle had been fought in defence of a fishing ground on a sand bar, and that two men had been killed as a

³⁹ The significance of the outcome and its likely further application in other areas of Aotearoa/New Zealand rendered the case important enough to be moved to the Court of Appeal.

⁴⁰ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321.

⁴¹ *White*, supra n32 at 10.

⁴² *Ibid* at 96.

⁴³ *Ibid*.

consequence. Hapu were allowed to travel over parts of the lake belonging to other hapu, so long as they were not fishing or exploiting other resources. However, it would appear that such concession depended upon the hapu concerned being at peace with each other. Further, groups from other iwi would be prevented from travelling on the lake unless they had a valid reason to be there – such as travelling to a tangi or hui – “if they came for no reason at all of course it would be assumed that they came to claim the lake”.⁴⁴ These points reiterate the exclusive nature of the entitlements held by Te Arawa hapu to the lakes.

In 1918 the status of the lands abutting Lake Rotoiti was clearly in Pikiāo ownership; the titles to all blocks in the immediate vicinity of Rotoiti having been awarded to hapu of Ngati Pikiāo by the NLC.⁴⁵ This evidence would have strengthened their iwi claim to title in the lakes had the inquiry continued. Although the Crown continued to search for evidence to limit iwi claims, White remarks that “Salmond’s search for evidence of ‘limited rights’ had been in vain”.

The Outcome of the Native Land Court Investigation

Te Arawa was well positioned to prove they held ownership in the lakes. White suggests that the strength of their evidence was unmatched by any other tribe.⁴⁶

The conception that Te Arawa had of themselves as being the owners of the lakes – informed largely by the existence of clearly demarcated areas of the lake and that particular hapu had the exclusive rights to fish in these divisions – is somewhat unusual in the context of other lakes in New Zealand. In the course of the present author’s research pertaining to the North Island lakes, no evidence of such clearly defined open water boundaries has been uncovered. Similarly in the case of other lakes, no evidence appears to exist of punitive action being taken against people taking fish who did not have the right to do so.

Unfortunately the inquiry was stopped before the Court decided on the Arawa evidence. The hearing ceased when Judge Wilson died in November 1918 during the flu epidemic. Although a replacement

⁴⁴ Ibid.

⁴⁵ Minutes of the Rotorua Lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake, cl 174, Native Affairs, Wellington, 1918, 137.

⁴⁶ White, *supra* n32 at 119.

appointment was made in early 1920 the Crown was hesitant to resume the inquiry. Additional pressure was put on the Government from the Department of Tourist and Health Resorts and the Department of Lands. In a letter of complaint to the Crown Law Office, Richard Knight from the Department of Lands counselled that every effort should be made to close the matter “while the conditions were favourable”.⁴⁷ The Crown’s indecisiveness is illustrated in the letter:

It’s all very fine for your Chief to say don’t do this or that. Any one could say as much. Why doesn’t he tell us exactly what to do? Apparently he is relying upon tiring the Natives out and so disheartening them with delay and expenses that they will at length chuck up the sponge. He seems to be trying to bluff them that he has a royal flush. Suppose they see him? What then! That *de novo* stunt of his is staggering – what about us poor blighters having to go through this again.

The Solicitor General responded with a letter advising that the litigation should be substituted with a political outcome as opposed to a judicial one:⁴⁸

It is advisable that the continuance of this litigation be put to an end if possible by some settlement with the Natives. I think it is probable that the final result of the litigation will be the making of freehold orders by the Native Land Court giving them title to these lakes as being Native freehold land. As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.

Shortly after, government officials were appointed to meet with Earl, the solicitor acting for Te Arawa in the investigations, “and his dingbats to finally and formally dispose of the affair”.⁴⁹ The proposal was presented at a series of hui in which the Crown promoted settlement as being the

⁴⁷ Letter from R Knight of the Lands Department at Auckland to J Prenderville, dated 21 October 1919, cl 174/2, Native Affairs, Wellington, cited in *White*, supra n32 at 116.

⁴⁸ Letter from Solicitor General to Under-Secretary of Lands, dated 29 April 1920, clo Opinions, Vol 7, LINZ, cited in *White*, supra n32 at 117.

⁴⁹ Knight to Prenderville, 21 May 1920, cited in *White*, ibid at 117.

only way out. To support their position officials stated that even if the Court found in Arawa's favour the lakes could still be taken by proclamation.⁵⁰ They also reminded Te Arawa that "the Government had a long purse but it wished to save the Maoris any further expense by coming to some mutually agreeable settlement."⁵¹

Ngati Pikiāo opposed a Te Arawa wide settlement and sought to have their claim settled separately. When they were refused one of the chiefs questioned how it was that the Crown had accepted a gift of land for a scenic reserve from Ngati Pikiāo without the consent of the whole of Te Arawa, but could not treat separately with Ngati Pikiāo in about their lakes? The Government officials reiterated the government call for "one settlement" while also repeating the "cost of litigation" factor. Unsurprisingly, in an official letter Bell described Ngati Pikiāo as "the bad eggs of the Arawas," and "the mob who joined the Hauhaus in 1866." In the same document, he recounted how Earl had said "that they were fools not to come in with the others and that he would have nothing more to do with them if they did not amend their ways."⁵² Because the Crown would not shift from their "one settlement" policy, Earl, on behalf of Ngati Pikiāo, tried to secure a higher amount whereby the money could be distributed by the Te Arawa wide body that was to be formed as part of the agreement, to aggrieved hapu. However, Tania Thompson makes the point that without any titles to the lakes there would be little basis for a fair distribution of any funds.⁵³ The Crown rejected Earl's endeavour concluding that an amount had been set and this was to remain unaltered.

So in a sad twist of events Te Arawa, including Ngati Pikiāo, abandoned the opportunity to have their "day in court" and instead agreed to

⁵⁰ A number of parallels can be drawn with the current Government's response to the *Ngati Apa Attorney-General v Ngati Apa* [2003] 3 NZLR 643 decision over the foreshore and seabed. Numerous hui, submissions, hikoī and a Waitangi Tribunal Report have been unsuccessful in stopping the enactment of the Foreshore and Seabed Act 2004 which vests ownership of the foreshore in the Crown with the potential for Maori to gain minimal entitlements if they can satisfy a series of onerous tests and if the Crown agrees. On these grounds one might rightfully conclude that history is repeating itself, this time at a national level.

⁵¹ Notes of meeting, 31 January 1921, 226 box 5B, LINZ Wellington, cited in *White*, supra n32 at 120.

⁵² Knight to Prenderville, 9 February 1921, cl 196/72, NA Wellington, cited in *White*, *ibid*.

⁵³ T Thompson, *Interim Report: Rotorua Lakes Research*, A Report commissioned for the legal firm of O'Sullivan, Clemens, Briscoe and Hughes, 1993, 19.

negotiate with the Crown.⁵⁴ In essence this agreement was a last ditch attempt by Te Arawa to seek some form of recognition for their traditional relationship with their lakes. There is no doubt that the financial strain of continuing litigation contributed to this decision. Even so, several individuals sold their land interests to fund Arawa's accumulated legal expenses.

The 1922 Lakes Agreement

In 1922, a battle-weary Te Arawa reached a forced agreement with the Crown that pre-empted the NLC making a decision about ownership of the lakes. This agreement was enshrined in the Native Land Amendment and Native Land Claims Adjustment Act 1922. Under the Act the Crown was deemed to own the 14 lakes⁵⁵ to which it applied.

The Te Arawa Maori Trust Board ("the Board") was established by statute. The Board received a fixed annuity of £6000 from the Crown and from 1922.⁵⁶



Lake Rotoiti

Source: Department of Conservation

Although the Board's legislative function was to administer the lakes annuity, consistent with its role of kaitiaki of Arawa iwi interests, it became a one stop shop for Te Arawa's social, economic, cultural and political activities. Over the years its services have included a wide range of activities covering welfare grants, education, training, farming and property investment in response to developing iwi interests and needs. Payments for tangihanga and expenses incurred in the fulfilment of other iwi related obligations have also been covered.⁵⁷ During the early days the annuity could be spread across a wide range of iwi activities. However, no adjustment for

⁵⁴ Whether Te Arawa would have had a positive Court decision legislated over is conjecture, but many Te Arawa feared such an outcome.

⁵⁵ The lakes covered by the 1922 Act are Rotoehu, Rotoma, Rotoiti, Rotorua, Okataina, Okareka, Rerewhakaaitu, Tarawera, Rotomahana, Tikitapu (the Blue Lake), Ngahewa, Tutaeinanga, Opouri/Ngapouri, and Okaro/Ngakaro.

⁵⁶ The Te Arawa Maori Trust Board was established to manage the annuity on the tribe's behalf.

⁵⁷ Personal communication with Arapeta Tahana, past Chairman of the Te Arawa Māori Trust Board, on 14 August 2004.

inflation has ever been made to the annuity, although in 1977 it was increased to \$18,000 per year. Therefore, over time Board funding of iwi activities has reduced significantly.

The Board was also responsible for distributing fishing licences to each of the hapu representatives or elected fishermen. By statute the Board received 40 trout licenses for a nominal fee and the rights to take indigenous fish were preserved. A special board to control and administer Lake Rotokakahi (the Green Lake) was also established. Throughout the 1918 NLC inquiry into the ownership of the Rotorua lakes, witnesses appearing in support of the Te Arawa application repeatedly stressed the economic significance of the lakes to Te Arawa. Captain Gilbert Mair, a Pakeha who had lived amongst Te Arawa for most of his adult life, informed the Court “that birds and rats aside, the Rotorua district is sterile country that is unsuitable for cropping and therefore fishing was of the utmost importance to Te Arawa.”⁵⁸ This importance extended beyond mere subsistence to include a trade economy. Fish and koura were bartered with iwi from other districts. In reaching an agreement in 1922, Te Arawa were adamant that their fishing rights were upheld.

Dissatisfaction with the 1922 Agreement

The 1922 agreement never sat comfortably with Te Arawa and remained a point of contention for the tribe particularly in relation to the annuity which was never adjusted according to inflation. Te Arawa were aggrieved that their control over tourism on the lakes had been wiped out. This dissatisfaction formed the basis of a Waitangi Tribunal claim.⁵⁹ In 1987, the Board lodged a claim before the Waitangi Tribunal and began discussions with the Crown on the settlement of the lakes. No progress was made until the Government agreed in 1997 to allow resolution of the Te Arawa lakes claim to be separated from other claims of Te Arawa before the Tribunal. Given that the grievances were relatively clear and the evidence of injustices claimed recorded in Government documents, a decision was made to bypass the Tribunal hearing process and enter into direct negotiations with the Crown. The Board's Deed of Mandate to negotiate a settlement for the lakes claim on behalf of all Te Arawa was recognised by the Government in December 1998.

⁵⁸ *Thompson*, supra n53 at 33.

⁵⁹ *Te Arawa Lakes Claim – WAI 240*. This claim, once lodged went straight to direct negotiation with the Crown.

Crown Recognition of Te Arawa Lakes Ownership 2004

The Crown offer was accepted in principle by Te Arawa iwi negotiators and is reflected in the Te Arawa Lakes Historical Claims and Remaining Annuity Issues (hereafter called “the Deed”) signed on 15th October 2004. Te Arawa has ratified the Deed through a series of hui (meetings) and postal ballots. The Te Arawa Lakes Settlement Bill is currently before the Select Committee who are scheduled to report back in August 2006. The Lakes Settlement process is scheduled for completion by December 2006. The key elements of the Bill include:⁶⁰

1. Formal apology from the Crown;
2. Title to the lake beds;
3. Financial redress package;
4. Statutory embodiment of Rotorua Lakes Strategy Group;⁶¹ and
5. Cultural redress package acknowledging Te Arawa's cultural, historical and traditional associations with the lakes.⁶²

The transfer of the title of the lakebed will be subject to the preservation of the rights of existing users such as public, commercial and any other third parties.⁶³ Under the Bill some elements of the 1922 agreement between the Crown and Te Arawa will continue. These include provision to purchase 200 fishing licenses annually, the right to take indigenous fish which includes koura and provision for Te Arawa to manage the customary and non-commercial fishing,⁶⁴ and the preservation of burial

⁶⁰ *Deed of Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues*, 15 October 2004.

⁶¹ The Rotorua Lakes Strategy Group will comprise two members each from Te Arawa Governance Entity, Rotorua District Council (RDC) and Environment Bay of Plenty (EBOP). Te Arawa negotiators initially sought 50% representation on this Group but neither RDC nor EBOP would agree to a 25% representation. Various other agencies such as Department of Conservation and Eastern Fish and Game Council are also involved in the management of the lakes. Te Arawa remains a minority decision-maker .

⁶² This will include the provision for the Governance Entity to manage customary and non-commercial fishing of certain species in the Te Arawa Lakes, amendment of place names, and access to paru and other indigenous plants.

⁶³ The Deed lists motorised and non-motorised watercraft operation, aircraft and hovercraft operation, organised sporting and recreation events, guided and scenic tours, training and educational activities, scientific research, water take and control, nature conservation, vegetation control and maintenance, and works for avoidance of flooding as existing types of commercial activities. See Te Arawa Lakes Deed of Settlement: Cultural Redress Schedule Part 1: Subpart C: Existing Types of Commercial Activities, 74.

⁶⁴ *Deed of Settlement*, supra n60 at 58.

grounds and the administration of Lake Rotokakahi (the Green Lake) will continue to be carried out by a special board.

Clearly the Crown offer entails a commitment to uphold the right of Te Arawa to take indigenous fish which includes the koura. However, the extent of this right is limited to customary and non commercial taking by Te Arawa for individual and customary consumption. The Bill also allows for Te Arawa to manage the customary and non-commercial fisheries (with the exception of trout) in their rohe, similar to the rights set out under the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

No rights⁶⁵ are created by the Bill in respect of commercial fisheries nor does the Bill affect:⁶⁶

1. the deed of settlement between Māori and the Crown dated 23 September 1992 in relation to Māori fishing claims;
2. the Treaty of Waitangi (Fisheries Claims) Settlement Act; or
3. the Maori Fisheries Act or the operation of, or distributions under, the Te Wai Maori Trust established under section 92.

Although, under the Bill, Te Arawa can recommend to the Minister that fishing of certain species (such as koura) be allowed,⁶⁷ any such fishing will still be administered by the Minister of Fisheries pursuant to the Fisheries Act 1996.⁶⁸ It is unclear in the Bill whether commercial fishing could proceed without Te Arawa recommending that particular species. Consent must be obtained from Te Arawa for any new commercial activity. Although the rights of commercial parties are to be protected under the Bill, these rights extend only to existing companies such as launch operators. It is unlikely that Te Arawa would have a right to veto commercial fishing which remains unaffected by the Bill administered under the Fisheries Act 1996.⁶⁹ However, under the Bill, Te Arawa can advise the Minister “on the conditions that should be imposed, including as to season, methods and areas.”⁷⁰

⁶⁵ Ibid at 37.

⁶⁶ Ibid at 14.

⁶⁷ Ibid.

⁶⁸ Ibid clause 11.21 at 58.

⁶⁹ Ibid.

⁷⁰ Ibid at clause 11.23.

Conclusions on Te Arawa Lakes Ownership

There is no doubt that Ngati Pikiāo and other Te Arawa hapu hold a strong affinity with our lakes. Historically, we vehemently guarded and executed tino rangatiratanga over the lakes and its fisheries. This is well recorded in korero tawhito (oral history), Land Court minutes and government documents. Even with the loss of ownership after the 1922 Agreement, Te Arawa maintained this affinity and continued to exercise their role as kaitiaki.⁷¹

The foregoing analysis illustrates that lake ownership of Te Arawa iwi according to customary law and independently, according to tikanga, is clearly made out.⁷² Additionally though, Maori customary law incorporates the right to develop and this should extend to commercialisation of the resources that are owned.

CONCLUSION

The Ngati Pikiāo/Te Arawa relationship with our lakes is defined by tikanga. To this day this relationship remains an integral part of Te Arawa identity. This article has shown that there is a continuing tension between legal principles introduced by Pakeha and tikanga as practiced by Te Arawa in relation to their lakes. That the legal system falls short of giving true consideration to tikanga values and principles was evident during the drawn out proceedings to determine lake ownership in the 1900's. These misgivings, combined with government eagerness to establish a tourist destination and the negative attitude of Crown officials, contributed to the eventual transfer of lakes ownership to the Crown.

⁷¹ Te Arawa exercise their role as kaitiaki through the practice of rahui, promoting customary practice in relation to taking koura, actively opposing resource consents that are likely to have detrimental effects on the lakes, maintaining relationships with key agencies (ie. Department of Conservation) and generally looking after the lakes.

⁷² The Government does not acknowledge this overtly in the Deed, which states: "Nothing in this Deed: extinguishes any aboriginal title, or customary rights, that Te Arawa may have; is, or implies, an acknowledgement by the Crown that any aboriginal title, or any customary right, exists," *Deed of Settlement*, supra n60 at 14.

Despite the loss of legal ownership, Te Arawa continue to carry out our kaitiakitanga obligations and to acknowledge our whakapapa connection to the lakes. With the return of the lakes, Te Arawa looks forward to exercising rangatiratanga over the lakes in a more effective manner. It will be interesting to see whether the legal recognition given to tikanga under the Te Arawa Settlement Act enables Te Arawa to truly give effect to their rangatiratanga.