

Indigenous Peoples' Legal Water Forum, July 2009

Negotiating co-management of the Waikato River

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This paper focuses upon the co-management solution being developed as part of the Waikato River Settlement. It will address the three aspects of its title: negotiating; co-management; and the Waikato River. But first, a song:

“kei te matakitaki te ao katoa, mēnā ko koe te tangata...”

“the world is watching with interest, to see how well you perform this role...”

The Māori lyrics are taken from a song by illustrious composers Ngāpo and Pimia Wehi in honour of King Tūheita who was raised up as Māori King in August 2006. King Tūheita's ascension followed the passing of his mother, Te Arikinui Dame Te Atairangikaahu, who had reigned as Māori Queen for many years and who had become highly regarded and much loved across cultures. The Waikato River settlement and the co-management solution which focuses upon restoring and protecting the health and wellbeing of the Waikato River are under similar scrutiny. In earlier presentations at the Water Forum, Tom Bennion spoke of his excitement about the settlement which seemed to be groundbreaking, but noted his disappointment about the language in one of the strategies around thresholds for water quality. Sacha McMeeking was cautious about the co-management solution being promoted as the “Rolls Royce” of co-management models on the basis that any New Zealand model would be constrained by other legislation. Moana Jackson questioned whether co-management is an appropriate starting point for discussions when one ‘partner’ has a neo-liberal policy. One question from the floor asked whether co-management can ever work when there is such an imbalance of power and resourcing, and when one partner is the ultimate decision-maker. In contrast, at another conference Guy Salmon, a participant at the Water Forum and a member of a review panel convened by the incoming National Government, publicly promoted the co-management model (as modified by recommendations made during the review) as one which ought to be applied to all catchments in the country.²

This paper is not intended to promote the co-management solution as a precedent to be imposed upon other iwi. It is offered in the spirit of sharing information about an innovative and bold settlement.

Waikato – He Tupuna Awa

For Waikato-Tainui the Waikato River is an ancestor and a way of life. Its spiritual dimension is captured in the words of respected elder Koroneihana Cooper at a tikanga symposium hosted by Waikato University School of Law:

¹ Waikato-Tainui and Ngāti Korokī Kahukura. Although appointed by Waikato-Tainui as a member of the Guardians Establishment Committee (GEC) under the Waikato River Settlement, this paper represents the writer's own personal views. I cannot speak on behalf of the GEC.

² Environmental Defence Society *Reform in Paradise* Conference, Auckland June 2009.

[H]ow do we feel about the Waikato awa? Waikato is living to us, we talk to the river, and we greet the river... we go there we have a karakia, and still to this day we ask that those taniwha look after us. Those who are not familiar with our language would not really appreciate our relationship with our ancestral river. [Translation]

The nature of the special relationship between the Waikato people and their ancestral river is further reflected in the following statement by the late Te Kaapo Clark, another highly 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...³

Kei whea te tuna? Where is the eel?

In addition to its spiritual dimension, the river was also a food basket for the Waikato-Tainui peoples. Most Waikato-Tainui children raised in our native language will know the following nursery rhyme:

Kei whea te tuna? Kei roto i te awa	Where is the eel? It is in the river
Kei whea te tuna? Kei roto i te hīnaki	Where is the eel? It is in the eel trap
Kei whea te tuna? Kei runga i te tēpu	Where is the eel? It is on the table
Kei whea te tuna? Kei roto i te puku!	Where is the eel? It is in the stomach!

The question posed by the children is a good one. Where are the eels? As a result of commercial fishing; the introduction of predatory fish; hydro-electric dams disturbing migration; and the inability of eels to survive the pollution of industries who have treated the river as a drain for far too long, many of the river iwi are now unable to source eels from the river. Apart from the tangible loss of a food source, other consequences include a loss of transmission of knowledge about species and fishing practices which have not been passed down, a loss of connection between youth and elders who possessed such knowledge, and a loss of vocabulary.

Western scientists confirm what Waikato-Tainui has known for decades. The work of Associate Professor Brendan Hicks of the University of Waikato, for instance, makes plain that there is a desperate need for 'high quality management' in relation to the Waikato River. His work over many years has shown that the multi-stranded ecosystem of the Waikato River has been highly modified, fish migrations have been disrupted, eels have been overfished, deforestation and land use intensification has degraded water quality, and pest fish have invaded the river, its lakes, and its tributaries.⁴ The consequences have been devastating on the life force of the river.

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 Associate Professor, Dr Brendan Hicks, *Waikato River*, Presentation made to University of Waikato Kīngitanga Day Seminars, April 2009.

Negotiating

The degradation that has occurred while the Crown has had authority over the River is one example of the many grievances that have arisen as a result of the widespread confiscation of Waikato lands in the 1860s, the driving of people away from their villages alongside their ancestral river, and the Crown's admitted failure to respect, provide for and protect the special relationship Waikato-Tainui have with the river as their ancestor. Historian, Ann Parsonson, identified that, for Waikato-Tainui, one of the greatest impacts of the raupatu (confiscations) in respect of the River has been the removal of their capacity to protect the River in the decades of rapid change that followed. Their authority and their tikanga were ignored, as if they had not existed for hundreds of years. As mining, farming, sewage disposal and hydro-electricity development took their toll on the health of the river, Waikato-Tainui were not consulted.⁵

These grievances have been the subject of negotiations between Waikato-Tainui and the Crown for almost all of the 150 years since the Kīngitanga was established with the raising up of King Pōtatau in the late 1850s.⁶ Pōtatau's son Tāwhiao became the second Māori King and he set sail in 1884 for England in the hope that a meeting 'monarch to monarch' with Queen Victoria might assist in having the deeply held grievances of raupatu addressed. The King and his entourage were not able to gain an audience with the Queen. Thirty years later in 1914, Tāwhiao's grandson and fourth Māori King, King Te Rata, also sailed to England in the hope of presenting a petition to the British Crown asking for the restoration of confiscated lands. Whilst he was eventually received by King George V and Queen Mary the British Government declined to entertain any discussions about grievances and directed Māori to look the New Zealand settler government for the redress of their grievances. It was during fifth Māori King, King Korokī's reign in 1946 that the Tainui Māori Trust Board was established and received 10,000 pounds as redress for the grave injustices of confiscation. Still, a widespread desire for the return of land remained. In 1995, Te Arikiniui, Dame Te Atairangikaahu signed one of the first major land settlements worth some \$170 million. The river claim was excluded and set aside for future negotiation, and on 22 August 2008, the Waikato River settlement was signed between Waikato-Tainui and the Crown in the presence of King Tūheita in relation to the Waikato River. The settlement has taken five generations to achieve. It is a story of patience and determination – and one of incremental progress.

This Waikato River settlement was reached via direct negotiations with the Crown.⁷ The major advantage of direct negotiations is that it is usually a speedier and less expensive process for claimants compared with that of the Waitangi Tribunal. The direct negotiations process has, however, a number of serious shortcomings. The Crown's marked advantage in terms of bargaining power means that it unilaterally decides the conditions of negotiation and claimants are expected to negotiate within those conditions if they want their claim resolved. Another disadvantage when compared with the Tribunal process is that anonymous Government officials rather than

⁵ Ann Parsonson, *Waikato River Claim Report* (A confidential working document to assist the negotiating team following the 1995 Settlement) Executive Summary 5.

⁶ For a full background to these claims see David McCan *Whatiwhatihoe* (2001).

⁷ For a more detailed explanations of Waitangi Tribunal claims settlement processes, and a fuller discussion of many of the issues raised in this paper, see Linda Te Aho, "Contemporary Issues" (2006) 14 *Waikato Law Review* 102; and (2008) *Waikato Law Review* 229 .

independent Tribunal officers make decisions about settlement. Waikato-Tainui mandated co-negotiators Tukororangi Morgan and Lady Raiha Mahuta to engage with Crown Ministers. A large technical team led by Denese Henare and Donna Flavell conducted negotiations with officials. This team had closely examined other models of joint management in New Zealand such as the Ngāti Whatua o Orakei model in respect of Okahu Bay; the Hauraki Gulf Forum; and the Guardians of Fiordland. Members of the team also travelled overseas to examine different models. Negotiations were protracted and, at times, gruelling. The negotiation team felt the burden of having to constantly come up with creative ideas in order to work within and around the principles that the Crown was willing to engage on. As former Crown Minister, David Parker, noted during discussion at the Water Forum, the Crown negotiators also faced the difficult task of convincing Cabinet to re-examine boundaries for the negotiations in order to keep the negotiations on foot. The outcome is a negotiated compromise. To the credit of the negotiators on both sides, the settlement deals with some very hard issues. The Waikato River is some 425km long. Unlike other joint management or co-governance models in New Zealand, this settlement encompasses several iwi and several local and regional authorities. For the first time in this country the settlement will attempt integrated management of a whole catchment. It aims to deal with the impacts of hydro-electric dams, and land-use, a particularly complex and sensitive issue in the rich and fertile farmlands of the Waikato.

An interesting point to note about this settlement is that unofficially, the Crown has also set a limit on the overall amount it is willing to spend on settling Treaty claims (the “fiscal envelope”) and early settlements such as the Waikato Raupatu and Ngāi Tahu settlements serve as benchmarks. While this settlement arises as a result of raupatu (confiscation), it is not technically called a Treaty settlement and in order to avoid impacting upon the Crown’s fiscal envelope.

Another notable feature of the settlement is that it is not about ownership. A number of speakers at the Water Forum talked about rights and ownership. In the context of the Waikato River negotiations, the Crown insisted that any vesting of ancestral title in the rivers would be restricted to parts of the riverbed. Because of privately owned land rights to the bed, the Crown claims not to have continuous title to the riverbed and therefore adopts the position that it cannot offer continuous title. As to ownership of the water, the Crown maintains that it does not own the water. Rather, it has authority and control over the river which is delegated to local authorities. For these reasons, past settlements such as that enshrined in the Te Arawa Lakes Settlement Act 2006, include the transfer of the lakebeds, but not the freshwater resource. In 2009 a forum convened by iwi, including Waikato-Tainui, is currently proposing a national meeting for all Māori to come together to discuss issues of rights, ownership and the inevitability of privatization of water.

Co-Management

With the Crown not prepared to engage on the issue of ownership of water, principal negotiator in the 1990s, the late Sir Robert Mahuta reminded Waikato–Tainui that we did not need the Crown to tell us that we own the water. In any event, what use is ownership or rights if the resource is completely polluted or gone? With ownership assumed, the settlement focuses upon the notion of co-management across a range of agencies and a unity of commitment to focus on the health and wellbeing of the Waikato River for future generations. Waikato-Tainui felt strongly that it was necessary to bring together Māori knowledge systems and western science to measure, monitor,

and restore the health and wellbeing of the river; and to co-operate with Local and Regional authorities; for the Crown to take responsibility for resourcing the work that needs to be done; and to garner the support of river iwi and other river communities.

The Guardians Establishment Committee – a test model for co-management

Māori did not become a key participant in resource management processes as they had expected when the Resource Management Act 1991 came into force containing statutory provisions which deal with Māori interests. So the aspiration of equal participation at all levels of decision-making is a key feature of the co-management solution as currently negotiated.

The Guardians Establishment Committee (GEC) was set up in 2008 as a result of the Agreement in Principle between Waikato-Tainui and the Crown. Initially, the GEC comprised 16 members, eight appointed by iwi, and eight appointed by the Crown. Waikato-Tainui compromised two of its members during further negotiations which saw the co-management body reduced to 12. The GEC is currently made up of six river iwi appointments and six Crown representatives and is co-chaired by Tukoroirangi Morgan who also the Chair of the executive committee of Waikato-Tainui's tribal parliament; and Gordon Blake, a farmer and the former Mayor of South Waikato District Council. Crown representatives include the current Mayors of Hamilton City and Waipā District Councils, a councillor from the regional authority Environment Waikato, and a staff member of Mighty River Power.⁸

The Deed of Settlement signed in August 2008 and the ensuing legislation centres around a Vision and a Strategy which have been developed following public consultation by the GEC. The Vision is intergenerational and sourced from a lament of second Māori King, King Tāwhiao:

Tooku awa koiora me oona pikonga he kura tangihia o te mataamuri.

The river of life, each curve more beautiful than the last.

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.

The role of the GEC is to provide to the Crown and to river iwi on the Vision and Strategy; to promote the Vision and Strategy in plans and policies affecting the Waikato River; to develop and implement education programmes in relation to the health and wellbeing of the Waikato River; to promote policies to improve the health and wellbeing of the Waikato River; and to act as the governance group for the Waikato River Independent Scoping Study (WRISS). The WRISS will identify rehabilitation priorities for the Waikato River and the likely cost of those activities. The National Institute of Water and Atmospheric Research Ltd (NIWA) is the group leading the study. It is a key feature of that study that Maturanga Māori (Māori knowledge and knowledge systems) will be included as a driving factor alongside western science. The study is to be completed by June 2010. The GEC is a forerunner to a permanent body who will be appointed in time and whose scope will apply to the Waikato River and activities in the catchments affecting the Waikato River its catchment from Taheke Hukahuka (the Huka Falls near Lake Taupō) to Te Pūaha o Waikato (the river

⁸ For more information about the GEC, see the website: www.river.org.nz.

mouth which flows into the Pacific Ocean). The name and the make-up of the permanent guardians is still subject to negotiation but will involve members appointed by Waikato-Tainui and other river iwi, and an equal number of members appointed by the Crown, one of whom will be nominated by regional authority, Environment Waikato.

The settlement as currently negotiated provides for the establishment of Statutory Boards and other entities to support the exercise of mana whakahaere (local authority and rights of control). However, a review commissioned in 2009 by the incoming National government prefers a single entity with 'teeth', such as for example the power to write National Environmental Standards. Some of the details of the co-management structure are still the subject of direct negotiations. An A3 summary of findings from the review panel is attached as an appendix.

Under the terms of the settlement the Vision for the Waikato River is intended to operate at the highest level possible to set the direction for enhancing the health and wellbeing of the river. The Vision and Strategy will be a National Policy Statement for the purposes of the Resource Management Act and a Statement of General Policy for the purposes of conservation legislation and will operate across other statutory frameworks such as fisheries frameworks. This means that local authorities will be required to give effect to the Vision and Strategy when preparing or changing plans and policy statements, to have regard to the Vision and Strategy when considering a resource consent application, and to have particular regard to the Vision and Strategy for designations and heritage orders. The Director-General of Conservation will be required to implement the Vision and Strategy when preparing Conservation Management Strategies and Plans. Other decision-makers under a range of other relevant legislation will also be required to have particular regard to the Vision and Strategy.

Other aspects of co-management include a "Kiingitanga Accord" which sets out the joint commitments of the parties to an enhanced relationship, to support integrated co-management and to protect the integrity of the settlement. The Accord includes commitments to:

- develop and agree portfolio-specific accords with the Minister of Conservation, Fisheries, Land Information, Environment, Arts, Culture and Heritage, Local Government, Agriculture, Biosecurity, Energy and with the Commissioner of Crown Lands, and
- explore accords between Waikato-Tainui and other Ministers and agencies after the deed is signed, and to support Waikato-Tainui to establish memoranda of understanding with councils and other relevant agencies.

For marginal strips and river-related Crown-owned land, the settlement provides for the Crown and Waikato-Tainui to discuss:

- the protection or gifting of sites of significance to Waikato-Tainui, and
- provisions for management or co-management of sites with Waikato-Tainui.

The settlement includes provisions for a contestable fund for restoring and protecting the health and wellbeing of the Waikato River. The Crown's initial contribution to this fund, through the Waikato-Tainui settlement, will be \$7 million per year for 30 years. This fund may need to be increased following the outcome of the WRISS currently being carried out.

Summary and Conclusion

The Water Forum was held during Māori Language week. Justice Williams who chaired the forum observed that we had come a long way in light of the very public promotion of Māori Language week: “We Love Te Reo”. The Waikato River settlement and the co-management solution being developed as part of that settlement is another illustration of how far we have come as a nation in dealing with some very complex issues that have been held in abeyance for far too long. 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 Resource Management Act would provide opportunities for this occur, the interpretation and application of that Act has seen those values and views being outweighed by other, often economic, considerations. Though the settlement is a negotiated compromise, and though 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’⁹ 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.

⁹ 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.