

# INDIGENOUS CHALLENGES TO ENHANCE FRESHWATER GOVERNANCE AND MANAGEMENT IN AOTEAROA NEW ZEALAND – THE WAIKATO RIVER SETTLEMENT

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## INTRODUCTION

Co-management of environmental resources is an idea that has been developing for some time in Aotearoa New Zealand as a strategy that recognises indigenous interests in the environment, and the different ways that people view the world. The contest for control of New Zealand's rivers has generally arisen from successive governments purporting to secure rights based upon English common law. Precepts of that law were completely foreign to the indigenous Māori who had their own conceptions of rivers. Through the eyes of the Māori, rivers have their own life force, their own spiritual energy and their own powerful identities. Rivers are inextricably linked to tribal identities. Over time a raft of policies were employed and legislation passed by parliament in the name of development and the national interest which did not take into account Māori understandings of the river and its ecosystems, nor their rights, interests, or authority. Excluded from decision-making processes, Māori have long brought matters to the attention of courts by using any basis to assert our rights and interests, and to have our concerns about the deteriorating health and wellbeing of our rivers taken seriously. The search for redress has been relentless. The Resource Management Act 1991 formalised a range of legal rights, but such rights can be meaningless if presented as just one of many other considerations that decision makers have to take into account. This article explores the notion of collaborative management and the development of co-management models as a background to the emergent Waikato River settlement – a legal solution embedded in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 that generates a more robust opportunity to bring to an end a paradigm of exclusion and usher in a new era that promises enhanced governance and management of a significant waterway.

## WAIKATO RIVER – AN ANCESTOR AND A WAY OF LIFE

*Ko au te awa, ko te awa ko au  
I am the river and the river is me*

Before we became more commonly known as Māori, the indigenous peoples of Aotearoa New Zealand were identified by tribal and sub-tribal affiliations. Although each tribal group maintained its own traditions, all are inextricably bound to the environment, including in particular waterways, by virtue of whakapapa (genealogy) which derives from the creation stories of human-

kind in Māori cosmology. We see ourselves as direct descendants of our earth mother and sky father and consequently not only 'of the land' but 'as the land'. The above saying – *ko au te awa, ko te awa ko au* – comes from the peoples of the Whanganui River on the west coast of New Zealand's North Island. It speaks to this interconnectedness that lies at the heart of the way many Māori view the world and our waterways.

At the heart of this article is the Waikato River, New Zealand's longest. It winds its way northwards for approximately 425 km from its volcanic mountain source in the centre of the North Island, through the spirited waters of the Huka Falls, and out to the Tasman Sea at Te Puuaha o Waikato, south of Auckland. In 1859 Austrian geologist, Dr von Hochstetter, spent three months in New Zealand and recorded the following impression:

[T]he sight of the majestic stream is truly grand. It is only with the Danube or the Rhine that I can compare the mighty river, which we had just entered. The Waikato is the principal river of the North Island. Both as to the length of its course, and quantity of water it surpassed all the others ... Its sources spring from the very core of the land; its waters roll through the most fertile and most beautiful fields, populated by numerous and most powerful tribes of the natives, who have taken their name from it; and no second river of New Zealand has such as importance, as the grand thoroughfare for the interior of the country. The Waikato is in truth the main artery of the North Island.<sup>1</sup>

The personification of the natural world is a fundamental feature of Māori tradition. The Waikato River is conceptualised as a living ancestor by the Waikato-Tainui peoples and is recognised as having its own mauri (life force) and spiritual integrity. The river's very origins are said to contain the life-giving water sent by one ancestral mountain, Tongariro, to heal another, the maiden Taupiri. According to later oral histories, there were a number of names ascribed to the river by early Māori navigators for its fast current and for its sheer length. The name that has become embedded was that ascribed by the captain of the Tainui canoe, Hoturoa, who observed the lively waters chopping against the side of his canoe, and named the waters Waikato. Naming traditions are important in Māori culture as means of clarifying identity and evidence of mana (authority) over a resource.

<sup>1</sup> F von Hochstetter *New Zealand: its Physical Geography, Geology and Natural History* (J G Cotta Stuttgart 1867) 294–5, cited in A Parsonson 'Waikato River Claim Report' (A confidential working document to assist the negotiating team following the 1995 Settlement).

The tribal groups that affiliate to the Waikato-Tainui confederation descend from Hoturoa. Hoturoa's people moved inland from the final resting place of the Tainui canoe in Kawhia on the west coast of the North Island in the fourteenth century and settled along the banks of the Waikato River. The river provided sustenance and a transport network for the nearby villages. In the words of the late Dr Michael King:

More than any others in New Zealand, the tribes of the Waikato Valley are a river people. Five centuries of continuous occupation of its banks have embedded the river deep into the group and individual consciousness. The river's associations grew and ripened with the history of the inhabitants until memories of heroes and villains, of battles, significant journeys and natural disasters, of settlements erected and destroyed – all became part of the river's story, all were commemorated in names and features along its banks. The life of the river became inseparable from the life of the people, and each took the name of the other.<sup>2</sup>

The characteristics of the people and the river were captured in proverbial sayings such as the following famous example which pays tribute to the strong leadership in those many communities. The reference to taniwha (guardians) which show themselves when signposts of a supernatural order are needed also alludes to the metaphysical nature of the river.

*Waikato taniwharau!*  
*He piko he taniwha, he piko he taniwha*  
*Waikato of a Hundred Taniwha!*  
*At every bend, a chief, at every bend a chief*

Over generations the Waikato-Tainui people developed tikanga (laws and practices) which reflect a profound respect for the Waikato River and the life within. Tikanga related to the blessing of children, of cleansing and of healing. The river's healing powers are reflected in the words of the late Te Kaapo Clark, respected Tainui elder:

Spiritually the Waikato River is constant, enduring and perpetual. It brings us peace in times of stress, relieves us from illness and pain, cleanses and purifies our bodies and souls from the many problems that surround us ...<sup>3</sup>

Tikanga also recognised that if the people care for the river, the river will continue to sustain them. Swampy lowlands and the river provided flax for weaving and water fowl and eels for food.<sup>4</sup> In the mid nineteenth century, the river and its tributaries were famous for an abundance of eel. Hochstetter recorded that on their travels through these waterways, his party noticed 'numerous eel traps, in which the natives are said to catch sometimes in one night more than a thousand eels'.<sup>5</sup> According to oral histories, when spearing eels little ones were thrown back. Food was not eaten right by the river, but taken home to eat. Elderly tribal

members recall being taught not to be greedy, to take only enough food for a meal and not to mistreat the river. The late Rua Cooper, a well known elder of the Waikato-Tainui peoples, was taught not to spear eels when they were feeding:

The eels are long and ... have paused enmasse in the water to gorge themselves. We were taught by our elders that when we saw the frothy water, we were to separate ourselves from that place so that we did not spear the eels busily eating ... We must look further out (closer to the banks) and catch enough for all of the people/tribe.<sup>6</sup>

These understandings of the river and its ecosystems, and the peoples' rights, interests and authority were neglected over many decades of rapid change. Mining, farming and hydro-electricity development contributed to the economic growth of New Zealand but they have also taken their toll on the health and wellbeing of the river. As a result of commercial fishing, the introduction of predatory fish, hydro-electric dams disturbing migration and the inability to survive industrial pollution, river iwi (tribes) are simply unable to gather important food species from a river once teeming with life. Apart from the tangible loss of food sources, this also means that knowledge about species and fishing practices has not been passed down to the next generations. This in turn results in a loss of connection between youth and the elders who possessed such knowledge and a loss to our language as names of different species, and different stages of their life-cycles, are no longer spoken.

## A PARADIGM OF EXCLUSION BEGINS

It is little wonder, given Hochstetter's description of the Waikato region, that the contest for land became a crucial issue in the 1850s as the British settlers' demand for land grew. The tikanga and authority of the Waikato-Tainui peoples over their lands and waterways came to be ignored as if they had never existed as the settler government calculated ways to appease the settlers.

The Māori King Movement, or Kīngitanga, was established during that time, largely as a unified response by a number of tribes to the upsurge of unauthorised land sales for the ever-growing number of settlers.<sup>7</sup> Paramount chief Pōtatau Te Wherowhero of Waikato was raised up as Māori King in 1858 following years of debates conducted throughout Aotearoa as to who should be offered the kingship. Pōtatau was soon succeeded by his son, Tāwhiao. It was during Tāwhiao's term as king that the settler government, seeing the Kīngitanga as a threat to its stability, sent its military forces into the Waikato heartland, labelling the Waikato people as rebels and subsequently confiscating Waikato lands. By Orders in Council under the New Zealand Settlements Act 1863 the Crown unjustly confiscated approximately 1.2 million acres of land in the Waikato area.

2 M King *Te Pua: A Biography* (Hodder & Stoughton Auckland 1977) 50.

3 Statement of Evidence of Te Kaapo Clark of Ngāti Korokī Kahukura, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996.

4 Te Kaapo Clark, L Tairi *Te Ihingarangi: A History of the Karapiro-Maungatautari Area* (Electricity Corporation of New Zealand Hamilton NZ 1992).

5 Hochstetter (n 1) 298–309.

6 Oral history recorded by broadcaster Haare Williams in 1991 and translated by Ngahina Te Uira; cited in Parsonson (n 1) 28.

7 See M King *The Penguin History of New Zealand* (Penguin Books Auckland NZ 2003) ch 15; see also <http://www.teara.govt.nz> for historical accounts of the King Movement.

Thus began a 'paradigm of exclusion'.<sup>8</sup> Following confiscation, the Waikato people were driven away from their villages alongside their ancestral river. The indigenous systems of law and government based on tikanga that had existed and operated prior to colonisation were decimated by those imposed by the incoming British.

Successive governments purported to secure rights for the Crown based upon English common law. That law presumed that the Crown owned the beds of tidal rivers as arms of the sea, and that the owners of lands with river frontage owned the beds of non-tidal rivers to the rivers' centre lines.<sup>9</sup> Such distinctions were completely foreign to Māori who had their own conceptions of rivers. Through Māori eyes, rivers are generally seen as whole and indivisible entities, not separated into beds, banks and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, the river is a living being, an ancestor with its own life force, authority and prestige, and sacredness. Over many years, however, a raft of policies was employed and legislation passed in the name of 'development' and the 'national interest' which did not align with this world view and which were imposed without consultation or recognition of prior rights. In most cases such development was detrimental to Māori interests and to the health and wellbeing of waterways, resulting in the degradation of rivers such as the Waikato, and in irreversible consequences – not only for the physical landscape, but conceptions of identity as well.<sup>10</sup>

Following the confiscations in the Waikato the Crown assumed control of the Waikato River. A host of different authorities came to have jurisdiction over the river.<sup>11</sup> From the 1870s wetlands were drained.<sup>12</sup> The river's banks were planted with non-native trees such as willows which rapidly choked its streams. Its waters were polluted by sewage, farm run-off, extensive coal mining and other industrial discharges. Thermal stations were built by the river at Meremere and Huntly. The upper reaches of the river were dammed in the 1900s to produce hydro-electric power, inundating significant sites and causing ongoing problems with unstable flow regimes. Waikato-Tainui were excluded from decision-making.

8 I have borrowed this expression from the work of Dr Kepa Morgan. See for example 'Exploring Knowledge System Synergies for Integrated Decision Making' (2009) 12 *Journal of Australian Indigenous Issues* 299.

9 See in particular the Whanganui River Report (Wai 167) 1999; see also *Muellar v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA) in respect of the Waikato River.

10 L Te Aho 'Contemporary Issues in Māori Law and Society: The Tangled Web of Treaty Settlements Emissions Trading, Central North Island Forests, and the Waikato River' (2008) 16 *Waikato Law Review* 229, 243–5.

11 Early examples include river boards with powers to control rivers under the River Boards Act 1884 and catchment boards established under the Soil Conservation and Rivers Control Act 1941.

12 The Land Drainage Act 1893 enabled wetlands to be drained for agricultural and pastoral production and the Public Works Amendment Act 1889 vested powers in river boards to declare rivers and streams public drains.

13 P Kapua 'Review of the Role of Māori under the Resource Management Act 1991' [2007] *Resource Management Theory and Practice* 92, 106–8.

The Resource Management Act 1991 (the RMA) provided some hope that things might change. A number of sections in the RMA seemed to provide for Māori interests and Māori expected to be key participants in resource management processes. However, the reality has not been positive for Māori who have lacked political weight.<sup>13</sup>

The potential of the RMA was echoed during the Crown's consultation process with Māori on the Sustainable Water Programme of Action in 2005.<sup>14</sup>

Māori (particularly in the context of the RMA) shouldn't be seen as anti-development, or as problematic but we are kaitiaki – to protect the whenua, the awa and sacred sites and this is affirmed in Te Tiriti o Waitangi. As we move forward, we must be in partnership. Any water programme of action must see water as a taonga in the context of the Treaty and this benefits all of us, not just Māori. The [Resource Management Act] seemed to set us apart as world leaders in this area, let's not let that go. Don't just consult with us; allow us to participate. Don't let Māori be relegated to a second tier level of consultation when Māori are the Treaty partner.

While central government is responsible for setting national environmental standards and national policy statements, day to day control is delegated to regional government and territorial authorities (regional and local councils). Regional councils have significant duties regarding water.<sup>15</sup> During the 2005 consultation process, many Māori criticised regional and local councils for the cumulative debilitating effects on waterways resulting from the granting of resource consents over many years. The use of non-notified application processes by such councils had excluded Māori participation in resource management processes. Councils, it was also said, were too heavily influenced by strong and wealthy applicants such as electricity generation companies and the strong farming lobby groups and this has ultimately led to too much emphasis on *mitigating* and *remedying* damage rather than *avoiding* it.<sup>16</sup> Ultimately, Māori sought strong legislative direction from central government and urged it to direct local councils to engage more effectively with them. Calls were made for proactive restoration and protection of the freshwater resource as well as education programmes aimed at encouraging New Zealanders to value water more. The co-management solution currently being shaped in relation to the Waikato River and other recent freshwater policy developments encompass many of these suggestions. However, these shifts have not come without challenge.

14 For more details about Māori responses to Crown's Sustainable Water Programme of Action see L Te Aho 'Contemporary Issues in Māori Law and Society' (2005) 13 *Waikato Law Review* 145, 158–63. See also *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, published by the Ministry for the Environment at the conclusion of the consultation process. The report is available at <http://www.mfe.govt.nz/okt>

15 See Jacinta Ruru's article which sets out in more detail the provisions of the RMA 1991 and the duties of regional councils and local authorities.

16 Resource Management Act 1991 s 5(2)(c).

## A LONG SEARCH FOR REDRESS

The Waikato River settlement follows an intergenerational mission to have the deeply held grievances of confiscation addressed. In 1884, the second Māori King, Tāwhiao, sailed to England in the hope that a meeting 'monarch to monarch' with Queen Victoria might prove fruitful. The King and his entourage did not gain an audience with the Queen. Thirty years later, Tāwhiao's grandson and fourth Māori King, Te Rata, travelled again to England to present another petition to the British Crown asking for the restoration of confiscated lands. King Te Rata set sail in 1914 and whilst he was eventually received by King George V and Queen Mary, the British Government maintained its position that Māori must look to the New Zealand settler government for the redress of grievances.<sup>17</sup> In 1927, a Commission of Inquiry found that forcing Waikato Māori into the position of rebels and then afterwards confiscating their lands was a grave injustice. Negotiations for appropriate redress ensued for some 18 years. In 1946, during the reign of King Koroki, the fifth Māori King, the Tainui Māori Trust Board was established to receive monetary redress. However, a widespread desire for the return of land remained – an issue that would not be resolved until 1995.

The Waitangi Tribunal was established in 1975 and Waikato-Tainui lodged claims. Under the Tribunal's process, any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Tribunal.<sup>18</sup> The Treaty of Waitangi guarantees in the Māori text 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' and in the English text 'the 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'. The Tribunal decides whether the claim is well founded and reports its findings.<sup>19</sup> It cannot resolve or settle claims – it can only make recommendations. Where a claimant group lodges a claim with the Tribunal and is able to satisfy the Crown that it is the correct claimant group to make a claim, the Crown may agree to negotiate directly with the claimants to achieve settlement.

Claims concerning water resources were the first to be heard by the Waitangi Tribunal.<sup>20</sup> In an early report the Tribunal upheld claims that the Crown's failure to properly control discharge of sewage and industrial waste onto or near significant traditional fishing grounds and reefs, and the ensuing pollution of the fishing grounds, were inconsistent with the principles of the Treaty of Waitangi.<sup>21</sup> The Tribunal affirmed that the

Treaty obliges the Crown to protect Māori people in the use of their fishing grounds to the fullest extent practicable, and to protect them especially from the consequences of the settlement and development of the land. This protection would involve at one level the physical protection of the fishing grounds from abuse and deterioration as a result of pollution or destruction. At another level the protection envisaged by the Treaty involves recognising the rangatiratanga (sovereignty) of the Māori people to both the use and the control of their fishing grounds in accordance with their own traditional culture and customs and any necessary modern extensions of them.

In a later report the Waitangi Tribunal turned its attention to the question of whether iwi in the Whanganui River had been extinguished, and if so, whether that had been done in accordance with the principles of the Treaty. The Tribunal found that as at 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi (the iwi) as a taonga (treasured thing) of central significance. The Tribunal also found that the extinguishments of the iwi's river interests arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi. Based on these findings, the Tribunal recommended that the Crown negotiate with the iwi having regard to two proposals; first, that the river in its entirety be vested in an ancestor or ancestors of the iwi. Any resource consent application in respect of the river would require the approval of the iwi. An amendment to the regional plan relating to the river would be needed. The second option was for the iwi entity to be added as a 'consent authority' in terms of the RMA to act with the current consenting authority. Both would need to consent to any application for the consent to be exercised. Although Whanganui's claims in relation to their ancestral river remain unsettled, many of the points raised in the Tribunal's report, and those in the earlier Motunui-Waitara Report, have become important precursors to the settlement in relation to the Waikato River.

## CO-MANAGEMENT OF ENVIRONMENTAL RESOURCES

*Me ka moemoea au, ko au anake, me ka moemoea tatou, ka taea e tatou*

*If I were to dream alone, only I would benefit, if we were to dream together we can achieve anything*

Te Puea<sup>22</sup>

The early Waitangi Tribunal Reports concerning water resources highlighted the importance of Māori participation in decisions that affect the resources they consider to be taonga. The Tribunal laid the foundation for the notion of co-management of environmental resources which has been developing for some time in Aotearoa New Zealand as a strategy that recognises indigenous interests in the environment and the different ways that people view the world. Co-management involves a negotiated arrangement by well-defined and identifiable Māori groups and Crown agencies, regional councils and/or local councils.

<sup>22</sup> Te Puea Herangi was the granddaughter of second Māori King, Tāwhiao and known for prophetic sayings.

<sup>17</sup> *Te Kingitanga: The People of the Māori King Movement from The Dictionary of New Zealand Biography* (Auckland University Press Auckland 1996) Te Rata, 103.

<sup>18</sup> Treaty of Waitangi Act 1975 s 6.

<sup>19</sup> *ibid* s 13. See also G Melvin *The Claims Process of the Waitangi Tribunal: Information for Claimants* (Waitangi Tribunal Wellington 2001); Waitangi Tribunal 'Guide to Practice and Procedure' (2000).

<sup>20</sup> Waitangi Tribunal 'Manukau Harbour Report' (Wai 8) 1985. See also 'Kaituna River Report' (Wai 4) 1984.

<sup>21</sup> Waitangi Tribunal 'Motunui-Waitara Report' (Wai 6) 1983.

In 1998, leading Māori commentator Sir Mason Durie considered a future beyond Treaty of Waitangi claims.<sup>23</sup> He saw then the potential for collaborative management of environmental resources as a means of forging relationships to facilitate positive Māori development, and of adopting 'politics of inclusion', rather than continuing to exclude many Māori from the wealth of the nation. According to Durie, 'developing a spirit of co-operation and mutual regard, rather than perpetuating conflict and collision, is the challenge'.<sup>24</sup> The joint management arrangement between the hapū (sub-tribe), Ngāti Whatua o Orākei, and the Auckland City Council is a pre-eminent example. Under s 8 of the Orākei Act 1991, almost fifty acres of land was set aside as a Māori reservation 'for the common use and benefit of the members of the hapū and the citizens of the City of Auckland'. The reservation comprises the Takaparawhau and Okahu Parks and part of the foreshore.<sup>25</sup> The fee simple title to the land is registered in favour of the Ngāti Whatua o Orākei Māori Trust Board. The reservation is jointly administered by the hapū and the Auckland City Council through a body known as the Orākei Reserves Board, which comprises three representatives of the Ngāti Whatua o Orākei Māori Trust Board and three representatives from Auckland City Council. By statute, the land is managed, financed and developed at the expense of the Auckland City Council in view of the land, including foreshore, being kept for public as well as hapū enjoyment. The chairperson (and the casting vote) is reserved for a Ngāti Whatua representative in recognition of the hapū's title and mana whenua (authority over the land).

This arrangement did not come about easily. Like many other settlements of this kind it was born of conflict and collision. Following a government announcement of a housing development destined for their ancestral lands, tribal members and supporters of Ngāti Whatua o Orākei refused to leave those lands for 506 days – the longest and perhaps most famous of protest actions in New Zealand history. On 25 May 1978, the government sent in a massive force of police and army personnel to evict them. Hundreds of protesters were arrested and their temporary buildings and gardens were demolished. A young tribal member lost her life during the ordeal. Ten years later the Waitangi Tribunal supported the hapū's claims to the land. In the words of the late Sir Hugh Kawharu, the inaugural Chairperson of the Orākei Reserves Board:<sup>26</sup>

... from the trauma and the ashes the Crown restored title to Orākei's 150 acre 'Whenua Rangatira' ... The arrangement has worked successfully and without untoward incident since its inception in 1992 ... It is a benign but

efficient regime; and here at least the mana of Ngāti Whatua stands tall, intact and protected ... [P]ublic access to the foreshore of Okahu Bay has been unrestricted from the day title returned to Ngāti Whatua.

The Ngāti Whatua o Orākei experience predates the amendments made to the RMA in 2005 that included new sections to explicitly provide for joint management agreements (JMAs).<sup>27</sup> The new sections provide a new framework for public authorities, iwi authorities and groups that represent sub-tribes to enter into JMAs concerning natural or physical resources. The framework is aimed at developing and encouraging collaborative projects between councils and Māori. There are a growing number of successful joint management models operating where title to resources such as lakebeds and the foreshore may be vested in Māori groups and there is joint management and protection of public use rights.

An excellent example is the JMA signed between Taupō District Council and Ngāti Tāwharetoa in 2008.<sup>28</sup> The purpose of the JMA is to provide the basis to develop and confirm a relationship and understanding between the parties with regard to the administration of the RMA in relation to multiply owned Māori land within the traditional rohe (territory) of the Ngāti Tāwharetoa iwi within the Taupo District. The RMA provides a basis for councils and iwi to jointly perform or exercise a local authority's functions, powers, or duties under that Act relating to a natural or physical resource. The JMA specifies those functions, powers and duties; the relevant area within the district; the scope of those specified duties; and how the parties are to make decisions. This JMA is notable as it represents the first time a New Zealand local authority has transferred powers to an iwi.

An example of co-management for the purpose of restoring freshwater lakes can be seen in the nearby Te Arawa-Rotorua Lakes Restoration Programme which has emerged following a long history of challenge by the Te Arawa iwi to freshwater governance and management.<sup>29</sup> The purpose of the programme is to protect and preserve 12 large lakes in the Rotorua area and to maintain or improve their water quality. A working group was initially formed in 1998 to identify and address the problems arising from a lack of coordination between the many groups with interests in managing the lakes, and then to consider how the law and those concerned could work together to solve problems effectively and efficiently. The Te Arawa Lakes Settlement Act 2006 makes permanent a Lakes Strategy Group comprising the regional and district councils together with the tribal confederation of Te Arawa as

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23 M Durie 'Beyond Treaty of Waitangi Claims: The Politics of Positive Development' in A Mikaere, S Milroy (eds) *Ki te Ao Marama – Tenth Anniversary Hui-a-tau 1998 Conference Proceedings* (University of Waikato Hamilton 1998) 11.

24 *ibid* 18.

25 I H Kawharu 'Orākei' in M Belgrave, M Kawharu, D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press Melbourne 2004) 158.

26 As quoted by Pat Sneddon in 'Rangitiratanga and Generosity: Making the Connections' (Speech to the Philanthropy New Zealand Conference 2004).

27 Resource Management Act 1991 ss 36B, D and E.

28 See <http://www.taupodc.govt.nz> for further information about the JMA.

29 See <http://www.ots.govt.nz> for further information about the settlement. See also T Taiepa 'Collaborative Management: Enhancing Maori Participation in the Management of Natural Resources' in T P Hauora (ed) *Proceedings of Te Oru Rangahau Māori Research and Development Conference* (School of Māori Studies Massey University Palmerston North 2008) for details of a management strategy for Lake Horowhenua between the Muaupoko Tribe, the Manawatu-Whanganui Regional Council, the Department of Conservation and the Horowhenua District Council.

of right. The group's vision is for the lakes and their catchments to be preserved and protected for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes. The Crown is named as the owner of 'Crown stratum', the space occupied by water and the space occupied by air above each lake bed, and funds 50 per cent of the \$200 million project which is set to run over 20 years. The Te Arawa Lakes Trust represents the iwi of Te Arawa who has mana whenua as the owner of the lake beds and provides cultural advice on all aspects pertaining to the lakes.

## THE WAIKATO RIVER SETTLEMENT

The Ngāti Whatua o Orākei and Ngāti Tāwharetoa joint management models each operate between one defined tribal group and one council. The Te Arawa example is slightly more complicated in that it involves two councils and a relatively large tribal confederation which in turn comprises diverse, although related, tribes and sub-tribes. The co-management solution in relation to the Waikato River is bolder and more far-reaching still. It provides an opportunity to bring to an end a paradigm of exclusion and usher in a new era that promises enhanced governance and management of this 'majestic stream'.

In the changing legal and political landscape of New Zealand, Waikato-Tainui have long maintained the importance of their unique relationship with the river, and the need to respect the river's mana and restore its wellbeing. Sir Robert Te Kotahi Mahuta continued to lead the search for redress from the 1970s, appealing to the courts against the granting of water rights, and in the 1980s fighting to protect Waikato-Tainui's rights and interests against a political background of privatisation of assets including environmental resources.<sup>30</sup>

Sustained efforts of generations of leaders culminated in an opportunity for Waikato-Tainui to resolve their grievances by negotiating directly with the Crown, rather than via the Waitangi Tribunal. The Waikato Raupatu Claims Settlement Act 1995 incorporates an apology by the Crown to Waikato for the Crown's breach of the Treaty of Waitangi in its dealings with the Kīngitanga and Waikato. At the heart of the settlement was the return of lands. The claim in relation to the Waikato River was excluded for future consideration.

By Deed of Settlement dated 22 August 2008, the Crown and Waikato-Tainui reached a settlement which focused upon restoring and protecting the health and wellbeing of the Waikato River and ushered in a new era of co-management. In the Deed of Settlement the Crown accepts that it failed to respect, provide for and protect the special relationship Waikato-Tainui have with the river as their ancestor; and accepts responsibility for the degradation of the river that has occurred while the Crown has had authority over the river. A revised Deed of Settlement was signed in December

<sup>30</sup> For example, see *Tainui Māori Trust Board v AG* [1989] 2 NZLR 513 (CA).

2009 aimed at streamlining the co-management arrangements. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (the Act) completes the settlement.

The two founding pillars of the settlement are preserved in the Act. Te Mana o Te Awa recognises that to Waikato-Tainui, the Waikato River is 'a tupuna (ancestor) which has mana (prestige) and in turn represents the mana and mauri (life force) of the tribe'. Mana whakahaere embodies 'the authority that Waikato-Tainui and other river tribes have established in respect of the Waikato River over many generations, to exercise control, access to and management of the Waikato River and its resources in accordance with tikanga (values, ethics and norms of conduct'. For Waikato-Tainui, mana whakahaere has long been exercised under the mana of the Kīngitanga.

According to the preamble, Waikato-Tainui have proclaimed their authority over the Waikato River ever since they first became concerned that the Crown might itself claim authority over it. For example, when Waikato-Tainui learned of the Governor's intentions to put an iron steamer on the river in 1862, the editor of the tribal newspaper expressed opposition and warned the gunboat not to enter the river without permission. He declared 'E hara a Waikato awa i a te kuini, erangi no nga Māori anake' (The Waikato River does not belong to the Queen of England, it belongs only to Māori). Even so, a notable feature of the settlement is that it is not about ownership.<sup>31</sup> Its overarching purpose is to restore and protect the health and wellbeing of the Waikato River for future generations,<sup>32</sup> and it focuses instead on the notion of co-management across a range of agencies and a unity of commitment to achieve this.

The settlement centres around a vision and strategy, Te Ture Whaimana o Te Awa o Waikato, which is set out in full in Schedule 2 of the Act and which was developed following public consultation. The shared vision begins with an excerpt from an ancient lament by King Tāwhiao, second Māori King:<sup>33</sup>

*Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri  
The river of life, each curve more beautiful than the last*

It continues as follows:

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

<sup>31</sup> Issues of ownership, including ownership of the water resource itself, is being contested by Waikato-Tainui and other tribes via an 'Iwi Leaders Forum', made up of some of the more powerful tribal groups. That process and the implementation of the Waikato River Settlement are taking place in the context of wider environmental policy changes including the establishment of a Land and Water Forum and Environmental Protection Authority.

<sup>32</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 s 3.

<sup>33</sup> See C Kirkwood *Tawhiao: King or Prophet* (MAI Systems Huntly NZ 2000) for the full text of the lament and the accompanying interpretation in English by Ngahina Te Uira.

Resource management issues are an integral part of the Waikato River settlement. For example, in order to realise the vision a number of objectives are listed. They include 'the integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River' and 'the adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River ...'.<sup>34</sup> To achieve the vision, twelve strategies will be followed. The first two strategies are to ensure that the highest level of recognition is given to the restoration and protection of the Waikato River, and to establish what the current health status of the river is by utilising matauranga Māori (traditional Māori knowledge and knowledge systems) and the latest available scientific methods. This second strategy is already underway. The Waikato River Independent Scoping Study is being undertaken to identify restoration scenarios for the Waikato River, the costs and benefits of these scenarios and priority actions.<sup>35</sup>

Under s 5 of the Act the vision and strategy is to be the primary direction setting document for the Waikato River and activities within its catchment affecting the river. It prevails over certain sections of the RMA and over national policy statements. There are a host of provisions which stipulate that decision makers under statutes such as the Conservation Act 1987 and the National Parks Act 1980 will be required to give effect to the vision and strategy. Decision makers under other statutes including the Fisheries Act 1996 and the Local Government Act 2002 will be required to have particular regard to the vision and strategy.

The Act is also notable in that it includes provisions for co-governance as well as co-management. Governance functions relating to the Waikato River are to be carried out by the Waikato River Authority, made up of equal numbers of Crown and iwi appointed members, which includes some of the other iwi with interests along the river. The Waikato River Authority is responsible for monitoring and implementing the vision and strategy and will also administer a contestable clean-up fund for restoring and protecting the health and wellbeing of the river.<sup>36</sup>

Iwi appointed commissioners are to participate in hearing committees and boards of inquiry in respect of applications for resource consents for activities which include taking, using, damming or diverting water in the Waikato River, and point source-discharges to the river.<sup>37</sup>

At a co-management level, JMAs are required between Waikato-Tainui and the regional council and between Waikato-Tainui and relevant local councils for specified functions under the RMA insofar as those functions relate to the Waikato River and activities

within its catchment.<sup>38</sup> On 23 March 2010, Waikato-Tainui and the Waikato District Council signed a JMA. The agreement is the first JMA to come from the Waikato River settlement and in a joint media release was hailed as establishing a 'positive, co-operative and enduring relationship between the two parties'.<sup>39</sup>

As well, certain customary activities are recognised<sup>40</sup> and provision is made to vest certain sites of significance in Waikato-Tainui, and for Waikato-Tainui to participate in the co-management of Crown-owned river related lands.<sup>41</sup>

How might the new administrative arrangements and policy objectives operate in a practical context? Over time, changes to more intensive land uses have increased the amount of nutrients entering the river from the vast tracts of agricultural land, the municipalities and the industries within its catchment. High nutrient concentrations contribute to problems with excessive growth of algae which can be unsightly and damage the ecosystems of streams and shallow lakes. The direct discharge of human waste to water is culturally offensive to Māori. Without wanting to preempt the findings of the Waikato River Independent Scoping Study and the review of the vision and strategy that will follow, the management and reduction of nutrient sources from human activities is likely to feature strongly in both documents. There have been significant improvements to the waste treatment systems of municipalities and industries. To be fair also, much is already being done by landowners to protect the river by fencing streams and removing stock from wetlands and lake margins, and by riparian planting. Unfortunately, these efforts have not been enough to counter increases in nutrient leaching from farmland. The obvious restoration actions of riparian planting and fencing streams are therefore likely to be highly prioritised by the new Waikato River Authority when making decisions on allocating the publicly contestable clean-up fund. The Authority may also explore ways of assisting research and development of low nitrogen leaching land uses, ways to permanently reduce nitrogen outputs from farming, and more modern treatment systems for nutrient removal. Given the significant contribution that dairy farming makes to the economic wealth of both the country and the region, for short-term political reasons regional councils have refrained from compelling changes to farming practices. However, assuming stronger provisions in the vision and strategy, the regional council will be legally required to give effect to those provisions in their policies and plans which could, in turn, lead to caps on nitrogen outputs from land in the catchment, forcing reductions in stock or changes to land use (eg from pasture to trees). Policies and plan provisions that require land-based disposal of sewage would help to meet Māori aspirations.

34 Waikato-Tainui Rauapatu Claims (Waikato River) Settlement Act sched 2(1) (3)(e) and (f).

35 See <http://www.river.org.nz> for reports relating to the Waikato River Independent Scoping Study.

36 Sections 22–24.

37 Sections 25–31.

38 Sections 35–55.

39 See <http://www.tainui.org.nz>.

40 These include the use of traditional whitebait stands and eel weirs and the right to continue traditional ceremonies: ss 56–63.

41 Sections 64–80.

## A WORK IN PROGRESS

The Waikato-Tainui settlement is intended to be innovative and bold and the notion of co-management is being promoted as an exemplar to be applied to other catchments in the country, and to other resources such as the volcanic cones of the largest city, Auckland, and to National Parks. It is not surprising then that this model has come under early scrutiny. There are some who are deeply concerned about whether co-management can ever truly work in New Zealand when there is such an imbalance of power and resourcing and when the Crown partner is the ultimate decision maker.<sup>42</sup>

All settlements are negotiated compromises. I have written elsewhere about tensions and conflicts that arise as a result of the Crown's Treaty settlement policies by which the Crown unilaterally determines who it will engage with ('recognised river iwi') and who it will not engage with in relation to the Waikato River, thus perpetuating a paradigm of exclusion for some river iwi and creating new grievances.<sup>43</sup>

The politics around the hurried finalisation of the Act that occurred in the context of settling other river iwi claims has resulted in its failure to provide for equitable proportional representation on the Waikato River Authority based on population and extent of tribal rohe. Despite its leadership in bringing the settlement to fruition, Waikato-Tainui may only appoint one member to the Waikato River Authority. Waikato-Tainui's representation on the co-governance entity has dwindled through various versions of the settlement from four representatives, to two representatives, and now to one, as a result of other river iwi calling for 'equity'. Equity does not necessarily mean equality, and as the legislation currently stands, it is

inequitable for the many thousands of Waikato-Tainui beneficiaries.

The Waikato River settlement, whilst ground-breaking, requires further review in order that these important issues might be addressed.

## CONCLUSION

The co-management solution being developed in relation to the Waikato River demonstrates how far New Zealand has progressed as a nation in dealing with some very complex issues around environmental management and, more recently, environmental governance. In the eyes and hearts of Waikato-Tainui, the Waikato River is an ancestral river and they have long sought to be included in decision-making processes that affect the river so that their values and ways of viewing the world are afforded priority. Despite expectations that the RMA would provide opportunities for this to occur, the interpretation and application of that Act has seen those values and views being outweighed by other, often economic, considerations. The enactment of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 demonstrates the power of law to entrench an innovative and sophisticated co-management model in relation to New Zealand's longest river. Although the Act represents a negotiated compromise, and although that compromise has been a painful process, rather than perpetuating decades of conflict and collision, co-management provides an opportunity to bring to an end a 'paradigm of exclusion' through the development of a spirit of co-operation and mutual regard towards a single purpose, to restore and protect the health and well-being of the Waikato River for future generations.

42 Indigenous Peoples' Legal Water Forum, Wellington 2009, questions and comments by Sacha McMeeking and Moana Jackson during the forum at which the writer delivered a presentation entitled 'Negotiating Co-Management of the Waikato River'.

43 Te Aho (n 10) 243-5; and see A Mikaere 'Treaty Settlements: Full and Final or Fatally Flawed?' (1997) 17 New Zealand Universities Law Review 425, 455. See also the work of Marama Muru-Lanning who analyses competing discourses and ongoing local struggles for prestige and mana.