AN INVESTIGATION OF ALTERNATIVE DISPUTE RESOLUTION IN RESOURCE USE CONFLICT AND OPTIONS FOR THE IMPROVEMENT OF ITS USE IN RESOURCE MANAGEMENT

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ADAM SCOTT BLAIR

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ABSTRACT

For the first time, New Zealand resource management legislation has included alternative dispute resolution (A.D.R.). In this thesis A.D.R. theory, particularly mediation, is explored. Conclusions from case studies and a questionnaire are drawn on to suggest ways in which the use of A.D.R. in resource management can be improved.

The introduction explains how confrontational or adversarial modes of dispute resolution have dominated the way in which resource use conflicts have been resolved in the past. What alternative dispute resolution is, its non zero sum philosophy, and what it purports to achieve is covered. It introduces the consents process in the Resource Management Act and and discusses how effective public participation in that process is a moral necessity. Alternative dispute resolution can provide, in part, a mechanism by which effective public participation can be achieved.

Chapter one looks at the theory of alternative dispute resolution. The works of various A.D.R. theorists are drawn on to explain the advantages of alternative dispute resolution and when it will be effective. A typical mediation process is outlined, again drawing from the works of theorists. Problems associated with alternative dispute resolution are explored. Some of the mediator training and skill requirements are discussed.

Most of the case studies involve Maori cultural and spiritual values and the principles of the Treaty of Waitangi. One of the mechanisms Maori use to safe guard their interests and redress past 'injustices' is the Treaty of Waitangi and the 'principles' of the Treaty. To facilitate greater understanding of the case studies how Maori view the world, and the principles of the Treaty of Waitangi are discussed in Chapter two.

The major case study in this work, Chapter three, shows how a substantial resource use conflict involving cultural and spiritual values has been successfully resolved using Mediation. An analysis of that case study is conducted using

points drawn from Chapter one. Chapter four presents four 'minor' case studies. These detail techniques which are not strictly mediation but promote the philosophy of A.D.R.. The positive aspects and problems which were encountered in all of these studies are drawn on in the conclusion.

The results of a questionnaire focusing on the attitudes to and use of A.D.R., by planning staff, in Local Government are discussed in Chapter five. Some conclusions are drawn about the way in which the A.D.R. provisions in the Resource Management Act have been used.

The conclusion suggests: agreements between parties should include some provision for re-negotiation should unforeseen circumstances arise; some gauge of the likely reaction of political decision makers to settlements needs to be made prior to entering an A.D.R. process; A.D.R. techniques could be introduced at the beginning of the consents process rather than at its concluding stages; training in mediatory techniques for planners should be introduced at the tertiary level; A.D.R. in the planning system cannot be conducted in isolation from the judicial decision makers.

"There are no panaceas; only promising avenues to explore."

- Frank E. A. Sander

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GLOSSARY: ABBREVIATED TERMS USED IN THE TEXT.

A.D.R. = Alternative Dispute Resolution.

A.R.C. = Auckland Regional Council.

B.A.T.N.A. = Best Alternative To a Negotiated Agreement.

C.R.E.D. = Centre for Resolving Environmental Disputes.

D.O.C. = Department of Conservation.

D.S.I.R. = Department of Scientific and Industrial Research.

E.I.A. = Environmental Impact Assessment.

H.D.T. = Huakina Development Trust.

H.E.P. = Hydroelectric Power.

K.A.O.S. = Kakanui Action On Sewerage.

M.A.F. = Ministry of Agriculture and Fisheries.

M.F.E. = Ministry For the Environment.

M.H.P.S. = Manukau Harbour Protection Society.

N.Z.M.C. = New Zealand Maori Council.

O.M.C. = Oamaru Maori Committee.

P.C.F.E. = Parliamentary Commissioner For the Environment.

R.M.A. = Resource Management Act.

R.M.L.R. = Resource Management Law Reform.

T.D.C = Taupo District Council or Tauranga District Council.

U.W.W.P. = Upper Waitaki Working Party.

W.V.A.S. = Waitaki Valley Acclimatisation Society.

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INTRODUCTION

Since the late 1960's and early 1970's environmental conflict in New Zealand has had a history of bitter confrontation, expensive litigation and alienation of the people from the decision making process. The 1972 protest over the raising of Lake Manapouri for the generation of electricity is the point at which organised environmental lobbying, and its associated conflict, arrived in New Zealand:

> "The bitterly contested battle for control of that lake was the first time that an environmental issue aroused sufficient concern to divide the nation and monopolise the Columns of the media." (Wilson, 1982, 10)

Bitter confrontation resulted from disputes over power generation, mining, forestry, sea exploration for petroleum production, the Government's 'Think Big' policy and other areas (Wilson, 1982).[1]

The key phrase in the above quotation is 'bitterly contested battle'. It is argued here that environmental decision making, under the Resource Management Act, need not continue in this vein. Canada and the United States have engaged in a relatively new concept in public participation in the planning process: Alternative Dispute Resolution.[2] Indeed a whole body of theory has been developed which pinpoints those disputes which need not be fought over and litigated and shows the ways in which common ground might be reached to the benefit of all involved.

This thesis investigates how alternative dispute resolution might be used to improve the public participation provisions in the consents process developed

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[1] These conflicts have included: the raising of Lake Manapouri; the Clyde High Dam; the Wanganui Minimum Flows debate; the Pureora and Whirinaki Forests; the South Island Beech Forests; the King Country Reafforestation Proposal; the Tui Mine; the Martha Mine; Mining on the Coromandel; the Gas to Gasoline Plant at Motonui; the Smelter at Aramoana; and most recently to legislation to lower the South Island hydro storage Lakes for electricity generation.

[2] Abbreviated to A.D.R.

under the Resource Management Act. A.D.R. is not new to some areas of resource management and planning in New Zealand.[3] However it is the first time it has found specific mention in planning legislation. The theory of alternative dispute resolution, and its attendant philosophy of non confrontational settlement, are also investigated. A number of case studies detailing how alternative dispute resolution techniques have been used in New Zealand in the last five years are included. Details of some of the problems experienced in these studies are highlighted and drawn on in the conclusion. In addition a brief questionnaire was circulated to the territorial and regional planning bodies requesting information on the use of the A.D.R. section of the Resource Management Act to date and the attitudes of the respondents to the section and relevant training. This is dealt with in chapter five.

A chapter detailing Maori cultural and spiritual values and the Principles of the Treaty of Waitangi is also included. A major component of many resource use disputes in New Zealand are Maori cultural and spiritual values and the principles of the Treaty. Any investigation into the nature of disputes and their resolution should examine the role these factors play and the reasons why particular regard should be given to them. In addition many of the case studies which are to follow involve cultural and spiritual values and Treaty issues. It is intended the chapter provide some background[4] to these issues so that the conflicts are more readily understood.

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[3]See appendix A, letter from Manawatu Wanganui Regional Council.

[4]In no way should this discussion be considered a full and exhaustive exposition of cultural and spiritual values.

What is Alternative Dispute Resolution?

Alternative dispute resolution is a collective term for techniques which might be used as an alternative to litigation. In general there are two technique areas in A.D.R.: arbitration and negotiation/mediation. This thesis limits itself to the study of negotiation and mediation, and of those two, mediation bears the heavier scrutiny. Arbitration is not investigated for two reasons: 1) it has no direct reference in the Resource Management Act; and 2) it is a contrary to the win - win or non zero sum philosophy which underpins the focus of this thesis and the suggestions set out in the conclusion.

The Philosophy of Alternative Dispute Resolution: Win - Win and Non Zero Sum Settlement

Often the resolution of an environmental conflict is grounded in the concepts of winning and losing; the idea that some one must win and some one must lose in the competition for scarce resources. The need to win takes precedence over the resolution of the issue (Redman,1991). Adversarial resolution of conflicts has the goal of producing winners and losers. Alternative dispute resolution theorists reject the idea of mandatory winning and losing and focus instead on systems which produce solutions which satisfy, to the greatest extent possible, the concerns of all participants:

> "Unlike the adjudicatory process, the emphasis is not on who is right or wrong or who wins or who loses, but rather upon establishing a workable solution that meets the participant's unique needs."(Folberg et al, 1984,10)

According to Folberg et al (Ibid) A.D.R., particularly mediation, can 'educate' the participants about each others needs. It can provide a personalized model for settling future disputes. And it can show that, through cooperation, all the participants can gain. This may not mean that everybody achieves exactly what they set out to achieve. It means, instead, that the parties 'win' in terms of achieving a settlement they are all happy with. This is called a 'win - win' settlement.

Crawford (Seminar, 1992) explains that it may not be possible to achieve a win win outcome where all the parties achieve what they want in disputes that involve many parties:

> "The fact of the matter is that you can't have a negotiation in an environmental dispute, that's got sixty or eighty parties, and have a 'win - win' outcome. You can have outcomes where everybody gains, compared to what they would have achieved if they'd dropped their bottom line ... but I don't see how you can have win - win outcomes."

Perhaps more appropriately Bacow et al (1984) discuss 'win - win' in terms of 'zero sum' and 'non zero sum' games. A zero sum game results from a common misperception of the negotiation process. People think of negotiation as haggling and making gains at the expense of the other participants. What is gained, by one party, exactly offsets what is lost by another. The gains and losses add to zero. The traditional adversarial system, by its nature, tends to produce zero sum outcomes. An adjudicator will find in favour of one party or another, usually to the detriment of the losing party's interests. This result, Bacow et al argue, is not the appropriate outcome for a negotiation.

What, then, is an appropriate outcome? In a conflict where there are multiple issues the parties may be able to concede one point in return for another. To do this the parties must be able to recognise common areas of interest and areas of conflict. If the parties are astute enough they may be able to make these concessions so that what is gained exceeds what is lost. The balance is not zero - a non zero sum game.

Bacow et al (Ibid) use the example of an environmental dispute focusing on development of an area of land with environmentally sensitive areas. Environmental groups may believe some parts of the area are especially sensitive while the developers may be under pressure from their financiers to commence work. The developers could trade protection of the sensitive areas for the right to commence work on their project.

However it should be noted that A.D.R. is used to produce a result which is acceptable to the parties. It may not be the 'correct' result in terms of the law, political climate, or societal values (Dwight, 1989). Participant acceptability of a solution is the main focus of A.D.R..

Negotiation

Chart (1989) defines negotiation as a process where at least two parties discuss the settlement of "issues of concern to them." Fisher et al (1981,x1) have a slightly different definition of negotiation:

> "Negotiation is a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."

In the past negotiation has been studied through decision analysis. Decision analysis grew out of game theory. Game theory is:

> "A theory of optimal decision making in situations with two or more decision makers ('players') in which strategies have to be chosen in ignorance of the other players choices, but with knowledge of the costs and benefits ('payoffs') of alternative results. The standard practice is to select the strategy which maximises the minimum payoff, the 'maximum' strategy." (Johnston et.al,1988,168)

Decision analysis involves several steps: (1) the parties must be identified; (2) the range of choices they confront must be identified; (3) the consequences of those choices must be estimated (Bacow et al,1984).

There are limits to decision analysis. It is prescriptive, that is it identifies how people should act and not how they really behave. It is premised on rationality but people do not necessarily think or act rationally.

Mediation

The simplest way to describe mediation is as a form of negotiation which is assisted by a neutral third party (Moore, 1989). Chart (1989, 3) concurs with this definition:

> "Mediation is a process in which an impartial intermediary(ies) facilitates negotiation between disputing parties. The outcome of mediation may or may not be an (enforceable) agreement."

Mediation is a process in which the disputants take responsibility for settling the conflict rather than an outside adjudicator (Sandford, 1990).

However according to Folberg et al (1984) mediation does not have a strict definition. The issue being mediated, the mediator, the mediating parties and the setting of the mediation combine to ensure that a strict definition of mediation is case specific. However they do concede that mediation is a process that... "...transcends the content of the conflict it is intended to resolve." (Ibid, 1984, 7)

They say it is a process in which the disputing parties and the neutral mediator get together and isolate a dispute's issues, formulate options to deal with those issues, and settle on an option to which all disputing parties agree.

At this stage it might be useful to discuss the concept of neutrality as it applies to the mediator. The Concise Oxford Dictionary (1976) describes neutrality thus:

> "Not assisting either of two belligerent States, belonging to a State that thus stands aloof, exempted or excluded from hostilities, taking neither side in dispute or difference of opinions; indifferent, impartial."

Gulliver (1986, 213 - 214) however disputes the notion that the mediator can be or is a neutral third party. The mediator in interacting with the parties debases his or her neutral status and becomes a third party to the negotiation:

> "He not only affects the interaction but, at least in part, seeks and encourages an outcome that is tolerable to him in terms of his own ideas and interests."

This may be the case in terms of a mediator who has some stake in the outcome. Note however that alternative dispute resolution techniques should, in theory, produce personalized resolutions which suit the participants. The mediator's role is to ensure the parties reach this point. Mediator neutrality is linked to the concept of trust. Parties will find it easier to trust a mediator who has no stake in the outcome.

Alternative Dispute Resolution and Resource Management Law Reform.

One of the key reports in the Resource Management Law Reform (R.M.L.R.) process, 'People Environment and Decision Making' (M.F.E., 1988) was released in December 1988. In this document scarcely any mention was made of mediation and alternative dispute resolution techniques. The report said that the Government did not see the need for compulsory mediation meetings but that the provisions for pre hearing meetings would continue. This is a curious statement especially given Chart's earlier (1988) paper on mediation in R.M.L.R. (working paper number 22) which said that submissions had expressed an interest in the introduction of A.D.R. techniques at consent hearings and to a lesser degree at the Planning Tribunal stage.

Several submissions were received in response to the discussion document. Most expressed concern that mediation, particularly compulsory mediation, was not considered by government:

> "We are concerned that the resource management proposals contain no specific provision for the use of mediation as a means of bringing two parties to agreement. Environmental mediation is used in other countries, and being non confrontational, enables the parties to talk through their differences, thus avoiding expensive time - consuming litigation. The whole community benefits when people take responsibility for settling their own conflicts." (Kemp et al, 1989, 1)

"The proposal does not recommend any legislative provision for mediation, as it is considered that parties should come to agreements voluntarily. We consider that it would be appropriate for the legislation to provide for compulsory mediation. This is because parties can often reach an agreement when forced to come together, but will often initially refuse to meet if not compelled to. Mediation is a very important tool of compliance, as it can assist agreement at an early stage, avoiding the cost and complexity of taking the matter to the Planning Tribunal." (Marshall, 1989, 3)

"Currently, public participation occurs during the formal adversarial stages of resource management. Input from the public, as well as technical experts, would therefore have to be included in the mechanism for non adversarial resolution of conflicts." (Marshall, 1989, 2)

"The Government has not seen fit to legislate for compulsory mediation. Past experience has shown that the parties involved in appeals will not always mediate on a voluntary basis, especially in cases where legal and delaying tactics are being used to one parties advantage." (Tauranga City Council, 1989, 1)

However by the time the first draft of the Resource Management Bill had been released mediation had been included in both the proposals for the consents process and the appeals to the Planning Tribunal. These were Clauses 85 and 315 respectively. Clause 85 stated:

"(1) For the purpose of clarifying, mediating, or facilitating resolution of any matter or issue, a consent authority may, upon request or of its own motion, invite any one who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit.

(2) A member, delegate, or officer of the consent authority who attends a meeting under subsection (1) and who is empowered to make the decision on the application which is the subject of the meeting, shall not be disqualified from participating in the meeting if -

(a) The parties attending the meeting so agree; and
(b) The consent authority is satisfied that the person should not be so disqualified

(3)If every person attending a meeting under subsection (1) agrees, the outcome of the meeting may be reported to the consent authority, and such report shall be part of the information which the consent authority may have regard to in tits consideration of the application." (R.M.Bill, 1990)

All of these provisions, except sub clause three, survived the review process and were included as sections in the R.M. Act. In section 99 the modified subsection (3) read:

"(3) the outcome of the meeting may be reported to the consent authority, and that report -
(a) Shall be circulated to all parties before the hearing; and
(b) Shall be part of the information which the consent authority shall have regard in its consideration of the application."(R.M.A., 1991)

Clause 315 survived into the Act with very little change. It became section 268. This writer sent a request for information about the section's use to the Registrar of the Planning Tribunal Division of the Department of Justice. The Registrar replied that little use had been made of the section because of the nature of the appeals and that Commissioners had concerns about failing to reach a settlement as mediators and then having to adjudicate on the dispute.[5]

With so little information available on the use of section 268 it was decided that the thesis would be restricted in scope to the consents process up to the hearing of applications by the consent authority committees. Before progressing to the A.D.R. theory and case studies, it is useful to summarise public participation issues and the consents process that will be the backdrop to the A.D.R. process.

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[5]Appendix A contains a copy of the letter by R. N. Ogilvie

Public Participation and the Planning Process in New Zealand

Williams (1985, 68) discusses the importance of public participation to the planning process in New Zealand. There are four main reasons for the use of public participation:

> "* To give the public confidence in district scheme (plan) preparation and administration, through open government.
>
> * To educate the public in the planning process and explain planning policies and objectives.
>
> * To tap the full range of possible information before decision making.
>
> * To ensure a thorough questioning of relevant issues, information and policies."

However William's account does not illuminate the deeper social issues behind public participation. O'Riordan (1981, 13 & 263) discusses how the bureaucrat has come to discount the importance of public participation.

> " Professionalism implies specialisation and is often accompanied by a reluctance to accept the opinions of people who are regarded as uninformed. This reluctance is shared by all the 'old guard' in resource decision making. Drew (1970, 58)[6]quotes a professional lobbyist for the US canal building interests as saying
>
> > "The problem a lot of us have ... is that we're not dealing with the knowledgeable and experienced people in ecology, but the bird watchers and butterfly net people who don't want any thing changed any where, and you can't deal with them."
>
> The technocrat tends to shun the political spot light and the public forum, and seeks from public opinion only an indication of the *strength* of feeling about an issue, not free advice on techniques. (O'Riordan, 1971b)[7]

6Drew, E.B., 1970, "Dam outrage: the story of the Army Engineers" Atlantic Monthly April, 51-62

7O'Riordan, T.E., 1971b, "Public opinion and environmental quality: a reappraisal"

> "It is the alienation, they feel, that is the cause of the apathy, indifference, frustration, and discontent that have lead to the present mess of a fragmented, conflict ridden society and confrontationist politics which threaten the future of meaningful democracy. Participatory design, through workshops, taskforces, community demonstration projects, embedded in the schools and encouraged by sensitive politicians, could be a vital step towards reshaping democracy. The current experiments need to be nurtured carefully for indeed they are very delicate plants."

Gibson (date unknown) discusses an ethical basis for public participation. According to this author there are four basic tenets of the 'human condition' which which form the ethical basis for public participation:

> "1) interdependence of individuals expressed in their need for society, 2) mortality, 3) environmental dependence, and 4) imperfect knowledge." (Ibid, 8)

The first means that people should be considered as part of, and interacting with, society and that this interaction is essential to their well being. The second and third are interlinked in the concept that people are part of a biological system on which they are dependent for their continued survival. To debase the environment is to debase the system on which human life is dependent.[8] Finally imperfect knowledge is a condition which all humans must take into account when making decisions:

> "Human ethics cannot justify actions which presuppose absolute certainty." (Ibid, 10)

Environment and Behaviour, 3, 191 - 214

[8]"The fact of dependence is now becoming clearer as the costs of the program of conquest become more evidently threatening to the present quality as well as the future existence of human life. Similarly the ethical implications are becoming more obvious: the reality and dynamics of human relationships with the natural environment ought to be thoroughly and critically examined in the light of both the human condition of environmental dependence which implies concern for maintaining a viable environment and the human condition of mortality which implies concern for the interests of future generations." (Gibson, date unknown, 9)

Gibson (Ibid) goes on to argue that the theory of infinite needs,or the 'consumer concept of human essence',[9] ignores the above four aspects of the human condition and that in the ignoring of these aspects people have found that they are alienated and powerless in the societies in which they function.[10] Gibson promotes instead the 'exerter' concept of human essence where the 'exerter' refers to the expression of human attributes and capacities. Under the exerter concept human beings act and express themselves as members of a society rather than as ...

> "...individuals treated impersonally and often brutally as interchangeable elements of an encompassing socio-economic mechanism and as easily replaceable appendages to the production process." (Ibid, 13)

When employing the exerter concept of human essence it is 'ethically just' that every member of society has the opportunity and the right to express themselves through public processes.

In addition Gibson (Ibid) proposes that there are two theories of democracy: 1) elite democracy; and 2) participatory democracy. In elite democracy public participation is restricted to electing 'elite leaders' who are expected to make

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[9] The concept of 'infinite needs' of humans has only recently developed with the development of the capitalist system and the industrial revolution.

> 'infinite needs' became the driving force for an ideal which stated that more and more consumption was positive and ethically correct. This is the consumer concept of human essence."

The need to consume superseded the need to take into account the four basic tenets of the human condition.

[10] "The possibility that the essential requirements of human life are not being provided by societies based on the consumer concept of human essence is perhaps most clearly revealed in the many recent social analyses which have identified alienation, meaninglessness, and powerlessness as symptoms of a wide spread and fundamental malaise in modern industrial societies."(Gibson, date unknown,15)

decisions based on the 'interests of the electorate'. This theory was built on the precepts of the consumer concept of human essence where people are too busy maximising their satisfaction to participate effectively in democracy.

Participatory democracy rejects the concept of consumer essence and focuses instead on the exerter concept of human essence:

> "The response of the theorists of participatory democracy to proponents of elite rule is built on the assumption that, essentially, humans are not mere consumers of satisfactions, but rather exerters requiring opportunities and encouragement for self expression and development." (Ibid, 22)

> " ... for participatory theory, the central task of government is not to assure production and provision of consumables and to repress social conflict, but to ensure for all individuals the opportunity and capacity for exertion of their human attributes and capacities." (Ibid, 23)

Finally Gibson (Ibid) gives two reasons, based on the 'exerter' concept of human essence, why public participation is ethically just. As well as public participation giving an opportunity for people to express their 'individual attributes and capacities', participation allows the participants to acquire a richer understanding of their own attributes and capacities and that they can accommodate these 'exertions' to the good of society.

On one level public participation might be said to strengthen the planning process. On another level, public participation might be seen as strengthening the democratic process. At either level public participation should be seen as essential.

Consents and Activities Under The Resource Management Act.

The R.M. Act has wide ranging public participation provisions in plan preparation and resource consent areas. It is not intended to cover the contents and formulation of plans. These subjects could form the basis of a thesis themselves. Under the Resource Management Act 1991 an application may be

made for five different types of consent: a) land use consents; b) subdivision consents; c) coastal permits; d) water permits; e) discharge permits.

a) A land use consent must be applied for when an activity falls with in the description of **section 9 Restrictions of use of land** and **section 13 Restrictions on certain uses of beds of lakes and rivers.**

b) A subdivision consent must be applied for when an activity contravenes **section 11 Restrictions on subdivision of land**.

c) A coastal permit must be applied for when an activity contravenes **section 12 Restrictions on the use of coastal marine area, section 14 Restrictions relating to water**, and **section 15 Discharge of contaminants into the environment.**

d) A water permit must be applied for in the case of a contravention of **section 14.**

e) A discharge permit must also be applied for for a contravention of **section 15.**

In essence each of the above sections prohibit certain activities unless that activity is allowed by a rule in a district or regional plan or a resource consent is acquired for that activity. These plans themselves categorise activities into 5 main groups:

1) Complying activities, for which no resource consent need be applied for.

2) Discretionary activities:

> ""Discretionary activity" means an activity which a plan specifies as being allowed only if a resource consent is obtained in respect of the activity from a consent authority, which must exercise its discretion to grant the consent in accordance with criteria specified in the plan and this Act:" (R.M.A., 1991, 10)

3) Controlled activities:

""Controlled activity" means an activity -

(a) Which a plan specifies as a controlled activity; and

(b) Which is allowed only if a resource consent is obtained in respect of that activity:" (R.M.A., 1991, 10)

4) Non - Complying activities:

""Non - complying activities" means an activity which contravenes a plan but is not a prohibited activity:" (R.M.A., 1991, 14)

5) Prohibited activities:

""Prohibited activity" means an activity which a plan expressly prohibits and describes as an activity for which no resource consent shall be granted:" (R.M.A., 1991, 15)

Resource consents must be applied for for discretionary activities, controlled activities and non complying activities. Under no circumstances can a resource consent be applied for for a prohibited activity.

The Consents Process

This is the process on which the thesis will eventually focus. Again this is by no means exhaustive and is intended to give people, unfamiliar with the consents process, some background. [11]

In general there are three bureaucratic decision making processes within the consents process; two departmental processes (Council planning department processes) seperated by a Committee/Council process.[12] The Committee/Council stage is a political decision making stage. The sections of

the consents process in the Resource Management Act follow these three stages of decision making.

Any person may make an application for a resource consent. [13] For the writer's purposes, people making applications will be called applicants or developers. In essence each application must be accompanied with a description of the activity and an assessment of the effects of that activity.[14] At this point the consent authority may ask the applicant for more information about the application. This request might be made at any reasonable time before the hearing of the application.

When the consent authority has accepted that application it must decide whether or not to notify the application. In certain circumstances notification need not be made for consents.[15] Of particular interest at this point is provision for the non notification of controlled, discretionary, and non complying activities. Controlled activity applications accompanied by the

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[11] Appendix B contains the sections referred to in the foot notes below.

[12] See the diagram on page 17.

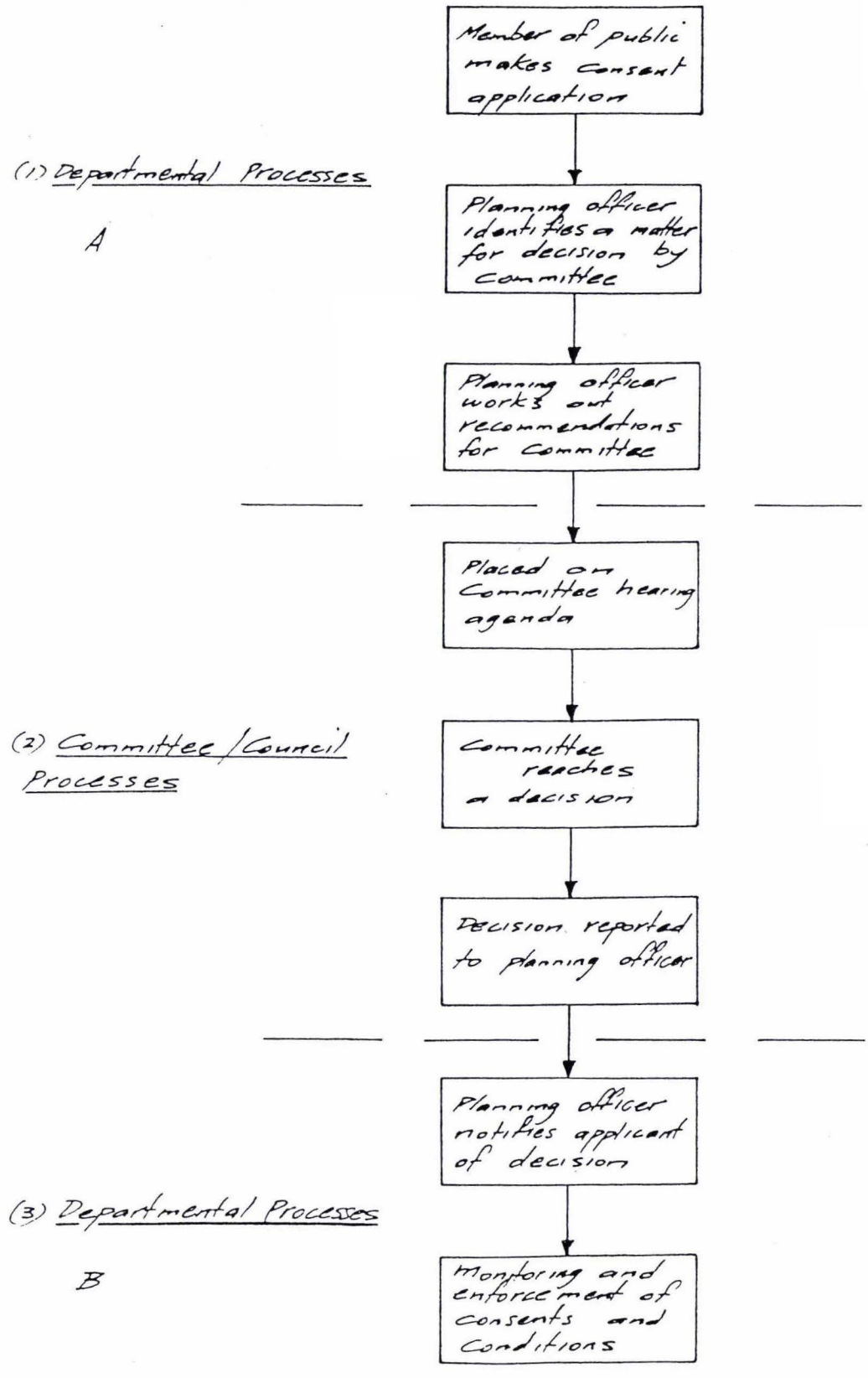
[13] See section 88.

[14] Much like an environmental impact assessment and is the focus of the next section.

[15] See section 94 for these circumstances.

The Formal Processes of Decision-Making

(adapted from Friend et al circ 1967, 48)



written permission of every adversely affected person[16] do not have to be notified. (Unless the authority thinks this is unreasonable.) Discretionary and non complying activities, do not have to be notified when the activity is considered to have minor adverse effect and written permission is obtained from every adversely affected person.

Where it decides to notify the application the consent authority must give notice of that application to the owners and occupiers of the affected land, persons likely to be effected by the activity, the general public[17], and ...

> "Affixed in a conspicuous place or adjacent to the site, unless it is impractical or unreasonable to do so; ..." (R.M.A., 1991, 76)

In some cases the Minister of Conservation, the Minister of Fisheries and the Historic Places Trust must also be notified.[18] The consent authority must make this notification within ten working days of receiving the application. From the day of notification any person may make a submission to the consent authority regarding that application. Each submission must state the reason for the submission, what decision the submissioner wants the consent authority to make, any conditions the submissioner wants imposed on the consent and whether or not they wish to be heard at the consents hearing.[19] At the close of this period the consent authority serves a list of the submissioners on the applicant.[20] Pre-hearing meetings could be called at this point.

A hearing for a notified application does not have too be arranged unless the consent authority believes it is necessary or the applicant or a submissioner wish to be heard.[21] The first 'departmental' decision making stage ends here.

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[16] In the opinion of the consent authority

[17] By public notice.

[18] See section 93.

[19] See section 97.

[20] See section 98.

[21] See section 100.

That hearing must be heard before the expiry of twenty five working days after the submission limit closes and the authority must give ten working days notice of the date, time and place of the hearing to the applicant and those submissioners wishing to be heard.[22]

Where a development requires more than one resource consent those applications can be heard at the same meeting. In addition where consent is required from more than one authority a joint hearing between the authorities can be held.[23]

Decisions of the hearing committees are governed by sections 104 - 119. That decision must be forwarded in writing to the applicant and every submissioner with in 15 working days of the end of the hearing. Where no hearing was held that decision must be served with in twenty working days.[24]

The applicant has the right to appeal any decisions of the consent authority whether that appeal is against a negative decision or on conditions that might have been attached to the consent. Submissioners may also appeal for the same reasons.[25] The appeal must be lodged with the Planning Tribunal with in fifteen working days of the notice of the decision and a copy must be forwarded top the consent authority.

Appeal to the Planning Tribunal initiates the opportunity for a second formal use of alternative dispute resolution under section 268. However for the reasons discussed above those hearings are not to be the focus of this study. This point is the end of the Committeee/Council decision making process.

The second departmental process (the last stage in the decision making process) involves the planning body giving notice of the decision of the political body to the applicant. This is normally (though not always) followed up with a

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[22]See section 101.

[23]See sections 102 and 103.

[24]See sections 114 and 115.

[25]See section 120.

programme monitoring any conditions which might be placed upon the consent granted.

Assessment of Effects

Public participation in the consents process also finds expression in the assessment of effects (Fourth) Schedule of the Resource Management Act. Any application for a resource consent must be accompanied by an assessment of effects. The Fourth Schedule lists the items which must be taken into account when an assessment of effects is undertaken. One of those items is a description of the attempts the developers have made to involve the public in the design of the project i.e. the consultation that has taken place.[26] Foster (1992, 10) states:

> "The key expectations of the Act are that policies and plans will: ...
>
> > be formulated through a process involving early and on-going genuine, active consultation with the constituent community;"

The possibilities for the combination and enhancement of 'on-going genuine, active consultation' and alternative dispute resolution is to be the focus of this work.

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[26]See Schedule Four appendix B.

CHAPTER 1: MEDIATION THEORY

The Advantages of Mediated Outcomes

Moore (1989) presents twelve advantages to mediation. These are not necessarily true to, or evident in, every mediated settlement. However they might be regarded as a 'rule of thumb' when discussing the mediation process: (1) economical decisions; (2) rapid settlement; (3) mutually satisfactory outcomes; (4) high rate of compliance; (5) comprehensive and 'customised' agreements; (6) practise in and learning of creative problem solving procedures; (7) greater degree of control and predictability of outcome; (8) personal empowerment; (9) preservation of an on going relationship; (10) workable and implementable decisions; (11) agreements that are better than a simple compromise or a win/lose outcome; (12) decisions that hold over time.

The Principles of Success

Bacow et al (1983) state that if three principles are followed, mediation strategies and processes, like the ones discussed below, can be adjusted to fit any case. The first principle claims that all participants must be motivated to participate and believe mediation will be helpful. In relation to this point Dwight (1989, 25) says:

> "Using A.D.R. well also means that the parties must have a genuine predisposition to settlement, and be opposed to delay. The parties must not be merely engaged in an exercise for tactical or evidentiary advantage, or in order to obscure legal issues better suited for court resolution."

Bacow et.al's (1983) second principle asserts that incentives for participation must remain throughout the process, otherwise one or more of the parties will leave the negotiations. Torstien (1966) supports this belief by saying that mediation will work best when all participants are interested in having the conflict resolved. As long as this interest remains the parties will cooperate with the mediator.

Bacow et.al's (1983) final principle for success is that a negotiated agreement must be as beneficial as the best alternative to negotiation for each party. This relates to the concept of B.A.T.N.A..[27]

Before discussing the stages of a mediation process an important preliminary aspect of mediation should be discussed: When and how a mediator enters into and assesses a dispute.

Timing of Mediator Entry Into The Dispute

How might the mediator enter the dispute? If not legislated for, (as in the Industrial Relations Act 1973 or the Resource Management Act 1991), then one or other of the disputants can suggest a mediator, or the mediator can suggest him or herself (Cruikshank et al,1987). Cathro(1986,67) states that the point at which a mediator enters a dispute is critical:

> "Although timing by a mediator looks simple it is a very sensitive issue. The most serious mediation in New Zealand takes place in conciliation for which timing is irrelevant. For most other disputes however, the parties do have some discretion and a mediator will be just as likely to be invited to a dispute early as late."

There are two schools of thought on mediator entry. Early entry and late entry. Cathro (Ibid) discusses arguments for and against late entry. Late entry (the classical position) is believed to be most effective when the conflict is in a crisis situation and the parties badly need a resolution. Cathro also argues that late entry allows the parties to resolve some of the issues in conflict by themselves before mediator involvement.

On the other hand early entry gives the mediator more time to familiarise him/herself with the issues and parties in the dispute. There is also more time to consider possibilities for settlement. Over time parties can become entrenched with one point of view and unwilling to consider alternatives. Early entry of the

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[27]B.A.T.N.A. means Best Alternative To a Negotiated Agreement. It is discussed on page 26.

mediator can prevent parties from publicly stating positions which they cannot back away from without 'losing face'. Finally early entry avoids delay while the mediator familiarises him or herself with the issues (Ibid).

Dispute Assessment

Some commentators recommend an assessment of the dispute prior to commencement of the actual mediation. Chart (1989,10) points out that ...

> "In practice, the usefulness of mediation may be influenced more by the characteristics of a particular conflict at a particular time than on the 'category' of the case."

Shrybman (1986) suggests six criteria for assessing a dispute:
(1) Can all the parties be included? Often not all the parties are identified. However inclusion can be straightforward in a small-scale dispute with little external importance. This identification process can be time-consuming.

When asked if it was possible to identify all of the stakeholders in a exceptionally large dispute Tanner (interview, 1991) responded:

> "Probably it's not ....I think it's probably pretty hard....I think you really do as well as you can ... because the risk you run is that if someone is not identified and that they're not there and you think you have an agreement and then up pops this person, you know there's a lot of potential there for the agreement to come undone, so it's an important area."

The more time put into identifying participants the less chance there is of the negotiation failing at a later stage. Identification would be easier if legislation dictates who has a relevant interest in the conflict and how they are to be identified (Chart,1989).

Note that section 96 Resource Management Act 1991 states:

> "Making of submissions-(1)Any person may make a submission to a consent authority about an application for a resource consent that is notified in accordance with section 93." (R.M.A.,1991,78)

Under the resource consent procedure only those who have made submissions can be included in the prehearing meetings. Therefore identification of the relevant parties to the mediation process, included in the Act, should not be an issue.

(2) Are the issues amenable to compromise or negotiated resolution? As is discussed later, value issues may not be amenable to a negotiated settlement.

(3) Are incentives available to encourage broad participation in the bargaining process? Some incentives might include avoiding costs and delays, fractious public debate, avoiding the consent process, perceived chances of success in litigation.

Talbot (1983) concurs with Shrybman's belief that pending court action can be an incentive to negotiate. In discussing six case studies of environmental mediation in the United States Talbot (1983,97) said:

> "These six case studies ....show that mediation is a supplement rather than an alternative to legal action in environmental disputes. It seems clear to me that the possibility of impending court action offered the impetus for mediation in most of the disputes. "

(4) Do representatives exist with bargaining power? Representatives must have the authority to speak for their concerns. The representatives must understand the concepts and dynamics of mediation. Representatives must be current with the consensus of opinion amongst the interests they represent. There are examples of negotiations and agreements that have fallen apart because the 'right' people did not participate in the negotiation (Chart,1989).

(5) Would the mediation be timely? This is discussed on page 22 under the timing of mediator entry into the dispute.

(6) Is there a way to implement a mediated agreement? Are 'mechanisms' available which will enable the parties to enforce any agreement reached? If the parties cannot be 'bound' one or other of the parties may withdraw from the agreement when the mediation is concluded. Often the signing of an agreement, or an 'agreement in principle', will bind the parties to the agreement. These agreements can take the form of a 'contract' between the parties.[28]

Outline Of A Mediation Process

Folberg et al (1984) convey an outline of the stages in the mediation process. This is a seven stage process which parallels other mediation processes. The stages are: Stage one introduction creating structure and trust; Stage two fact finding and isolation of the issues; Stage three creation of options and alternatives; Stage four negotiation and decision making; Stage five clarification and writing a plan; Stage six legal review and processing; Stage seven implementation, review and revision.

According to Gusman and Huser (1984) a process similar to the one above was used to settle a dispute in Canada. This dispute involved a community developed development plan and objections from local commercial interests affected by the plan. Gusman reported that this mediation process had four phases: (1) exploration; (2) process design; (3) negotiations and; (4) implementation.

Folberg et al's (1984) mediation process starts with Stage one Introduction creating structure and trust. According to Kressel et al (1985, 188) creating structure and trust involves reflexive intervention strategies:

> " As the term implies, such tatics are primarily to affect the mediator. They are the means by which mediators attempt to fashion themselves into the most effective instrument of conflict management. Reflexive interventions tend to come early in mediation."

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[28]As an example see appendix C.

These reflexive strategies can be broken down into gaining entry, bonding and, diagnosis. Where bonding refers to creating trust and diagnosis refers to isolating the issues (Ibid).

Folberg et al (1984) outline some of the information which should be collected at this stage. This includes, as discussed, the participants motivation to use mediation. These 'motivations' are called B.A.T.N.A.s - Best Alternative To A Negotiated Agreement.

B.A.T.N.A.S. are somewhat like the economic concept of opportunity cost - the best alternative foregone. In other words the B.A.T.N.A.s. are the conflict resolution choices faced if the conflict is not resolved through mediation or negotiation.

In industrial disputes, particularly personal grievance disputes, the Labour Court acts as an effective incentive and B.A.T.N.A. for mediation:

> "...It is also designed for both parties to resolve the dispute, no one really wanted to go to the Arbitration Court or Labour Court ... none of us really liked going to the Labour Court. You've got three Judges up there and they give you a hard time, your parties never wanted to (go to Labour Court) and from the employers point of view I always put it in the case of the employer by saying, "If we go to court I'll be annoying you for the week before hand so it's a week of your time out, it's probably two days in the court room ... a decision I can't guarantee because there's a panel of three, a Judge, a union representative, an employer representative...." generally they won't do that. Most would say no, and they would bail out." (Interview John Dippie, 1991)

Other information which should be collected by the mediator at this stage includes: the real issues hidden behind presented issues; communication styles; the emotional states of the participants; and the background events of the conflict.

Dawson (date unknown) discusses the styles of negotiation which the parties might bring to the negotiation table. The mediator must recognise and be able to accommodate these styles.

The pragmatic negotiator is a 'street fighter'. This type of negotiator will adopt the attitude of not knowing or caring about win - win negotiation, and expects every one else at the negotiation to adopt the same attitude. Next comes the extrovert or 'den mother'. This type of negotiator is always trying to organise the other participants in the negotiation. Often this negotiator is so enthusiastic he or she forgets the other parties may not be as enthusiastic. The amiable negotiator is a 'pacifier'. This type of negotiator tries to keep everybody happy. The points this negotiator wants to win become secondary to keeping all of the parties happy. Finally the analytical negotiator or 'executive' is some one who conducts the negotiations very inflexibly. The executive believes any sign that he or she is not absolutely set on a course is a sign of weakness.

Felstiner (1982) suggests a mediator also needs to know about the emotional state of the participants. There are two types of mediated outcomes. First there are personality independent outcomes. In this case the mediator will be able to suggest outcomes which will satisfy the interests of the parties. These are interests which would be indicative of any person in the same position. Secondly there are personality dependent outcomes. Here the desired outcomes of the parties are 'idiosyncratic'. That is, the outcomes are specific to the parties.

Knowledge of the background events of a dispute is important:

> "In the research on the effects of mediation one finding stands out. The worse the state of the parties relationship with one another, the dimmer the prospects that mediation will be successful. This conclusion emerges from nearly a dozen studies across an array of dispute settings." (Kressel et al,1985,185)

Returning to Folberg et al's (1984) process there are eight steps to complete in the first stage. Step one involves the obvious introductions and seating. Step two calls for a preparatory statement. Step three confirms the data base. The importance of information about the negotiators and their situations has been discussed. Folberg et al (Ibid) believe the mediator should discuss what is known about the stances of the participants as it shows the mediator is not keeping secrets. In step four the mediator hands the discussion over to the participants. The participants are expected to discuss their expectations and

positions thereby, supposedly, exposing hidden agendas or unacknowledged conflicts.

At step five the mediation guidelines are reviewed. A review of the mediation guidelines is used to break any tension which may have arisen between the participants. It is a break from the negotiations in which the participants can rest. They could be reminded by the mediator that any 'strong emotions' should be kept under control (Ibid).

Step six involves signing the employment agreement with the mediator. This step depends of course on the forum the mediation is taking place in. Naturally this step is dependent on the nature of the dispute being mediated.

During stages two to six the mediator may use two types of strategies: contextual interventions and substantive interventions.

> "Contextual interventions refer to the mediators attempts to alter the climate and conditions prevailing between the parties so as to facilitate mutual problem solving and thus minimise the role of the mediator in developing a solution." (Kressel et al,1985,191)

Kressel et al (1985, 192) also describe substantive interventions:

> Substantive interventions refer to those tactics by which the mediator deals directly with the issues in dispute. These tatics aim to narrow the gap and precipitate a settlement."

Stage two Fact finding and isolation of the issues: This is a critical stage in the mediation process. At the conclusion of this stage the participants should have equal information about each others position and fully understand what the issues are.

The 'definition' of the issues at this stage is important. A narrow definition of the issues in a dispute can lead to problems in the latter negotiations. It reduces the chances of 'trade-offs' during the negotiation and ultimately a win-win negotiation (Chart,1989; Susskind,1986).

> "For example, an agenda which includes socio economic, environmental and health and safety issues holds greater promise of at least some progress being màde then if the dispute is framed in terms one or two either/or issues"(Chart,1989,18) sic

These issues are used to develop, goals objectives and strategies that incorporate the participants wants and needs. Note though that the mediator could decide to suspend the negotiations because of an impasse. To summarise to this point, the issues have been identified, the mediator has gained the trust of the participants and the participants should be committed to the process.

Strategies Used To Reach Agreement

The next two stages, three and four, are defined by the strategy a mediator might use to develop a final agreement. Two general strategies might now be used: (1) An 'agreement in principle'; (2) a 'building block' approach (Moore, 1989).

First the agreement in principle approach:

> "Agreements in principle are general decisions in that they outline the parameters within which the final agreement will be forged." (Ibid, 34)

Moore (Ibid) uses the analogy of piecing together a jigsaw puzzle. A strategy sometimes used is to find all the straight edged pieces and then construct a frame. When the frame is complete what remains is to fill in the 'holes in the middle'.

> "The procedure used to fill in the substantive "holes" of negotiation, involves the creation of increasingly specific levels of agreement. Each sequential agreement makes the exchanges more tangible and concrete until a final agreement has been reached with the specificity that is mutually acceptable to the negotiators" (Ibid, 35)

GENERAL AGREEMENTS IN PRINCIPLE

MORE SPECIFIC

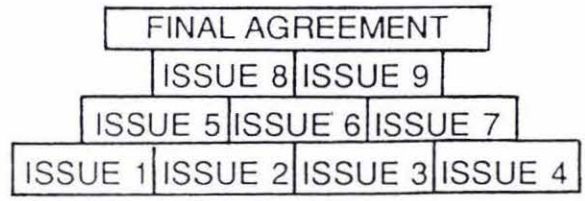
VERY SPECIFIC
AGREEMENTS

AGREEMENT ON
FINAL
DETAILS

FINAL AGREEMENT

Secondly the building block approach. This approach is used when a general agreement is not possible. Moore (ibid) uses the puzzle analogy again. The pieces are put into groups according to some common factor, say colour (i.e. an issue) then are fitted together (solving that issue). Each block of 'solved' pieces are then put together to form the whole picture.

Moore (Ibid) uses another analogy to clarify this process. As issues are solved they become blocks which are fitted into a foundation supporting the final agreement.



Strategies may be used separately or in tandem with each other (Ibid). The building block approach might be used to develop the form of an agreement. Conversely an agreement in principle might be reached only to have parties reach an impasse in finalising that agreement. Here they might employ the building block approach.

Returning to Folberg et al's (1984) process, having defined the issues at sufficient definition, the participants move onto Stage three creation of options and alternatives. The tasks of this stage are to let the participants explain the

options they are aware of, or want, and to develop new or more appropriate options.

Moore (1989, 45) suggests some techniques which might be used to help generate some options for settlement:

A) " Develop agreements on general principles then work out the detail."
B) "Conduct an open discussion in which a trial - and - error approach is used to generate options."
C) "Generate multiple options individually then share with other parties."
D) "Develop "package" proposals that are comprehensive and satisfy most interests."
E) "Break issue into smaller problems (fractionate) and discuss solutions to sub issues."
F) "Pursue a position counter position procedure."
G) "Develop a single text negotiating document."
H) "Use model solutions developed in previous similar situations and modify them to address the needs in a specific situation."
I) "Select a possible option that is neither perfect nor totally acceptable to the parties, but provide a frame work for joint generation of modifications."
J) "Look for options that can be traded."
K) "Ask for assistance of outside experts."

Stage four negotiation and decision making: The mediator initiates the back and forth communication between the participants. He or she makes sure the participants have the opportunity to express the concerns they represent with out pressure from other participants (Folberg et al, 1984).

Stage five clarification and writing a plan: This stage is used to produce a document which shows the parties decisions and commitments (Ibid). Take for example the documents produced in the Waitaki Working Party process[29]. Cruikshank et al (1987) suggest convening a sub-committee to produce a draft agreement and to invent new ways to "bind" the parties to the agreement.

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[29]See Chapter Four.

Stage six legal review and processing: A legal review is used as a check on the social and legal acceptability of the agreement (Folberg et al,1984). Under the Resource Management Act 1991 it is a mandatory part of the consent process. A mediated plan could fall apart if it is not supported by relevant policies and social attitudes A legal review may determine if the relevant or appropriate people are representatives (Ibid). Bingham et al (1986, 4) comment:

> "Although environmental dispute resolution processes are often characterised as alternatives to litigation - with the presumption that litigation is bad - it is the authors view that voluntary dispute resolution processes are better regarded as supplementary tools that may or may not be more effective or efficient in particular circumstances ."

Susskind et al (1985, 374) comment on the role of government in the review process.

> "The process of generating informal agreements must be linked at some point to the formal processes of government decision making. No elected or appointed official should be expected or encouraged to relinquish his or her statutory authority to an adhoc dispute resolution process."

Stage seven implementation review and revision: In this stage the parties carry out the terms of their agreement. This stage takes place outside the mediation environment and the mediator is not involved to any great degree, if at all (Folberg et al,1984).

Team Mediation

Tanner (interview, 1991) outlines the concept of mediating in teams. In a highly complex dispute requiring specialised knowledge on the part of the mediator, teams may be used to resolve the dispute. The team might consist of a member with specialised knowledge of the mediation process and a member with specialised knowledge of the area in which the dispute arose.

> "... I think you need to have someone there who is really familiar with the substance, what the content of it's going to be,... and then someone who is very skilled in the process side of it and so in that sense it's quite a good combination ... I think you each have to have some understanding of the other side of it too. At least a basic understanding. So what we did is have several meetings ourselves, before we went and mediated, to go over what we thought the issue was going to be, so I could get more planning kind of information. The other thing that we discovered is quite important ... you need to know the other person quite well, ... and develop a sense of working together." (interview Tanner, 1991)

Problems With The Mediation Process

Jeffery (1987) believes there are five drawbacks to the mediation process. The first, a problem also identified by Cruikshank et al (1987), Shrybman (1986) and Chart (1989), focuses on the obvious problem of identifying all of the parties affected in the conflict. A negotiated agreement might be undermined in the review stage if the negotiation failed to include all of the affected parties and the non participating affected parties and they attacked the agreement.

The second problem is that of representation of the parties. Jeffery (1987, 245) believes that representation of 'interests' by one person ... " ... in order to reduce the number of participants ... ", will cut out those who have a legitimate stake in the negotiation.

Burgess et al (1983, 152 - 153) comment:

> "The question of representation is most often a problem with amorphous public interest groups (e.g. public interest groups). Even if a representative signs an agreement, there is sometimes fear that some segment of his or her organisation might disagree and take steps to block the agreement after it has been reached."

The third problem Jeffery (1987) envisages centres on the crystallisation of the issues, as discussed in the second stage of Folberg et al's (1984) process, To attempt to mediate or negotiate before the issues of a conflict have been sufficiently defined would be..."...premature and hence unproductive" (Jeffery, 1987, 245).

Incentives to mediate are the focus of Jeffery's (1987) fourth problem. Do incentives exist which will induce the parties to negotiate? The relative negotiation strengths of the parties and their expectations may determine their willingness to participate.

In relation to this Cruikshank (el al, 1987) and Fisher (1983) ponder whether those who dominate, through power, would agree to meet less powerful groups, and if they do can the power imbalances be addressed? Note however that Electricorp Production in the Waitaki Water Rights Working Party saw it in their best interests to negotiate. Electricorp had already shown, in the Wanganui minimum flows dispute, it had the resources to take a major water rights application through the adversarial consent process. Hence greater financial power, than the other parties, need not be a disincentive to negotiate.

Finally there is Jeffery's (1987) implementation factor. Can the mediated or negotiated agreement be implemented and if it is subject to adjudicative review, is it legally legitimate?

Susskind (1985) addressed two process questions not included in Jeffery's (1987) critique. These were: Can mediated decisions be wise when the parties are looking for the 'least damaging compromise'? And do individuals exist who can mediate effectively?

In later times criticisms of A.D.R. and mediation in particular have centred on its impact on the judicial process.

> "The American criticisms focus on such issues as whether runaway development of A.D.R. will stunt development of judicial law making, whether it will attract the best lawyers away from less lucrative judicial positions, whether it allows the courts to abdicate their responsibilities to society in a quest for efficiency rather than justice and whether two systems of justice will be created, one for wealthy (commercial) litigants and the other for the have nots." (Dwight, 1989, 27)

Dwight (Ibid) believes that issues like civil rights, and environmental disputes which involve public interest should not be resolved by negotiation. Cathro (1986) and Cameron et al (1986) point out that the mediator's job is to produce a settlement It does not matter whether that settlement is good or bad in terms of public interest. This role arises in, Cathro's (1986) view, because it is difficult to define the public interest and to 'push the public interest' runs the risk of alienating the parties.

Pengilly (1992) believes that there are some disputes which are better resolved in the courts: A) where a 'societal norm' or legal precedent is at issue; B) when the outcome of the dispute will be unavoidably unpopular, in the wider society, one or other parties may want the courts to make a decision; C) where the court must provide official recognition of settlement. e.g. bankruptcy; D) some issues, by their nature, must be resolved by the the court. e.g. constitutional issues.

In addition it is generally held that value issues are not amenable to negotiation or compromise:

> "People are unlikely to resolve disputes if they have to compromise deeply held beliefs" (Susskind et al, 1986, 38)

This view should be thought of as a generality or a' rule of thumb'. As will be shown in the Waikareao Estuary case study, to follow, deeply held beliefs need not prohibit a settlement.

Moore (1989) presents some techniques which might be used to solve a value issue. Parties can open the negotiation by explaining the concerns they have for a value issue. Parties need not agree with an issue but they should at least

understand and acknowledge the concerns each party has. From this position parties can agree to disagree and move on from the issue or continue to try to persuade each other.

Values can be explored for 'underlying interests'. Thus the issues can be addressed and the values avoided. Ways can be found to compensate a party for an infringed value. This may be:

> (A) "An equal trade of the same item" (Ibid, 81)
> (B) "Trade of an item in the same realm but different in form" (Ibid, 81)
> (C) "A substantive item which compensates a party in another currency" (Ibid, 81)

In addition, separate spheres of influence could be created which give a party sole authority to make decisions concerning the particular value. The mediator could look for a hierarchy of values. If a lesser value is at issue he or she could point out the danger to a higher value if agreement is not reached on the lesser value. Finally Moore (1989) believes that the mediator could point out where one value held by a group conflicts with another held by the group:

> "By knowing which value is dominant, a negotiator or mediator can create internal tensions within a party which will encourage the balancing of values and subordinating one value to another." (Ibid, 82)

Finally there may be an unexpected side effect to mediation:

> "...the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed." (Sander, 1982, 27)

Improving dispute resolution may encourage people who have remained silent to bring forth their grievances, thus overload the system and waste resources (Sander, 1982).

Training

Mediation and conflict resolution can be taught. It consists of a number of 'skills' and 'sub-skills'.[30] These skills relate to the understanding of conflict as well as the resolution of conflict (Redman,1991). Most commentators agree that to successfully mediate some form of training is essential.

> "There appears to be no disagreement, however about the need for some form of education or training by those who serve as mediators. Consensus on the need for mediation education and training does not resolve questions about the prerequisites, the curriculum, and the nature of the study - whether it should be conceptual or experiential." (Folberg et al, 1984, 223)

On the academic side a number of New Zealand tertiary institutions run alternative dispute resolution courses. For example the Faculty of Law at Canterbury University conducts a course entitled 'Laws 339: Negotiation,Mediation, and the Lawyer'. Recently a dispute resolution centre has been set up in association with Lincoln University: The Centre For Resolving Environmental Disputes (C.R.E.D.) offers both training for mediators and mediator services.[31]

Folberg et al (1984) believe that understanding conflict is an important component of training. The mediator needs to understand the dynamics, nature and creation of conflict. Folberg et al (1984) go on to say that mediation training can 'involve two elements'. The first is the understanding of the function and objectives of each stage of the mediation process. The second is learning to 'disassociate' the 'habits and assumptions' of previous professional training.

Tanner (interview, 1991) discussed the impact of previous professional training on Family Court Judges:

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[30]Discussed in the next section.

[31]See Appendix D.

> "I know some of the Family Court Judges. I mean they've been doing it for ten years now, in the Family Court and .... there's still feed back that some of the Judges ....say this is what I think you should do, and this is what you need to do... and so there are still some skills that ... in my opinion aren't what I would say are mediator skills. They are very much coming from ...the position of being the one who's had to make decisions, and that's a hard thing to give up and let go of."

Dippie (interview, 1991) also discussed the impact of training on lawyers in the mediation system:

> " ... because they really have not been exposed in the past to the mediation system, they've been straight out of the adversarial system, we win or lose theres no win-win sort of thing."

Learning about the types of negotiation styles a mediator may encounter is important. Dawson (date unknown) comments on the need to understand styles outlined earlier. The neutral negotiator tries to separate the negotiation styles from the problems. He or she should know about all the styles present at the negotiation, what they want and, why they want what they do. He or she waits until the true problems are aired then acts on them.

Some training in the ethics of mediation is also desirable. Mediators need to know about the ethical and moral consequences of their actions: should they withhold information from the parties?; what part does public interest have to play in the negotiation ?; is the settlement fair even though the parties are happy with it ? (Chart, 1989)

In New Zealand some 'experiential' training is available. On occasion mediation work shops are conducted:

> "Tanner attended the recent work shop "Environmental conflict resolution; Negotiation, Facilitation, and Mediation" presented by Dr John Gamman and Dr Scott McCreary in association with Jan Crawford, Planning Consultant. The workshop was a two day course with an emphasis on simulations relating to drafting, carrying out conflict assessment and mediating complex disputes." (Tanner, 1991, 14)

Mediator Skills

Folberg et al (1984) list a number of mediator skills This list was developed by a group of mediators from diverse backgrounds. The writer has divided these skills into 'process' skills and 'personal' skills in the list below.

PROCESS SKILLS.

(1) Interests and needs assessment skills.
(2) Option inventory skills.
(3) Empowerment skills.
(4) Refocusing and reframing skills.
(5) Reality testing skills.
(6) Paraphrasing skills.
(7) Negotiating skills.
(8) Information sharing skills.
(9) Techniques of breaking deadlocks.
(10) Skills for remaining neutral.
(11) Pattern and stereotype breaking skills.
(12) Techniques for including other parties.
(13) Goal setting skills.
(14) Child interview techniques.
(15) Identifying agenda items and ordering skills.
(16) Strategic planning skills.
(17) Skills in designing temporary plans.
(18) Rewarding and affirmation techniques.
(19) Skilful use of attorneys and other professionals.
(20) Techniques of building momentum.
(21) Caucusing techniques.
(22) Techniques of balancing power.
(23) Conflict identifying and analysis skills.
(24) Agreement writing skills.
(25) Techniques for developing ground rules.
(26) Grief councilling techniques.
(27) Referral techniques.

PERSONAL SKILLS.

(1) Listening skills.
(2) Trust and rapport-building skills.
(3) Humour skills.
(4) Techniques for dealing with anger.
(5) Sensitivity skills.
(6) Self-awareness techniques.
(7) Credibility building skills.

SUMMARY

The traditional adversarial dispute resolution system tends to produce outcomes where the parties have to accept a Judgement laid down by a third party. The process might be characterised by the parties taking polarised positions on an issue (usually an antithesis position) and then asking an adjudicator to rule in their favour. This process can be expensive, there is no guarantee the adjudicator will find in their favour, and the functional relationship between the parties may be damaged.

Alternative dispute resolution, more specifically mediation, seeks to avoid these pit falls and to resolve the conflict to the mutual benefit of the parties concerned. Whether the outcome is termed 'win - win' or 'non zero sum' the philosophy of A.D.R. is to produce outcomes which would be more beneficial, to the parties concerned, than a resolution in an adversarial arena. Benefits may come in the form of attaining settlement of issues to the mutual satisfaction of the parties concerned, or they may be less substantial such as an improvement of the functional relationship between the parties.

CHAPTER 2: MAORI CULTURAL AND SPIRITUAL VALUES AND THE TREATY OF WAITANGI

Introduction

The 'Principles of the Treaty of Waitangi' have come to define the way in which tangata whenua's views and values are taken into account in resource management and statutory planning issues. These principles are the result of the interaction of three 'factors' in New Zealand society. The first is the Maori world view. The second is based on the different interpretations placed on the Maori and Pakeha versions of the Treaty. And the third focuses on the conflict between the Maori world view and European resource use practices. These factors are explored here.

The Waitangi Tribunal, the Court of Appeal and Central Government have defined what they believe are the principles of the Treaty. The chapter also explores how those principles were developed, bearing in mind the three factors that have combined to produce the environment in which they were defined.

The Maori World View

The Maori world view is a holistic view. Johnston et al (1988) defines holism as the belief that the whole is more than simply the sum of its parts. In the Maori world what is seen and unseen are not divided into separate spheres, but are incorporated into an 'integral and indivisible entity' (Wai 8, Manukau, 1985, 38). This means the physical and spiritual dimensions of the world form a whole and are inseparable.

Perhaps the Maori creation myth can best express the holistic approach to the Maori world view. Salmond (1984) and the Huakina Development Trust (H.D.T, 1990) recount the creation myth from the time of nothingness (te kore) to this 'world of lights gods and, men'.

At the beginning there was an endless and absolute nothingness - a void - te kore. Within this epoch a series of 'voids' arose as abstract properties appeared. For example there was te kore te whi whia, a void in which nothing tangible could be obtained and te kore te rawera, a void in which nothing could be done (Ibid).

Te kore developed into a new 'epoch', te po (darkness) in which matter and energy came into existence. During this period of te po the earth and sky materialised. They were created by Io the supreme god (H.D.T., 1990). The earth (Papatuanuku) was personified as female and the sky as male. (Ibid) Papatuanuku and Ranganui mated to produce the gods (atua). Each atua, seventy altogether, had authority over various things. Tane Mahuta and Tangaroa, the most well known atua, had authority over trees and fish respectively.

In an East Coast Maori rendering of the creation myth, the children of the gods dwelt in darkness trapped between their parents. Tane finally broke this impasse in which he and his brothers were trapped:

> "He said to his brothers, 'we must force our parents apart.' They argued with him and disputed, but finally they agreed and Tane used all his strength to put props between Rangi and Papa and light flooded into the world." (Salmond, 1984, 32)

Each atua created the parts which make up the basic environment and gave all those parts a divine life force (mauri) (H.D.T., 1990). Finally humanity was created, by Tane, from the soils of Papatuanuku. Salmond's (1984) account relates how Tane fashioned the first woman, Hiene Hau One, then made her pregnant thus creating the human race.

The Maori derive their holistic view of the natural and unnatural world around them from these myths of divine creation (Ibid). Atua created and are a part of every thing in the natural world. O'Reagan succinctly expresses this concept:

> "When one is really looking at it (the environment) if one is Maori one is looking at oneself. We are looking at Tangaroa and at Tane, we are looking at atua from

> whom we descend, at our own Tupuna we are looking at ourselves."
> (O'Reagan, 1984, 14)

Weiner (1985) calls this concept 'inalienable wealth'. An object can become a vehicle for the past to come to the present. The object can define who a person is with a mix of mythology an ancestry. Thus the physical and metaphysical are inseparable in Maori belief.

Coupled with this spiritual view of the world is an intuitive systemic view. The systemic view is one which portrays every living organism in the world as being interdependent and symbiotic in varying degrees. Every organism is a living system and part of a wider global system. What Maori realised intuitively, modern science is now beginning to accept increasingly as a reality (Hopa, 1990).

The Maori World View And Its Conflict With Resource Use Practices

Holism is a concept which has, according to some, lost precedence in the Pakeha view of the world (Orr, 1989; Piddington, 1984). This downgrading of holistic thought has lead to a resource management system which has difficulty accepting and incorporating Maori cultural and spiritual values. Hopa (1990, 578) gives expression to these difficulties:

> "Pakeha are puzzled when Maori refer to mountains as ancestors or to a river in the same manner. They find it difficult to apprehend that the body of Papatuanuku cannot be dissected or that parts of her like coal, trees or fish, cannot be conceptually or physically separated or properly utilised or taken without appropriate measures being taken to appease the spirit in charge and restore the ecosystems balance."

This lack of understanding has lead to resource use practices which have attacked the spiritual essence, the mauri, of the environment and ultimately the tangata whenua themselves. Minhinnic (1984, 32) in commenting on an imminent Planning Tribunal water right decision, stated that if the right was granted the tangata whenua might as well be dead:

> "... once you do that (grant the water right) there is nothing for us to live for. Once you do that you've destroyed everything else, and now you want to take away our very ancestoral lives."

The Treaty Of Waitangi

The Treaty of Waitangi was signed by Maori chiefs and Queen Victoria of England's representative, William Hobson, at Waitangi on the sixth of February 1840. It was intended that this Treaty cement the relationship between Maori and the Crown. Over the last one hundred and fifty three years the status and meaning of that Treaty has been debated by New Zealanders.[32]. Some have questioned its relevance others have questioned its meaning. To a large extent the relevance question has been resolved. Maori have based much of their legitimate protest on the Treaty and the Court of Appeal has recognised the Treaty as a treaty of cession - establishing the Crown's right to govern as a right of cession not conquest. The meaning of the various Clauses of the Treaty is still hotly debated. This debate is fuelled by the fact that there are two versions of the Treaty; one in the English language,one in the Maori language.

Both versions consist of a preamble and three articles.[33] The first article of the English version ceded the Chiefs sovereignty to Queen Victoria of England. The second article of the English version guaranteed the signatory chiefs that they would maintain the possession and use of ...

> " ... their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess ..."

... as long as they wanted to do so. There was a proviso that the sale of the above properties must be to the representative of the Crown.

32New Zealanders have debated whether the Crown's right to govern was a right by conquest or a right gained by Maoridom cededing the country to the Crown.

33See Appendix E.

The third article gave Maoridom ...

> " ... all the rights and privileges of of British subjects."

It has been argued that the Maori version does not say what the English version says and that both versions are equally legitimate. The attempt by the Crown, the Courts, and Maoridom, to find an explanation of what the Treaty means is explored below.

The Treaty Of Waitangi And Its Conflicting Versions

The preamble to the Treaty Of Waitangi Act 1975[34] makes reference to two distinctly different treaty texts:

> "And where as the text of the Treaty in the English language differs from the text of the treaty in the Maori language. And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles." (Treaty of Waitangi Act, 1975)

There are three main inconsistencies between the texts: kawanatanga and sovereignty; te tino rangatiratanga and governance; and the scope and meaning of taonga.

The first article, of the English version of the Treaty, was intended to cede 'all the rights and powers of sovereignty', which the then 'Confederation or Individual chiefs' held, to the Queen of England.[35] The Maori version of the Treaty used the term kawanatanga to express sovereignty.

Article two, of the English version of the Treaty, guaranteed the 'Chiefs and Tribes ... full exclusive and undisturbed possession of their Lands and Estates,

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[34]Refer to pages 49 - 51 for discussion on the Treaty of Waitangi Act 1975.

35As the figure head of the Crown.

Forests, Fisheries and other properties which they may collectively or individually possess' if they so desired to retain them. Te tino rangatiratanga was used to express the idea of possession in the Maori version of the Treaty.

Kawanatanga and Sovereignty

When Williams used the word Kawanatanga, he was coining a phrase from a Maori translation of the Bible. To the Maori the 'Kawana' was associated with Pontious Pilate - a law maker (Ross, 1972; Wai 8, Manukau, 1985).

> "In the Maori text the chiefs ceded to the Queen 'Kawanatanga'. We think this is something less than the sovereignty (or absolute authority) ceded in the English text. As used in the Treaty it means the authority to make laws for the good order and security of the country but subject to an under taking to protect particular Maori interests." (Wai 8, Manukau, 1985, 90)

The right to make laws for the good order and security of the country is not the same as absolute authority or sovereignty (Renwick, 1990). However the Waitangi Tribunal believes that both parties wanted social control and protection from lawlessness.[36]

> "We think Maori people would have understood the Treaty as a promise of internal peace and security through the authority of the Queen. We think both parties to the Treaty wanted this and got it." (Wai 8, Manukau, 1985,90)

36The Crown and tangata whenua.

Mana, Rangatiratanga, and Sovereignty

Herein lies the key to many claims to the Waitangi Tribunal. As Kelsey (1990) states Maori have asserted their tino rangatiratanga but few Pakeha have understood what that has meant.

Ironically contemporary belief is that te tino rangatiratanga - the highest chieftainship - means more than possession and is a better approximation of sovereignty than Kawanatanga (Orange, 1987). Williams (1989) and Walker (1989) believe the word 'mana' should have been used to express the concept of sovereignty.

As early as 1835 Busby the British resident prior to the signing of the Treaty, used mana to describe sovereignty in the Declaration of Independence (Wai 8, Manukau, 1985). In 1869 a translation of the English text into Maori by T.E. Young, a Native Department translator rendered the Article I provision 'all the rights and powers of sovereignty' as 'nga tikanga me nga mana katoa o te rangatiratanga'. Later Sir Aparana Ngata in 'Te Tiriti O Waitangi; He Whakamarama' 1922, rendered the same passage as 'te tino mana, te mana rangatira' (Williams, 1990). Rangatiratanga and mana, some believe, are interchangeable. Walker (1987) defines mana as power, sovereignty and prestige. Thus article two of the Maori version of the Treaty can be interpreted as guaranteeing Maori sovereignty over their lands, forests fisheries and other taonga.

The last of the major discrepancies between the texts involves the word 'taonga'. Taonga is recognised as meaning 'precious possessions'. Renwick (1990, 25) when speaking of Henry William's translation said:

> " ... instead of translating 'forests' and 'fisheries' he gave te tino rangatiratanga o o ratau kainga me o ratau taonga katoa' - the highest chieftainship over their lands, homes and prized possessions. The result is a text in Maori which in a literal sense says very much more than the English it is based on."

The Waitangi Tribunal discussed the wider meaning of taonga in its Te Atiawa report:

> "The Te Atiawa people gave us examples of their use of the word 'taonga' and illustrated for us that to them, the general word 'taonga' embraces all things treasured by their ancestors and includes specifically the treasures of the forests and fisheries." (Wai 6, Te Atiawa, 1983, 59)

This was the beginning of an acceptance of a Maori definition of taonga (Booth, 1988).

How Did These Differences Occur?

Having established that these texts are different, how did the differences occur? Some commentators believe it was deliberate misrepresentation on behalf of the translator, Williams. Others believe it was Williams' ineptitude and the fundamental differences between the English and Maori languages.

Ross (1972) states that the English Treaty version Williams translated was not the Treaty which Hobson forwarded to London. Hobson in fact forwarded five versions of the Treaty throughout 1840.[37] The five versions were composites of notes made by Hobson, Hobson's secretary Freeman, and the resident Busby. What Williams received was another composite of notes by the same people. This version has not survived for comparison today.

> "The existence of a number of other English versions, all of them also composite versions of the same draft notes, suggests a certain element of chance as well as haste, in the compilation and selection of the version actually handed over for translation." (Ibid, 135)

Walker (1989) believes that both Busby and Williams were trying to deceive the Maori. The word mana had been used to signify sovereignty in the Declaration of Independence in 1835.

37Ross considered the differences 'minor'.

> "The Missionaries knew that any loss of mana was an anathema to the chiefs. Had mana appeared instead of kawanatanga no chief would have signed." (Ibid, 266)

Walker (Ibid) proposes a second reason for deliberate 'fudging' of the first article of the Treaty. Williams had substantial land holdings purchased from the chiefs. It is alleged the Treaty was fudged to protect those holdings.

Ross (1972) believes neither Williams or his son Henry were experienced translators and neither were skilled in 'constitutional law and convention'. Over the one hundred and fifty years since the Treaty was signed, there have been several translations of the Maori and English versions of the Treaty, some of which have been mentioned here; all of which have been different.

Biggs (1989, 303) Comments:

> "No one would expect to find single English words equivalent to tapu, or hau, or mana, each of which has been the subject of many academic papers, all striving for an understanding. So how could a treaty in an essentially word for word translation be expected to convey the exact meaning of complicated, legal terms such as 'sovereignty' or 'pre-emption' both of which have had widely differing interpretations at different times and in different places."

Background To The Treaty Of Waitangi Act 1975

New Zealand had long thought of itself as having good race relations. On the surface this appears to be true. However throughout the 1960's and 1970's the socio-economic position of the Maori in New Zealand society deteriorated. Maori came to have the highest rates of imprisonment and unemployment. Education standards were also low in comparison to Pakeha. Behind the facade of happy relations between Maori and Pakeha, activist Maori activity was increasing during the sixties. The Hunn report of 1961, which had suggested 'assimilationist policies', had caused outcries in University and Church spheres. These views were not readily apparent to the majority of New Zealanders (Sharp, 1990).

In 1964 Maori activists had joined the protest movement against sending an All Black team to South Africa. The South Africans had requested that Maori players not be included in the team (Ibid).

In 1966 the Pritchard - Waitfield report on Maori Land Courts [38] made suggestions that would make the alienation of Maori Land easier. Maori spoke out again against the resultant legislation (Ibid).

Nga Tamatoa, a group made up of young educated Maori, brought the activist movement to the notice of Pakeha society in 1970:

> "What Nga Tamatoa and other Maori had begun to call the 'Maori renaissance' ... had become public. The production of the history of injustice and disaffection, once largely confined to the marae ... papakainga ... and to the seclusion of the Universities, was one of the constituents of that renaissance." (Ibid, 7-8))

Maori began to contact North American Indians who were engaged in protest over the breach of Treaties between the governments of the United States and the tribes. In 1972 Indians arranged a land march on Washington D.C. during election week. These tactics were repeated in New Zealand in 1975:

> "In 1975 there was the Great Land March from Te Hapua at the extreme north of the North Island to Wellington at its extreme south. It was lead by Te Matakite O Aotearoa ('The seers of Aotearoa/New Zealand) and somewhere between 20,000 and 30,000 marchers joined Te Matakite to complain of the loss of Maori Land and vowed that 'not one more acre' should be lost." (Ibid, 8)

Concurrent to and in connection to these events was a Maori demand for the ratification of the Treaty of Waitangi.[39] In response Matiu Rata the Minster of Maori Affairs, in the Labour Government, introduced the Treaty of Waitangi Bill, which would allow Maori to lodge claims, with a Tribunal, against breaches of the principles of the Treaty of Waitangi relating to policy and legislation of

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38Which would lead to the Maori Affairs Amendment Act 1967.

39That it be recognised by statute and made a part of New Zealand Law.

government (Sharp, 1990). A major feature was that the Tribunal could only investigate breaches of the Treaty from the time of commencement of the Act.

The Tribunal had a slow start after the legislation was passed by the Labour Government in 1975. Only eight claims were investigated and reported on between 1977 and 1986. However some of these reports were to have far reaching consequences for government and New Zealand society. In 1986 the incumbent Labour Government expanded the powers of the Tribunal. It could now investigate and recommend on claims as far back as 1840. This caused an avalanche of claims. There are now over two hundred claims lodged and waiting to be heard.

Cultural And Spiritual Values And The Treaty Of Waitangi

At an early stage the Waitangi Tribunal made the connection between cultural and spiritual values (P.C.F.E., 1988). It was suggested that the Treaty requirements recognising 'Full exclusive and undisturbed possession' must include the cultural and spiritual values Maori associated with land forests fisheries and other taonga. In the Kaituna Report the Tribunal said:

> "The Kaituna River and the Maketu Estuary have long been an important source of food as we have already pointed out, and on cultural grounds the elders of Ngati Piako tribe made it clear beyond any doubt that if the pipeline is built they will have to declare the river *tapu* so long as the sewage effluent discharge continues. Such a declaration would make it impossible for any food to be gathered from those waters and they would suffer a very serious loss as a result." (Wai 4, Kaituna, 1984, 9)

And in the Motonui claim:

> "For this Tribunal the question is not only whether the Treaty of Waitangi envisages a measure of protection for the Te Atiawa reefs, but whether such protection should properly accord Te Atiawa cultural preferences." (Wai 6, Te Atiawa, 1983, 10)

Development Of The Principles Of The Treaty Of Waitangi

As has been noted, there is wide spread debate about the different interpretations and meaning of the text of the Treaty of Waitangi. The reference to the words 'principles of the Treaty of Waitangi' in the 1975 Treaty of Waitangi Act has lead to the formulation of a number of principles.

> "The principles of the treaty are the fundamental ideas it implies or expresses"
> (Renwick, 1990, 28)

There have been two main sets of defined principles. One set are those that have been developed over the period that the Waitangi Tribunal has been operating. The other set are those that were developed by the Court of Appeal in 1987.

The Court of Appeal Principles

In a legal sense the most significant principles were probably those developed by the Court of Appeal. It had long been held in New Zealand courts, that unless the Treaty was specifically mentioned in legislation, it could have no bearing in legal matters (Orange, 1987).

Since the Treaty of Waitangi Act 1975, the Treaty has taken increasingly important roles in the drafting of environmental and planning related legislation. The principles of the Treaty has been incorporated into the Treaty of Waitangi Act 1975, the Environment Act 1986, the Conservation Act 1987, the State Owned Enterprises Act 1986, and the Resource Management Act 1991.

The 1987 Muriwhenua Claim to the Waitangi Tribunal sparked the New Zealand Maori Council case in the High Court (Temm, 1987). During the hearing of the Muriwhenua Claim the claimant's counsel argued that the sale of Crown assets through the State Owned Enterprises Bill would remove from Crown jurisdiction assets which the claimants were asking the return of. The Tribunal sent an interim report to the Ministers of the Crown responsible for the Bill and to the Minister of Maori Affairs. The interim report recommended that the transfer of Muriwhenua claimed land be put on hold and that the Crown's right to other assets under other claims be investigated (Kelsey, 1990).

Prime Minister David Lange and Minister of Justice Geoffery Palmer responded by adding Clauses 9 and 27 to the Bill. [40] The New Zealand Maori Council (N.Z.M.C.) did not consider these Clauses adequate enough to protect Waitangi Tribunal Claimant's interests. The N.Z.M.C. applied to the Wellington High Court on 30 March, 1987, for an interim order preventing transfer of the assets and the removal of the case to the Court of Appeal.

Heron J heard evidence on 31 March and delivered his decision on 1 April. The Ministers were restricted from taking any action on assets which were the subject of Tribunal claims on or before 31 March 1987. The case was then referred to the Court of Appeal and on the same day the Court of Appeal extended the order to include all of the assets to be transferred to the State Owned Enterprises.

On 15 April 1987, the Crown was ordered to release maps of prospective S.O.E. land transfers to the N.Z.M.C.. The N.Z.M.C. was ordered to produce details of three detrimental impacts of the prospective land transfers.

The hearing ran from 4 to the 8 May 1987. The N.Z.M.C. asked the Court to declare 'unlawful' land transfers without giving possible claimants a reasonable chance to submit a claim to the Waitangi Tribunal. Counsel for N.Z.M.C. presented ten principles which they believed were implicit in the Treaty particularly in the Maori text:

1. "the duty actively to protect to the fullest extent possible" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

2. "the jurisdiction of the Waitangi Tribunal to investigate omissions" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

3. "a relationship analogous to fiduciary duty" (Judgement Richardson J,

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[40] Now sections 9 and 27 0f the State Owned Enterprises Act. Appendix B.

New Zealand Maori Council v. Attorney General. [1987] 1 NZLR 641 at page 673)

4. "the duty to consult" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

5. "the honour of the Crown" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

6. "the duty to make good past breaches" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

7. "the duty to return land for land" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

8. "that the Maori way of life would be protected" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

9. 'that the parties would be of equal status" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

10. "where the Maori interest in their taonga is adversely affected, that priority would be given to Maori values. (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

Counsel for the Crown contended that there were no principles implicit in the Treaty and submitted five principles they believed could be found in an analysis of the Treaty and its preamble:

1. "that a settled form of civil Government was desirable and that the British Crown should exercise the power of Government" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

2. "that the power of the British Crown to govern included the power to legislate for all matters relating to "peace and good order"" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

3. "that Maori Cheiftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

4. "that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

5. "that the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it" (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 673)

In its decision ([1987] 1 NZLR 641) the Court developed what it considered to be the principles of the Treaty:

1. "THE ACQUISITION OF SOVEREIGNTY IN EXCHANGE FOR THE PROTECTION OF RANGATIRATANGA" (P.C.F.E.,1988,112)

2. "THE TREATY REQUIRES A PARTNERSHIP AND THE DUTY TO ACT REASONABLY AND IN GOOD FAITH" (P.C.F.E.,1988,113)

3. "THE FREEDOM OF THE CROWN TO GOVERN" (P.C.F.E.,1988,114)

4. "THE CROWN DUTY OF ACTIVE PROTECTION" (P.C.F.E.,1988,114)

5. "CROWN DUTY TO REMEDY PAST BREACHES" (P.C.F.E.,1988,114)

6. "MAORI TO RETAIN CHIEFTAINSHIP (RANGATIRATANGA) OVER THEIR RESOURCES AND TAONGA AND TO HAVE ALL THE RIGHTS AND PRIVILEGES OF CITIZENSHIP" (P.C.F.E.,1988,115)

7. "THE MAORI DUTY OF REASONABLE CO-OPERATION" (P.C.F.E.,1988,115)

8. "ON WHETHER THE TREATY CREATES A DUTY TO CONSULT" (P.C.F.E.,1988,116)

The status of the Treaty, in law, had not been changed by the decision and the Court was careful not to undermine the Crown's right to govern. Implicit in the N.Z.M.C.'s first claim in its statement of claim, was a duty to consult. But the Court was unwilling to endorse this principle.

> "The Court's objection to consultation as a principle was founded on the suggestion implicit in the pleadings that no land could be transferred unless consultation took place between actual or potential Waitangi Tribunal claimants and the matter referred to the Tribunal should no solution be possible. That would be an unacceptable inroad into the Crown's right to govern." (Boast, 1987, 244)

In this writer's opinion, the second principle defined by the Court was the most important in that it defined the way in which the Treaty partners are to act towards each other and in particular, set the Crown a measure by which it must evaluate its decisions.

The Court had little difficulty defining the partnership principle. It said there is a relationship between the Treaty partners which requires the Crown to hold responsibilities which are like 'fiduciary duties' (Blanchard, 1988). All of the five Judges who heard this case agreed on this principle.

Justice Richardson also discussed issues relating to the 'honour of the Crown'.

> " Where the focus is on the role of the Crown and the conduct of the government that emphasis on the honour of the Crown is important. It captures

> the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners." (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641 at page 682)

The honour of the Crown meant that promises made by the Crown were to be 'solemnly kept' (Cheyne, 1987). The Treaty draft instructions from Lord Normanby to Hobson emphasised that Hobson's dealings had to be carried out with 'sincerity, justice and good faith', thus sealing the Crown's honour in the Treaty. Canadian cases reflecting on Treaty rights also focused on the faith and honour of the Crown. Thus there was a precedent for the Appeal Court to follow (Judgement Richardson J, *New Zealand Maori Council v. Attorney General.* [1987] 1 NZLR 641)

In a subsequent Court of Appeal ruling in 1989 (Judgement Cooke P, *New Zealand Maori Council v. Attorney General.* [1989] 2 NZLR 142), on an action brought by the N.Z.M.C against the Attorney General, in relation to the sale of cutting rights to Crown owned exotic and indigenous forests, the Court reviewed its stance on consultation and said that the Crown did indeed have an obligation to consult with Maori.

> "In the judgements in 1987, this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument." (Judgement Cooke P, *New Zealand Maori Council v. Attorney General.* [1989] 2 NZLR 142 at page 152)

The Waitangi Tribunal's Methodology

Unlike the Court of Appeal the Waitangi Tribunal has recommendatory powers only. Its findings are not judgements or orders. A more formal adjudicatory role would 'formalise' proceedings and remove from the Tribunal its ability to make statements which pressurise politicians into action.

The Tribunal has stressed that the principles are an evolving entity:

> "In interpreting the Treaty the Tribunal is conscious of the need to have due regard for the intentions of the Treaty partners in the light of surrounding circumstances at the time. In other words we must be wary that we don't become trapped into the idea that a definitive or exclusive set of principles can be established. The Treaty is a living document which calls to be interpreted and applied not simply as at 1840 but in the contemporary setting." (Gardener, 1989, 5)

The Tribunal's principles owe their development to cultural and environmental concerns as well as legal interpretation. Many of the principles and recommendations of the Tribunal have come about through Maori exposition of their holistic view of the world.

The Tribunal had been directed by the Treaty of Waitangi Act 1975, to determine the principles of the Treaty. Had the Tribunal, in their view, been directed to determine the terms of the Treaty it could be considered to be a constitutional document or a Treaty at international law (Wai 22, Muriwhenua, 1988).

Like the Courts, the Tribunal has used many different sources to interpret the Treaty. The first report to discuss the methodology used in defining the principles of the Treaty was the Te Atiawa report (Wai 6, Te Atiawa). In this report, the Tribunal drew heavily on overseas experience:

> "The overseas experience must cause us to re think our perception of the Treaty of Waitangi and its significance. We consider that it will be increasingly unrealistic for New Zealanders to assess the Treaty of Waitangi in the context only of their own history." (Wai 6, Te Atiawa, 1983, 54)

The Tribunal drew heavily from a submission from the Department of Maori Affairs. The Department contended that the principles of treaty interpretation be applied rather than the principles of statute construction. A House of Lords ruling on the interpretation of statutes,James Buchanan and Co Ltd v Babco Forwarding and Shipping (U.K.) Ltd (1977) All ER 1048, was used to introduce the rules of interpretation.

Next the Department introduced work by I.M. Sinclair "Treaty Interpretation in the English Courts" (ICLQ (1963) vol 12 P508). In summary form this work said:

(a) Treaties are interpreted on their actual text;

(b) Words and phrases are given their "normal natural and unrestrained meaning in the context in which they occur." (Wai 6, Te Atiawa, 1983, 56);

(c) "Treaties are to be interpreted as a whole." (Wai 6, Te Atiawa, 1983, 57);

(d) "The objective or purpose must be used to interpret the treaty. Each provision of the treaty must be interpreted so that "a reason or a meaning can be attributed to every part of the text." (Wai 6, Te Atiawa1983, 57);

(e) The actions of the parties after the Treaty is concluded, may be used in interpreting the Treaty;

(f) Treaties must be interpreted using the meanings of words or phrases at the time the treaty was signed.

Fothergill v Monarch Air lines Ltd (1980) 2 All ER 696 (H.L.) and Minister of Home Affairs v Fisher (1980) AC 319 (PC) were drawn on by the Department to highlight the idea that treaties should be interpreted in light of the spirit of the treaty and the surrounding circumstances.

Lord McNair's "The Law of Treaties" was the next source drawn on by the department. This work focussed in part on the interpretation of bilingual treaties. Using this work, the Department stressed that neither text in the Treaty was superior to the other and that each text could be used to interpret the other. However the Department said that as Maoridom signed the Treaty on the basis of what the Maori text said, it should predominate in terms of interpretation. It backed this point by pointing out Articles 33(2) of the Vienna Convention on the Law of Treaties of 1969 of which New Zealand became a party to in 1971.[41]

41The Vienna Convention came into force in 1980.

Finally the Department brought in the rule of *contra proferentem*[42] and quoted from Jones v Mehaan (1899) 175 U.S. 1.[43]

The next instance in which the principles of treaty interpretation were discussed was in the Manukau case. Much of the discussion centred on what the Department of Maori Affairs submitted in the Te Atiawa case. By this stage, the Tribunal was using McNair's work directly in saying it was possible to interpret one text with reference to another. And again drawing directly from Jones v Mehaan (1899) 175 US 1, the Tribunal said:

> "... the Supreme Court has laid down an indulgent rule which requires treaties to be construed 'in the sense which they would naturally be understood by Indians.'" (Wai 8, Manukau, 1985, 88)

Thus re-emphasising that the Maori version of the Treaty had equal status with the English version.

The Orakei and Muriwhenua claims also discussed the principles of Treaty interpretation. These discussions took much the same format as the previous discussions. It seems clear that the Tribunal had settled on criteria which satisfactorily enunciated the principles as they saw them to be. These criteria were summarised in the Orakei report. However the Tribunal was careful to add a disclaimer, that this was not a definitive set of principles for interpreting the Treaty. They were relevant only to the Orakei report and are summarised below:

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[42] *Contra Proferntem*: Where a provision is ambiguous that provision will be construed against the party which proposed that provision. (Wai 9, Orakei, 1987)

[43] ""The Department made then a comparison with North American Treaties -

> "The Supreme Court of the United States has laid down an indulgent rule which requires treaties made with Indian tribes to be construed "in the sence which they would naturally be understood by the Indians"
>
> ... Discussion by the Courts and commentators on the rule indicate that it may be regarded as an extension of the contra proferentem rule."" (Wai 6, Te Atiawa, 1983, 59)

(a) The primary duty of a Tribunal charged with interpreting a Treaty is to give effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of surrounding circumstances.

(b) It is necessary to bear in mind the overall aim and purpose of the Treaty.

(c) In relation to bilingual treaties neither text is superior.

(d) Given that almost all Maori signatories signed the Maori text, considerable weight should be given to that version.

(e) The *contra proferentem* rule that in the event of ambiguity such a provision should be construed against the party which drafted or proposed that provision (in this case the Crown) applies.

(f) The United States Supreme Court "indulgent rule" that treaties with indigenous people (American Indians) should be construed 'in the sense that they would naturally be understood by Indians' supports the principle (d) above.

(g) Treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes. (Wai 9, Orakei, 1987)

The Principles Which the Tribunal Has Developed

In 1988 the Parliamentary Commissioner for the Environment produced a report on the Crown response to the recommendations of the Tribunal. In this report the principles of the Treaty, both implied ans stated by the Tribunal were set out. They are summarised below.

1. "THE EXCHANGE OF THE RIGHT TO MAKE LAWS FOR THE OBLIGATION TO PROTECT MAORI INTERESTS" (P.C.F.E.,1988,104)

2. "THE TREATY IMPLIES A PARTNERSHIP, EXERCISED IN THE UTMOST GOOD FAITH" (P.C.F.E.,1988,104)

3."THE TREATY IS AN AGREEMENT THAT CAN BE ADAPTED TO MEET NEW CIRCUMSTANCES" (P.C.F.E.,1988,105)

4. "THE NEEDS OF BOTH MAORI AND THE WIDER COMMUNITY MUST BE MET, WHICH WILL REQUIRE COMPROMISES ON BOTH SIDES" (P.C.F.E.,1988,105)

5. "THE MAORI INTEREST SHOULD BE ACTIVELY PROTECTED BY THE CROWN" (P.C.F.E.,1988,107)

6. "THE GRANTING OF THE RIGHT OF PRE-EMPTION TO THE CROWN IMPLIES A RECIPROCAL DUTY FOR THE CROWN TO ENSURE THAT THE TANGATA WHENUA RETAIN SUFFICIENT ENDOWMENT FOR THEIR FORSEEN NEEDS" (P.C.F.E.,1988,108)

7. "THE CROWN CANNOT EVADE ITS OBLIGATIONS UNDER THE TREATY BY CONFERRING AUTHORITY ON SOME OTHER BODY" (P.C.F.E.,1988,108)

8. "THE CROWN OBLIGATION TO LEGALLY RECOGNISE TRIBAL RANGATIRATANGA" (P.C.F.E.,1988,109)

9. "THE COURTESY OF EARLY CONSULTATION"(P.C.F.E.,1988,109)

10. "TINO RANGATIRATANGA INCLUDES MANAGEMENT OF RESOURCES AND OTHER TAONGA ACCORDING TO MAORI CULTURAL PREFERENCES" (P.C.F.E.,1988,110)

11. "'TAONGA' INCLUDES ALL VALUED RESOURCES AND INTANGIBLE CULTURAL ASSETS" (P.C.F.E.,1988,111)

12. "THE PRINCIPLE OF CHOICE: MAORI, PAKEHA AND BICULTURAL OPTIONS" (P.C.F.E.,1988,111)

CONCLUSION

Resource management issues involving Maori cultural and spiritual values have not been dealt with easily in the Court system as resource management legislation such as, the now replaced, Town and Country Planning Act and the

Water and Soil Conservation Act have not specifically mentioned either the principles of the Treaty of Waitangi or spiritual and cultural values.

The Resource Management Act, in it's Purposes and Principles,[44]has ensured that Maori cultural and spiritual values and the principles of the Treaty[45] are taken into account by the persons 'exercising functions and powers' under it. With the combination of the Maori view of the world, the conflict between that view and Pakeha resource use practices, and the principles of the Treaty, resource use conflicts involving cultural and spiritual values will become increasingly complex. There are alternatives to the Court system for the resolution of these issues. Some of which are explored in this thesis.

44Part two of the Act.

45Section 6(e), section 7(a) and section 8.

CHAPTER 3 MAJOR CASE STUDY: WAIKAREAO ESTUARY

Background To The Conflict

The Need For And Planning Of Route P

Route P was designed and built to alleviate traffic flows, and expected increased traffic flows, on Cameron Road in the Central Business District in Tauranga. Cameron Road collected traffic from the Port of Tauranga[46] and distributed it to the Routes out of the city. With the redevelopment of the Port Cameron Road was expected to come under some pressure from traffic to and from the Port. It was decided to provide alternative access to the Port and by pass Cameron Road. The map on page 65 is a visual representation of the options discussed in the environmental impact assessment.

At this stage the reader should note the shore line Route. This Route would play a part in the negotiations which are to follow. Widening Cameron Road and the Eastern Tauranga Peninsula Routes were rejected for reasons of practicality.[47] An option not explored by the environmental impact assessment, but favoured by Ngai Tamarawaho, one of the parties to the Mediation detailed below, was a Route following the east coast main trunk railway from the harbour bridge north west through the suburb of Otumotai.

The Route chosen in the E.I.A. was Route P. The Route was designed as 'a limited access arterial road'. It was designed to function with expected and present traffic flows in mind. Access to and from the Route would be at the northern end and at Marsh Street. The connection was designed to take traffic flows from the harbour bridge and the Chapel Street Bridge.

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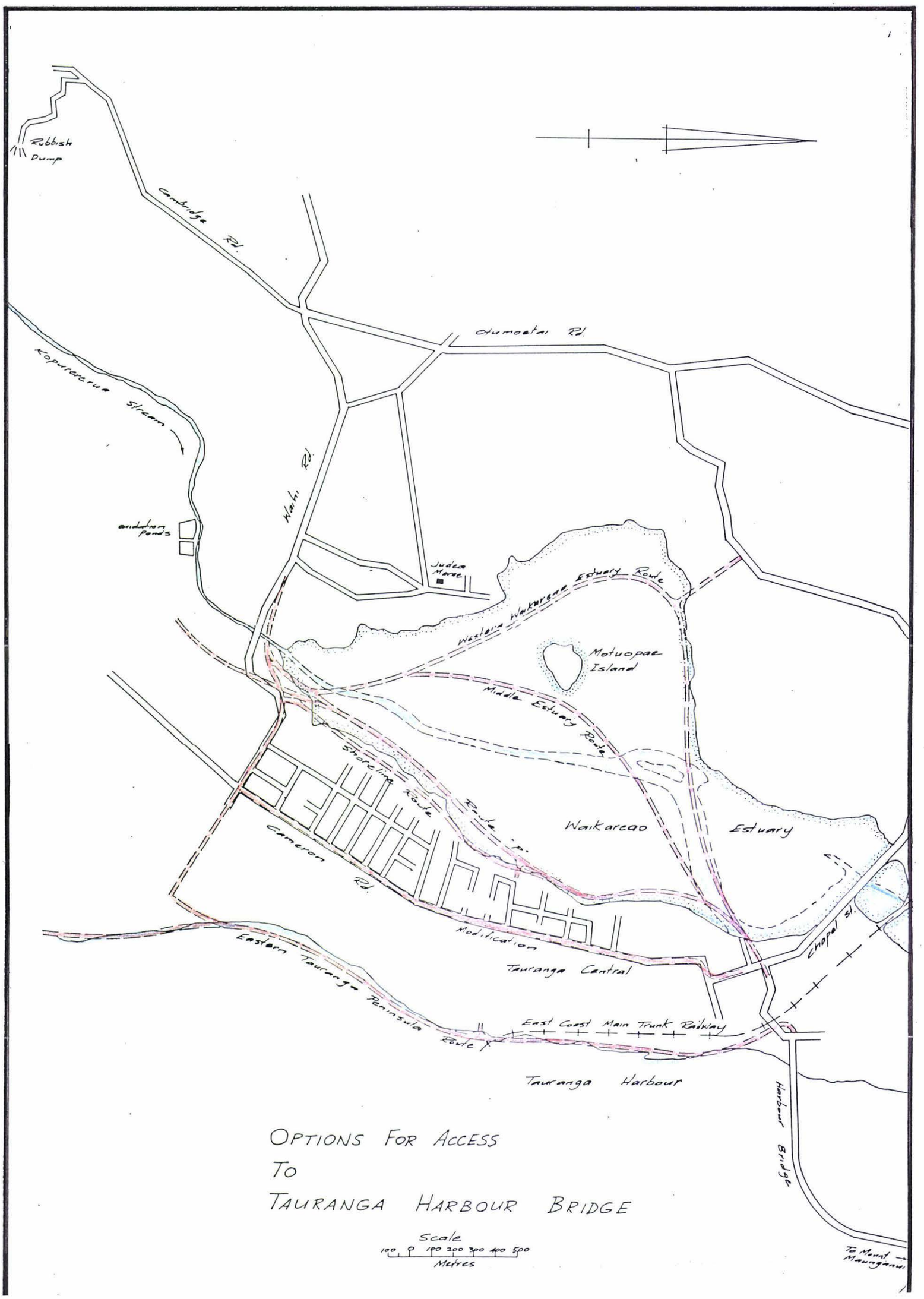
[46]Which was under going a redevelopment.

[47]The Western Waikareao Estuary Route and The Middle Estuary Route were never really seriously considered. The environmental and Cultural and Spiritual impacts were too great.



OPTIONS FOR ACCESS TO TAURANGA HARBOUR BRIDGE

At the southern end the E.I.A. proposed two options. The first was to end the Route at Waihi Road. The second was to extend the route southwards to connect with the proposed Route J. This second option could collect traffic from Waihi road. An intermediary connection was proposed from Elizabeth street. It was intended that this would collect traffic moving from the central business district to Judea. Either option would require the reclamation of around ten hectares from the bed of the estuary. Special legislation was passed which authorised the Council to undertake the works. However the Council would still need approval from the Minister of Conservation, under section 178 of the Harbours Act,[48] to undertake the works.

The State Of Relations Prior To The Mediation.

Relations between the Tauranga City Council and Ngai Tamarawaho, over the five years preceding the Waikareao mediation, can best be described as 'unhappy'. Younger members of the tribe disgruntled over the building of the town hall and library on what they claimed was traditional Ngai Tamarawaho land had occupied the town hall in protest over their claims. In another incident the recently completed library had been occupied, during which time books had been burnt.

With the Labour Government's review of local government structures[49] and the disestablishment of the Tauranga City Council the opportunity arose for the new Tauranga District Council and Ngai Tamarawaho to enter a new era of consultation. Both Ngai Tamarawaho and the District Council took the opportunity the change presented. Allan Tiplady, Director of Community Services for the Council, commented:

> "When the new Council came into being, the new Tauranga District, ... there was a Mayor elect who was not the previous Mayor of Tauranga City. The previous Tauranga City Council had had difficulties in the days of the Town Hall. There was a definite block between the Council and the Maori people because of what had happened in

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[48] See Appendix F.

[49] Local Government Reform.

> the Town Hall matter. The new Mayor of the Tauranga District Council had a very positive approach to the Council's relationship with the Maori community and made a clear statement to the Maori people that he wanted to consult and involve them in the Council's decision making processes. So again the political will was there from the Council perspective ... to get along side the Maori people and make this thing happen." (interview, Tiplady, 1992)

Greg Tata and Hoori Rikirangi, the Secretary and Assistant Secretary of Rununga O Ngai Tamarawaho also commented on the change of administration:

> "And because of the continual change of various administrations, with in the District Council, and the amicability of communication between the Council members, particularly the Mayor, Allan Tiplady and even the chief executive officer, who is Alan Bickers, it is now a better situation. We can now sit around the table, we have been, talk about it and we can still oppose them ... " (interview, Rikirangi, 1992)

> "And the council for the very first time, during those consultations, saw my people as principle concern. And for the very first time in our lives, along with the District Council, we got to be one of the drivers rather than being in the back seat with the passengers." (interview, Tata, 1992)

The Planning Of The Project: Extent of Ngai Tamarawaho's Involvement.

The consultants designed a public participation programme based on three stages.

1) An identification of the 'parties with a potential interest in the proposal'. In this stage they identified Ngai Tamarawaho as an interested party.

> "(B) The Ngai Tamarawaho of the Judea Marae who have a burial ground on Motuopae island, and who have been traditional users of the estuary for food gathering." (E.I.A., 1988, 109)

2) An information programme. This entailed the production of a four page document, outlining the proposal, which was circulated to 30,000 households in

the district. In addition radio interviews, advertising, and public meetings were utilised. The Council's design engineer was appointed as the liaison officer who would answer inquiries during working hours. A special committee in council was set up with full members selected from identified interests in the community. This included two members from Ngai Tamarawaho.

3) Research and analysis: The meetings, outlined above, served to highlight three areas of concern for Ngai Tamarawaho:

> "(1) the spiritual and cultural significance of the estuary and the surrounding lands;
> (2) broad historical factors related to land ownership and confiscation; and
> (3) the perceived impacts of Route P." (E.I.A., 1988, 122)

> "Past experience appears to leave the Ngai Tamarawaho dubious about the extent their concerns will be listened to, and believe that the Council will go ahead with it any way. I'll borrow a million bucks to bet on that." (E.I.A., 1988, 124)

Hoori Rikirangi commented on the expectation that Route P would proceed despite his Tribe's protestations:

> "During the process of ... multiple meetings with the designers of the Route, at that time, it was clear to us there, at that time, that first initial meeting, that a decision had not been made that a Route would be there:
>
> 'We are only investigating a situation ... where it could possibly happen.'
>
> But many of our kaumatua, and actually one of our kaumatua said:
>
> 'I bet that a decision is already been made. This Route is going to go on by hook or by crook.' " (interview, Rikirangi, 1992)

Greg Tata believed the consultation was too little and too late:

> "From my perspective ... this whole planning ... for this Route should have started way back in the fifties. That's when the whole thought, the idea, was conceived. Way back in those days, and through the sixties ... Where we had seen, just as a matter of

> happenstance, plans that had been caste, through our eyes, with out any consultation what so ever. Realising at this particular stage it was not possible because that wasn't the thinking of the municipality, or the government to do any thing of that nature." (interview,Tata, 1992)

And further:

> "In the light that we came in, when they finally got their ... Peat Marwick and all those folks in together, it was they that actually decided that there should be some Tangata Whenua involvement. At that stage we had meet with the District Council." (interview, Tata, 1992)

In a discussion on the hindering effects of a lack of information on public participation the E.I.A. stated:

> "Waiting for all the information to become available, however, can mean that people are presented with a fait accompli." (E.I.A., 1988, 109)

Indeed Ngai Tamarawaho believed that when they were approached by the E.I.A. consultants the project was very much a *fait accompli.* Some, if not all, of the Tangata Whenua 'consulted' questioned the stage and the level in which they entered the public participation process. Ngai Tamarawaho were 'consulted' in the design of the route. However, from the tribes perspective, their involvement in the environmental impact assessment process was neither adequate or at the right level.

A letter was forwarded to Noel Pope (the Tauranga City Mayor) on 15 October 1987. This letter, parts of which were included in the E.I.A., covered Ngai Tamarawaho's reluctance to be represented on the Council's Subcommittee. They cited seven reasons for not participating in the subcommittee:

1) The findings of the Muriwhenua claim[50], being heard at the time, would affect the way they viewed events in the estuary and they preferred to wait until they could read the findings when released.

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[50]Waitangi Tribunal Claim number 22.

2) Ngai Tamarawaho had a claim pending before the Waitangi Tribunal where they would seek remedy for adverse effects resulting from the project.

3) Cultural and spiritual effects of the proposal.

4) Effects on: fisheries; the hydrology of the estuary; fresh and polluted water entering the estuary; noise; effects on beaches, mud-flats and margins.

5) Effects on Motuopae Island.

6) Down stream effects of Route J on Urupa, Pa sites and 'acquisition' of remnant Ngai Tamarawaho lands.

7)

> "Lastly, there is the very important principle raised by Archdeacon Michael Smart concerning the meaningfulness and effect of 'token' representation. The point he made from his church in coming to grips with the reality of full consultation and joint decision making in fulfilment of the principles of partnership between Maori and Pakeha is of great relevance to your invitation and cannot be ignored." (E.I.A., 1988, 125)

Ngai Tamarawaho suggested a jointly sponsored committee to address these issues.

Lodgement of the Wai 42 and Wai 86 Claims.

From this point on in the case study the reader may find it useful to refer to the time lines on page 71. [51] These claims were the most important catalysts in the process which was to follow. Wai 42 was unresolved by the process: it was never intended that Wai 42 be resolved by negotiation. The hearing for this matter is to be held in 1993.

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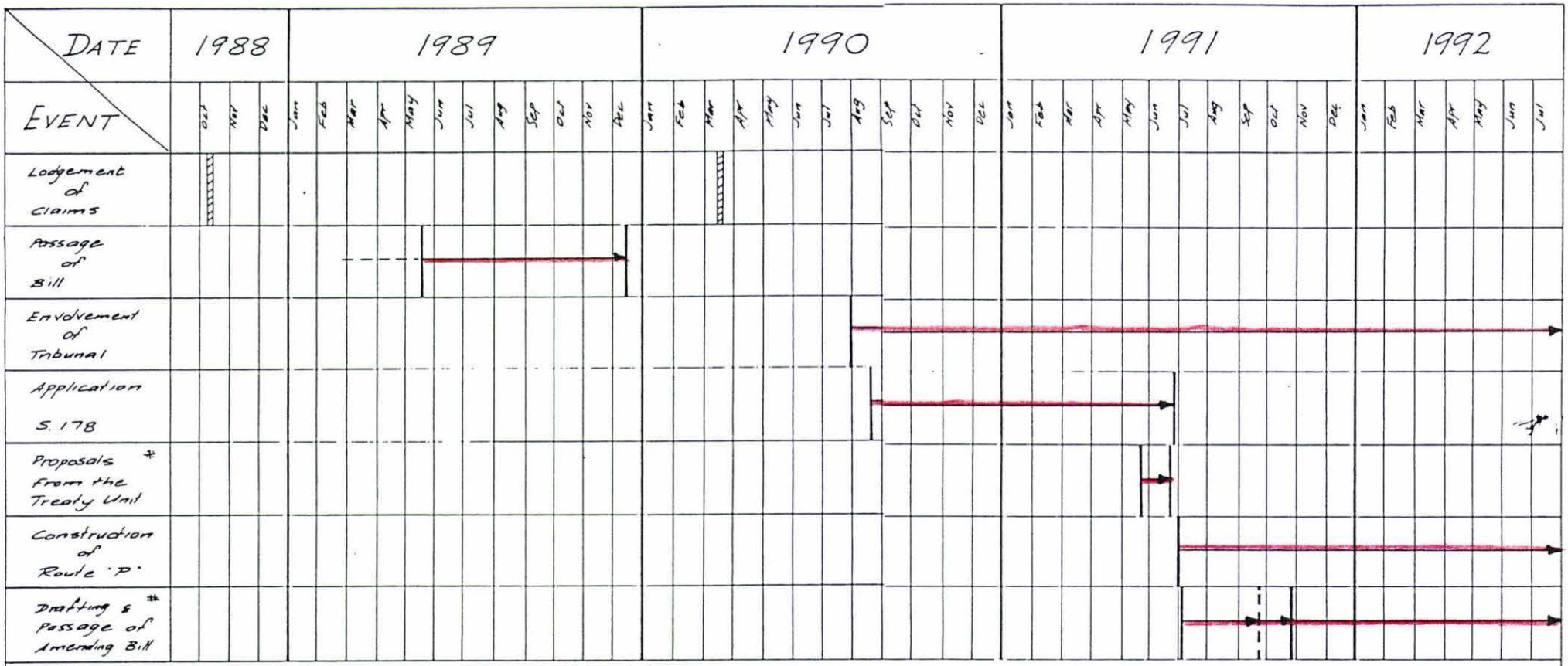
[51] These are a visual representation of the sequence of events detailed with in. Where appropriate the reader will be directed to refer to the lines.



To Approval of Proposals by Cabinet

To Approval by Council then its Continuation Through Parliament

WAIKAREAO ESTUARY MEDIATION - SEQUENCE OF EVENTS

Wai 86 was first filed with the Waitangi Tribunal on 10 October 1988. The claim was filed by seven individuals on behalf of themselves and Ngai Tamarawaho. This claim encompassed the proposed Route P and the proposed Route J. It said Ngai Tamarawaho would be "prejudicially affected by the planning, policies, proposals and decisions of the Tauranga City Council and the Department of Conservation and other statutory bodies, authorities and agencies of the Crown ..." The claimants sought a recommendation that the above matters were inconsistent with the principles of the Treaty of Waitangi and that mana, use and control of all whenua, kainga and taonga be restored to the tangata whenua (D47, T.D.C., 1991).

A second claim was filed on 21 March 1990 by ten more individuals (kaumatua) of Ngai Tamarawaho. This claim was against the Tauranga District Council (Waikareao Estuary Express-way) Empowering Act 1989. It claimed the Act was inconsistent with the principles of the Treaty and requested the Act be repealed, the Waikareao Estuary ownership be returned and compensation be paid. Both claims were numbered Wai 86 (Ibid).

It would be useful at this stage to highlight the stated positions of the Council and Ngai Tamarawaho during the mediation. These are positions which were `polarised' and did not change during the mediation.

Ngai Tamarawaho took a position, on the proposal, based on the cultural and spiritual values which are an important element of their relationship with the estuary. Ngai Tamarawaho were of the opinion that the proposal should not proceed:

> "But right from the beginning our opposition (remained), even now our opposition (remains). Route P is there now, many of our people still oppose that." (Interview Rikirangi, 1992)

This is a position acknowledged by the Tauranga District Council:

> "The Ngai Tamarawaho people stated in that first meeting that they were totally opposed to Route P. Now they have maintained that stance right through and they still maintain that stance to this day." (Interview, Tiplady, 1992)

The Tauranga District Council had a similarly entrenched position:

> "Our starting point was; `Well, we have legislation to back us. We are able, legally, to build the road even though we know we still have to get the Minister of Conservation's consent.' " (Interview, Tiplady, 1992)

However, while these positions remained to the end, they did not prevent the parties from reaching a position where the Council could apply for the section.178 Harbour Act Consent and commence construction of the road, without opposition from Ngai Tamarawaho.

Council were also very careful to stress that, once the Tribunal became involved, the negotiations were between Ngai Tamarawaho and the Crown. They were only an interested party:

> "But certainly the involvement of the Council ... was as an interested party. So we said it all the way along the line, in these negotiations, that we are an interested party, we want the issues to be resolved, obviously because we want to build the road, but we're here to help to facilitate, coordinate and do whatever we can, within our powers, to help the Crown and the Claimants settle the issue." (Interview Tiplady, 1992).

An Epochal Description Of The Mediation Process.

This description has been `pieced together' from the files supplied by Allan Tiplady, Director of Community Services, Tauranga District Council. Comments of interviewees are interspersed in the discussion where some description on the stance and the issues facing the parties was felt necessary.

The Council and Ngai Tamarawaho had gone to some lengths to try to resolve the issues before the Tribunal had become involved. Council approached the Waitangi Tribunal when it became clear that Ngai Tamarawaho were not

interested in entering a process of negotiation which would jeopardise the claims they had lodged:

> "[We] agreed with and accepted that point of view and position. Went back to the Tribunal and agreed with the Ngai Tamarawaho people that they should ask the Tribunal to act as mediator in the process." (Interview Tiplady, 1992)

> "Well, it began a long while after the claim had been lodged anyway. Meanwhile we saw people ... jumping over fences, putting stakes out in the estuary, all sorts of things happened like this. And then we just went to the Council and said they had to stop then ... and it did. And it was then that the District Council went down to Wellington [and] the Crown said: `Well, we'd better undertake this Wai 86, bring it up from the pits to the top, and let's do it right away.'" (Interview Tata, 1992).

The First Meeting.

The first meeting in the mediation process took place on 31 July 1990[52]. Representatives of the Waitangi Tribunal, the Crown Law Office, the Cabinet Treaty Policy Committee, Transit New Zealand, the Claimants and Tauranga District Council were present. This was an exploratory meeting chaired by Judge Trapski. In his opening remarks, Judge Trapski stressed that the parties were not there to mediate, but were there to consider the role the Tribunal was to take in this matter. He asked the parties to be 'frank and forthcoming'. They were not expected to reveal information they did not want to. The Claimants were asked to speak first. Representatives stood and explained the concerns they had about the project. Issues which were raised were: the protection of Motuopae Island; the effects of water levels on low-lying housing areas; the effects on Kaimoana; a description of the extent and delineation of the reclamation; a description of what land was owned by the parties; and that the Manukau and Maketu reports conflicted with conclusions of E.I.A (D1, T.D.C., 1990).

The Crown Law Office stood and explained their role in the process. They acknowledged that they had responsibility for the drafting of the legislation and

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[52]Refer to time line: Involvement of Tribunal. Page 71.

that Resource Management Law Reform (and its Treaty provisions) had come too late to affect the Empowering Act. Transit New Zealand stood and described their involvement in the design of the Route. The last `formal' action of this meeting was for Judge Trapski to set a date for another meeting to be held on 20 August 1990. In its summary of the report on the meeting, Council representatives reported that the process had been very useful (D1.T.D.C., 1990).

The possibility of assistance for `remedial and protective work' on Motuopae was raised. In the report's discussion on what should be included in the agenda of the next meeting, it was noted that Ngai Tamarawaho would want to do this work themselves and it raised the issue of Council providing technical and material support for the protection. It noted that such support would have to be provided in a respectful and culturally sensitive manner.

On the issue of rising water levels, the report recommended that D.S.I.R. reports and other expert advice by made available to the parties. It was also recommended the latest plans of the Route be made available to Ngai Tamarawaho representatives and that consultant and legal advice be sought on the ownership of land around the harbour and the conflicts with the E.I.A. report.

Meeting 2 August 1990.

The next meeting was held in Council chambers on 2 August. Kaumatua, Councillors, and Council staff were present. Discussions were held on the points which were raised in the 31 July meeting. On the question of the protection of Motuopae Island, Council stated that they recognised the sensitivity of the issue. They would respond to Ngai Tamarawaho directions on work that should be undertaken. Ngai Tamarawaho were invited to attend a demonstration by the D.S.I.R. on the effects of the reclamation on sea level rise. Work was still on going in addressing concerns over the exact extent of the route and definition of land ownership.

Another issue was added at this stage: "The effect heavy traffic on Route P will have on the island, especially from vibration and noise." It was noted that this

issue had been referred to engineering consultants for investigation and report (D5,T.D.C.,1990).

Meeting 13 August 1990.

Monday 13 August 1990 saw a meeting between Ngai Tamarawaho representatives and Council. It was to set the agenda for the 20 August meeting. The agenda set included for discussion:

1 The role of the Crown Law Office and ownership of the Road and Estuary upon completion of road works.
2 Protection works for Motuopae Island.
3 Compensation for the loss Route P would impose on Ngai Tamarawaho.
4 Effect of pollution on kaimoana.
5 Sea levels and their effect.
6 Effect of vibration and noise on the island (D8,T.D.C.,1990).

Morehu Ngatoko (of Ngai Tamarawaho) stressed that while there had been progress in the discussion of issues, the main issue, whether or not Route P should proceed, may still have to be "adjudicated on by the Waitangi Tribunal". This fundamental difference between the parties still remained (D8,T.D.C.,1990).

Few of the issues had been resolved by this stage. However, useful discussion of all of the issues raised was proceeding. Discussion on protection works for Motuopae appeared to be well underway and committed to by the Council. The report (D8,T.D.C.,1990, 2) on the 13 August meeting said:

> "His Worship the Mayor stressed that whether or not Route P proceeds, the Council is committed to the Motuopae Island restoration and protection works."

Minutes of the 20 August meeting were not made available to the writer. It appears that restoration work had been finalised at this meeting. The next full mediation meeting was listed in Council files as occurring on 27 March 1991.

Description Of Issues Highlighted To Date, With Comment From Council And Ngai Tamarawaho Representatives.

1. Protection works for Motuopae Island. Progress on this issue had been substantial:

> "Council is prepared to undertake design, construction and supervision work up to an amount of $60,000 on restoration and protection of Motuopae Island. This offer is made on the basis that it is separate from, and will proceed regardless of the Route P proposal." (D9, T.D.C. 1990, 1)

Allan Tiplady (interview, 1992) commented on the protection works:

> "We undertook to (carry out) ... protection works for Motuopae Island ... for the urupa ... it has been suffering from erosion problems for many years and it was getting into quite an alarming state and erosion was getting into the island ... And we've actually completed construction of a protective sea wall right around the exposed part of ... Motuopae Island."

Although this issue was substantially resolved, at this point, it's importance in the mediation process should not be under estimated. The issue provided a base for developing trust between the Council and Ngai Tamarawaho.[53] These retention works were carried out through late 1991 and early 1992.

2. The effect of water levels on low lying housing areas. This concern would focus latter on the urupa on Motuopae Island. Kaumatua were convinced that such a large scale reclamation would cause a general rise in the tide level in the estuary. Thus inundating low lying parts of the estuary shore and the Island (D9, T.D.C., 1992)

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[53] See the photograph of the commemorative plaque on page 78.

Commemorative Plaque - Waikareao Estuary

> "They also believed, and I think some of them still believed to this day,that the construction of the road, the reclamation, they believed it was going to increase the level of water in the estuary. And that ... at ... high tide ... the level of water was going to be increased" (interview Tiplady, 1992)

3. Pollution effects on kaimoana. Ngai Tamarawaho use the estuary as a source of Kaimoana. Mr Tata and Mr Rikirangi referred to the estuary as the Tribe's kete- kai - food basket. Pollution had had a major effect on the cultural and spiritual relationship between the tribe and the estuary.[54]

Ngai Tamarawaho had had pollution concerns for the last four decades. Previous Councils had located rubbish tips/dumps at points where leachate could, in Ngai Tamarawaho's opinion, easily enter the waters of the Waikareao.[55] The first was located at Glasgow Street adjacent to the Estuary. This land was recovered eventually, and the tip relocated to Cambridge Road; on the edge of the Kopurererua Stream. This stream is the main tributary to the Waikareao Estuary (Interview Tata, 1992). In conjunction with the tips, Ngai Tamarawaho had pin-pointed sewerage discharges as a contributing factor to the pollution:

> " ... Since then other complications have arisen where we've got this ugly seaweed or weed which is out there ... this green lettuce,[56] that from what I have read has come about because of the ... District Council's sewer programme ... that's caused this weed. Professor John Morton, in Auckland, he says very very plainly `Yes,it is caused by the sewerage pipe'." (Interview Tata 1992).

Ngai Tamarawaho had also shown concern about the storm-water[57]

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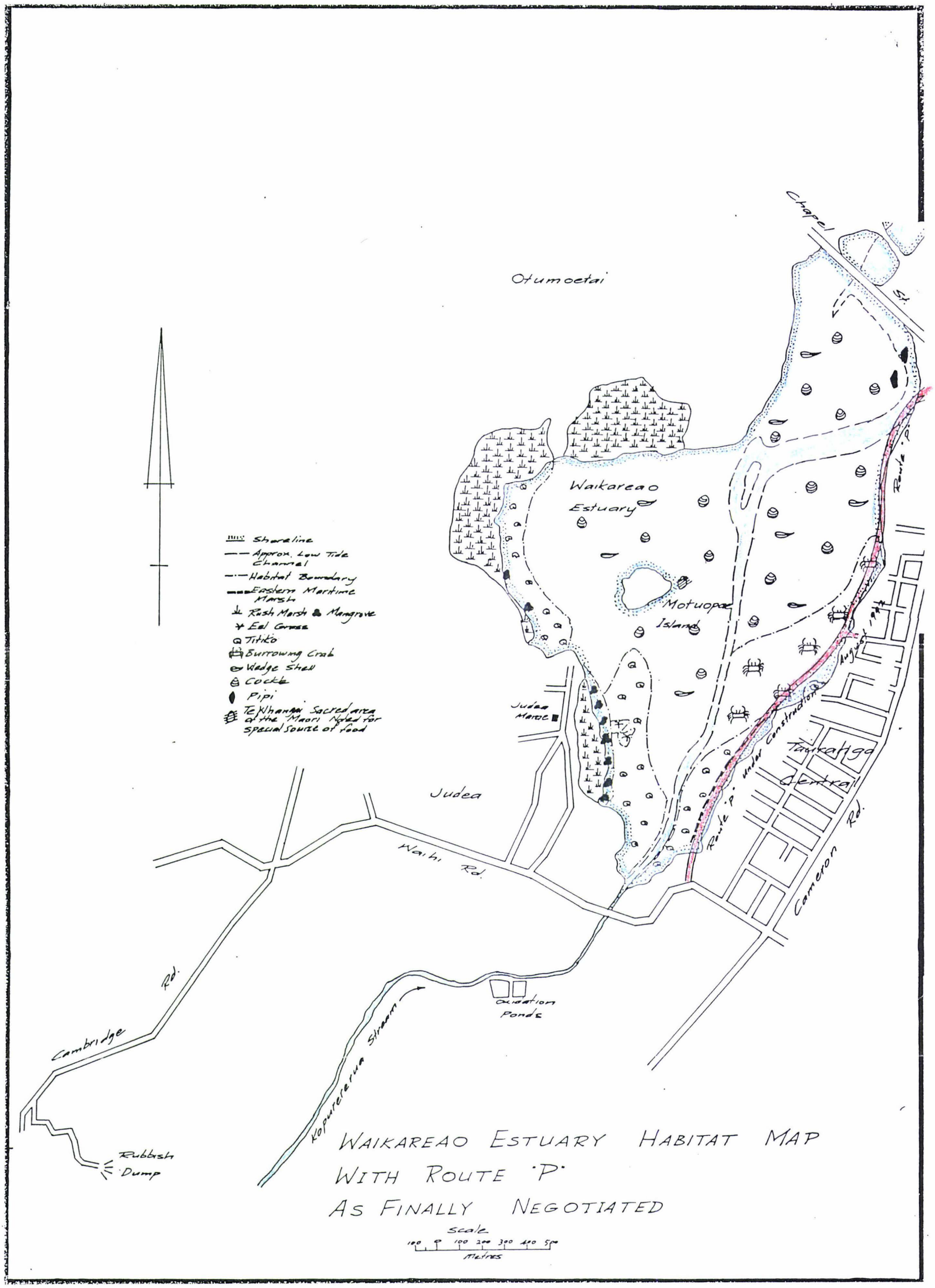
[54]Refer to map page 80 for a representation of the animals and kaimoana associated with the estuary.

[55]Refer to Map on page 80. Note the Rubbish Dump around 500 meters from the banks of Kopurererua Stream.

[56]See photograph of sea lettuce on page 81.

[57]See photograph of storm water outlet on page 81.



WAIKAREAO ESTUARY HABITAT MAP WITH ROUTE 'P' AS FINALLY NEGOTIATED

Sea Lettuce - Waikareao Estuary

Stormwater outlet - Kopurererua Stream

discharges and leachates from the Judea industrial area (Interview Rikirangi, Tata, 1992).

Mr Rikirangi explained, for the writer, the meaning of Waikareao: "Wai is water, kareao is sparkle".

> "Sparkling waters in translation, no longer sparkling in the eyes of our people." (Interview Rikirangi, 1992).

All of these pollution sources have, of course, impacted on the quality of Kaimoana to be taken from the estuary. In the interview with Mr Tata, he explained that shellfish are seldom taken from the estuary, through fear of the contaminates which may be in them.

4. A description of the extent and delineation of the route. Confusion remained amongst the parties about the size of the actual reclamation and the delineation of the route. Promises had been made in the 13 August meeting that the information would be provided as soon as possible. The issue was not included in the agenda for the next meeting.

5. That the Manukau and Maketu reports conflicted with the E.I.A. It is possible the consultant's report had not been received by this stage. The issue was not included in the agenda for the next meeting.

6. The role of the Crown law office and ownership of Route P and estuary upon completion.

7. Compensation for the loss Route P would impose on Ngai Tamarawaho. This was a particularly 'thorny' issue which would stay with the proceedings for some months to come.

8. Effects of vibration and noise on the Island: As the Tribe's urupa Ngai Tamarawaho were naturally concerned to protect Motuopae from the effects of the expressway. Firstly the vibration issue:

"We have seen the effects of this kind of thing in other areas ... and with that we have become concerned that our concreting on the island has not been done with the greatest amount of expertise. It was done by people who had been tradesmen and did, sort of, freelance work and everything else and they may not have the right mix of cement. And of course the vibrations that may be ... some of those things may be affecting." (Interview Tata, 1992)

"Because we've run out of room there, we're burying our people in vaults, ... semi vaults, ... we dig down say half a metre in the ground, ... concrete vaults ... and we were frightened that vibration from the route would crack open ... our vaults ..." (Interview Rikirangi 1992).

Secondly the noise issue:

"... right now you can hear Cameron Road, come any closer and you won't have the peace that you normally would have on the marae when we're having ... our huis ... like this. Worse than that can you imagine saying a prayer on the island and the people calling across from the end of the road there, across to that (island). You won't be able to hear anything."

and in speaking about Maungatapu:

"... well, there's a little grave site there. I don't honestly know how my cousins are able to bury their dead and feel good about it when you've got cars and trucks ... whizzing past." (Interview Tata, 1992).

Council Concern and Action on Section 178 Consent.[58]

In late August 1990 the Council began to pay more attention to the approvals they would require from the Minister of Conservation. Council's solicitors were asked to report on the possibility that the Minister could veto the reclamation if he so desired.

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[58]Refer to time line: Application S.178. Page 71.

The solicitors' report, dated 27 August 1990 indicated, that in their opinion, the Minister did not have the right to veto the consent. Section 4 of the Empowering Act authorised the Council to carry out the reclamation 'subject to the provisions of the Harbours Act' (D12,T.D.C.,1990):

> "Those words `subject to the provisions of the Harbours Act 1950' do not mean that any other consents to the basic right to reclaim are necessary, but that procedural requirements of the Harbours Act must be complied with."

Approval for the reclamation had been given by Parliament (in passing the Empowering Act). The Minister's role was to ensure proper safeguards were added to the plans. This line of argument was still open to debate. However it was clear, at this stage, that the Minister's approval would be needed before the Council could proceed with construction.

Over the next five months separate consultation and negotiations proceeded between Council and D.O.C. over the recommendations D.O.C. were to make in their report to the Minister for his consideration.

Council's Route P working party convened a meeting on 4 March 1991. The working party met to discuss recommendations that had been developed to address the issues which had been raised by the Department of Conservation.

These recommendations included: realigning the route closer to the original edge of the estuary; special noise reduction measures be taken when sealing the road; that damage to tombstones caused by the use of the Route be rectified by the Council (in a manner agreed upon by Ngai Tamarawaho and Council); and that the Council assist Ngai Tamarawaho with erosion protection works.

Obviously these issues were arrived at by D.O.C. with some consultation with Ngai Tamarawaho (D13,T.D.C.,1991). Note that these 'issues' were not <u>all</u> the issues raised by D.O.C.. The issues detailed here are those raised by both D.O.C. and Ngai Tamarawaho. This was only an interim report; consultation with D.O.C. over these recommendations was to continue.

<u>Mediation Meeting 27 March 1991.</u>

A full mediation meeting was heard on 27 March 1991 on Huria Marae. Judge Trapski opened the Hui by summarising the process to date. The Judge noted that Tauranga District Council required consent under Section 178 of the Harbours Act; and that it would be considered by the Minister on 22 April 1991. The Judge reported that the Minister could only consider technical issues when addressing the consent; Treaty issues were not within the jurisdiction of the Minister in this instance. But the Judge pointed out that the Tribunal was well within its rights to address Treaty issues as well as technical issues and would continue to do so.

Greg Tata, secretary of the Rununga was next to speak. He reiterated that Ngai Tamarawaho were totally opposed to the Route. He noted that information provided by consultants and technicians `seemed' to indicate noise and vibration would have little impact on Motuopae Island.

Mayor Clarke spoke. He accepted the stance that Ngai Tamarawaho did not want the roadway. He invited the Director of Technical services (Bruno Petrenas) to bring the Hui up to date on the progress of the negotiations and design of the roadway.

The Director reported that the Route had been aligned closer to the shore; the planning period for increasing the width of the reclamation (four to six lanes) had been reduced from 50 years to 30 years; landscape plans for the reclamation had been prepared. Reports had been received on traffic noise and vibration. They indicated that the route would not have a substantial effect on the island. A vibrating roller with the effect of 200-300 vehicles on the road (at any one time) was monitored for vibration. The report stated that people walking on the island would cause 8-10 times more vibration. It was estimated that traffic noise would not impact on the island. But one-off noise events from braking vehicles would have an impact (D14,T.D.C.,1991; D15,T.D.C.,1991). Restoration work on the island was still being discussed and consultants had produced plans for three alternative land fill sites. In addition Council was investigating options for the cessation of sewage discharge (long-term) - this in relation to the pollution concerns.

Kaumatua and Claimants from Ngai Tamarawaho took their turn to speak and address the concerns they had over the route.

Peri Kohu entered the mediated negotiations for the first time at this stage. He expressed dismay at not being invited to the mediation meeting personally; after all, he was one of the principal claimants.[59] He expressed displeasure as well that Patiko Kuka, another claimant, was not invited to the meeting. In addition, he expressed his total opposition to the construction of the route and described desecration of Wahi Tapu. Further discussion from representatives of Ngai Tamarawaho re-emphasised their total opposition to the project.

Judge Trapski again summed up the position/concerns of the Tangata Whenua and the issues which were raised. The Claimants were not against progress but couldn't see why it had to be at their expense. The `honour of the Crown' and the `mana of the people' had to be restored by power sharing. Judge Trapski asked what was the matter with the alternative routes and why they were not considered. Was Section 178 and the Minister's role interpreted correctly?

The Judge re-emphasised that pollution of Kaimoana must be recognised and Motuopae protected, under the auspices of Article II of the Treaty of Waitangi. There were still questions about the vibration, to be answered. Compensation matters still needed to be considered. Finally, the Judge said that Crown representatives did not have suggestions at this stage but were taking a careful note of what was happening (D14,T.D.C.,1991, D15,T.D.C.,1991).

In informal discussions after the Hui, Judge Trapski asked for information concerning a number of aspects on the project which included clarification of findings on the vibration, inundation, and Council guarantees concerning the noise/vibration and protection works on Motuopae Island. A further meeting was organised for 22 April. A lot of discussion on the definition of issues had taken place but very little progress in the resolution of the issues had been made.

Catalysts to the Conflict Resolution.

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[59]Wai 42.

Of note in the process to this point is the lack of response from the Crown in the mediation huis/meetings to date. In a letter from the District Council's solicitors to the Crown Law Office, the Council stated:

> "The Tauranga District Council is concerned to make progress with this mediation. It looks forward to the next meeting on 22 April 1991 as being a working meeting at which some common ground can be established for all parties involved. The Crown is the major player (apart from the Claimants), but it has so far scarcely contributed to the discussion or to the explanation of an acceptable resolution." (D17,T.D.C.,1991)

Coupled with the above was the impending Ministerial consideration of the Section 178 consent. A letter from Daniel Bates, Ngai Tamarawaho's solicitor, dated 16 April 1991, was sent to the Minister of Conservation detailing Ngai Tamarawaho's opposition to the proposed route. It was sent in response to the Department of Conservation circulating its draft report to the Minister. In it Mr Bates stated:

> "My client has always been and remains totally opposed to construction of the proposed Route P. Further, in the event that decisions are made which will enable the Route P proposal to proceed despite opposition to it, it should not, in the interests of justice, be allowed to do so until a comprehensive plan (concerning inter alia restoration of Waikareao Estuary, protection of Motuopae Island, appropriate recognition of cultural and related values, and compensation) has been prepared and formally adopted by all affected parties (being principally the Crown, Tauranga District Council and my client)." (D19,T.D.C.,1991,2)

and further:

> "As a courtesy to you, I now apprise you of the fact that I have advised my client that in the event you decide to give your consent to the Tauranga District Council, there would be ample justification for issuing proceedings in the High Court by way of application for review of your decision. Concomitantly it would probably be necessary to seek an interim injunction against the Tauranga District Council to prevent commencement of construction of Route P, pending hearing of the application or review of the S.178 consent." (D19,T.D.C.,1991,5)

To summarise pressure was mounting on the Crown Law office and the Treaty Negotiations Unit to 'front up' with proposals. Tauranga District Council wanted to continue with the project as soon as possible but it seemed likely that unless agreement could be reached in the mediation a High Court injunction would be sought restricting the Council from commencing work.

Mediation Meeting 22 April 1991.

At the opening of this meeting a question arose concerning the participation of Wai 42 and Wai 86 claimants. In the past Wai 42 claimants had not been notified of impending mediation meetings. David Bates (counsel for Ngai Tamarawaho) suggested that in the future the claimants from both Wai 42 and Wai 86 be notified. Judge Trapski agreed with this point.

Mr Bates then summed up the issues as he saw them. He questioned the ownership of the land which was to be reclaimed and vested in the Council, and how that was affected by Article II of the Treaty of Waitangi. Mr Bates also pointed out that the forthcoming decision of the Minister of Conservation on the Section 178 consent would determine the path the negotiations took and there was a chance High Court proceedings would be issued.

John Delamere of the Treaty Negotiation Unit for the Crown stated his Department's position. He said his Department was putting some proposals together and that they had 'reason to believe' there had been a 'breach of the Treaty'. Any proposals would have to be put before the Cabinet Committee for their ratification. He said he wanted a cabinet response before the Minister of Conservation made his decision on Section 178. Special note should be made here that John Delamere suggested that the raupatu (or confiscation)/compensation issue be separated from the Route P negotiations.

Mr Bates voiced doubts that the road could proceed before the confiscation claim was resolved. However, Judge Trapski noted that separating raupatu from the claim (and dealing with the issue as part of Wai 42 in the 1993 hearings) might be the only way they could proceed without long-term delays. The Judge suggested meeting the Claimants separately to discuss the events in

a couple of weeks' time. This would give the Crown more time in which to get some work done on the suggestions.

Grant Bridgewater, representing the Department of Conservation, reported that D.O.C.'s section 178 report for the Minister of Conservation had been prepared. He said the report had been circulated for Ngai Tamarawaho and Council comment before being forwarded to the minister. He was expecting the process to take six to eight weeks.

Final comment was sought from the parties present. Matiu Tarawa, of Ngai Tamarawaho, questioned the separation of the raupatu issue. It was said Ngai Tamarawaho wanted their land returned, so as to restore their Mana and their economic viability.

Mike Batchelar, for the Council, restated that the claim and negotiations were between the Ngai Tamarawaho and the Crown. The Council were just an interested party who wanted to see the issue resolved. It was up to the Crown to resolve the issues (D20,T.D.C.,1991).

Mediation Meeting 9 May 1991.[60]

This is a report on a meeting held between the Crown, the Council and, Judge Trapski. John Delamere opened the meeting by tabling specific accommodations:

(1) That full ownership of Motuopae be vested in Ngai Tamarawaho.
(2) That sources of pollution be eliminated and the estuary cleaned up.
(3) That the Crown would guarantee the protection of Motuopae Island.
(4) Naming rights of the expressway be vested in Ngai Tamarawaho (D20a, T.D.C., 1991).

He would not be recommending a cash or land compensation settlement. He stated there was a good chance that the cabinet committee would accept the

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[60]Refer to time Line: Proposals from the Treaty Unit. Page 71.

proposals, but he needed Council and, of course, Ngai Tamarawaho acceptance of the proposals (D20a, T.D.C., 1991).

Council representatives discussed the recommendation/proposal on the pollution abatement. The Mayor noted that the Council was already committed to pollution abatement .[61] Bruno Petrenas said that an effective plan for dealing with the pollution would have to be developed in partnership with the Bay of Plenty Regional Council. Possible sources of pollution were identified as the tip,[62] storm-water discharges, the industrial area at Judea, and run off from farms. The existing water right for the sewerage discharge was to expire in July 1992 at which point the Council would be applying for a five year extension while a more compatible scheme was established (D20a, T.D.C., 1991).

In summing up at this meeting Judge Trapski reminded the Council that Ngai Tamarawaho wanted manawhenua in relation to the estuary not just fee simple title.

In early June 1991, the Council received a copy of a report from the Treaty Policy Unit detailing five points which the unit would be presenting to Cabinet as a basis for negotiating a final agreement:

> "(a) a formal written agreement with the Crown by which the Crown recognises and acknowledges Ngai Tamarawaho as Tangata Whenua of the Waikareao Estuary." (D21,T.D.C.,1991,2)
>
> "(b) they have full ownership of Motuopae Island.
>
> Should the Crown vest ownership of Motuopae in the people of Ngai Tamarawaho there is no likelihood of the island ever being sold, developed or otherwise desecrated as the island is the traditional burial ground (urupa) for Ngai Tamarawaho." (D21,T.D.C.,1991,2).
>
> (c) the Crown guarantees in writing that the pollution of the Waikareao Estuary

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[61] Presumably through their long-term planning documents.

[62] At Cambridge Road. See map page 80.

would be cleared up and the sources of that pollution be eliminated.

Ngai Tamarawaho wish to be partners in this process including the privilege of contributing labour, where possible, as only Ngai Tamarawaho know of these areas of special significance

Ngai Tamarawaho also expect to be partners in the on going preventative pollution management programmes." (D21,T.D.C.,1991,3).

It was also stated that BOP Regional Council should be included in any agreement on Pollution Control.

"(d) the Crown guarantees in writing the commitment of the Tauranga District Council to protect Motuopae Island from any adverse effects arising from the construction and use of the proposed Express-way, including noise pollution, rising water levels, vibration and related damage." (D21,T.D.C.,1991,3)

"(e) Naming rights to the Express-way, walk-ways and points of interest involved in the current proposal be vested in Ngai Tamarawaho." (D21,T.D.C.,1991,3)

Compensation in land or money terms would not be part of the Crown's negotiating brief. These issues would be addressed in Wai 42.

After studying the document, T.D.C.'s chief executive officer raised points, in a memo, which concerned him regarding the negotiating brief suggested by the Policy Unit. The concerns related to points c, d, and the inclusion of compensation for the land taken in reclamation in Wai 42.

"I am unclear as to what Ngai Tamarawaho would expect in terms of `partnership' in `on going preventative pollution management programmes'. I would have thought that these were the principal responsibilities of the Bay of Plenty Regional Council and that provisions for consultation with the community in general, and specifically the tangata whenua, were embodied in various statutes." (D22,T.D.C.,1991,1)

and, in relation to Section D:

> "The administration of any guarantee to protect Motuopae Island from adverse effects of noise pollution and vibration is significant and, again, I would not wish to see the Council involved with this." (D22,T.D.C.,1991,2)

It appears the Chief Executive's concerns and the proposals were forwarded to the Council's solicitor for comment, along with a request for comment on the viability of amending the empowering legislation to encompass these proposals. Mr Batchelar[63] replied, on 13 June 1991, to the Regional Council concern:

> "It seems unlikely that the Regional Council would accept any responsibilities over and above those which it already has under existing legislation. We see this as likely to cause delay."

and in relation to (c), he replied:

> "In relation to proposal 6.3(c) a commitment to the elimination of pollution and sources of pollution cannot be absolute in terms of actual results but must necessarily be limited to what is practicable and reasonable by way of inclusion in the District Plan and other documents such as the proposed Tauranga Harbour Management Plan being promoted by Regional Council." (D23,T.D.C.,1991,2)

Further correspondence dated 14 June 1991 from the solicitor's office stated:

> "As the Chief Executive has stated the obligations of local government in environmental matters are provided by statute. In principal, it would seem that Council's position should be that it will consult fully with the tangata whenua in regard to the adoption and undertaking of pollution control programmes in accordance with its statutory obligations." (D23,T.D.C.,1991,1)

And finally, with regard to amending the Empowering Act, Mr Batchelar replied in the 13 June correspondence:

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[63]Council's solicitor.

"... we think this would be acceptable provided the essential features of the existing Act are retained, namely Section 4 providing the authority to reclaim and Section 9 providing for tolls.

Although the Empowering Act is a local Act it must be clearly seen that the initiative for amending it is coming from the Crown as a method of resolving part of the Waitangi Tribunal claim(s).

We think that the Act could be amended to meet the suggestions made by Mr Delamere but the Council must clearly insist on consultation with regard to the amendments." (D23,T.D.C.,1991,1)

These concerns were raised and discussed by an emergency Council meeting on 18 June 1991. The aim of the meeting was to ratify a statement of position, by the Council, suggesting what the Council would find as acceptable amendments to the Policy Unit's proposals. The briefing paper (D26,T.D.C.,1991) by Allan Tiplady reiterated that Ngai Tamarawaho would be likely to issue injunction proceedings in the High Court, [64] challenging the Minister of Conservation's granting of the approval.

In essence, the major changes suggested were in proposal (c). The Council suggested amending the proposal to read that the Crown guarantee the achievement of:

"(1) The identification of sources of pollution of the estuary.

(2) The preparation of a programme to control or remove sources of pollution to the Waikareao estuary.

(3) An analysis of the current degree of pollution of the Waikareao Estuary.

(4) The preparation of a programme to improve or remove the current level of pollution of the Waikareao Estuary.

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[64] Which would probably be successful.

The above factors to be undertaken on a partnership basis with Ngai Tamarawaho in relation to the Waikareao Estuary, with an undertaking from the Tauranga District Council to make its best endeavour to achieve them, but with acknowledgement of the following limiting factors:

(1) Legislative restrictions on the Tauranga District Council.
(2) Availability of finance.
(3) Priorities of work.
(4) Environmental restrictions." (D24, T.D.C., 1991, 2)

Section 63(d) was deemed acceptable to the Council. In the matter of compensation the proposal was found to be acceptable to the Council, with the proviso it be stated that Council was not liable for payment of compensation for land reclaimed for the Route.

The proposals were `faxed' to John Delamere for comment before they were presented to Council. Council ratified the amendments on 18 June 1991.

Nine days later Allan Tiplady received a letter from John Delamere of the Treaty Policy Unit/Manager, Claims and Negotiations. In the letter Mr Delamere announced that the Cabinet committee had, on 24 June, decided that the Unit was to negotiate an agreement based on:

"(a) a written agreement between the Crown and Ngai Tamarawaho recognising Ngai Tamarawaho as Tangata Whenua with entitlement to effective participations in the management of the Waikareao Estuary.

(b) the Department of Conservation taking the necessary steps to have full ownership of Motuopae Island returned to Ngai Tamarawaho.

(c) an assurance that pollution in the Waikareao Estuary will be cleaned up by amending the Empowering Act to oblige Tauranga District Council to fulfil their stated commitments as indicated in their planning documents.

(d) an assurance that the Tauranga District Council will protect Motuopae from any adverse effects arising from the constructing of Route P by amending the

Empowering Act to oblige the Tauranga District Council to fulfil their stated commitments.

(e) the Claimants, Ngai Tamarawaho, declaring their endorsement of "the Route P project". (D27,T.D.C.,1991,2-3)

Compensation for the reclamation was to be addressed when the Ninety Mile Beach claim report (Wai 45) was released.

Mr Delamere acknowledged that much work had still to be done on finalising the agreement. But he complimented the effort everybody involved had contributed, in particular Judge Trapski:

"But especially to you, Judge Trapski, thank you for the way you have wisely guided us and will, I know, continue to do so in the future." (D27,T.D.C.,1991,3)

A short while later an agreement in principle was prepared and signed. The above points were included with the addition of two extra points:

"(6) That while the Kaumatua of Te Rununga o Ngai Tamarawaho have agreed:

(a) not to impede the construction of Route P, and

(b) to assist the Tauranga District Council where necessary and appropriate during construction of Route P to ensure the protection of both the sacred island of Motuopae and the Waikareao Estuary

they wish it to be recorded for the future generations of Ngai Tamarawaho that they have never supported the Route P project.

(7) That it is noted the Waitangi Tribunal is addressing the issue of the Crown's assumption of ownership of the foreshore in the Wai 45 claim, and any finding by the Tribunal is likely to set the precedent for foreshore claims, including Waikareao Estuary, and

> That the Crown agrees to reopen negotiations and address Ngai Tamarawaho's claim for compensation on the issue of the reclamation of the nine (9) hectares for Route P when the report from the Waitangi Tribunal on the Wai 45 claim is released." (D27A,T.D.C.,1991,1-2)

The Hon. Denis Marshall signed the consent for the section 178 reclamation on 27 June 1991. A press release was issued on 28 June. Clause 6a of the agreement in principle precluded Ngai Tamarawaho from taking out a High Court injunction against the Minister of Conservation. Work on the Route commenced.[656667]

Transference of Shell Fish During Construction.

During construction of the Route a karakia was carried out by by Ngai Tamarawaho, with the cooperation of the Tauranga District Council. Dredging of a tidal channel in the construction of the expressway was to destroy a pipi bed prized by Ngai Tamarawaho as a source of Kaimoana:

> " ... there were some quite significant shell fish beds which were part of an area which had to be dredged out for a tidal channel ... We assisted them as much as we could, understanding that it was is a ceremony they had to do according to their traditions so we couldn't do it. ... But we ... assisted as much as we could in the relocation of shell fish in the estuary. " (interview Tiplady, 1992)

Hoori Rikirangi participated in the moving of the beds:

> "We had a Karakia ... 1.15 in the morning. There were ... two of our kaumatua, and myself and about five others ... Walked on the shell fish beds and did a Karakia and we had to do that before sunrise. And it was a Karakia to ask the appeasement of

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[65]Refer to time line: Construction of Route P. Page 71.

[66]Refer to map page 80 for delineation of the Route as under construction.

[67]See photograph on page 97 of the expressway under construction.

Expressway under construction

> our god; Tangaroa, to release them for transference. It took about a quarter of an hour or twenty minutes to do that. And when they went home my self, in a wet-suit, ... it was beautiful out there, started transferring (shellfish) from the edge of where the route is now." (interview Rikirangi, 1992)

The Continuing Negotiations.

Subsequently two separate but connected negotiation processes emerged. The first was the development of an acceptable amendment Act.[68] The second was the development of a formal agreement between Ngai Tamarawaho and the Crown.

In the case of the Empowering Act amendment, a three-way process developed. Council's solicitors were engaged to draft the legislation. Copies of each draft amendment were forwarded to Council and Ngai Tamarawaho's solicitors for comment and input. The first draft was received by Council on 3 July 1991. A fourth draft was dated 24 July 1991[69](D38,T.D.C.,1991). A letter from T.D.C.'s solicitor to Allan Tiplady said that while there were still problems with Peri Kohu the Claimants were happy with the draft Bill. The solicitors advised the Council that the next step was for Council to approve the Bill in this form and then forward it to John Delamere to make it available for comment in Wellington, before initiating the process to get the Bill before Parliament. Council's Corporate Policy Committee passed that fourth draft on 17 September 1991 (D41,T.D.C.,1991).

Sharp Tudhorpe[70] advised the Council they had forwarded the draft to John Delamere in a letter dated 11 October 1991 (D42,T.D.C.,1991).

The development of the formal agreement with Ngai Tamarawaho was the second subsequent negotiation process. Negotiations on the formal agreement commenced very soon after the signing of the agreement in principle. This was

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[68] Refer to time line: Drafting and passage of Amending Bill. Page 71.

[69] Details in Appendix G.

[70] Council's solicitors.

expected to be a reasonably straightforward process. However, this was not to be the case.

A form of an agreement was developed through the type of consultation process outlined in the amendment negotiations. A significant aspect at this stage was that Judge Trapski had little or no input into the document. By late October 1991 no formal agreement had been reached. Construction of the Route was now well under way. In a letter from Allan Tiplady to Mr Tom Benion of the Waitangi Tribunal, Mr Tiplady stated:

> "Some concern has been expressed to the Council by Ngai Tamarawaho that the expressway is proceeding and the Council is honouring its obligations under the agreement reached but that the agreement has not yet been formalised. I can understand the concern and unease that is being felt by the Claimants at this time. The Council for its part cannot now delay the Route P work because of contractual commitments that it has entered into." (D50,T.D.C.,1991,2)

Work on the agreement had continued until the end of March 1992. At this stage, Council, Ngai Tamarawaho and the Treaty of Waitangi Policy Unit began preparations for a signing ceremony. The Maori Queen and the Minister of Justice, the Hon. Doug Graham, were invited to witness and sign the document respectively. However, a few days before the signing ceremony (set for a Saturday) Council received a call to say that all was not well with the document. It should be stressed that the following comments reflect what Mr Tiplady believed, at the time of the interview, was what had happened:

> "... I'm not totally sure of my facts because I don't work in Wellington and, of course, I wasn't directly involved with this. But we understood that at a late stage concern was expressed to the Minister about some of the content of the final agreement. How advice to the Minister at such a late stage considering the heavy involvement of all parties in the matter could occur, I don't really know. But we understand that it was this late advice to the Minister in that last week, that the agreement wasn't in a satisfactory form and we shouldn't sign it, which lead to the signing ceremony being postponed." (Interview, Tiplady, 1992)

The document was re-drafted again. At the time of writing, Council were addressing the document and all parties were endeavouring to reach agreement before the 19 September opening of the Express-way. Council felt it would be premature to release the contents of this final draft to the writer before they had achieved a ratification of it. The expressway has now been completed and is in use.[71]

Analysis Waikareao Estuary Mediation

The following points were developed from the main themes of the theory in Chapter One.

1. Mediator neutrality.

2. Mediator entry - early or late?

3. The process:
   - A) Apparent strategy used to reach agreement.
     - -Agreement in principle.
     - - Building block approach.
   - B) Definition of issues
   - C) Generation of options
   - D) Generation of implementable decisions.

4. The principles of success.
   - A) Motivation to participate.
   - B)Incentives to participate remaining.
   - C) Outcome at least as beneficial as the B.A.T.N.A.'s.

5. The advantages of mediation.
   - A) Economical decisions.
   - B) Rapid settlement.
   - C) Mutually satisfactory outcomes.

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[71] See photograph page 101 of the completed expressway.

Expressway looking north

Expressway looking south

D) High rate of compliance.
E) Comprehensive and 'customised' agreements.
F) Practice in and learning of creative problem solving procedures.
G) Greater degree of control and predictability of outcome.
H) Personal empowerment.
I) Preservation of an on going working relationship.
J) Workable and more implementable decisions.
K) Agreements that are better than a simple compromise or win/lose outcome.
L) Decisions that hold over time.

6. Problems of mediation.

A) Can all the parties be identified?
B) Are the right people representing the parties?
C) Crystallisation of the issues.
D) Incentives to mediate and power imbalances.
E) Can the mediated agreement be implemented?

1. Mediator neutrality: Judge Trapski's neutrality was never seriously questioned during the mediation. Any questions of neutrality were negligible and did not undermine the level of trust and respect the Council and Ngai Tamarawaho held for the Judge.

Judge Trapski's Position as a Waitangi Tribunal member undoubtedly contributed to the high level of trust afforded him by the parties in the negotiation. Coupled with the Judge's connection to the Tribunal were personal qualities conducive to resolving the issues:

> "From my perspective Judge Trapski's role has been the ... best thing that has happened in the ... mediation ... He has certainly helped us put things into place he has also certainly ensured the respects of both sides ... To my people he has been good ... "

"A very astute negotiator, very astute. ... He has a good understanding or our hurts, our very big hurts, which has a lot of impact on the decisions he ... had to make. (interview Rikirangi, 1992)

2. Mediator entry - early or late?: More by default than by design, Judge Trapski entered the dispute at a late stage. The classical position. Almost two years had passed since the lodgement of the first Wai 86 claim. The parties were quickly reaching a crisis situation, where the empowering legislation had been passed and the Council would soon be seeking the Harbours Act consents they needed. The Council and Ngai Tamarawaho had had time to build a working relationship but had reached a point where the Crown had to become involved when Ngai Tamarawaho referred back to their Treaty claims - the Wai 42 and 86 claims.

" ... in 1990 we had some meetings in which we got all the parties involved together ... we got to the point ... where we realised we weren't going to achieve the ultimate result ... In a lot of or negotiations the Ngai Tamarawaho people kept coming back to their claims ... and saying that until their claims were dealt with ... that they really didn't want to get an agreement with us here ... " (interview Tiplady, 1992)

The Judge's position as a Tribunal member helped the process overcome the problem of familiarisation with the issues in the dispute. This should not be read that time was not spent in familiarisation:

"What actually happened for that first meeting, and perhaps one or two subsequent meetings, was that we took a couple of steps backwards, in our view, because the Judge ... had to bring himself up to speed with what we had been talking about, directly, with the Ngai Tamarawaho people ... up to then." (interview Tiplady, 1992)

3. The process:

a) Apparent strategy used to reach agreement.

i) Agreement in principle

or

ii) Building block approach

It is fairly clear that this process adopted an agreement in principle approach. Actual progress in the resolution of the dispute, did not occur until the Treaty Policy Unit presented options to the Cabinet Treaty Committee and the negotiating brief was approved. Reaching the final agreement proved a convoluted process. The process would probably have been easier if Judge Trapski had had some input into the development of the final agreement at an earlier stage in the process.

B) Definition of the issues: Again this was not a straight forward process. It took several meetings to define the issues. The issues which were brought to light in the first meetings might be divided into two categories. 1) Issues based on a lack of information exchange and 2) substantive issues.

Information issues included: a description of the extent and delineation of the expressway; the conflict of the Maketu and Manukau reports with the E.I.A.; the role of the Crown law office and ownership of the Route upon completion. These issues were relatively easy for the parties to resolve - information was exchanged.

The substantive issues were a different matter, and took somewhat more effort to resolve. These issues were the ones dealt with in the agreement in principle.

C) Generation of options and D) Implementable decisions: While it appears that the generation of the settlement options came from the negotiations unit of the Justice Department this was not strictly the case. Certainly the initial proposals came from the Treaty Unit. However their final form, with its additions, came from input from the major parties involved. Council was concerned to ensure that the programmes developed in its planning documents, regarding pollution, were not circumvented and that they were not committed to programmes that were beyond their's to control.

The first clause of the agreement had progressed from a recognition of Tangata Whenuaship to effective participation in management of the estuary. Presumably this clause was developed from input from Ngai Tamarawaho.

4. The principles of success:

A) Motivation to participate. Both Council and Ngai Tamarawaho were highly motivated to participate in this process. The Council because they had a legal right to proceed with the road, but needed the Minister of Conservation's consent. And Ngai Tamarawaho participated because, even though they remained adamantly opposed to the expressway, they believed the Route would proceed. It came down to a matter of minimising the impacts on their interests and maximising any benefits that might come from the construction and associated projects.

B) Incentives to participate remaining. Certainly, from the Council's perspective, the incentive to participate remained. They wished to avoid confrontation in the High Court over possible injunction proceedings. On Ngai Tamarawaho's part the need to protect their interests was probably the reason they remained through out the process.

C) Out come at-least as beneficial as the B.A.T.N.A.s. One cannot really analyse what the B.A.T.N.A.s.facing Ngai Tamarawaho and the Tauranga District Council were. Certainly both parties faced High Court proceedings, and their associated costs, had agreement not been reached.before the Minister gave consent to the reclamation. What the outcome of these proceedings would have been is indeterminable. It is likely one or other of the parties would have lost substantially compared to what they gained through the mediation. Almost certainly the working relationship between the Council and the Tribe would have been damaged.

5. The advantages of mediation.

A) Economical decisions: Whether this process turned out cheaper for the participants than a litigated resolution is again indeterminable. Solicitors were retained by both the Tribe and the Council during the process. Legal advice was

sought regularly. For example the Council's solicitors spent a good deal of time developing the amendment to the Empowering Act.

B) Rapid settlement: The settlement of this dispute could not be called rapid. Indeed many of the issues viewed in the dispute have been deferred to a latter date. If the lodgement of the Wai 86 Claim is taken as the starting point for the dispute it has taken two years to reach this point of near completion.

C) Mutually satisfactory outcomes:

> "Now in a way we were happy, and in a way we were sad, but ... we didn't want to be seen to be breaching progress. But I look on it on a long term basis ... that still in the end the District Council have to pay. Every thing goes on how they pay. In terms of labour, or what ever, it may happen (to be) if any thing goes wrong down there. " (interview Tata 1992)

This writer believes that, at best Ngai Tamarawaho are ambivalent about the agreement reached with Tauranga District and the Crown. There is an expressway on the estuary they did not want. Weighed against this is a return of ownership of their urupa (Motuopae Island), guarantees on pollution, recognition of Ngai Tamarawaho as Tangata Whenua of the Waikareao, vibration and noise protection guarantees and increased participation in decision making processes.

Council, on the other hand, have the expressway they wanted built, albeit in a redesigned fashion and at financial cost, with statutory obligations imposed on them.

D) A high rate of compliance: To date one of the terms of agreement has been actioned, but others have not. On Ngai Tamarawaho's part they have not impeded the construction of Route P. The remainder of the terms in the agreement in principle are reliant upon the actions of Central Government and the Tauranga District Council. The amending Legislation is currently going through the processes of enactment before Parliament. Presumably when it is passed, the Tauranga District Council will take action on the pollution control

measures in their district plan. Ownership of Motuopae Island has yet to be returned to Ngai Tamarawaho. Those actions will be undertaken soon.

E) Comprehensive and customised agreements: The agreement was geared towards the unique needs of the participants.

F) Practise in and learning of creative problem solving techniques: Both Ngai Tamarawaho and the Tauranga District Council have benefited from the contact they have had with A.D.R. techniques. Both parties have stated that the working relationship between them has improved. Should the need arise in the future for further consultative negotiation between the tribe and the Council they will have had the knowledge, experience, and working relationship to reach a successful resolution.

G) Greater degree of control and predictability of outcome, and H) personal empowerment: These were two of the most positive outcomes of the whole process. 'We got to be one of the drivers rather than being in the back seat with the passengers.' One of Ngai Tamarawaho's greatest complaints in this dispute was that they felt they were being presented with a 'fait accompli' and that what consultation there was during the design of the Route was too little and too late. Although the Road has been constructed it has not been with out some meaningful input from Ngai Tamarawaho. Perhaps that input is at a level greater than what it would have been had another method been used to resolve the dispute. e.g. litigation.

On the other hand, Ngai Tamarawaho have been promised 'meaningful' participation in the management of the estuary. Hoori Rikirangi described the Tribes expectations:

> "We have equal opportunity for ... say if you wanted ... to build a hotel in the middle of the Waikareao ... So you come back and say: 'Well I'll put this ...'
>
> (And We'll say:) 'No way that's going to happen. You're going to have to come and talk to us, not to the Council about it.'
>
> Then we'll say 'Yes' (or) 'No - Cut, Finished."

At the very least Ngai Tamarawaho expect a high level of empowerment.

I) Preservation of an ongoing relationship: Again, this was one of the most successful factors to come out of the mediation process. Through the change of local government administration Tauranga District Council and Ngai Tamarawaho were presented with an opportunity to improve their relationship - an opportunity they utilised.

Further the dispute over the expressway had the potential to undermine this improvement. In this writers opinion two factors combined to prevent a reversal in this relationship. The first was a desire on the part of the Council and tribe to reach an amicable resolution. The second was the involvement of the Tribunal and Judge Trapski. From reported accounts Judge Trapski was careful to ensure Ngai Tamarawaho's concerns were highlighted and addressed.

F) Workable and more implementable decisions: By April 1991 Ngai Tamarawaho were still interested in addressing the compensation issue in the mediation process (see meeting 22 April). But at that stage it was suggested, by John Delamere that the compensation claim might be separated from the process and addressed at a latter date. Judge Trapski indicated that this may have to be done if long term delays were to be avoided. Ngai Tamarawaho concurred:

> " ... During the process of our meetings ... there came a clear indication from our side that perhaps we can oppose it and yet allow the Route P to be (completed). Yes there is a way for the Crown, suggestions can be made which would not compromise our claims to the Waitangi Tribunal. That means we can go back in front of the Waitangi Tribunal and claim compensation for ... the area of land that has been taken ... " (interview Rikirangi, 1992)

A draft of the final agreement, dated 5 March 1992 said this of the compensation issue:

> "The parties acknowledge that the present agreement is with out prejudice to the rights of Ngai Tamarawaho to pursue before the Waitangi Tribunal those parts of their

> claim not covered in this mediation, notably the assumption of ownership of the foreshore which may include what the claimants see as the loss of 10.42 hectares reclaimed from the Waikareao Estuary for the Route P expressway. If successful, the claimants may seek a recommendation from the Waitangi Tribunal as to the possible remedies, including compensation." (D47, T.D.C., 1992)

In retrospect this may have been the only way in which the compensation issue could have been dealt with. The Crown wanted to view the recommendations of the Tribunal regarding Wai 45, the Tauranga District Council were adamant that compensation issues were between the Crown and Ngai Tamarawaho and Ngai Tamarawaho were just as adamant that compensation was due. It is likely an impasse destroying the process to this point would have been reached. With regard to the other points 'agreed to' their workability is addressed in sub-point D) above.

K) Agreements that are better than a simple compromise or win/lose outcome: It is perhaps debatable whether this resolution is a compromise or not. Certainly if Ngai Tamarawaho's ultimate goal was preventing the building of the expressway they failed, but gained through increased participation and noise, vibration and pollution abatement - they compromised.

If however as this writer believes, Ngai Tamarawaho came to accept the building of the expressway, subject to compensation and impact abatement, the outcome was non zero sum. If Ngai Tamarawaho receive what is for them acceptable compensation for the reclamation, the balance will be zero. But in addition they have gained pollution abatement and 'meaningful' participation in managing the estuary.

If the latter was the case the outcome was successful, much however still depends upon the resolution of the compensation claim.

L. Decisions that hold over time: The return of Motuopae Island to Ngai Tamarawaho was being dealt with by the Crown and Ngai Tamarawaho at the time of writing. In a letter detailing progress on the implementation of the agreement Allan Tiplady stated:

"b) A formal structure for Ngai Tamarawaho's effective participation in the management of the Waikareao Estuary has not yet been established although, on an informal basis, any work done by this Council in relation to the estuary are certainly discussed with them first.

c) The amendment to the Empowering Act is on hold at the present time as I understand it, pending the signing of the final agreement.

d) No action has been taken on pollution elimination at this stage. Action will proceed on this when the final document has been signed.

e) Protection of Motu-o-pae Island has been completed. This work was done at the same time as the construction of the expressway." (Letter Tiplady, 1992, 1-2)

As can be seen from the comments in the letter most of the post mediation compliance is reliant upon the signing of the final agreement.

6. Problems of mediation.

A) Can all the parties be identified?: Identifying all the parties was a relatively straight forward process. These negotiations, by their nature, were limited to Ngai Tamarawaho representatives, Tauranga District Council representatives, and the Crown.

B) Are the right people representing the parties?: A mistake in representative identification nearly destroyed the process in the middle stages of the mediation. There were two sets of Wai 86 claimants, the group who lodged the October 1988 claim and the group who lodged the March 1990 claim. Mr Kohu's presence in previous meetings had been limited. He asserted that as a claimant he had the right to participation in the process. However he was entering the process with the attitude that abandonment of the project was the only

settlement possibility. The two sets of claimants resolved this issue amongst themselves.

C) Crystallisation of the issues: The years preceding the mediation had allowed time for the issues to crystallise in the minds of the claimants. Indeed as early as the environmental impact assessment Ngai Tamarawaho had identified their concerns over the project.

D) Incentives to mediate and power imbalances: A combination of the relationship between the Council and Ngai Tamarawaho, and the futility Ngai Tamarawaho had felt during the design of the project might well have been a disincentive to enter a mediation process prior to 1989. But with the advent of a new Council administration and the perception it was unwilling to dominate through political power, Ngai Tamarawaho were willing to participate in such a process. The underlying key to this point and probably the whole process, was that the parties had developed a 'trust' in each other. A remarkable transformation took place from the days of the library and town hall occupations.

E) Can the mediated agreement be implemented? As the case study shows this has been a particularly successful process. Actual implementation of the agreement is still dependent on factors largely beyond the control of the participants.

CHAPTER 4 MINOR CASE STUDIES

CASE STUDY 1: UPPER WAITAKI WORKING PARTY

Background to the Upper Waitaki working Party

The Upper Waitaki catchment is 12 946,380 ha, and has four major tributary basins: the Tekapo River; the Pukaki River; the Ohau River; and the Ahuriri River.[72] All of these basins, except the Ahuriri river, contain glacial formed lakes. In addition to these lakes there are three hydro lakes: Lake Benmore; Lake Avimore; and Lake Waitaki. The Ahuriri River is the only one of the tributaries to the Waitaki which remains unchanged by hydro-electric development (Waitaki Catchment Commission, 1982).

The catchment harbours a diverse range of activities and resource uses. Hydroelectric power is the region's most significant resource use. (see description below) Agriculture and pastoral farming is the next most significant resource use. Seventy two percent of land in the catchment is used in these primary production activities. Ninety seven percent of this land is used for grazing purposes. The remaining twenty eight percent of this land is described as 'not grazed'.

The Waitaki Power Development is a system of eight power stations generating over 8000 GWh per annum.[73] The Upper Waitaki Development is comprised of five of the eight power stations and a complex system of power canals and storage lakes.

Irrigation is an increasingly important water use in the catchment. In 1982, eleven properties had developed or were developing irrigation schemes.

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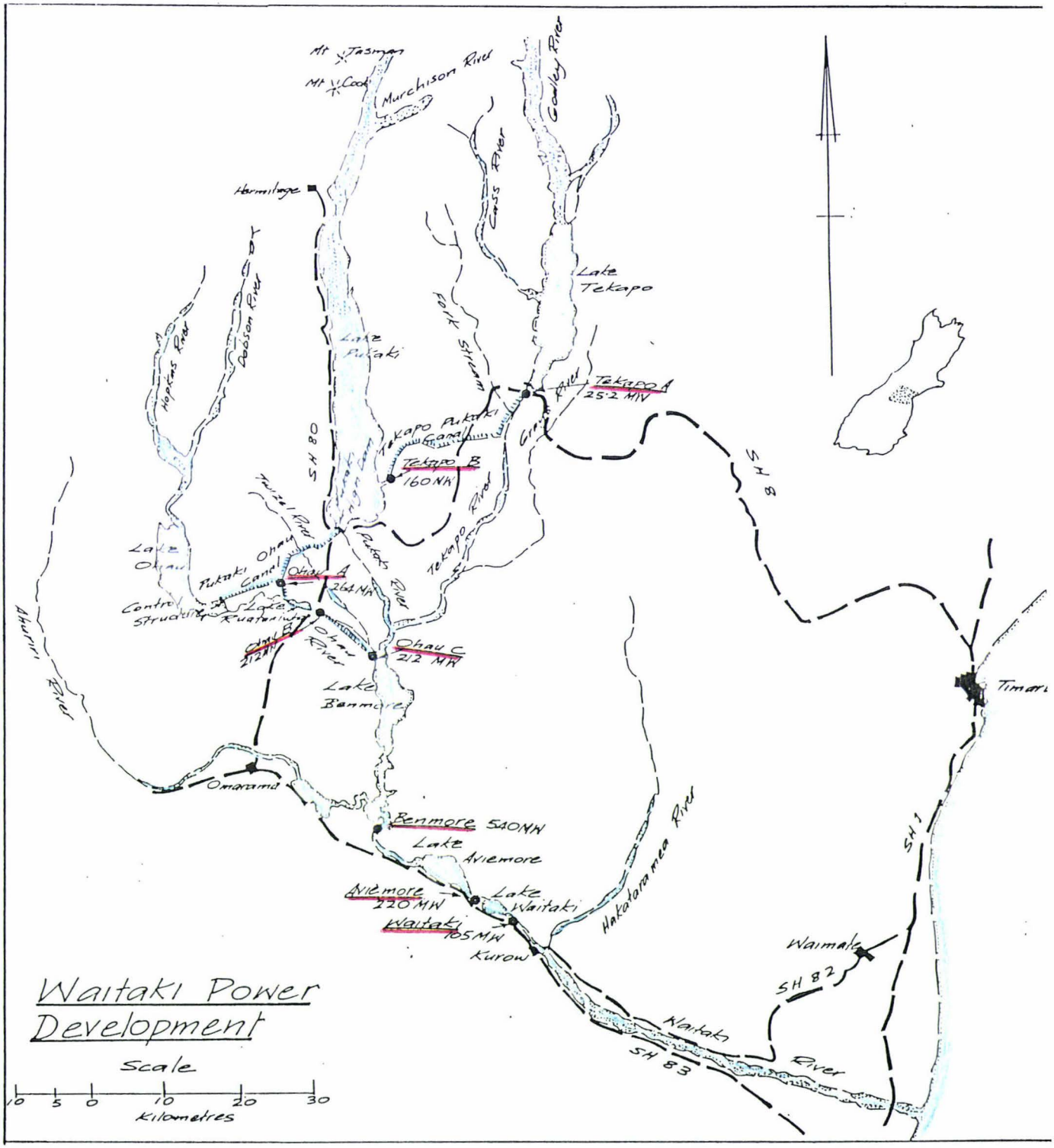
[72] See map page 113.

[73] One third of New Zealand's annual consumption.


Mt Jasman
Mt Cook
Murchison River
Godley River
Cass River
Hermitage
Lake Tekapo
Fork Stream
Hopkins River
Dobson River
Lake Pukaki
SH 80
Tekapo A
25·2 MW
Tekapo Pukaki Canal
Tekapo B
160 MW
SH 8
Tekapo River
Lake Ohau
Ohau A
264 MW
Pukaki Ohau Canal
Control Structure
Lake Ruataniwha
Ohau B
212 MW
Ohau River
Ohau C
212 MW
Lake Benmore
Ahuriri River
Omarama
Benmore 540 MW
Lake Aviemore
Hakataramea River
Aviemore 220 MW
Lake Waitaki
Waitaki 105 MW
Kurow
SH 1
Waimate
SH 82
Kakaka
SH 83
River
Waitaki Power Development
Scale
10 5 0 10 20 30
Kilometres

There were thirty five schemes irrigating approximately 2000 hectares. These draw less than two cumecs from the upper catchment.

Development of the Upper Waitaki Hydro Electric Schemes

On 11 November 1968 Central Government passed an Order in Council, under section 23 of the Water and Soil Conservation Act 1967, declaring the waters of Forks Stream, Lake Tekapo, Lake Pukaki, and Lake Ohau to be of national importance. In the next year, Parliament passed a further Order in Council effectively securing the water rights for what was to become the Upper Waitaki Power Scheme. These rights had a twenty one year life span with a right of renewal. This hydroelectric power (H.E.P.) scheme was not subject to any environmental impact assessment procedures.[74]

"Genesis" of the Upper Waitaki Working Party

With the passing of the State Owned Enterprises Act the New Zealand Electricity Department became Electricorp. The new management of Electricorp agreed to re-apply for all of its H.E.P. water rights within fifteen years of the first of April 1988. In May of 1988 South Island salmon fishermen, in particular the Waitaki Valley Acclimatisation Society (W.V.A.S.), noted fluctuations in the minimum flows of the Waitaki river and became concerned about the effect of the fluctuations on the salmon spawning run. W.V.A.S. applied, under section 20J of the Water and Soil Conservation Act, to the Waitaki Catchment Commission (W.C.C.) for the imposition of a minimum flow. At this point four Lower Waitaki irrigation schemes took the opportunity to press their case for increased minimum flows.[75] W.C.C. decided to hold a water rights hearing, set a new minimum flow, and let Electricorp contest the flow in the Planning Tribunal if they wished (France,1991). At this point Electricorp was involved in two Planning

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[74]The first environmental impact assessment procedures to affect government related projects were not passed until 1973.

[75]An increase in minimum flows would reduce operational costs associated with fluctuating flows.

Tribunal appeals.[76] One was for the removal of water from a Waitaki power scheme storage lake, the other was the Wanganui minimum flows appeal (France, 1991).

Electricorp management decided to try a new concept in conflict resolution, a working party and negotiated agreement. Mark France, the environmental manager for Electricorp production's South Island group initiated the process:

> "I felt that "there had to be a better way" and I went, one cold wet Tuesday night, to the meeting of the Waitaki Valley Acclimatisation Society in Waimate to persuade them that all involved parties should sit around the table and discuss the issues to see if agreement could be reached." (France, 1991, 17)

Two months latter a three day meeting was held in the back bar of a hotel at Kurow. John Young the Water Resources Manager of the Waitaki Catchment Commission agreed to chair the meeting. As will be discussed, the choice of Young was crucial to the outcome of this and the latter negotiations.

The groups in attendance were M.A.F.Fish, M.A.F.Tech, the Department of Conservation, the Ministry for the Environment, the Waitaki Valley Acclimatisation Society and the Waitaki Bridge Salmon Anglers Society. A negotiated settlement was reached which preserved the existing minimum flow (120 cumecs) saving Electricorp $27 m to $127 m (NPV). Electricorp agreed to slow the rate at which it reduced increased flows and funded a study on the effects of fluctuations on the salmon fishery. Irrigators were appeased by an Electricorp agreement to provide better warning of flow fluctuations and funding of works to alter irrigation intakes (France,1991).

The apparent success of the above working party lead to the Upper Waitaki Working Party (U.W.W.P.). This later working party had its roots in the earlier working party format. The Wataki Catchment Commission called for a public meeting, at Twizel. It was publicly notified and widely advertised. Miller states that the working party process is open to every interested person:

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[76] It was the appellant in both.

"...we're open to any one who comes along, or any one with any suggestion that other people could be involved, and they would be added to the list and then they would be advised of further meetings and provided with the relevant documentation.

A.S. Blair: "You don't have any strict criteria, then, about the people...

M. Miller: Well,...we don't want to presume who's eligible and who's not the intention is to have it open and any one can attend..."(interview M.Miller, 1991)

The meeting was held on 15 and 16 March 1989. Approximately 24 organisations were represented by 50 individuals. The major parties in attendance were: Waitaki Catchment Commission; Mackenzie County Council; Department of Conservation; M.A.F.fish; Waitaki Valley Acclimatisation Society; Mackenzie Federated Farmers; M.F.E.; Omarama Federated Farmers; D.S.I.R. Hydrology Centre. This meeting became the pivotal point for the rest of the U.W.W.P. process.

Every group or person who wished to do so, was given the opportunity to relay their opinions on the water rights (France, 1991). The issues they raised were recorded.[77] John Young was appointed to the chairmanship of the Working Party. At the conclusion of the meeting each group was invited to provide a representative to a Working Party to consider the issues raised.

The Working Party developed a unique way of addressing the issues raised in that first meeting. By agreement issues were 'let out' to consultant researchers. This approach involved three steps:

(1) A 'brief', focusing on an issue, was agreed upon by the members of the Working Party.

(2) That 'brief' was forwarded to an agreed upon 'expert' for investigation.

(3) Final reports were copied and circulated to all of the Working Party members (France,1991).

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[77]See Appendix H.

France (1991) explained the logic behind this process. Everybody agreed upon a common data base by choosing one 'expert'. Any options the expert proposed ... "were seen as having the same validity". The 'experts' were encouraged to provide as many options as possible, thus widening the range of possible settlements.

Working Party Meetings

Each meeting followed generally the same pattern. On going negotiations were continued. As additional parties were identified they were invited into the process and brought up to date.[78]Studies were initiated as the need for them became apparent. As an issue arose it was deemed a water right issue or a general issue. Water right issues were addressed on a catchment by catchment basis. Each meeting except the first took approximately half the day (France, 1991).

Six meetings were held at two monthly intervals between the 15 March 1989 meeting and a final meeting on the 27-28 March 1990.[79] The meetings were held on a semi formal basis:

> M.Miller: " They tend to be reasonably relaxed, informal I guess, you have a chair... beyond that they have an agenda. Beyond that it is reasonably informal, it is intended to be informal." (interview M. Miller, 1991)

Perhaps the major feature of the Working Party process is the lack of, or breaking down, of adversarial attitudes. The writer, in an interview with M. Miller asked how adversarial attitudes were broken down:

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[78]The on going additions were: Otago Canoe and Kayak Club; Royal Forest and Bird Protection Society; and the Ngai Tahu Maori Trust Board.

[79]3 May 1989; 13 July 1989; 31 August 1989; 26 October 1989; 12 December 1989; 8 February 1989.

"I don't think there's any you can't (break down). (With) some of the staff leading some of the projects ... there were certainly different views as to how money should be allocated and so on. And in terms of particular studies that should be undertaken and ... the studies that need to be done, and there were more studies than the resources could deal with ...

... I think What you would emphasise is ... the forum is there and people have got to be forward and open in that discussion ... Some of the concerns arise once they've been through the meeting and they sort of realise they haven't made the points they wanted to make. ... So to reduce the conflict and hostility I guess the ... the endeavour is ... to make sure it's (the forum) open. That all the views are brought out ... and I think that's a skill of the chairman to some extent ... to make sure that parties sitting back and quiet are actually invited to make a comment rather than say nothing ... or not take the opportunity and stew over something that they didn't approve of. (interview 1991)

Chisholm (interview, 1991) recounted how informal behind the scenes negotiation could break down some of the adversarial attitudes prevalent at the beginning of a working party process. When the working party process opens some in attendance will have an "axe to grind", and open the process with a basically confrontational stance. However Chisholm believes these attitudes are de-constructed when a third person with no interest in the outcome of the dispute suggests an alternative or option for the resolution of the issue. [80]

Inclusion of the Ngai Tahu Trust Board

The first involvement in the working party process of the Ngai Tahu Trust Board came in the 31 August 1989 meeting of the Working Party. Mark France representing Electricorp reported his intention to meet with the Trust Board and report on this meeting in the next Working Party meeting. In subsequent meetings, on 5 October 1989 (Lower Waitaki working Party) and 26 October 1989 (Upper Waitaki Working Party), Mr France reported that the Trust Board had 'interests' in the Waitaki river system. These interests included the Waitaki's

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[80] i.e. the third party takes a mediator like role on an informal basis.

estuary and the fisheries in the upper river.[81] These concerns centred around the native fisheries: the possibilities for elver (eel) passes on the dams, the effects of the developments on eels; and the effects of the hydro development on aquatic farming - particularly koura [82]He also reported that Electricorp had agreed to part fund a liaison person from the Ngai Tahu Trust to take part in the process. Finally it was reported that further consultation would take place with different Maori groups to elicit their concerns on the Lower Waitaki (Electricorp Production, 1990).

Ngai Tahu had three representatives on the on the working party at the next meeting on 12 December 1989 - Kelly Davis, David Higgins, and Leo Reynolds. The minutes of this meeting show that there was little recorded input from the representatives. However David Higgins did say he was encouraged by the 'consensus approach' of the Working Party. Ngai Tahu were not represented in the 8 February meeting but were present in the next meetings on 27 and 28 March 1990. In these meetings comment was passed on the impact of the project on, and the need to protect, native species (Electricorp Production, 1990).

Inclusion of the Lower Waitaki Working Party with the Upper Waitaki Working Party

On 8 February 1990 the Lower Waitaki Minimum Flow Working Party was combined with the upper Waitaki Water Resources Working Party. The former was a working party convened by the Waitaki Catchment Board to resolve minimum flow issues in the lower Waitaki (the river below the Lake Waitaki Hydro). Some of the parties present in the Upper Waitaki Working Party were represented already. However there were some new issues to be dealt with.[83] The issues this party was considering included:

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[81]The Moeraki and Waihao people were concerned with the estuary. The Arowhenua people were concerned with the Upper Lakes.

[82]Fresh water crayfish.

[83]Lower Waitaki irrigation Schemes, M.A.F.tech, Glenary Waitaki Bridge Salmon Anglers Association.

"Effects of Flow Fluctuations on the lower river fishing.

Optimum Flows for wildlife values.

Flow regime effects on irrigation schemes.

Communication between all river users." (Electricorp Production, 1990,1)

The Agreements Reached

Where an agreement was reached the Working Party categorised it as a "subject of water right conditions" or as a matter which was "outside the scope of the tribunal to impose as condition(s)" (France,1991,18). The former were set down in one document entitled 'Agreement to Electricity Corporations Water Rights' The later were set down in individual agreements between Electricorp and the parties.

The collective water right agreement[84] was signed or affixed With an official seal by each of the members of the Working Party. Upon signing the agreement each party agreed that: (1) Subject to the conditions the interests of each party would be served by the granting of the water rights; (2) That subject to the conditions the water rights should be granted; (3) that the signatories would urge the Canterbury Regional Council to "adopt the conditions" on the granting of the water rights; (4) that the agreement be subject to the execution of the separate agreements, between Electricorp and the individual parties, before the Canterbury Regional Council convened the water rights hearing.

Further Clauses and stipulations were added to safeguard the rights of appeal should the Canterbury Regional Council not grant the conditions on the water rights. Notably room was given for the resolution of disputes, by arbitration, before appeal to the Planning Tribunal or the High Court. The individual agreements took the form of the agreement between the South Canterbury Fish & Game Council and Electricorp.[85]

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[84]See appendix C.

[85]See appendix C.

Strengths of the Process

France (1991, 19) detailed what he believed to be the strengths of the process:

"* No surprises - the widespread notification and consultation resulted in an exhaustive sampling of issues and interest groups - no unexpected issues, parties or witnesses arrived at the hearing.

* Cost effective - monies were spent directly on productive relevant research rather than on legal representatives and witnesses.

* Participation - no-cost participation was available to virtually all interest groups.

* Better informed participation - all involved parties developed a greater understanding of, and sympathy for, the perspective of other participants.

* More robust decisions - the fact that decisions were agreed upon meant they are more likely to survive the passage of time - providing greater certainty for decision making.

* Greater flexibility - the technique of identifying as wide a range of options as possible, and achieving agreement on a combination of these opened up a range of solutions which were far wider in scope than could have been imposed by a tribunal.

* Greater control - all parties were able to determine their desired outcomes and argue for them to the tribunal with the support of all interest parties, minimising the risk of an unacceptable outcome."

Use Of The Working Party Process In Other Water Permit Applications.

Following the success of the Upper Waitaki Working Party Electricorp has adopted the technique in its applications for the Water Permits relating to other power installations. With the advent of the Resource Management Act, the 15 year time limit that Electricorp had set itself had been reduced to 10 years thus greatly reducing the limit for applying for the rights while increasing the burden on their resources. Electricorp recognised that they could either adopt an adversarial stance or a consultative stance (Electricorp Production, 1991).

The other power projects have been earmarked for the Working Party process include: the Mangahao; Huntly; Manapouri/Te Anau; and the Tongariro power development (van Rossem, 1992). The Tongariro Power Development Working Party process is underway and had held its first meeting on 12 November 1991. The process is expected to run through to mid 1994 (Electricorp Production, 1991).

The Power Crisis of 1992

The water shortage in the Waitaki Power Development storage lakes,[86] the resultant power crisis, and the passage of the Lake Pukaki Lowering Empowering Act 1992, illustrates how carefully constructed working party agreements can be disregarded when major political issues are at stake. The implications of the power crisis and the passage of the Act are too complex to be dealt with in this thesis. It is clear though that political commitment to working party agreements is a crucial factor if the format is to be a success.

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[86] Refer to map page 113.

CASE STUDY 2: MANUKAU HARBOUR TASKFORCE

The Manukau Harbour and it's Decay

As discussed in Chapter Two Maori have a holistic view of the world and their part in it. This view was reflected in the way in which tangata whenua interacted with the Manukau and its environs. They knew they were physically dependent on the Manukau and learned to live within its constraints.

However Europeans brought with them a different world view involving the world and its resources. The world was to be exploited for human use...

> "...the settlers for the most part came with a secular *laissez fair* attitude to their environment; despite being the children of a burgeoning/ scientific/ technologic age they had no understanding of ecology. Neither had they the practical experience of spiritual perspective of the Maori." (Penny, 1988, 4)

The Manukau and its environs presented a prime exploitative opportunity to the European settlers. These lands and waters proved ideal for farming, fishing and manufacturing. The land was farmed, the water was fished and used as a convenient dumping ground for production wastes (Penny, 1988).

Maori actively participated in economic activities centred on the Manukau until the Land Wars of the 1860's. By this time settler pressure for more land saw the initiation of the Land Wars and confiscation of much of the Tainui tribal lands around the Manukau and Northern Waikato (Ibid; Wai 8, Manukau, 1985).

Through further sales, confiscation, and Acts of Parliament Tainui were fully divested of their traditional lands. With the loss of land came extensive environmental damage. Reclamations, infills, raw sewerage discharges, industrial discharges, run off from farms, all lead to the degradation of the Manukau's environment and the destruction of Tainui's traditional food source; kaimoana from the Manukau.

Waste discharges into the Manukau grew during the first half of this century to peak in the late 1940's and early 1950's. According to Bercusson (1991) investigation by a government analyst, in 1955, revealed that the pollution in the harbour was worse than previously thought. Putrefying matter was up to 3 feet 6 inches deep in places.

Yet still commercial and industrial development around the harbour continued. Through the 1960's a large tract of land was recovered from the harbour, destroying an important fishing ground, for the Auckland international airport. Anchoring restrictions around the airport prevented tangata whenua gaining access to what was left of these grounds.

Abattoirs, steel works,and asbestos cement works opened on the shores. The Manukau sewerage purification works, a major contributor to the harbours pollution opened.

In conjunction with the pollution the fisheries came under pressure from an increasingly important, regional, fishing industry. Commercial fishing ravaged the fish stocks of the harbour (Ibid).

These are the main events which lead to Nganeko Minhinnic, on behalf of the Manukau tribes, lodging a claim to the Waitangi Tribunal in 1984. The claimants asked the Tribunal to recommend to the Crown:

> "(a) The 'return' of the harbour to its 'rightful' owners, the Manukau tribes.
> (b) To vest the control of the harbour in the Manukau tribes as the persons best able to protect it.
> (c) A moratorium on granting further water rights for both the harbour and river.
> (d) The appointment of Maori Guardians to contribute to planning and policy formation and the application of those plans and policies to particular cases.
> (e) Provision for Maori representation on planning bodies.
> (f) The reservation of parts of the harbour for associated marae, and the Whatapaka and Pukaki creeks in particular.
> (g) A prohibition (or Increased controls) on commercial fishing in the harbour and lower Waikato river.

(h) The review of all relevant laws to ensure that traditional fishing grounds are acknowledged and given a proper weighting, and
(i) A share in the rewards of development." (Wai 8, Manukau, 1985, 76)

As McCaffery (interview, 1991) points out the political implications of some of the 'relief' sought were far reaching. The Tribunal avoided making recommendations for the return of the land and ownership:

"... the Tribunal really didn't find in favour of Tainui's claim ... that's the 1984 one and that was that they were the rightful owners of the harbour. It really found that every thing that they claimed was true, but it seemed to be saying that politically it would be too difficult to make the decision that they were the owners of it ... what they proposed instead was that Tainui should have a major say in the way the harbour was managed and controlled and they in essence floated the concept of control as opposed to ownership..."

The specific recommendations on the claim were directed at Cabinet Ministers.

However after much public debate the recommendations of the Waitangi Tribunal were, for the most part ignored by the Crown. It seems even the 'politically minded' recommendations of the Waitangi Tribunal were to difficult for the Crown to implement.

In the years following the release of the report the Manukau Harbour Sewerage Purification Works came under increasing scrutiny as one of the major contributors to the pollution in the harbour. The Auckland Regional Council (A.R.C.) as the statutory authority responsible for the works reviewed the scheme and in 1990 released its proposals for the upgrading of the works.

The A.R.C.'s proposals called for the installation of an outfall several kilometres out into the Tasman Sea. This outfall was to be built in two stages. The first, to be completed in seven years, was for an outfall into the middle of the Papakura channel. The next stage envisaged the extension of the outfall through the ranges south of the Manukau Heads out into the Tasman Sea.

This proposal did not find favour with the environmental protection groups associated with the harbour, particularly the Manukau Harbour Protection Society (M.H.P.S.). The society developed its own proposal based on small scale local treatment and land disposal of effluent.

Initiation of the Manukau Task Force

By 1989 concern over lack of government reaction to the Waitangi Tribunal recommendations prompted the M.H.P.S. to lobby the Ministry for the Environment (M.F.E.). The Society tabled proposals calling for conservation groups, local community groups, tangata whenua, Government departments and local and regional authorities to come together around a table and design a strategy for the harbour:

> "... the idea behind that was that the various reports that had emerged on the harbour showed really clearly that one of the main reasons the harbour had been allowed to get into the state it was, is the absolute confusion of planning and controls, ... the responsibility was spread amongst so many that in the end nobody took responsibility for it." (interview McCaffery, 1991)

The official position of the M.F.E. states that the Ministry took the opportunity presented by the government review programme, which included local government reform, Resource Management Law Reform, and the Rununge a Iwi Act to initiate the Manukau Task Force. It seems likely that it was a combination of this lobby pressure and the opportunity presented by the reviews which lead to the formation of the Task Force.

The Labour Government associate Minister of the Environment, the Hon P Dunne, established the Task Force on 1 January 1990. Members invited to attend the Task Force included the Associate Minister, officials from the Auckland Regional Council, Franklin District Council, Manukau City Council, Papakura District Council, Auckland City Council, Waitakere City Council, Manukau Harbour Coalition, Manukau Harbour Protection Society, Huakina Development Trust, and the Department of Conservation.

The Task Force agreed upon a 'brief'.[87] It was agreed that the task forces purpose was ...

> "... TO ACHIEVE THE EFFECTIVE CO-ORDINATION OF CROWN, LOCAL AUTHORITY, TANGATA WHENUA, AND OTHER SECTORAL INTERESTS IN THE SUSTAINABLE MANAGEMENT OF THE MANUKAU." (M.F.E., 1990, 6)

The 'brief' instructed the Task Force to consider means of co-ordinating the activities of the members; develop 'Alternative Organisational Arrangements', develop a kaitiaki structure for the harbour; investigate the possibility of developing 'principles of sustainable management for the harbour'; and gain agency approval of the proposals.

Themes and Principles

In their discussions the members developed 'themes' and from these themes developed 'principles'.

Theme 1: The Policy Process: a unified policy process for the Manukau needed to be developed.

Theme 2: Structural Relationships: Structures relating to the harbour had caused 'tensions' between the various statutory bodies responsible - transparency and separation of functions was needed.

Theme 3: Management issues: Effective executive and administrative management had to be determined.

The 'principles' developed from these 'themes' were: (a) Common agreement on goals;(b) Boundaries of interest determined; (c) Lines of accountability specified; (d) Functional separation and transparency; (e) Spirit of cooperation; (f) Acting within existing frame works; (g) Involve tangata whenua; (h) Cost effectiveness. (M.F.E., 1990)

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87 Known as the terms of reference'.

The Meetings: Format And Tensions

The Minister P Dunne convened the meetings. According to McCaffery (interview, 1990) this caused a degree of resentment amongst the Task.Force members - they did not like having a Minister of the Crown interfering in what was perceived to be a regional matter. The H.D.T. were particularly reluctant to take part:

> "Huakina ... represented Tainui through Carmen Kirkwood and Julie Wade and Nganeko (Minhinnic) ... Which is an interesting story in itself about Ngati te Ata and their role in it, have by this stage, really partly withdrawn from the Huakina Trust, as such, ... and were operating as a separate tribal group under Ngati te Ata. So Nganeko was able to come and take part but choose not to ... She decided that the ... progress that was being made with working along side the Pakeha system was getting nowhere so she outlined a strategy of withdrawal and pressure through the U.N. and other organisations." (interview McCaffery, 1991)

The meetings were dependent on Peter Dunn - when the Minister was available or released from Parliament. Often this was on a Friday afternoon or sometimes on a Monday. These meetings were scheduled for once every three months over a period of a year to eighteen months.

> "... but between that there was an enormous amount of working party work done by what they called the officials group which basically did the work and reported to a full group of politicians and we were well represented on the officials group and put in an enormous amount of work to try to get the protocols and the reports and things up and running ... " (interview McCaffery, 1991)

The officials group would report back to the full Task Force at the three monthly meetings, McCaffery reported that there was often friction between the officials group and the more politically oriented Task Force when these reports were

made. (It should be noted that the following comments are the opinion of Mr McCaffery.)

Recommendations of the officials group ...

> " ... often foundered when you got to the political scene (a reference to the meetings) because the politicians hadn't been briefed or didn't want to hear what the officials were recommending ... so they just over rode them."
> (interview McCaffery, 1991)

The Options Developed

The Task Force developed a number of options then proceeded to eliminate them as they breached the principles they had defined for them themselves. The eliminated options were:

(1) Recommendations to individual agencies;
(2) A special authority;
(3) An independent group existing by agreement.

The eliminated option number 1 involved forwarding a list of recommendations to groups and authorities responsible for the harbour. This option was rejected because (a) the Task Force felt it did not have enough time to develop the recommendations and (b) there was no forum to create 'linkages' between the agencies and to monitor the implementation of the recommendations.

The eliminated option number 2 involved statutory creation of a special controlling authority for the harbour. McCaffery (interview, 1991) commented on this option; it was his opinion that with the right legislative and financial backing a separate authority would have worked well. However the A.R.C. was not interested in setting up the authority [88]and central government were not interested in funding such a project.

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[88] This was, possibly, related to a reduction in its jurisdiction.

> "... we were at a position with the Labour Government ... where they didn't want to spend a penny more than they had to and the cheapest option was to try and persuade the A.R.C. to provide the forum for it. But that was doomed ... because the A.R.C. never wanted it." (interview McCaffery, 1991)

It appears that without A.R.C. and government funding this option was never going to be realised.

Officially this option was rejected because (a) it did not operate within existing frameworks and (b) the principle of cooperation would be breached. The local authorities unwillingness to devolve its responsibilities was commented on by the M.F.E. in its report:

> "The new agency would require the taking away of functions from existing authorities. It is not considered that this would be welcomed without some resentment which could well effect its future effectiveness." (M.F.E., 1990, 9)

(c) A third official reason for the rejection of this option was that the principle of cost effectiveness would be breached. Here again McCaffery's comments on the reluctance of the Government to make funds available have been borne out.

The third option eliminated involved setting up a non statutory group which would report to the Minister for the Environment on the progress of the Task Force's recommendations. The option was rejected because (a) lines of accountability would not be apparent, i.e. who would be responsible to whom? In addition it could not be agreed who should be responsible for coordinating the groups work. (b) It was suggested a 'secretariat' could be established to carry out the coordinating functions, but this lead to the questions of funding and cost effectiveness. (c) Finally it was decided that existence by agreement did not have the force required to keep the group together.

The Final Recommendations

A section of the Local Government Amendment Act 1989 was used to develop the option finally agreed upon by the Task Force. Sections 114 (P) to Section

114 (T), inclusive, were used to suggest that the A.R.C. set up a sub committee of its Regional Planning and Policy Committee. Within the above sections, all the legislative powers a coordinating body for the Manukau would need, were available. The committee would have the power to set rates, the power to make a bylaw, and the power to carry out proceedings in the High Court.

And, importantly, at section 114 (R) subsection 4:

> "(4) A local authority or committee may appoint to any committee, as the case may be, any person who is not a member of the local authority or committee, if, in the opinion of the council,. that person has knowledge that will assist the work of the committee or the subcommittee." (L.G.A., 1989, 81)

This subsection gave the Task Force the opportunity to suggest that the parties to the Task Force be included in the subcommittee. As well as its subcommittee the Task Force recommended that a kaitiaki for the Manukau be recognised. However as discussed below this kaitiaki structure would not be that as recommended by the Waitangi Tribunal. A Manukau guardians group, as recommended by the Waitangi Tribunal, was recommended by the Task Force. It was envisaged this would be an independent watch dog group for the Manukau.

The Failure to Define a Kaitiaki Structure

At the time of the Task Force tangata whenua, particularly Nganeko Minhinnic, were engaged in developing what was for them an appropriate kaitiaki structure.[89] This structure it appears was unacceptable to some of the Task Force members:

> " ... by the time the Task Force was really up and running ... Nganeko's concept of kaitiaki ... had replaced the original idea of two sets of guardians ... so it was left too late ... so by the time the Pakeha system thought it might be acceptable to sit down side by side with Maori people and have a guardianship scheme, a

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[89]Refer Appendix I.

> set of Maori and Pakeha guardians, the Maori's had moved beyond that to a kaitiaki scheme which saw them really having most of the control over the harbour and I don't think government or the A.R.C. seriously wanted to resolve the issue." (interview McCaffery, 1991)

In the end the Task Force avoided the issue by recommending to the Minister that Kaitiaki O Manukau be recognised but did not suggest a possible structure. The Task Force did, however, suggest that a taiapure authority for the Manukau would be appropriate. This suggestion has now been actioned by the Minister of Fisheries and the Minister of Maori Affairs.

The New Minister's Response to The Recommendations

November 1990 saw a general election and the election of a National Government with a massive majority. Simon Upton was appointed the new Minister for the Environment. At this time Resource Management Law Reform process was nearing its completion and the Resource Management Bill had been released for public scrutiny. These events foreshadowed the demise of the Task Force and its recommendations.

Prior to the election the Task Force worked hard to get its report completed.[90] They also lobbied National Party candidates to gain support for its recommendations. That support was gained but unfortunately little attention was paid to it in the new National Cabinet (interview McCaffery, 1991).

The Hon Simon Upton was briefed by his Ministry, on the insistence of the Task Force, on the Task Force and its recommendations. In April of 1991 'sources' in Wellington informed the Manukau Harbour Coalition and the Manukau Harbour Protection Society that the Minister was about to withdraw the M.F.E.'s support from the Task Force and reject its recommendations.[91]

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[90] It was released September 1990.

[91] Refer to copy of facsimilie in Appendix J.

Warren Kyd, National Member for Clevedon, was approached by John McCaffery on the issue. Mr Kyd denied that the recommendations were to be rejected. His letter to Mr McCaffery stating this arrived the same day the Hon Mr Upton announced the M.F.E's withdrawal from the Taskforce.

Mr McCaffery received a letter, dated 7 May 1990, from the Minister stating his reasons for rejecting the recommendations.[92]

On the A.R.C. committee the Minister said:

> "The A.R.C. should make its own decision on the committee structures necessary to fulfil its responsibilities. The Resource Management Act will more than adequately provide the tools with which to improve and restore the Manukau Catchment and Harbour."

On the Guardians, Mr Upton stated that he believed that there were already enough groups around the harbour fulfilling the function recommended for the Guardians. He believed that the environmental health of the harbour would be protected through monitoring programmes of voluntary groups and statutory authorities:

> "A further Guardian body will make little difference to this."

On Kaitiaki, for which no formal recommendation was made, the Minister said that the issue was a Treaty of Waitangi issue between the Crown and the tangata whenua, and that Tainui should meet with the Crown to further discuss the matter.

Conclusion.

The Task Force came to a rather inauspicious end. It had achieved most of the ends it had been set up to achieve but ultimately its recommendations did not find favour at the crucial political decision making stage. While it dealt largely

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[92]Refer to a copy of this letter Appendix J.

with appropriate administrative structures rather than resolving specific resource use conflicts, it represented a serious attempt to accomodate Maori concerns in decision making and thus pre-empt conflicts which could arise in the future.

CASE STUDY 3: WHAKAMOENGA POINT

Whakamoenga Point Residential Development

Whakamoenga point is a million dollar exclusive residential development on the shores of Lake Taupo. The development was carried out on 24 hectares owned by the Gower family.[93] It is described as 'a unique development for Taupo and is probably only the second of its kind in New Zealand.' Upon completion the point's development had 46 freehold lots, tennis courts with a pavilion, a croquet green, fax and satellite television facilities, boat launching facilities and bush walks (Taupo Times, 2/1/91). The Point itself has been identified by the Historic Places Trust (1989) as containing many sites of archeological interest. These include four Pa sites, pits, landings, and ovens, along the access road or near the development itself.

The development was the subject of a scheme change which became operative on 18 march 1988 (T.C.C.,1988). The area had been zoned as a lake shore reserve and was re-zoned as "Conservation And Recreation Park Zone (Whakamoenga Point)" (1988). The scheme change gave the Taupo District Council an extensive foreshore reserve which necessitated improved access.

The Agreement For the Realignment of Acacia Bay Road

It is not the development itself that is to be the focus of this case study, but rather the upgrading of the access road to the Point. Increased traffic volumes to and from the road would necessitate upgrading the road.[94] The Council had obtained a legal right to the road in 1938 (Laughlan, 1991). The Taupo District Council agreed to fund half of the $600, 000 budgeted for the upgrading project.

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[93]The developers of the Whakamoenga Point development.

[94]Refer to map page 136.

Agreement had been reached between the T.D.C. and the Hiruharama-Ponui Incorporation, in March 1989, on the route the upgrading and realignment would take through the Incorporation's land to the Point, before the work was undertaken.

> "After some 20 months of protracted negotiations, agreement was reached with Department of Conservation (as lessee of one block) and the two groups of Maori Trustees over the proposed realignment and subsequent legalisation of the new road-to-be. During this time numerous areas of historic/cultural sensitivity were identified and very considerable time and effort spent on defining and designing around these areas in conjunction with the land owners." (Works Manager, 1991, 1)

Notably these negotiations were carried out by the consultants hired by the Council, not the Council members themselves (Ibid, 1991).

Early Conflict With The Department of Conservation

Work on the road realignment began in November 1990. However work was halted when D.O.C. brought up questions about the applicability of the Harbours Act, particularly sections 175 and 178.[95] The T.D.C. owned the land up to the lake edge and a small reclamation was to be made at Ponui Point to facilitate widening the road and avoiding damaging a nearby urupa.[96] Over

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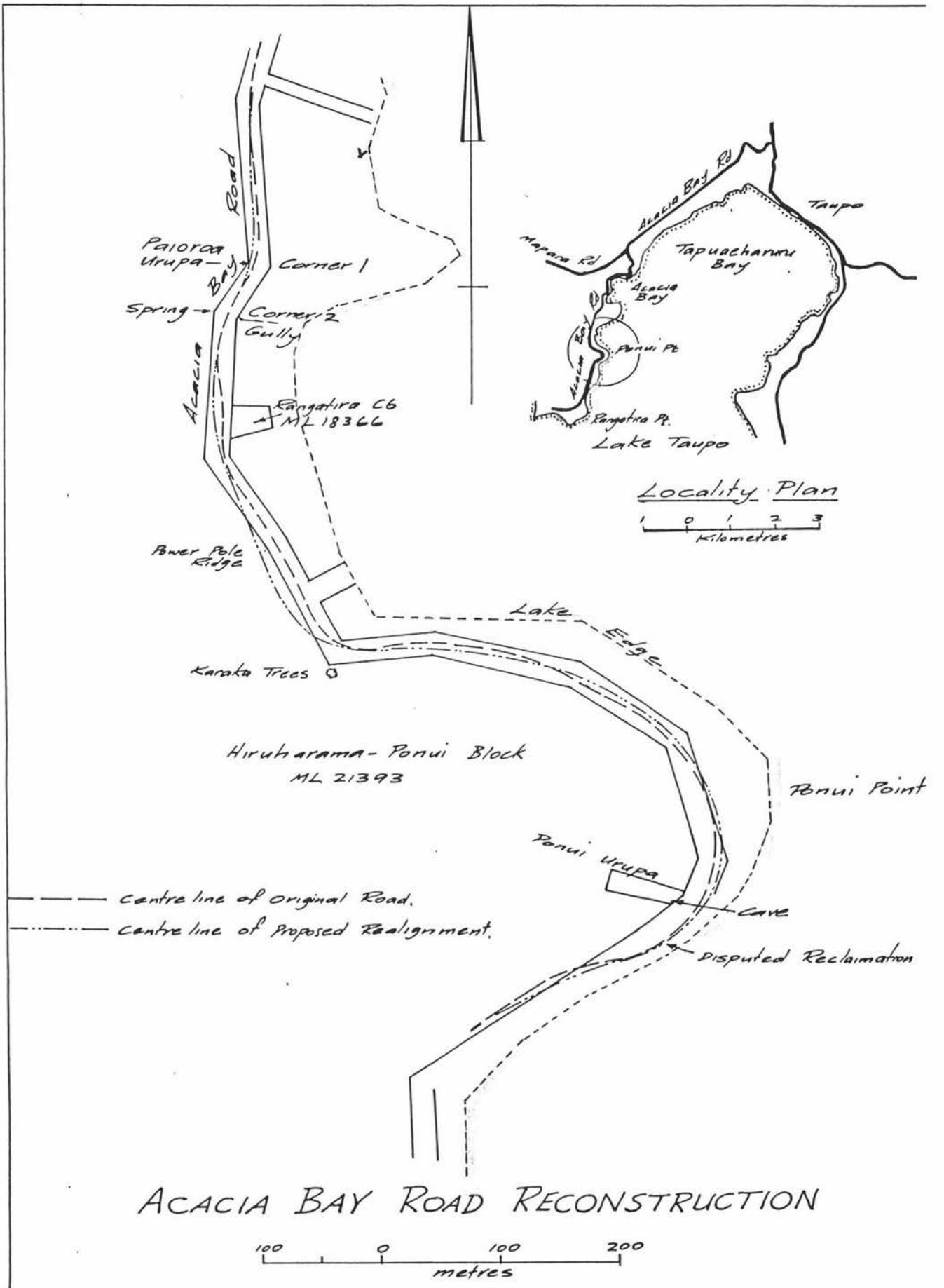
[95]Refer Appendix F.

[96]Land vested in the Council, as part of the legal road, extended to the lake edge at this point.


Acacia Road
Paioroa Urupa
Bay
Corner 1
Spring
Corner 2
Gully
Rangatira C6
ML 18366
Bwer Pole Ridge
Karaka Trees
Lake Edge
Hiruharama - Ponui Block
ML 21393
Ponui Point
Ponui Urupa
Cave
Disputed Reclaimation
Centre line of original Road.
Centre line of Proposed Realignment.
Locality Plan
Acacia Bay Rd
Taupo
Mapara Rd
Tapuacharuru Bay
Acacia Bay
Ponui Pt
Rangatira Pt.
Lake Taupo
1 0 1 2 3
Kilometres
ACACIA BAY ROAD RECONSTRUCTION
100 0 100 200
metres

necessary. The karaka tree, seven complete kumara pits, cave and urupa were confirmed as the protected sites.

However Mr Fletcher, in a lat er inspection on the site of the realignment, discovered human bone fragments amongst the earth works. Work on the site was immediately suspended (Taupo Times, 11/1/91). The contractor, concerned over the breach of contract with the Council, served a notice of damages on the Council. Kaumatua of Hiruharama-Ponui were contacted about the remains (Laughlan, 1991).

The Council decided that the realignment was to go through the bone's site but Hiruharama-Ponui did not want the bones removed. The road could not be moved because to compensate moving corner 1, corner 2, with a steep embankment or gully, would have to be filled at great expense - pumice fill was hard to obtain and would have to be shipped in (Laughlan, 1991).

Consultations between the T.D.C. and the tangata whenua were carried out over the next couple of weeks. However common ground could not be found and a tapu was placed on the site on Wednesday 9 January 1991. On that same day a hui was called, by public notice, by Hiruharama-Ponui on the Nukuhau Marae for the following Sunday to discuss the realignment.

The level of communication between the Council and the Incorporation appears, at this stage, to be not particularly good:

> " Mr Worth described the public notice as a" shock"
>
> He said he had only heard "second hand" that the bones unearthed on December 17 could form part of a burial site. " (Taupo Times, 11/1/91)

Further, T.D.C. received a letter, written by a representative of Huriharama-Ponui, focusing on what was described as a 'desecration' of the site (Taupo Times, 11/1/91).

On 10 January the Mayor, Joan Williamson, made assurances that all of the appropriate steps had been taken to make archeological investigations, consult

with the tangata whenua, and obtain Historic Places Trust permits. Mrs Williamson also stated that the T.D.C. had not been insensitive or irresponsible regarding the remains:

> " "The Council, and rightly so, is extremely culturally sensitive and aware of the need to preserve the sacred places of the Maori people," she said.
>
> However a balance was required between cultural sensitivity and what could be an enormous cost to the rate payers caused by any delays to the road works." (Taupo times, 11/1/91)

The hui was followed by a meeting between the Taupo District Council, the Incorporation, and the Tuwharetoa Trust Board, on the following Tuesday.[100] Mr Alan Johnson, the T.D.C. Works Committee chairman chaired the meeting. A site inspection followed the meeting and the Incorporation representatives reported back to their respective peoples (Taupo Times, 16/1/91). During the meeting, concerns raised by the Hiruharama-Ponui people were discussed. Mr Johnson reported to the Taupo Times:

> " "The discussions have been conducted in an open understanding manner by all concerned and I am confident that the issues can be resolved quickly to the satisfaction of every one."" (Taupo times, 16/1/91)

Mr Johnson reported early the following week that the Council was facing cost over runs on the road redevelopment. He could not give an accurate figure on the likely size of the cost blow out. He stressed that these costs would have to be met by the rate payers (Taupo Times, 23/1/91). <u>These cost increases were to play a considerable part in the events which followed.</u>

Secondary Agreement Reached

Agreement was reached with the Incorporation before the end of January 1991. This basically proposed that the old alignment be followed past the area where

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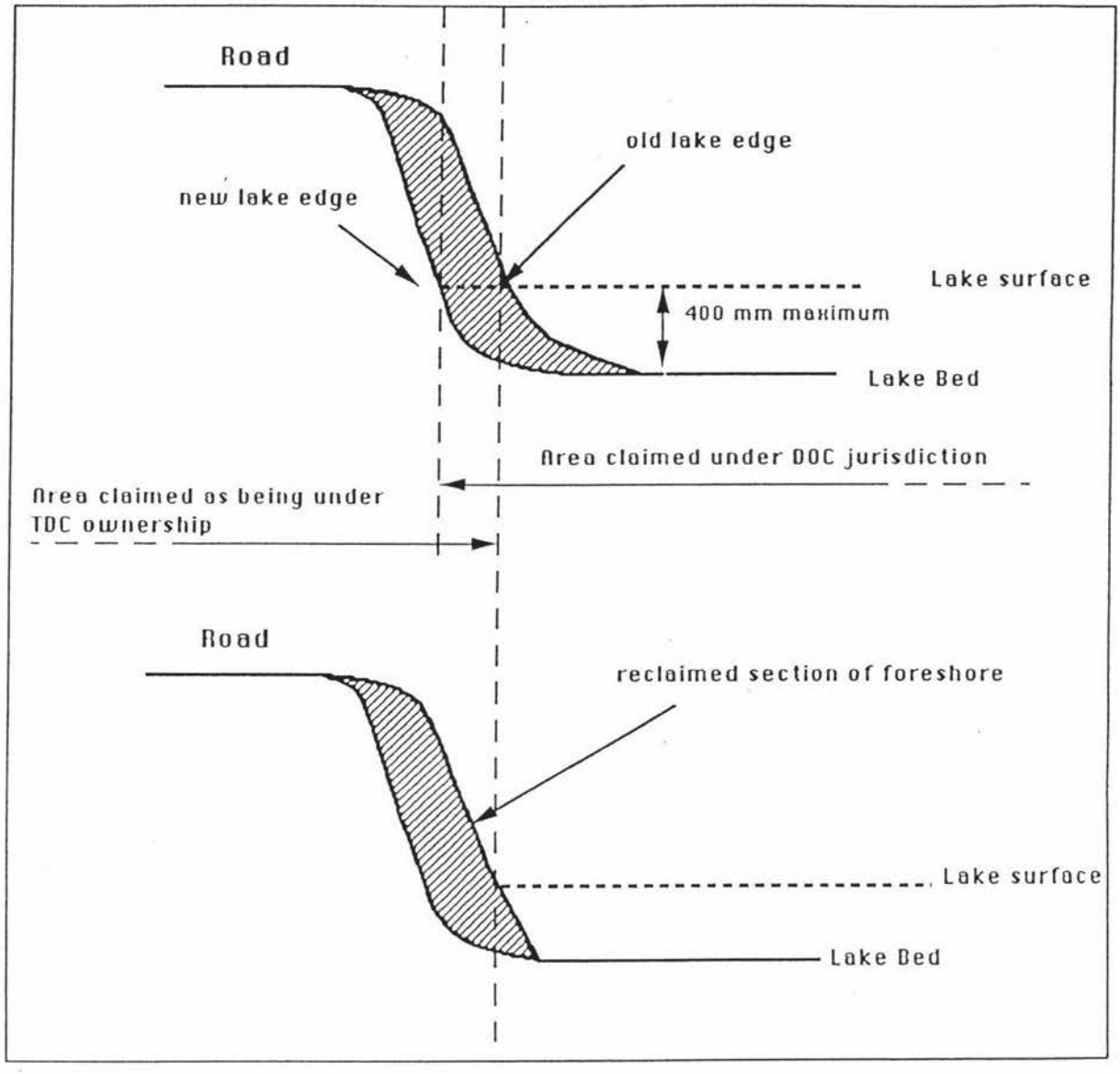
[100] 15/1/91



Stylised Cross Section: Ponui Point

the bones were found. However even though this agreement was reached the kaumatua delayed lifting the tapu on the section of road. The delay in lifting the tapu was derived from the fact that one of the Incorporation's liaison representatives was a woman:

> "She in terms of Maori protocol she was not entitled to be there or discuss the matter anyhow, so she had been placed in a very difficult situation, as a woman she shouldn't have been anywhere near the site." (interview, Crawford)

The contractors could not commence work until the tapu was lifted or until ordered to do so by the Council.

D.O.C. Re-enters The Alignment Dispute

D.O.C.became involved in the realignment project again. However D.O.C.'s involvement was unrelated to the bone find and focused again on an 'unauthorised' reclamation of part of the lake's foreshore. A D.O.C. officer, making an inspection of the road realignment, noted that a reclamation of the foreshore, outside of the agreed area around Ponui Point, was about to be undertaken. What ensued was essentially a short 'media war' between D.O.C. and the T.D.C..

D.O.C. released a statement on Tuesday 5 February 1991. The statement accused T.D.C. of insensitive and haphazard dumping of several tonnes of rock and reported that D.O.C. would be referring the matter to the Tuwharetoa Trust Board[101] and its lawyers.

> " "Both D.O.C. and the tangata whenua were led to believe that in fact no debris from the roadworks would be put in the lake at all," the Department's statement said." (Taupo Times, 7/2/91)

D.O.C. informed the Council that they would be required to apply for a permit under the Harbours Act. The T.D.C. rejected D.O.C's argument and continued

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[101] Tuwharetoa is the trust with jurisdiction over the lake's bed.

with its activities (Taupo Times, 7/2/91). T.D.C. claimed that the contractor had placed the rocks in the lake to protect them. This work was undertaken without the knowledge of the Council. The rocks were to be pulled back to form part of a rock wall supporting the road. This was latter said to help quell wave action which might undermine the road. T.D.C. went on to accuse D.O.C. of reneging on their pre-work agreement:

> " "It would appear D.O.C. is attempting to upset the previous agreement reached after lengthy discussions between the department and the Taupo District Council," Mr Worth said." (Taupo Times, 7/2/91)

At this time the halt in the upgrading work caused by the bone discovery and the reclamation controversy began to impact on the T.D.C.'s roading budget and other projects (Taupo Times, 8/2/91).

12 February 1991 saw a reply from D.O.C. to the T.D.C.'s allegation that D.O.C. was going back their previous agreement. D.O.C. went to lengths to explain that they were not responsible for the hold up in the road works:

> " Following discussions with the T.D.C., a completion notice for roadworks was given under the Harbours Act last November.
>
> We gave the notice to complete the job in the confidence the council would comply with the conditions that were agreed to," Mr Green said.
>
> "But to date, Mr Worth has ignored five of those conditions." (Taupo Times, 12/2/91)
>
> D.O.C. said the need to protect the rocks and quell wave action were not "necessary or relevant excuses" for pushing the rocks into the lake. (Taupo Times, 12/2/91)

The reclamation conflict came to a conclusion the next day. D.O.C. and the T.D.C. released a joint statement calling the conflict a 'misunderstanding'. D.O.C. acknowledged that the dumping of some of the rocks was temporary and done without the knowledge of the T.D.C.. Both parties called for further

meetings between T.D.C. and the Incorporation in an effort to resolve the 'bone' conflict.

The Decision to Continue Construction

Negotiations with the Incorporation were continuing, but without noticeable success. Concessions were made which included the provision of fencing and stone work for the urupa. But still the tapu wasn't lifted (Laughlan, 1991).

The Times next report on the roading project was on 22 February 1991. T.D.C. and the Incorporation met on Wednesday 20 February to continue negotiations on the issue. Hiruharama-Ponui land owners were to meet on the following Saturday to continue their discussions on the road. Five days later on 27 February 1991 Peter Worth was reported by the 'Times' as 'endeavouring to reach' a resolution to the issue. These endeavours appear to be only partially successful (Taupo Times, 27/2/91).

Apart from the cultural and spiritual difficulties with the woman liaising with the Council[102] the Incorporation found difficulties in communicating with and gaining ratification from the peoples they represented. Like much of the Maori land held by Trusts and Incorporations, the ownership of Hiruharama - Ponui land has become very fragmented (interview, Crawford, 1992). Communicating with and gaining the approval of the land owners who had their own interests to protect would have proved difficult. These factors slowed and prolonged the negotiation process placing financial pressure on the Council who had contractual obligations to see that the work on the road continued. Despite all efforts the tapu remained in place. In addition the Department of Conservation's actions were adding their own element of uncertainty to the project. Council were fast approaching the position where they had to consider either abandoning the project or continuing despite the tapu.

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[102]Who was replaced as a liaison representative of the incorporation.

On 12 March 1991 a report by Mr Worth was forwarded to the Works Committee. This report outlined the project to date and made recommendations on how the committee should proceed with the project. There were five options presented:

"a) **Continue with the project as it now stands"**

The Council had reached an agreement with the trustees on a compromised design of the road. 600 meters of the road would be left at 50kh/hr of which 300 meters (past the Paiaroa urupa) would follow the original road. There had been no agreement over the future upgrading of this section of road. The road beyond this section was ready for sealing.

"b) **Continue as Planned With Deletion of Around Ponui Point"**

This option called for the continuation of the project but with the contentious section of the road around Ponui Point left intact. The Works Manager pointed to the fact that the existing road around the Point was inadequate for two way traffic.

"c) **Continue as Planned With Deletion of 700-1750m"**

This option was much the same as option b) but with a greater length of road left untouched [103]and with the attendant problem outlined in b.

"d) **Terminate the Contract"**

This option was not recommended as a major section of the road was ready for sealing. If the contract were to be cancelled the council would be liable for compensation to the contractors.

"e) **Use Council's Statutory Powers to Undertake the Work Through Private Land"**

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[103]From before the bones until after Ponui Point.

The council held the necessary permits from the Historic Paces Trust for the "modification" of the site. They could use their statutory powers to proceed with the project and see it through to completion.

In his summary the Works Manager (1991) said:

> "Given the major cost over-runs likely on this project (due to delays, D.O.C. requirements and Maori concerns), a decision is required as to whether to continue with the work in its present form or to abandon/defer some or all of the disputed 1050m length. Council has an obligation to provide (if possible) an adequate sealed road to Whakamoenga Point and install the sewer rising main. To do this, it is likely that an extra $250 000 will be required unless other projects are deferred."(my emphasis)

In the end it appears that the committee decided to follow none of the above options:

> "Resolved
>
> THAT THE COUNCIL TAKE THE NECESSARY STEPS TO ENSURE THE CONTRACTOR CAN COMPLETE THE CONTRACT AS ORIGINALLY DESIGNED." (Ibid; 7)

The next day the Taupo Times reported that the Council was intending to go ahead with the realignment project. The projected cost over-run was the reason given for the decision. Up to that time all attempts to reach a resolution of the tapu issue had failed.

> " If the council went ahead with the compromised road design they would have a single lane substandard road which "I personally would not recommend was worth sealing," Mr Worth said.
>
> That road would cost $810 000.
>
> The council had a legal right to proceed with the original roadway which would result in a safe, sealed rural road.

This was the option favoured by Councillors." (Taupo Times, 13/3/91)

The road realignment progressed over the next four months during which time the tapu was lifted.

However on 15 July the contractors arrived at the site to complete the disputed last 300 meters of the road to find access blocked by vehicles. Some of the Incorporations people believed that Power Pole ridge was a karakia place. Under their agreement the contractors could remove up too seven meters of the ridge (Laughlan, 1991). Mr Kusabs, the Hiruharama-Ponui Incorporation's accountant, was quoted by the Taupo Times as stating that the Incorporation believed that they had an agreement with the T.D.C. that the remaining 300 meters[104] would be by-passed. He also stated that the barricade was not authorised by the Incorporation's Management Committee (Taupo Times, 16/7/91).

The Final Meeting

T.D.C. and the Incorporation's management committee met again to try to resolve the issue. This time the meeting was successful. The Mayor, two councillors, the Chief Executive and the Works Manager met with trustees and seven members of Hiruharama-Ponui Incorporation on 23 July. A joint press release was issued on 23 July stating that both parties had made concessions and the road could now be completed.

"At the Annual General Meeting of the Incorporation, held on the preceding Saturday 20 July 1991, the owners 'vetoed' the original agreed road alignment through the bones area.

After lengthy debate, it was agreed by all present that the future road could be detoured around the 'bones' area but would otherwise adhere to the original alignment [and in particular could traverse the previously disputed power pole

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[104]Which encompassed the Power Pole Ridge area.

> ridge area]. With these amendments, a satisfactory alignment could be achieved." (Works Manager, 1991a, 1)

Crawford commented on the adjustments the T.D.C. made to their design when they negotiated the settlement of the roading conflict:

> "(We said to ourselves) "We designed a geometric road which had speed values of ... a hundred kilometers an hour ... we are not going to be able to maintain these proper geometrics for the ... urupa site, where the bones were found, and we're not going to maintain proper geometrics for coming round the corner next to the karaka tree."
>
> Once you get around Ponui Point you could have had a relatively high speed road and one of the feelings that was coming through from the land owners was ... "no your going round a series of bays, slow the traffic down and enjoy it as an experience." What has happened does do that, but it has happened for very different reasons." (interview, Crawford, 1992)

The short fall of funding and the impact of this on rate payers proved to be an unfounded fear when the costs and funding available were totalled and reported on the first of November 1991.

Conclusion

The agreement signed by both the T.D.C. and the Incorporation did not make any provision for the resolution of disputes that might arise through unforeseen circumstances. The finding of the bones was very much an unforeseen circumstance but not unforeseeable as the area around the reclamation was rife with archeological finds prior to the commencement of the road. Although this might be easily said in hindsight the parties should have provided some mechanism whereby they could have settled any unexpected disputes. Such provisions, though as yet unused, were included in the agreements between Electricorp and the other parties in the Waitaki Working Party negotiations.

That consultants carried out the early negotiations and not the than representatives of the T.D.C. points to a possible reason why subsequent negotiations were difficult. A previous working relationship had not been established at the negotiation level. Coupled with this was the culturally 'incorrect' combination of a woman and human remains. Correct representatives were not defined at the beginning of the secondary negotiation process. As A.D.R. theory states, people who can legitimately represent areas of interest should be the people to enter negotiations on the behalf of others.[105]

CASE STUDY 4: KAKANUI SEWERAGE MEDIATION

This case study briefly describes the resolution of a conflict over the design and building of a sewerage scheme which discharges into the Pacific Ocean near Kakanui. (South of Oamaru.) The study is based on an interview of Barry Fairburn. Mr Fairburn was the County Engineer, for the Waitaki County Council office in Oamaru, during the installation of the Kakanui Sewerage Scheme. (Mr Fairburn is currently a consulting engineer for Rankine and Hill Christchurch.)

The scheme was designed to replace the septic tank system which Kakanui had been using.

> " ...it's a first time sewerage reticulation and treatment scheme, subsidised by central government under the last of the old subsidy provisions. It's an orthodox reticulation scheme. The sewerage treatment involves an oxidation pond and a managed wetland and a discharge to the ocean." (interview Fairburn, 1991)

Mr Fairburn represented the Council in its dealings with groups and residents with concerns about the proposed scheme:

> " ... It was up to me to present the information as best I could and to ... try to implement the policies of Council." (interview Fairburn, 1991)

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[105]See Chapter 1, page 24.

Kakanui's septic tank disposal method had been causing leachate problems in respect of ground water and the nearby Kakanui River. Kakanui's residents had divided themselves, almost evenly, into two opposing groups. One group, represented by 'Kakanui Action On Sewerage' (K.A.O.S.), were in opposition to the scheme:

> " ... there were two elements ... in the opposition to the scheme. The first one was on cost pure and simple. ... Their (K.A.O.S.) view was that of the two hundred and something homes in ... Kakanui there were only some twenty or so that actually had an effluent problem. So the first opposition was on straight out cost. They then switched later on to the actual effluent discharge which they opposed as a sort of second stage issue further down the track." (interview Fairburn, 1991)

Each household, in Kakanui, was facing a bill of around two and a half thousand dollars and with such a large outlay Council had to ascertain the degree of public support for the scheme. It conducted two postal surveys, the results of which indicated that support for the scheme was split. In addition, two public meetings, at which Mr Fairburn spoke, were conducted. In the end Council concluded it would continue with the scheme.

Mr Fairburn believed the issues could be crystallised in terms of 'growth' and 'non growth'. 'Growth' in Kakanui would be curtailed by the non provision of adequate sewerage reticulation.

> "...if (we) didn't put a sewerage scheme in we would have to have put an embargo on further planning development and residential development" (interview Fairburn, 1991)

Clearly growth of any sort could not proceed with out the infrastructure to deal with its by products.

> "The opponents to the scheme said ... they wanted Kakanui to stay as it is, it's sort of a retirement and fairly quiet backwater sort of existence and they wanted that to maintain and stay as it was." (interview Fairburn, 1991)

The groups infavour of the scheme took almost exactly the opposite attitude.

> "The people that were for the scheme said they wanted Kakanui to be an on going, viable, vibrant, community for their children and ... for their future and they wanted to see the township develop." (interview Fairburn, 1991)

While the Council had these issues to deal with it also had a time frame with in which they had to work. This time frame was created by the imminent expiry of a central government sewerage subsidy.

Having decided to progress with the scheme the Council investigated its options. They defined three possible alternatives for discharges : 1)the Pacific Ocean; 2) the Kakanui River and; 3) a land based disposal system. Economics and practicability favoured the ocean outfall.

At this stage the Oamaru Maori Committee (O.M.C.) was approached. The O.M.C. voiced its concerns on the cultural and spiritual effects of the discharge associated with the proposed scheme. The O.M.C. then lodged a claim with the Waitangi Tribunal. Council approached the O.M.C. at their "marae":

> "Well it's not really a marae. There aren't too many Maoris in Oamaru as you are probably aware, it's an ordinary suburban house which is used as a marae."

The Council explained to the Committee what they were intending to do. The committee responded by explaining their concerns to the Council representatives:

> " ... obviously they had cultural and spiritual concerns about a discharge. They also had extremely practical concerns because there were shell fish beds a kilometre north and south of the proposed discharge point. And they were obviously concerned that those shell fish beds were going to be contaminated." (interview Fairburn, 1991)

Council took careful note of the O.M.C.'s concerns. They made assurances that all possible steps would be taken to prevent the sewerage outfall contaminating

the shell fish beds. Council was also very careful to explain to the committee the environmental benefits of the sewerage scheme:

> "One of the central arguments that was very persuasive to the Maori people was the fact that the sewerage scheme essentially reduces the amount of pollution into the environment. In other words you can take the two cases with or with out a sewerage scheme. Without a sewerage scheme you had leaching of the sceptic tank effluent into the Kakanui river, into the soils, into the waters, ... drainage schemes that kind of thing ... I think from a Maori perspective, in terms of the total environment the sewerage scheme was an improvement ... " (interview Fairburn, 1991)

Mr Fairburn pointed out that the Council believed the O.M.C. was not actually in opposition to the scheme. In commenting on a claim the O.M.C. lodged with the Waitangi Tribunal, over the outfall, Mr Fairburn said:

> " ... They lodged an objection to the Waitangi Tribunal, as you are aware, but it was a *pro forma* type thing. There was never any animosity or any deeply felt problems." (interview Fairburn, 1991)

In the end it was the imminent expiry of the government's subsidy on sewerage disposal which convinced the O.M.C. to withdraw its claim to the Tribunal. A claim to the Waitangi Tribunal would not have been resolved before the expiry of the subsidy. They could quite plainly see that the sewerage scheme would enhance the environment and protect to some degree their spiritual values.

Conclusion

Technically the resolution of this dispute did not amount to the use of A.D.R.. However it illustrates how a contentious issue can be resolved when the parties adopt an open minded attitude and look for ways to accommodate each others concerns.

The residents of Kakanui had an advantage in that they came from a small community in which they all knew each other. While not everybody in Kakanui

would have been happy to see the eventual construction of the sewerage scheme the Council and other proponents of the scheme convinced the O.M.C. that their interests would be best served by the introduction of the scheme.

CHAPTER 5 QUESTIONNAIRE SUMMARY

A brief questionnaire was circulated to Planning Department Managers in the District, City, and Regional Councils in New Zealand.[106] It was designed to gauge some of the attitudes of Planning Staff towards Alternative Dispute Resolution in the year following the introduction of the Resource Management Act. It was not intended to be an exhaustive study of A.D.R. use in Councils - certainly the results reflect this. There was a response received from **89.6%** of Councils.[107]

Percentages From Responses To Questionnaire

Unfortunately the value of questions one and two is limited as the writer neglected to ask the respondee to indicate the number of notified applications which received dissenting submissions in which the submissioners wished to be heard in Council Committee hearings. From this the writer would have been able to calculate a meaningful percentage for the number of notified applications utilising section 99. The following percentages were calculated from the tables of data in appendix **K**

A) The percentage of Councils using Section 99 on notified applications:

78 Returns from which **51** indicated they had used section 99 since 1/10/91 -

65.4%

B) The percentage of Councils using section 99 that actually resolved disputes between submissioners and applicants:

35 of the **51** respondees using section 99 resolved disputes -
68.6%

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[106] Questionnaire set out in appendix K.

[107] These Councils are set out out in appendix K.

C) The percentage of Councils using section 99 which had section 99 related applications appealed in the Planning Tribunal:

12 of the 51 respondees using section 99 indicated that appeals had been made to the Planning Tribunal -

23.5%

D) The percentage of respondees who stated they knew of persons who had the ability to conduct section 99 mediations:

72 of the 78 respondees indicated they knew of persons capable of conducting section 99 mediations -

92.3 %

E) The percentage of respondees who saw some need for training in mediatory techniques:

59 of the 78 respondees indicated that they believed training in mediatory and conciliatory techniques was needed -

75.6%

F) The percentage of Respondees to Question 7 who believed their Council should pay for mediatory training:

53 of the 59 respondees who indicated training was needed believed their Councils should pay for the training -

89.8%

G) The percentage of respondees who believed that the New Zealand Planning Institute should conduct mediation training courses:

48 of the 59 respondees who believed training was necessary saw that the New Zealand Planning Institute could have some involvement -

81.3 %.

H) The percentage of Councils/respondees who have used negotiation techniques in issues other than resource consents:

63 of the 68 respondees who answered this question said their Council had used negotiation techniques in other disputes.

92.6 %.

I) The percentage of Councils who would be prepared to pay for the services of a consultant mediator:

36 of the 70 respondees who answered this question indicated that a consultant mediator might be engaged to resolve disputes.

51.4 %.

Discussion of Written Responses to the Questionnaire

Questionnaire responses have been graded by the theme of the response into sets and set out under the question number and title of those themes in appendix Regional Councils have been graded separately. In all but a few cases, and in the interests of fairness, the name of the respondees and the Council organisations they work for have been deleted from the data. In the interests of economy, discussion of the responses has been minimised and only brief comment is made on each of the theme sets.

Responses to Question 5

Under question five's 'other reasons' the different responses were graded in to seven sets of response themes: 1) Political motivation; 2) Prefers arbitration to negotiation / mediation; 3) Good Fourth Schedule environmental impact assessment; 4) Time frame of the Act too short; 5) Preferring to have a Council hearing; 6) Using informal A.D.R. or carrying over A.D.R. methods from the Town and Country Planning Act era[108]; 7) Submissioners not wishing to use A.D.R..

1) Under political motivation there was only one response. However the writer believes that what the respondent said was highly significant and deserved separate mention. This may be a common attitude amongst Councillors from Councils not making substantial use of A.D.R.. It is acknowledged, though, that this is a 'dangerous' conclusion to draw from only one questionnaire response.

2) The response in Prefers arbitration to negotiation/mediation was graded into a separate theme because of its reference to arbitration. The Resource Management Law Reform exercise explored A.D.R. options with the view of promoting non adversarial resolution of disputes. Arbitration is a less formal method of adjudicative resolution of disputes. This writer would not wish to see such methods introduced to the New Zealand consents process. Submissioners / applicants should be encouraged to resolve disputes with solutions designed by themselves.

3) Good Fourth Schedule E.I.A.. This response was graded separately as it provides support for one of the suggestions which is to follow in the thesis' conclusion: that A.D.R. can and should form part of the consultative process encouraged by the Fourth Schedule of the Resource Management Act. 1991.

4) Time frame of the Act too short.[109] This is a major problem with A.D.R. in the consents process which needs to be dealt with in future amendments to the Act. A.D.R. techniques do not necessarily guarantee a speedy resolution of conflict as multiple party or multiple issue mediation/negotiation attempts generally cannot be carried out within a preset time frame, nor can serious attempts be made in one sitting. The time constraints

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[108]With supporting material from question 8

[109]See also the response under question 8.

of the consents process, this writer believes, has restricted councils/applicants/submissioners to using section 99 as a clarification of the issues with no real intent to resolve problems.

5) Preferring to have Council hearing. These questionnaire responses indicate that the philosophy of the Councillors and Council staff (and perhaps erroneous views of A.D.R.) are restricting the widest possible use of A.D.R. techniques. Take for example response D) and the belief that A.D.R. is not possible where there are a large number of submissioners. The Upper Waitaki Working Parties, with multiple participants, shows that multiple party negotiation/mediation is possible.

The fact that a pre-hearing meeting might 'duplicate' meetings thus expending staff time and resources, indicates that the Councillors/staff involved may not recognise the positive and less tangible outcomes possible from the use of A.D.R..[110]

In relation to response A) 3,[111] pre - hearing meetings to work successfully require the exchange of information. This writer doubts that the amount of information exchanged in an honest attempt at a pre-hearing meeting would be anything less than that exchanged in the Council hearing.

6) Using informal A.D.R. or carrying over A.D.R. methods from the Town and Country Planning era. These responses indicate that alternative dispute resolution techniques are definitely not new to the New Zealand consents system and that there are local government organisations that place some value on these techniques. As Taranaki Regional Council's questionnaire return shows some Councils are prepared to go to extra lengths to utilise A.D.R. methods:

> "This Council and the Catchment Board before it have placed much value on mediation. It is undertaken by senior staff, generally either the Operations or

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[110] See chapter 1, page 21.

[111] "N.B. - our Council prefers to have a hearing in each case to improve quality of information upon which they base a decision and to directly answer any queries Councillors may have."

> Permits Manager. The provisions, particularly the time frame of the R.M.A., do not assist in effective resolution of conflicts. Often resolution can take some months, and we, in those cases, ignore the time constraints in the Act with the agreement of all others involved." (Feely, Questionnaire, 1992, 2)

7) Submissioners not willing to use A.D.R.. This is an area of concern that should be dealt with in the dispute assessment. Again, as the theory stipulates, if the parties are too polarised there is really not much point in trying to negotiate. This is an area which the submissioner/ applicant must make his or her mind up over. What the local authority can do is provide information about the benefits of alternative dispute resolution techniques.

Responses To Question 7

Question 7 was an enquiry about the respondees attitudes towards training in mediation. Responses in this section were graded in to six areas: 1) In favour of training; 2) In favour of training conducted by the Planning Institute; 3) In favour of training organised by the institute but conducted by professional organisations; 4) In favour of training by professional organisations; 5) Not in favour of training.

1) In favour of training: The comments in favour of training indicate that Councils are aware of the need to have their staff kept up to date with 'innovative' methodology. Indeed training in A.D.R. is already recognised by some councils as essential to the development of planning skills.

2) and 3) In favour of training conducted by Planning Institute and in favour of training organised by the Institute but conducted by professional organisations: The returns from both of these groups show that Councils and staff favour some involvement from the Planning Institute. However opinion is divided on what that involvement should be. Some respondents favoured courses run entirely by the Planning Institute while some councils, (and these were in the majority), favoured Institute organised courses which employed the services of organisations such as the Centre For Resolving Environmental Disputes. Indeed as has been stated earlier in Chapter One courses such as these have already been conducted.

4) In favour of training by professional organisations: Taranaki Regional Council's return, while in favour of training, questioned whether the Planning Institute would be the best organisation to organise training. They believed section 99 would involve legal and technical matters that a purely planning oriented Institute would not appreciate. However the reader should be aware that this Regional Council has separated its consent processing and enforcement functions from its planning functions. Other councils have not separated these functions.

5) Training is not required: Interestingly out of the respondees who indicated that they believed training was not required only two provided substantial comment. One has indicated that they have used their staff with 'total success'. The other believed that planners experienced in dealing with the public could conduct prehearing meetings. It seems there are councils who believe that experience is all one needs to successfully conduct mediated meetings.

Responses To Question 8

Question 8 was a general enquiry about the attitude of the respondee to to alternative dispute resolution. An interesting range of responses resulted: 1) Submissioners and applicant must be open minded and Submissioners and applicant need to know A.D.R. techniques; 2) Isolating and defining issues. 3) General support of section 99 and General comments on section 99. 4) The Need to train associated professions.

1)Submissioners and applicant must be open minded: This questionnaire reply illuminated a major drawback to using A.D.R. techniques - the applicant and submissioners must recognise the potential benefits of A.D.R. and be willing to utilise the techniques. The respondee is probably quite correct in stating that inflexible attitudes will only aggravate a situation when trying to utilise A.D.R. techniques.

In addition one respondee, from a regional council, stated that he or she believed that all persons coming into contact with A.D.R. techniques should know how to use them.

Read in tandem these comments indicate that, at the least, it is believed there is some need for the public at large to be willing to use the techniques.

2) Isolating and defining issues: Twelve respondees indicated that section 99 was being used to isolate and define issues on disputes between applicants and submissioners. Clearly the definition content of section 99 is being used. In addition it seems section 99 is having some success in 'de-mystifying' the planning process. However some of the respondees were still putting greater emphasis on the hearing of submissions. As noted earlier this may be in connection with the short time period in the Act.

3) General support of section 99 and General comments on section 99: There was a general support in the comments, from respondees. However some of these comments were tempered with provisos regarding the nature of disputes. i.e. that they be not overly contentious.[112] One comment in particular the comment refered to the process being open to abuse.[113] Generally the morality or ethical nature of a negotiated settlement will be in the hands of the parties and the mediator.

4) The need to train associated professions: The writer believes this comment is valid as planners/development control officers do not do their job in isolation from other professions. Often those professions mentioned will be involved in a resource dispute. Their familiarity (particularly lawyers) with section 99 would ease the use of the section.

Summary

It can be noted that alternative dispute resolution is being used in New Zealand Councils but that use is still in its infancy. This might hardly be thought to be surprising as the Resource Management Act was less than a year old at the time

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[112] See comment under responses to question 8 subsection 3(b), Appendix K.

[113] See comment under responses to question 8 subsection 3(e), Appendix K.

the questionnaire was circulated. However some major themes can be derived from the data.

The first is that it can be seen from the table detailing the figures from questions one to four that the Regional Councils have made better use of the section 99 provisions than the District councils. This could be explained as the simple adoption of negotiation techniques used while the Water and Soil Conservation Act was in force.

Secondly section 99 has found substantial use as an issue identification tool rather than a strict negotiation and mediation provision.

Thirdly most of the respondents saw the need for training in A.D.R. techniques and believed that the New Zealand Planning Institute should have some involvement in the provision of training courses.

Finally that the use of A.D.R. techniques is not solely dependent upon the promotion of these techniques by council staff. Project developers and the general public must be willing to become involved in the use of A.D.R..

CONCLUSION

The obvious conclusion that can be drawn from the analysis of the Waikareao Estuary case study, and the other case studies, is that alternative dispute resolution does work and that it is applicable to New Zealand's unique resource conflict situations. Some suggestions are presented here to ensure that the techniques detailed in this thesis find wider and more effective use amongst the planning and resource using communities of New Zealand.

The Need For Fall-Back Negotiation/Mediation Clauses

The Whakamoenga Point case study shows that uncertainty or unexpected events can ruin a negotiated agreement. The Taupo District Council had spent a great deal of time negotiating an agreement with Hiruharama Ponui over the alignment the road would take through the Incorporation's land. The discovery of the bones undermined that agreement to the point where months and thousands of dollars were lost. Having signed the agreement the parties were committed to courses of action from which they could not deviate. When the problems arose they had no mechanism for which to settle disputes.

On the other hand Electricorp and the other parties to the Upper Waitaki Working Party process recognised the danger of unexpected events and incorporated fall-back clauses in their agreements. However these fall back clauses were of little use to the parties during the national power crisis of 1992. The agreements were over ridden by the Lake Pukaki Empowering Act 1992 which allowed Electricorp Production to lower storage lake levels below agreed levels. It should be recognised that such clauses could not cover every possible situation.

That the parties to the Upper Waitaki Working Party felt it necessary to refer any future disputes to arbitration is unfortunate. One of the purported advantages of resolving disputes via 'alternative' means is the cementing of a positive on-going working relationship; parties should at-least try to resolve problems by

utilising that relationship before resorting to arbitration with its inevitable polarised and competitive nature.

The Need For Political Acceptance

It is useful to recall the comments, in the introduction, about alienation and its threat to the democratic process. That concept of alienation and decaying democracy is central to the discussions below.[114]

Simon Upton's dismissal of the recommendations of the Manukau Task Force points to a major impediment in alternative dispute resolution processes - acceptance at the political decision making level. The recommendations had the potential to implement long standing recommendations of the Waitangi Tribunal. A subcommittee of the Auckland Regional Council's Policy and Planning Committee may well have proved the ideal solution to what had become contentious issues. The Minister's dismissal of the suggestions of the Task Force, on the strength of the provisions of the Resource Management Bill, brought to a fruitless end a process in which many people had invested considerable time and effort.

The Task Force was set up and attended by the outgoing Labour Minister for the Environment Mr Peter Dunne with the election of the National Government, the survival of such a successful Labour Government driven process may not have been acceptable to the newly elected Government. In much the same way the agreements of the Upper Waitaki Working Parties were over ridden by the concerns of political decision makers during the winter of 1992 in the 1992 winter 'power crisis'.

The Waikareao Estuary Mediation is another indication of the importance political decision making can play in dispute resolution processes. One of the major impediments to the resolution of this dispute at an early stage was the animosity felt between Ngai Tamarawaho and the political hierarchy of the Tauranga City Council. It is clear that meaningful consultation with the tangata

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[114]See quotation by O'Riordan (1981) in Introduction, pages 10 - 11.

whenua of the area had not been undertaken. Indeed Ngai Tamarawaho felt very bitter towards the Council for the lack of participation they were afforded in the planning of the route.[115]

Then came the reform of local government, the disestablishment of the City Council, and the establishment of the District Council. The result was an improvement of the relationship between the parties.[116] That improvement in relationship paved the way for the agreement between the parties. Ngai Tamarawaho are now somewhat less sceptical of the part they are playing in the decision making process in relation to the management of the Estuary. Central government had a major part to play in this conflict resolution as well. Cabinet's ratification of the negotiating brief was one of the turning points in the process. What would the outcome of the mediation have been had Cabinet not accepted the negotiating unit's proposals? This is an experiment that needs to be nurtured carefully for indeed it is 'a very delicate plant'.

The questionnaire return discussed in Chapter 5, under question 5 subsection 1,Political motivation, links these observations to the willingness of political decision makers to use alternative dispute resolution processes with the consents process.[117] The consents process basically culminates in a political decision[118] based on information, recommendations, and submissions provided by the applicant, planning staff and the general public. The Resource Management Act preserves that political input. Long standing members of Planning and Regulatory Committees will have acquired considerable expertise in dealing with planning issues. It would be a waste of resources not to utilise that knowledge and experience. Indeed section 99 (2) makes provision for this. Some councillors could prove to be the ideal mediators. (They would be likely to have the personal skills outlined on page.39)

As the Resource Management Act is only a year old it may be too early to predict the impact of the political element on the mediation process. Though there was

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[115]See comments from Tata (interview 1992) in Chapter 3, pages 68 - 69.

[116]Recall comments of Tiplady (interview, 1992) in Chapter 3, pages 66 - 67.

[117]Refer to Chapter 5, page 155.

[118]With in the constants of the relevant plan and the Resource Management Act.

only one questionnaire that mentioned the impact of political motivation on the use of the section, it can be noted, at this stage, that there will be a political impact. It should also be noted that the utilisation of section 99 may not reduce the quantity of committee hearings to any great degree. The clarifying content of pre hearing meetings has been utilised to a significant extent, reducing dissenting submissions and making the decision making element easier. Given the value of this 'clarifying' process it is likely that fully mediated outcomes will have the support of some local authority politicians.

Finally while the case studies and questionnaires have highlighted that politics are an important element in A.D.R., the literature on A.D.R. has either dealt lightly or not at all with the political element in the dispute resolution process. Just as decisions must be legally acceptable, they must also be politically acceptable, especially in a system such as New Zealand's where politics plays such an important role.

These conclusions lead the writer to suggest that a seventh item could be added to Shrybman's (1986) six dispute assessment guide lines in Chapter one.[119]
(7) What role will politics play in the process? How hard will it be to find a political acceptable solution?

While it will be difficult to assess the will of political decision-makers, such an assessment may help to 'avoid that late running torpedo'.

Assessment Of Effects And A.D.R.

The Fourth Schedule of the Resource Management Act states what should be included in the assessment of effects to be provided with an application for a

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[119](1) Can all the parties be included?; (2) Are the issues amenable to compromise?; (3) Are incentives available to encourage broad participation in the bargaining process?; (4) Do representatives exist with bargaining power?; (5) Would the Mediation be Timely?; (6) Is there a way to implement a mediated agreement?

resource consent. And in particular subsection (h) says that applicants should identify affected or interested persons.[120]

The Benefit Of Early Consultation In E.I.A.

The Waikareao Estuary Mediation, Upper Waitaki Working Parties, and the Kakanui Sewerage Negotiation have highlighted that effective and meaningful participation in environmental impact assessment and decision making at an early stage will obviate the need for litigation or conflict resolution at a latter stage. Ngai Tamarawaho were dissatisfied with the level of participation in the design of the road.[121] Clearly participation was not early or effective enough. Electricorp in the Upper Waitaki Working Party Process learnt a lesson from the Wanganui Minimum Flows Planning Tribunal Case - consult early. Faced with the application for the water consents to all its hydro electric power installations over a relatively short period of time - fifteen years, Electricorp has settled on negotiation as a means of acquiring its consents. The Waitaki Working Party Process was not quick, neither was it cheap. However in applying for the water permits Electricorp faced only one objector, and the green and and sustainable marketing image, the company is trying to maintain, remained unscathed. (Until the water shortage debacle of this winter anyway.)

Effective Fourth Schedule impact assessment could assist section 99 prehearing meetings. The onus is on the applicant to effectively consult with affected members of the public. This could then lead to agreement among applicants and people making submissions. Consent orders can then be sought before hearing committees or the Planning Tribunal. Take for example Taranaki Regional Council who promote the use of alternative dispute resolution from the time an application is lodged and are prepared to ignore the time constraints of the Resource Management Act.[122]

The Role Of Consent Authorities In The Assessment Of Effects And A.D.R.

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[120]Refer to Appendix B.

[121]Refer to Tata (interview, 1992) comment on page 68.

[122]Refer to Regional Council response to question 5, subsection C, Appendix K.

Consent authority planning staff have a role to play in this area as well. This writer contends that consent authorities should be providing impetus for the use of alternative dispute resolution techniques in the assessment of effects.

A 'complaint' or 'excuse' for the non use of section 99 detailed in the questionnaire was that the time frame in the consents process was too short. That time frame does not start ticking away until the consent authority receives the application with the assessment of effects. If the consent authority can promote the use of alternative dispute resolution techniques with in the assessment those techniques need not be used after the application has been lodged.

Promotion Of A.D.R. Is Dependent On The Philosophy Of The Consent Authority

Should Councils promote the use of alternative dispute resolution? - Yes. Will they? This depends entirely on the philosophy of the staff and decision makers in consent authorities. For example two councils, (Taranaki Regional Council, and Tauranga District Council) take a very positive view of alternative dispute resolution techniques. [123]

Other Councils have expressed a philosophy placing less emphasis on the use of section 99. Being presented with the opportunity to use A.D.R. does not mean the applicant must use A.D.R. In addition A.D.R. will only be effective when the parties involved are committed to the process. However the first step must be to let the applicants know that these techniques are available, they have advantages and they work. This is surely the role of the consent authority.

In addition such alternative dispute resolution need not be done in isolation from the consent authority. In fact it is more than likely they will be involved in providing information on plans and policy or determining what conditions are likely to be attached to consents. Consent authorities can facilitate this process. As the QuestionnaireChapter shows, at least one Council already considers A.D.R. as a part of project assessment.

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[123]Refer to responses to question 7, subsection 3(e) and Regional Council responce to question 5, subsection 6(C).

The Role Of The Consultant And A.D.R. Techniques On Large Projects

Consultants have played and will continue to play a large part in the preparation of Environmental Impact Assessment for applications for consents. What this research has not addressed is the extent to which A.D.R. is being used by Consultant Planners. This thesis presents one case study where it had not been used by consultants - the initial stages of the Waikareao Estuary conflict.[124] However there is obviously scope for the use of A.D.R. very early in the planning of a project. It is fair to state that mediation will become more difficult as the size of a project and the number of parties involved increases. Pure mediation or negotiation techniques need not be the only techniques used at this stage. The Upper Waitaki Working Parties and the Manukau Task Force have highlighted processes which might be used on larger scale projects.

A working party process initiated in the early stages of the planning of a major resource use project will highlight community values and allow them to be incorporated into plans. As the Waikareao Estuary Mediation shows the incorporation of cultural and spiritual values becomes more difficult the longer significant public participation is left. A mediation structure might be used at a later stage in the E.I.A. after a working party process has crystalised the issues but failed to resolve all of them.[125]

The obvious drawback to this suggestion is the time that can be spent in the utilisation of these processes. Commitment must be made to these processes at an early stage of the planning of projects. In such cases the onus is squarely on the applicant's/developer's shoulders to consult early.

Graduate Training

The preceding two sections, dealing with political acceptance and assessment of effects, give a good backdrop to what could become a major impediment to

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[124] Though whether it could have worked given the state of relations between the parties is questionable.

[125] Assuming the parties have not taken polarised positions.

the use of A.D.R. in resource use dispute - a lack of knowledge and experience on the part of planning staff in the use of A.D.R. As stated, the incidence of alternative dispute resolution use may only increase through the promotion of these techniques by consent authority and consultant planners. This will require a professional training programme. The questionnaire indicated that a high percentage of consent authority planners saw the need for some form of training in the techniques of mediation (75.6%)[126] [127]

The planning community in New Zealand might be divided in to two groups: those practicing, and those training in tertiary institutions. These groups should be targeted separately in any attempt to increase the pool of A.D.R. experienced planners. The questionnaire asked the respondent whether or not they believed their Council should pay for such training: 89.8% replied in the affirmative while 81.3% of those people believed it should be conducted or arranged by the Planning Institute. Indeed the Institute has begun to arrange training sessions through the Centre for Resolving Environmental Disputes. These training sessions need to be held at regular intervals in places accessible to planners.

Ironically alternative dispute resolution courses have been held in tertiary law schools. Ironic as A.D.R. is popularly thought of as an anathema to lawyers. Tertiary institutions provide prospective planners with the necessary skills required for a career in planning. As discussed above, A.D.R. is viewed as an important skill by members of the profession. To teach it at the tertiary level would eventually obviate the need for mid career training as today's graduates move into more and more senior positions. Hence these techniques should be taught as a part of environmental planning technique courses or ideally as a separate course in themselves.

This writer envisages that a course would consist of four components: 1) a history in the use of A.D.R.; 2) the different A.D.R. techniques available to

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[126] See Tauranga District Council return to question 7, subsection 3(e), Appendix K.

[127] Hawke's Bay Regional Council said the following in an advertisement for a consents processing/ Resource planning vacancy: "It would be advantageous to have skills and experience in conflict resolution .." (New Zealand Herald, 21/9/92)

planners; 3) working examples or case studies of successfully resolved disputes; 4) practical training using mediators. The first three would be relatively easy to accommodate in comparison to the fourth. Elements one to three could be handled through existing staff with suitable research.

A U.S. authority on A.D.R., Dr D.W. Moore, nas produced a manual geared towards the teaching of A.D.R. techniques to seminar participants. Manuals such as these might be used in the teaching of theory.

Any comprehensive course in A.D.R. must include practical instruction. Hence the need for guest mediators. In these times of tighter departmental budgets and higher course fees, departments and students alike might find that course fees such as those imposed by C.R.E.D. will make practical training prohibitive. Practising mediators with a will to impart thier knowledge at an affordable rate would need to be found - if such people exist! After-all professional mediators must also make a living.

Alternative Dispute Resolution And Legal Interpretation Of The Resource Management Act

R.N. Ogilvie's letter dated 3 June 1992 indicates there will be an uneasy relationship between the judicial arm of the planning system and alternative dispute resolution techniques.
128

However as the Waikareao Estuary Mediation shows there is a place for the judicial system in alternative dispute resolution. Solicitors were retained by both the Rununga and the District Council and matters were constantly referred to them for interpretation or clarification. The agreement was drafted by solicitors. The redraft of the empowering legislation was carried out by the Council's solicitors and ratified by the rununga's solicitors. A major point of legal interpretation was referred to the solicitors when the rununga threatened to issue High Court proceedings against the Minister for the Environment.- Was the Minister's consent automatic, subject to any conditions the Minister might

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[128]Referred to in Introduction and included in appendix A

impose, or did the Minister have the right to veto the consent? Issues such as these were central to the dispute yet outside of the scope/abilities of the parties to resolve themselves.

Negotiated decisions over consents whether, through section 99 or in the assessment of effects will be subject to Part II of the Resource Management Act - the Purposes and Principles section. Incorporated in these sections are concepts such as 'sustainable management' and 'intrinsic values of ecosystems' which have not been interpreted in the legal system. Take for example section 5(2) (c).[129] In the proposed Tongariro Power Development Working Party there will be crucial legal questions that will need clarification if the process is to work satisfactorily. If parties negotiating a settlement on the form a development will take find that remedying or mitigating any adverse effects isn't possible, or they cannot agree on the form the remedying or mitigating should take, does it follow, on legal interpretation, that the effects must be avoided? Negotiators may find that they need not be avoided only to have their agreement overturned, by the judicial system, at a latter stage because the effects should have been avoided.

As an almost revolutionary piece of legislation, there may be many such difficulties, which will require interpretation in the judicial system, over the early years of the Act's use. Theory has shown that legal ratification of an agreement can be an essential element in a negotiated agreement.

Concluding Comment

Resource Management Law Reform investigated the possibility of improved dispute resolution in the New Zealand planning system. That investigation resulted in the Resource Management Act's provision for alternative dispute

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[129]"In this act, "sustainable management" means managing the use, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while - ...

...(c) Avoiding, Remedying, or mitigating any adverse effects of activities on the environment."

resolution - section 99. This thesis has shown that alternative dispute resolution techniques can work. However a much firmer philosophical and practical committment is needed if A.D.R. techniques are to reach their potential in the New Zealand planning system.

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APPENDIX A

Letters from Manawatu Wanganui Regional Council and R.N. Ogilvie

CS 02 01
ECO:JDG

26 June 1992

MANAWATU WANGANUI REGIONAL COUNCIL.

Private Bag 11025
Palmerston North,
New Zealand.
Telephone (06) 357-9
Fax (06) 356-7477

Adam S Blair
Resource and Environmental Planning Section
Geography Department
Massey University
Private Bag
PALMERSTON NORTH

Dear Sir

SECTION 99 RESOURCE MANAGEMENT ACT 1991

Your letter dated 3 June 1992 was received by the Regional Council on 23 June 1992. I have answered Questions 1 to 4 of your Questionnaire on Section 99.

It is drawn to your attention that under the old Water and Soil Conservation Act 1967 objections made to a water right went through a long mediation process before being presented to the Water Board. The issues involved in Water Rights were always resource issues i.e the effect on other users and the environment.

The Resource Management Act has simply put into statute a system that was used to resolve disputes in the past. Regional Councils in taking over the old Catchment Board and Regional Water Boards inherited considerable expertise in resolving resource disputes.

The Town and Country Planning Act 1974 on the other hand was far more formal in resolving disputes and submissions/objections proceeded directly to a Hearing. Planners associated with territorial authority district schemes and planning issues normally adopted a very structured approach to planning. This means that planning staff with territorial authorities may have less expertise in mediating on resource outcomes.

Questions 5 to 10 of your Questionnaire are not relevant to this Regional Council and I have not answered them.

Yours faithfully

E C O'CONNOR
DEPUTY DIRECTOR OF ENVIRONMENT & PLANNING

For: B COWIE
DIRECTOR OF ENVIRONMENT & PLANNING

Enc:

DEPARTMENT OF
JUSTICE
NEW ZEALAND

Tribunals Division
49 Ballance Street
P.O. Box 5027
Wellington
Telephone 472-1709
Facsimile 471-1263

In reply please quo

RMA/ADM 2

3 ~~May~~ June 1992

Mr Adam Scott Blair
Regional Planning Section
Geography Department
Massey University
Private Bag
PALMERSTON NORTH

Dear Mr Blair

I refer to your letter of 18 May and advise that the Planning Tribunal does not have any reliable figures in respect of the use of s.268 of the Resource Management Act.

The Tribunal has written to a number of appellants in cases that look capable of settlement, asking if they are prepared t enter into negotiations between the parties rather than the Planning Tribunal holding a formal hearing. To date, I am aware of only 5 or 6 cases where the parties have advised that they are prepared to try once negotiate a settlement between themselves rather than use a mediator as intended by the Act. In any event the Tribunal has some reservations about who woul pay for the cost of mediators appointed from outside the Tribunal and the use of Planning Commissioners as mediators if the case proved impossible to settle and if it required a formal hearing.

Yours faithfully

R N Ogilvie (Mrs)
for Registrar
PLANNING TRIBUNAL

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APPENDIX B

Sections 88 - 120 and Schedule Four of the Resource Management Act 1991

Sections 9 and 27 of the State Owned Enterprises Act 1987

PART VI

RESOURCE CONSENTS

87. Types of resource consents—In this Act, the term "resource consent" means any of the following:

(a) A consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a "land use consent"):

(b) A consent to do something that otherwise would contravene section 11 (in this Act called a "subdivision consent"):

(c) A consent to do something in a coastal marine area that otherwise would contravene any of sections 12, 14, and 15 (in this Act called a "coastal permit"):

(d) A consent to do something (other than in a coastal marine area) that otherwise would contravene section 14 (in this Act called a "water permit"):

(e) A consent to do something (other than in a coastal marine area) that otherwise would contravene section 15 (in this Act called a "discharge permit").

Application for Resource Consent

88. Making an application—(1) Any person may, in the manner set out in subsection (4), apply to the relevant local authority for a resource consent.

(2) No application shall be made for a resource consent—

(a) For a prohibited activity; or

(b) For any activity described as a prohibited activity by a proposed plan once the time for making or lodging submissions or appeals against the proposed rule has expired and—

(i) No such submissions or appeals have been made or lodged; or

(ii) All such submissions and appeals have been withdrawn or dismissed.

(3) An application may be made for a resource consent—

(a) For a controlled activity or a discretionary activity or a non-complying activity, under a plan or proposed plan; or

(b) Where there is no plan or proposed plan, for an activity for which a consent is required under Part III.

(4) An application for a resource consent (other than for a controlled activity) shall be in the prescribed form and shall include—

(a) A description of the activity for which consent is sought, and its location; and

(b) An assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated; and

(c) Any information required to be included in the application by a plan or regulations; and

(d) A statement specifying all other resource consents that the applicant may require from any consent authority in respect of the activity to which the application relates, and whether or not the applicant has applied for such consents; and

(e) Where the application is for a subdivision consent, the information specified in section 219.

(5) An application for a resource consent for a controlled activity shall include those matters described in subsection (4) (a), (c), and (d) and, in the case of a subdivision consent, the matter described in subsection (4) (e), and shall also include such assessment as may be specified in the plan of any actual or potential effects that the activity may have on the environment and the ways in which those adverse effects may be mitigated.

(6) Any assessment required under subsection (4) (b) or subsection (5)—

(a) Shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment; and

(b) Shall be prepared in accordance with the Fourth Schedule.

(7) Without limiting subsection (4) or section 92, an application for a resource consent for reclamation shall be accompanied by adequate information to accurately show the area proposed to be reclaimed, including its size and location, and the portion of that area (if any) to be set apart as an esplanade reserve under section 246 (3).

89. Applications to territorial authorities for resource consents where land is in the coastal marine area—(1) Where an application for a subdivision consent is made to a territorial authority and any part of the land proposed to be subdivided is in the coastal marine area, the territorial authority may hear and decide the application as if the whole of that land were part of the district, and the provisions of this Act shall apply accordingly.

(2) Where—

(a) An application is made to a territorial authority for a resource consent for an activity which an applicant intends to undertake within the district of that authority once the proposed location of the activity has been reclaimed; and

(b) On the date the application is made the proposed location of the activity is still within the coastal marine area,—

then the authority may hear and decide the application as if the application related to an activity within its district, and the provisions of this Act shall apply accordingly.

(3) Section 116 (2) shall apply to every resource consent that is granted in accordance with subsection (2).

90. Distribution of application to other authorities—(1) A consent authority (other than a regional council) that receives an application for a resource consent shall, if the application is required to be notified in accordance with section 93, forward a copy of the application to the regional council for the region in which the activity to which the application relates will occur.

(2) A regional council that receives an application for a resource consent shall forward a copy of the application to—

(a) The territorial authority for the district in which the activity to which the application relates will occur; and

(b) Where the activity will occur in the coastal marine area, the Minister of Conservation.

91. Deferral pending application for additional consents—(1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—

(a) Other resource consents under this Act will also be required in respect of the proposal to which the application relates; and

(b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.

(2) Where a consent authority makes a determination under subsection (1), it shall forthwith notify the applicant of the determination.

(3) The applicant may apply to the Planning Tribunal for an order directing that any determination under this section be revoked.

Further Information

92. Further information may be required—(1) A consent authority may, at any reasonable time before the hearing of an application, by written notice to an applicant for a resource consent, require the applicant to provide further information relating to the application.

(2) Where the consent authority is of the opinion that any significant adverse effect on the environment may result from an activity to which an application for a resource consent relates, the consent authority may—

(a) Require an explanation of—

(i) Any possible alternative locations or methods for undertaking the activity and the applicant's reasons for making the proposed choice; and

(ii) The consultation undertaken by the applicant; and

(b) Where the application is for a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to discharge of contaminants), require an explanation of—

(i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects, and the applicant's reasons for making the proposed choice; and

(ii) Any possible alternative methods of discharge, including discharge into any other receiving environment; and

(c) Commission a report on any matters raised in relation to the application, including a review of any information provided in an application under section 88 (4) or under this section.

(3) Where a consent authority seeks further information under subsection (2),—

(a) It may postpone either the notification of, or the hearing on, the application until the information is received; and

(b) It shall make that information available for public inspection at its principal office at least 15 working days before the hearing; and

(c) It shall, upon receipt of any report that it commissioned, send a copy of the report to the applicant at least 15 working days before the hearing.

(4) Further information may be required under this section only if the information is necessary to enable the consent authority to better understand the nature of the activity in respect of which the application for a resource consent is made, the effect it will have on the environment, or the ways in which any adverse effects may be mitigated.

Notification of Applications

93. Notification of applications—(1) Once a consent authority is satisfied that it has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is—

(a) Served on every person (other than the applicant) who is known by the authority to be an owner or occupier of any land to which the application relates; and

(b) Served on the Minister of Conservation if the application relates to land which adjoins any coastal marine area; and

(c) Served on the Historic Places Trust if the application relates to land subject to a heritage order or otherwise identified in the plan as having heritage value; and

(d) Served on the Minister of Fisheries if the application relates to marine farming within the meaning of the Marine Farming Act 1971 or to a fish farm within the meaning of the Freshwater Fish Farming Regulations 1983; and

(e) Served on such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate; and

(f) Served on such local authorities, iwi authorities, and other persons or authorities as it considers appropriate; and

(g) Publicly notified; and

(h) Affixed in a conspicuous place on or adjacent to the site to which the application relates, unless it is impracticable or unreasonable to do so; and

(i) Given in such other manner as it considers appropriate—

unless the application does not need to be notified in terms of section 94.

(2) A notice under subsection (1) shall be in the prescribed form and shall—

(a) Where it is to be served in accordance with paragraphs (a) to (e) of subsection (1), contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her; and

(b) Where it is to be published or given in accordance with paragraphs (f) to (h) of subsection (1), contain a description of the application including the location (as it is commonly known) of the proposed activity; and

(c) State that submissions on the application may be made in writing by any person; and

(d) State the closing date for the receipt of submissions by the consent authority under section 97; and

(e) State that a copy of every submission must be served on the applicant; and

(f) State the place where the application and accompanying information may be viewed and the addresses for service of the consent authority and the applicant.

94. Applications not requiring notification—(1) An application for—

(a) A subdivision consent need not be notified in accordance with section 93, if the subdivision is a controlled activity:

(b) A coastal permit or a land use consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:

(c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if—

(i) The activity to which the application relates is a controlled activity; and

(ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and—

(a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and

(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

(3) An application for a resource consent need not be notified in accordance with section 93, if the application is for a resource consent to do something that would otherwise contravene any of sections 12 (1), 13, 14 (1), or 15 (1) and—

(a) There is no relevant plan or proposed plan; and

(b) The consent authority is satisfied that the adverse effect on the environment of the activity for which the consent is sought will be minor; and

(c) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.

(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2) (a) or subsection (3) (b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2) (b) or subsection (3) (c).

(5) Notwithstanding subsections (1) to (3), a consent authority may require any such application to be notified in accordance with section 93, even if a plan expressly provides that such an application need not be so notified.

95. Time limit for notification—Where an application for a resource consent is required to be notified, notice shall be given within 10 working days—

(a) Of receipt by the consent authority of the application; or

(b) Where further information is sought under section 92, of receipt of that information.

Submissions on Applications

96. Making of submissions—(1) Any person may make a submission to a consent authority about an application for a resource consent that is notified in accordance with section 93.

(2) Every submission shall be in writing, shall be served on the consent authority, and shall state—

(a) The reasons for making the submission and the decision that the person wishes the consent authority to make, if known by the person making the submission, and the general nature of any conditions sought; and

(b) Whether or not the person making the submission wishes to be heard in respect of the submission; and

(c) Any other matter prescribed in regulations made under this Act.

(3) A submission may state whether it is in support of, or in opposition to, the application.

(4) A person who makes a submission shall serve a copy of it on the applicant as soon as reasonably practicable after serving the submission on the consent authority.

97. Time limit for submissions—The closing date for serving submissions on a consent authority shall be the 20th working day after public notification or such later date as is notified under section 37.

98. Advice of submissions to applicant—As soon as reasonably practicable after the closing date for submissions, the consent authority shall provide the applicant with a list of all submissions received by it.

Pre-hearing Meetings

99. Pre-hearing meetings—(1) For the purpose of clarifying, mediating, or facilitating resolution of any matter or issue, a consent authority may, upon request or of its own motion, invite anyone who has made an application for a resource consent or a submission on an application to meet with each other or such other persons as the authority thinks fit.

(2) A member, delegate, or officer of the consent authority who attends a meeting under subsection (1) and who is empowered to make the decision on the application which is the subject of the meeting, shall not be disqualified from participating in the meeting if—

(a) The parties attending the meeting so agree; and

(b) The consent authority is satisfied that the person should not be so disqualified.

(3) The outcome of the meeting may be reported to the consent authority, and that report—

(a) Shall be circulated to all parties before the hearing; and

(b) Shall be part of the information which the consent authority shall have regard to in its consideration of the application.

Hearings

100. Obligation to hold a hearing—A hearing need not be held in accordance with this Act in respect of an application for a resource consent (whether or not it is required to be notified in accordance with section 93) unless—

(a) The consent authority considers that a hearing is necessary; or

(b) Either the applicant or a person who made a submission in respect of that application has requested to be heard and has not subsequently advised that he or she does not wish to be heard.

101. Hearing date and notice—(1) If a hearing of an application for a resource consent is to be held, the consent authority shall fix a commencement date and time, and the place, of the hearing.

(2) The date for the commencement of any hearing shall not be more than 25 working days (or such later date as is notified under section 37) from the closing date for submissions on the application.

(3) The consent authority shall give at least 10 working days' notice of the commencement date and time, and the place, of a hearing of an application for a resource consent to—

(a) The applicant; and

(b) Every person who made a submission on the application stating his or her wish to be heard and who has not subsequently advised that he or she does not wish to be heard.

(4) Where a joint hearing is to be held under section 102 the consent authorities concerned shall ensure that every applicant

and every person who made a submission is aware of the joint hearing and that a joint decision will be made.

102. Joint hearings by 2 or more consent authorities—(1) Where applications for resource consents in relation to the same proposal have been made to 2 or more consent authorities, and those consent authorities have decided to hear the applications, the consent authorities shall jointly hear and consider those applications unless—

(a) All the consent authorities agree that the applications are sufficiently unrelated that a joint hearing is unnecessary; and

(b) The applicant agrees that a joint hearing need not be held.

(2) When a joint hearing is to be held, the regional council for the area concerned shall be responsible for notifying the hearing, setting the procedure, and providing administrative services, unless the consent authorities involved in the hearing agree that another authority should be so responsible.

(3) Where 2 or more consent authorities jointly hear applications for resource consents, they shall jointly decide those applications unless—

(a) Any application is for a restricted coastal activity; or

(b) Any of the consent authorities consider on reasonable grounds that it is not appropriate to do so.

(4) Where 2 or more consent authorities jointly decide applications for a resource consent in accordance with subsection (3), they shall identify in their decision on those applications—

(a) Their respective responsibilities for the administration of any consents granted, including monitoring and enforcement; and

(b) The manner in which administrative charges will be allocated between the consent authorities,—

and any consent shall be issued by the relevant consent authority accordingly.

(5) In any appeal under section 120 against a joint decision under subsection (4), the respondent shall be the consent authority whose consent is the subject of the appeal.

103. Combined hearings in respect of 2 or more applications—Where 2 or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to

hear the applications, the consent authority shall hear and decide those applications together unless—

(a) The consent authority is of the opinion that the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and

(b) The applicant agrees that a combined hearing need not be held.

Decisions

104. Matters to be considered—(1) Subject to subsection (2), when considering an application for a resource consent, the consent authority shall have regard to any actual and potential effects of allowing the activity.

(2) When considering an application for a resource consent, where—

(a) In accordance with section 94 (1) (c) (ii) or section 94 (2) (b) or section 94 (3) (c), the written approval of any person has been obtained; and

(b) That person has not made a submission under section 96 indicating that such approval is withdrawn—

the consent authority shall not take account of any actual or potential effect of the activity on that person; and the fact that any such effect may occur shall not be relevant grounds upon which the consent authority may decline to grant the application.

(3) When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.

(4) Without limiting subsection (1), when considering an application for a resource consent, the consent authority shall have regard to—

(a) Any relevant rules of a plan or proposed plan; and

(b) Any relevant policies or objectives of a plan or proposed plan; and

(c) Any national policy statement, New Zealand coastal policy statement, and regional policy statement; and

(d) Where the application is made—

(i) In accordance with a regional plan, any relevant district plan; and

(ii) In accordance with any district plan, any relevant regional plan; and

(e) Any relevant water conservation order; and

(f) Any relevant draft water conservation order included in the report of a special tribunal under section 208 or

the report of the Planning Tribunal under section 213; and

(g) Part II; and

(h) Any relevant regulations.

(5) When considering an application for a resource consent for something that would otherwise contravene section 13, and the bed of the river or lake adjoins any area held by the Crown under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act for other than administrative purposes, the consent authority shall also have regard to any relevant management strategy or plan prepared under those Acts for that adjacent area.

(6) The consent authority shall have regard to any information provided under subsections (4) to (7) of section 88 and section 92 in considering the effects of allowing the activity to be undertaken.

(7) Where an application is for a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects of allowing the activity, have regard to—

(a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and

(b) Any possible alternative methods of discharge, including discharge into any other receiving environment.

(8) Without limiting subsections (1), (4), (6), and (7), when considering an application for a coastal permit, a consent authority shall have regard to—

(a) Any relevant policy stated in a New Zealand coastal policy statement in respect of the Crown's interests in land of the Crown in the coastal marine area; and

(b) Any relevant provisions included in the appropriate regional coastal plan to implement that policy.

105. Decisions on applications—(1) Subject to subsections (2) and (3), after considering an application for a resource consent for—

(a) A controlled activity, a consent authority shall grant the consent and may, in accordance with—

(i) Section 108; or

(ii) In the case of a subdivision consent, section 108 or section 220—

include any conditions in the consent:

similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

(g) Any significant adverse effects on aquatic life.

(2) A consent authority may grant a discharge permit that may allow any of the effects described in subsection (1) if it is satisfied—

(a) That exceptional circumstances justify the granting of the permit; or

(b) That the discharge is of a temporary nature—

and that it is consistent with the purpose of this Act to do so.

(3) Without limiting section 113, where, in accordance with subsection (2), a consent authority grants a discharge permit which allows any of the effects described in subsection (1), the authority shall include in its decision its reasons for doing so.

108. Conditions of resource consents—(1) Except as provided in subsection (3), a resource consent may include any one or more of the following conditions:

(a) A condition requiring that a financial contribution (within the meaning of subsection (9)) be made for purposes specified in the plan:

(b) A condition requiring that a bond be given in respect of the performance of any one or more conditions of the consent, including any condition relating to the removal of structures on the expiry of the consent:

(c) In respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into which is capable of registration under the Land Transfer Act 1952, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):

(d) A condition requiring that an administrative charge be paid to the consent authority for any specified matter in accordance with section 36 or any regulations:

(e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants), a condition requiring the

223F of the Local Government Act 1974 and in reasonable accordance with the purposes for which the money was received.

112. Obligation to pay rent and royalties deemed condition of consent—(1) In every coastal permit authorising the holder to—

(a) Occupy, within the meaning of section 12 (4), any land of the Crown in the coastal marine area; or

(b) Remove any sand, shingle, or other natural material, within the meaning of section 12 (4), from any such land—

there shall be implied a condition that the holder shall at all times throughout the period of the permit pay to the relevant regional council, on behalf of the Crown,—

(c) Where the permit was permitted to be granted by virtue of an authorisation granted under section 161, the rent and royalties (if any) specified in the authorisation held by the permit holder; and

(d) Any sum of money required to be paid by any regulation made under section 360 (1) (c).

(2) In every water permit granted to do something that would otherwise contravene section 14 (1) (c) (relating to the taking or use of geothermal energy) there shall be implied a condition that the holder shall at all times throughout the period of the permit pay to the relevant regional council, on behalf of the Crown, any sum of money required to be paid by any regulation made under section 360 (1) (c).

113. Decisions on applications to be in writing, etc.—Every decision on an application for a resource consent shall be in writing and state—

(a) The reasons for the decision; and

(b) In a case where a resource consent is granted for a shorter duration than specified in the application, the reasons for deciding on the shorter duration.

114. Notification of decisions—(1) A consent authority shall ensure that a copy of a decision made by it on an application for a resource consent is served on the applicant and on every person who made a submission.

(2) A consent authority shall ensure that notice of a decision made by it on an application for a resource consent is served on such persons or authorities as it considers appropriate.

(3) A consent authority may, if it considers it appropriate to do so, give notice of a decision in accordance with section 93 (1) (a) to (i).

(4) A notice of a decision on an application for a resource consent shall state a summary of the decision and where the full text of the decision is available for public inspection.

115. Time limits for notification of decision—(1) Notice of a decision on an application for a resource consent shall be given in accordance with section 114—

(a) Where a hearing is held, no later than 15 working days after the conclusion of the hearing; or

(b) Where no hearing is held—

(i) For non-notified applications, no later than 20 working days after the date of receipt of the application or the approval of all affected persons, if any, has been obtained under section 94 (whichever is the later); and

(ii) For applications that are notified under section 93 but for which no submission is received and no hearing requested, no later than 20 working days after the closing date for submissions.

(2) A consent authority may extend any time limit prescribed in subsection (1) under section 37.

116. When a resource consent commences—(1) Except as provided in subsections (2) and (3), every resource consent that has been granted commences—

(a) When the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or

(b) When the Planning Tribunal determines the appeals or all appellants withdraw their appeals—

unless the resource consent or a determination of the Planning Tribunal states otherwise.

(2) A resource consent to which section 89 (2) applies shall not commence—

(a) In the case of a subdivision consent, until the date the land to which the consent relates is vested in the consent holder under section 355 (3); and

(b) In every other case, until the proposed location of the activity has been reclaimed and a certificate has been issued under section 245 (5) in respect of the reclamation.

(b) For a non-complying activity unless, having considered the matters set out in section 104, he or she is satisfied that—

(i) Any effect on the environment (other than any effect to which subsection (2) of that section applies) will be minor; or

(ii) Granting the consent will not be contrary to the objectives and policies of the regional coastal plan or proposed regional coastal plan; or

(c) For a prohibited activity; or

(d) For any activity described as a prohibited activity by a rule in a proposed regional coastal plan once the time for making or lodging submissions or appeals against the proposed rule has expired and—

(i) No such submissions or appeals have been made or lodged; or

(ii) All such submissions and appeals have been withdrawn or dismissed.

(4) Where the Minister decides to grant a coastal permit for a restricted coastal activity, the permit shall come into effect on the date of the decision or such later date as the Minister states in his or her decision.

Appeals

120. Right to appeal—Any one or more of the following persons may appeal to the Planning Tribunal in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:

(a) The applicant or consent holder:

(b) Any person who made a submission on the application or review of consent conditions.

121. Procedure for appeal—(1) Notice of an appeal under section 120 shall be in the prescribed form and shall—

(a) State the reasons for the appeal and the relief sought; and

(b) State any matters required by regulations; and

(c) Be lodged with the Planning Tribunal and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with this Act.

(2) The appellant shall ensure that a copy of the notice of appeal is served on every person referred to in section 120

FOURTH SCHEDULE

Section 88 (6) (b)

ASSESSMENT OF EFFECTS ON THE ENVIRONMENT

1. Matters that should be included in an assessment of effects on the environment—Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 (6) (b) should include—

(a) A description of the proposal:

(b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

(c) Where an application is made for a discharge permit, a demonstration of how the proposed option is the best practicable option:

(d) An assessment of the actual or potential effect on the environment of the proposed activity:

(e) Where the activity includes the use of hazardous substances and installations, an assessment of any risks to the environment which are likely to arise from such use:

(f) Where the activity includes the discharge of any contaminant, a description of—

(i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects; and

(ii) Any possible alternative methods of discharge, including discharge into any other receiving environment:

(g) A description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect:

(h) An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted:

(i) Where the scale or significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom.

2. Matters that should be considered when preparing an assessment of effects on the environment—Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters:

(a) Any effect on those in the neighbourhood and, where relevant, the wider community including any socio-economic and cultural effects:

(b) Any physical effect on the locality, including any landscape and visual effects:

(c) Any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:

(d) Any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations:

(e) Any discharge of contaminants into the environment, including any unreasonable emission of noise and options for the treatment

FOURTH SCHEDULE—*continued*

ASSESSMENT OF EFFECTS ON THE ENVIRONMENT—*continued*

(f) Any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations.

9. Treaty of Waitangi—Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

p. 1322/25 S. 27. RPLD & SUBSTD (by new ss. 27, and 27A to 27D) by s. 10(1) of 1988 No. 105, s. 362 of 1991 No. 69 and ss. 7, 8 and 9 of 1992 No. 27 as set out below.

REFER: s. 10(2) of 1988 No. 105 as to the substitution of rights conferred by the new ss. 27 to 27D in place of existing rights.

"27. Maori land claims—The submission in respect of any land or interest in land of a claim under section 6 of the Treaty of Waitangi Act 1975 does not prevent the transfer of that land or of any interest in that land or of that interest in land—

(a) By the Crown to a State enterprise; or

(b) By a State enterprise to any other person.

27A. District Land Registrar to register necessary memorial—(1) Where any land or interest in land is transferred to a State enterprise under section 23 of this Act or vested in a State enterprise by a notice in the *Gazette* under section 24 of this Act or by an Order in Council made under section 28 of this Act, the District Land Registrar shall, without fee, note on the certificate of title the words 'Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation)'.

(2) Subsection (1) of this section shall not apply in relation to any piece of land or interest in land that is excluded from section 27B of this Act by subsection (2) or subsection (3) of that section.

27B. Resumption of land on recommendation of Waitangi Tribunal—(1) Where the Waitangi Tribunal has, under section 8A (2) (a) of the Treaty of Waitangi Act 1975, recommended the return to Maori ownership of any land or interest in land transferred to a State enterprise under section 23 of this Act or vested in a State enterprise by a notice in the *Gazette* under section 24 of this Act or by an Order in Council made under section 28 of this Act, that land or interest in land shall, if the recommendation has been confirmed with or without modifications under section 8B: of that Act, be resumed by the Crown in accordance with section 27C of this Act and returned to Maori ownership.

(2) This section shall not apply in relation to any piece of land that, at the date of its transfer to a State enterprise under section 23 of this Act or the date of its vesting in a State enterprise by a notice in the *Gazette* under section 24 of this Act or by an Order in Council made under section 28 of this Act, was subject to—

(a) A deferred payment licence issued under the Land Act 1948; or

(b) A lease under which the lessee had the right of acquiring the fee simple.

(3) This section shall not apply in relation to any piece of land or interest in land in respect of which a certificate issued under section 8E (1) of the Treaty of Waitangi Act 1975 has been registered.

27C. Resumption of land to be effected under Public Works Act 1981—(1) Where section 27B of this Act requires any land or interest in land to be resumed by the Crown, the Minister of Lands shall acquire that land or interest in land under Part II of the Public Works Act 1981 as if it were land or an interest in land required for both Government work and a public work and Parts II, IV, V, VI, and VII of that Act and the First, Third, Fourth, and Fifth Schedules to that Act shall, subject to the modifications set out in Schedule 2A to this Act and to all other necessary modifications, apply accordingly.

(2) The existence on the certificate of title to any land or interest in land acquired pursuant to subsection (1) of this section of a memorial under section 27A of this Act shall not be taken into account in any assessment of compensation made under the Public Works Act 1981 in relation to the acquisition of that land or interest in land.

(3) The power conferred by this section does not include the power to acquire or take and to hold under section 28 of the Public Works Act 1981 any interest in land described in section 8A (6) of the Treaty of Waitangi Act 1975.

27D. Resumption of Wahi Tapu—(1) Where the Governor-General is satisfied that any land or interest in land held by a State enterprise, being land or an interest in land transferred to that State enterprise under section 23 of this Act or vested in that State enterprise by a notice in the *Gazette* under section 24 of this Act or by an Order in Council made under section 28 of this Act, is Wahi Tapu, being land of special spiritual, cultural, or historical tribal significance, the Governor-General may, by Order in Council published in the *Gazette*, declare—

(a) That that land or interest shall be resumed by the Crown on a date specified in the Order in Council; and

(b) That, on the date of its resumption pursuant to the Order in Council, that land or interest in land shall be no longer liable to resumption under section 27B of this Act.

(2) Where any land or interest in land is to be resumed pursuant to subsection (1) (a) of this section,—

(a) The State enterprise shall transfer the land or interest in land to the Crown on the date specified in the Order in Council; and

(b) The Crown shall pay to the State enterprise in respect of the land or interest in land the compensation that would have been payable to the State enterprise if, on the date specified in the Order in Council made under subsection (1) of this section, the land or interest in land had, pursuant to section 27C of this Act, been acquired by the Minister of Lands under Part II of the Public Works Act 1981.

(3) Every memorandum of transfer executed pursuant to an Order in Council made under subsection (1) of this section—

(a) Shall recite that it is so executed; and

*(b96s) 1986 p. 1320(4)

(b) Shall give both the date of the Order in Council and the date of its publication in the *Gazette*.

(4) Upon its resumption pursuant to subsection (1) (a) of this section, the land or interest in land shall be dealt with in accordance with an agreement made between the Crown and the relevant tribe or, if they fail to agree, in accordance with any recommendation of the Waitangi Tribunal pursuant to an application made under section 6 of the Treaty of Waitangi Act 1975.

(5) A resumption of land or of an interest in land pursuant to subsection (1) (a) of this section is not a subdivision within the meaning of the Resource Management Act 1991."

APPENDIX C

Agreements from the Upper Waitaki Working Party

AGREEMENT TO ELECTRICITY CORPORATION'S WATER RIGHTS

This Agreement dated the day of 1990.

PARTIES

Between Electricity Corporation of New Zealand Limited at Wellington ("Electricity Corporation")

and HER MAJESTY THE QUEEN acting by and through the Minister of Conservation
and SOUTH CANTERBURY FISH & GAME COUNCIL of Temuka
and NGAI TAHU TRUST BOARD at Christchurch
and BENMORE IRRIGATION COMPANY LIMITED at Dunedin
and THE NEW ZEALAND CANOEING ASSOCIATION INCORPORATED at Christchurch
and MACKENZIE DISTRICT COUNCIL at Fairlie
and LOWER WAITAKI IRRIGATION COMPANY at Oamaru
and MAEREWHENUA SETTLEMENT IRRIGATION COMPANY at Oamaru
and MORVEN GLENAVY IKAWAI IRRIGATION COMPANY at Waimate
and TRANSIT NEW ZEALAND at Christchurch
and SOUTH CANTERBURY BRANCH ROYAL FOREST AND BIRD SOCIETY OF NEW ZEALAND INCORPORATED
and NEW ZEALAND SALMON ANGLERS ASSOCIATION INCORPORATED at Dunedin
(Collectively ("The Parties")

BACKGROUND

A. Electricity Corporation operates an electricity generation system in the Waitaki Valley incorporating a system of dams, canals and power stations.

B. Electricity Corporation's right to utilise these waters was embodied in an Order in Council dated 18 August 1969.

C. The Order in Council granted rights to the Minister of Electricity. Pursuant to an Asset Sale and Purchase Agreement dated 31 March 1988, these rights were transferred to Electricity Corporation.

D. The rights were granted for a period of 21 years with successive rights of renewal. The first term of 21 years came to an end on 17 August 1990. The Electricity Corporation has made an undertaking to the Crown to apply for new water rights within 15 years of 1 April 1988. Electricity Corporation believes that the expiry of the first term of the Order in Council is an appropriate time to apply for new water rights to fulfil its undertaking to the Crown.

E. Over a number of months, the parties have held a series of meetings and commissioned a number of reports to consider the environmental, recreational, social, cultural and economic values and opportunities of the Waitaki River Catchment resource.

F. The parties have identified a series of provisions and conditions which they believe, if applied to the Electricity Corporation's operational water rights as conditions where legally possible and otherwise incorporated as provisions in separate agreements between the parties, will maximise the opportunities and minimise the adverse effects of the Electricity Corporation's operations and represent the acceptable balance between retaining or enhancing the values identified and recognising the importance of the use of the resource for the generation of electricity.

G. It is intended that this document, which records the series of agreements between all the parties and the Electricity Corporation, will form a joint submission to the Canterbury Regional Council. The submission will ask the Canterbury Regional Council to adopt the conditions set out in Schedule 1 as the conditions of the Corporation's Water Rights.

IN CONSIDERATION of the parties hereto agreeing to the granting of the water rights applications No.s CRC 905301 to CRC 905366 filed with the Canterbury Regional Council by the Electricity Corporation, and in consideration of the Electricity Corporation agreeing to the various conditions on its water rights recorded in the Schedule hereto, and in further consideration of the various additional agreements and undertakings entered into between the parties hereto, IT IS AGREED between the parties:

(i) Their interests and the interests of each of them would be provided for if the Electricity Corporation received the water rights applied for under applications No.s CRC 905301 to CRC 905366 inclusive subject to the conditions set out in Schedule 1 and subject to the separate agreements set out in Annexures A-G.

(ii) The parties therefore agree to the granting of all the rights applied for in Applications No.s CRC 905301 to CRC 905366, subject to the conditions set out in Schedule 1.

(iii) That the parties jointly request the Canterbury Regional Council to adopt the conditions set out in Schedule 1, as the conditions to apply to the Water Rights No.s CRC 905301 to CRC 905366.

(iv) This agreement is subject to and conditional upon the separate agreements set out in A-G being executed by the relevant parties by the date of the hearing of water right application No.s CRC 905301 to CRC 905366 by the Canterbury Regional Council.

Further Terms of Agreement

1. The applications for Water Rights and conditions will be determined by the Canterbury Regional Council. This agreement records the parties agreement to the granting of the water rights subject to the conditions set out in Schedule 1, but does not in any way purport to be a determination of that issue.

2. Any notice given under this agreement shall be in writing and delivered or transmitted as follows:

Electricity Corporation
PO Box 974
DUNEDIN
fax (024) 770841

Department of Conservation
PRIVATE BAG
CHRISTCHURCH
fax (03) 654 508

South Canterbury Fish and Game Council and New Zealand Salmon Anglers Association Inc.
PO Box 150
TEMUKA
fax (03) 3083 809

Ngai Tahu Trust Board
PO Box 13042
CHRISTCHURCH
fax (03) 654 098

Lower Waitaki Irrigation Company
15K RD
OAMARU
Phone (03) 4348700

New Zealand Canoeing Association Inc
PO Box 3768
WELLINGTON
fax (03) 798 272

MacKenzie District Council
PO Box 52
Fairlie
fax (0505) 8533

Maerewhenua Settlement Irrigation Company
5K Rd
OAMARU
Phone 029722 444

Morven Glenavy Ikawai Irrigation Company
10 RD
WAIMATE
Phone 0519 27808

Transit New Zealand
PO Box 1479
CHRISTCHURCH
fax (03) 656 576

Benmore Irrigation Company Limited
40 Glenross Street
DUNEDIN
Phone 025 322 259 or 03 476 7585

South Canterbury Branch Royal Forest and Bird Protection Society of New Zealand Incorporated
No 3 RD
TIMARU

or to such other address as either party shall notify to the other.

A notice given under this agreement shall be properly given and received

a) When delivered by hand;

b) Three days after being posted by mail with prepaid "FAST POST" postage;

c) On completion of transmission when sent by facsimile.

3. Any dispute arising between any two or more of the parties to this agreement, shall be referred to arbitration by arbitrators in New Zealand, one to be appointed by each party in dispute (although in the case of disputes involving three or more parties the number of arbitrators can be reduced by agreement) and in the event of the Arbitrators differing, to an umpire who shall have been appointed by the arbitrators before they enter upon their deliberations. Such arbitration shall be conducted in all respects in accordance with the provisions of the Arbitration Act, 1908 or any statutory modification or re-enactment of the Act which may be for the time being, in force.

4. If the decision of the Canterbury Regional Council on the Water Rights Applications No's CRC 905301 to CRC 905366 inclusive includes substantially the rights and conditions in the Schedule and does not contain any other material conditions or restrictions then no party will appeal.

5. If the decision of the Canterbury Regional Council on the said Water Rights applications does not include substantially the rights and conditions in the Schedule or includes conditions and/or restrictions which are materially different from those set out in the Schedule, then the parties may renegotiate this Agreement, but failing agreement within three months from the final date for lodging an appeal then this agreement is voidable at the option of any party by giving 14 days notice to all the parties.

6. If the Canterbury Regional Council grants the Electricity Corporation's application and issues Water Rights substantially in terms of this Agreement and that decision is appealed by someone who is not a party to this Agreement then all parties to this Agreement will support the decision of the Council on appeal.

7. If the decision of the Planning Tribunal on the appeal referred to in Clause 5 above does not include substantially the rights and conditions in the Schedule or includes conditions and/or restrictions which are materially different from those set out in the Schedule, then the parties may renegotiate this Agreement, but failing agreement within three months from the final date for lodging an appeal against the Planning Tribunal decision, then this agreement is voidable at the option of any of the parties, by giving 14 days notice in writing to all of the parties.

8. In relation to every condition that this contract is expressed to be subject to the following shall apply unless otherwise expressly provided:

   (1) The condition shall be a condition subsequent.

   (2) If the condition is not fulfilled by the date for fulfilment either party may at any time before the condition is fulfilled or waived avoid this contact by giving notice in writing to the other and upon avoidance of the contract, no party shall have any right or claim against any other.

   (3) The time for fulfilment of any condition may be extended by agreement between the parties.

9 Any of the signatories to this Agreement shall be entitled to assign all or any of its rights under this Agreement.

SIGNED by the parties on the date set out above.

Signed by the ELECTRICITY CORPORATION NEW ZEALAND LIMITED by its duly authorised agent:

.....

in the presence of

..... Witness

..... Occupation

..... Address

The common seal of the SOUTH CANTERBURY FISH AND GAME COUNCIL is hereunto affixed in the presence of:

..... Chairman

..... Secretary

ANNEXURE B

AGREEMENT IN RELATION TO WATER RIGHTS

Agreement dated the day of 1990.

PARTIES

Between Electricity Corporation of New Zealand Limited at Wellington ("Electricity Corporation")

and South Canterbury Fish and Game Council (with its successors and assigns)

Background

A The Electricity Corporation operates an electricity generation system in the Waitaki Valley incorporating a system of dams, canals and power stations.

B The Electricity Corporation's right to utilise the waters of the Waitaki was embodied in an Order in Council dated 18 August 1969.

C The Order in Council granted rights to the Minister of Electricity. Pursuant to an Asset Sale and Purchase Agreement dated 31 March 1988, these rights were transferred to the Electricity Corporation.

D The rights were granted for a term of 21 years, but with successive rights of renewal. The first term of 21 years came to an end on 17 August 1990. The Electricity Corporation has given an undertaking to the Crown to apply for new rights within 15 years of 1 April 1988. The Electricity Corporation believes that the expiry of the first term of the Order in Council is an appropriate time to apply for new water rights to fulfil its undertaking to the Crown.

E Over a number of months, a number of parties including the Electricity Corporation, and the former Waitaki Valley Acclimatisation Society and South Canterbury Acclimatisation Society, have held a series of meetings and commissioned a number of reports to consider the environmental, recreational, social, cultural and economic values and opportunities of the Waitaki Valley water resource.

F The parties have identified a series of provisions and conditions for the Electricity Corporation's operational water rights, which they believe provide acceptable recognition of these various values and opportunities, and have resolved to adopt these provisions and conditions by agreement.

APPENDIX D

Promotional material from C.R.E.D.

Centre For Resolving Environmental Disputes

mediation,
aining and
facilitation
service

P.O. BOX 56
COLN UNIVERSITY
CANTERBURY
HONE (03) 325 2811
FAX (03) 325 2156

What is CRED?

The Centre for Resolving Environmental Disputes (CRED) is based at Lincoln University. Its staff work alongside the research team of the Centre for Resource Management. CRED has ready access to the scientific, technical and other expertise available at both Lincoln University and the University of Canterbury.

CRED is committed to upholding the principles of the Treaty of Waitangi and works closely with the Centre for Maori Studies and Research at Lincoln University.

CRED staff can assist when people disagree over how we should use our natural resources, and over the relationship between environmental, community and economic well-being. The Centre offers confidential and structured negotiation processes that can be tailored to the needs of the particular situation, for example when there are disputes over waste management, mining consents, water rights, commercial developments and the siting of activities.

CRED can help organisations and communities in conflict to develop solutions that will work over the long term and that meet the needs of all those affected as much as possible.

Who is CRED?

Gay Pavelka, Manager of CRED, has considerable experience in mediating and facilitating the resolution of disputes within and between organisations, both in organisational and in other contexts. She has conducted workshops in negotiation and mediation for a wide range of groups, and has had extensive training in New Zealand and overseas.

Jane Chart, Senior Lecturer in Law, University of Canterbury, Christchurch, and CRED affiliate, has an extensive background in both training and the practical application of negotiation and mediation. Jane has conducted negotiation and mediation training for a wide range of groups in New Zealand.

What can CRED offer?

TRAINING, WORKSHOPS, SEMINARS, AND IN-HOUSE PRESENTATIONS

- to develop co-operative and efficient ways of dealing with conflict within or between organisations

FACILITATION

- of public meetings
- of groups wanting to clarify problems and generate creative solutions

FACILITATED NEGOTIATION

- to analyse and understand conflict
- to design a process that is sensitive to the nature of the dispute
- to clarify needs and issues
- to develop a negotiating agenda
- to build constructive communication
- to seek creative and workable solutions

What is facilitation?

Facilitation involves the assistance of a meeting manager who objectively assists groups to articulate their perspectives on issues.

What is facilitated negotiation?

An impartial mediator works with the parties to build up constructive communication between them in a neutral, non-threatening environment. Open discussion and careful listening are encouraged in a structured process. Those involved are assisted to develop their own solutions, appropriate to the problems and issues they have jointly identified.

These solutions may, in some cases, be formalised and presented to Planning Tribunals. If sanctioned, the agreements then become legally binding on the parties just as though they had been reached through a Court hearing.

What are the benefits?

Facilitated negotiation has a proven track record in Australia, Canada and the United States.

- Decision making remains in your hands
- costs are significantly lower than for litigation and other adversarial processes
- parties control the timing of decision making
- relationships between the parties can be improved
- stress and antagonism are reduced
- if required, confidentiality can be protected
- solutions are explored in safety without hasty, pressured commitment
- workable outcomes can be crafted that address as many concerns as possible

Who can benefit?

...from facilitated negotiation

- government agencies at central, regional and local levels carrying out their statutory responsibilities
- professional organisations involved in resource management issues
- developers dealing with regulatory authorities and communities
- communities and individuals challenged by change
- environmental groups responding to commercial developments

...from training

- those wishing to assist in resolving conflict within their organisations and with other organisations, and within their communities

...from facilitation

- those wanting to develop effective meeting processes and develop solutions to specific issues or broad policy questions.

When can CRED help

- when communication has broken down
- when people have adopted entrenched positions
- when emotions are running high
- when issues are complex and parties are many
- when impasse has been reached
- when an objective approach is needed
- when further skills in managing or resolving conflict are sought

Contact

Gay Pavelka
CRED
P.O. Box 56, Lincoln University
Canterbury

Phone (03) 325 2811
Fax (03) 325 2156

APPENDIX E

The Treaty of Waitangi

The Text in English

(*Source:* Treaty of Waitangi Act 1975, First Schedule)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation ***all the rights and powers of Sovereignty*** which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

The Text in Maori

(*Source:* Schedule to the Treaty of Waitangi Amendment Act 1985. *Note:* this Act corrected errors in the Maori text in First Schedule of the 1975 Act).

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu ***te Kawanatanga katoa o o ratou wenua.***

English Translation of the Text in Maori

(*Source:* adapted from; Royal Commission on Social Policy 1988, 'June Report', Vol III part 1, pp. 211-212)

Victoria the Queen of England in her gracious recollection of the chiefs and tribes of New Zealand and her desire that they and their chieftainship be secured to them, and a peaceful state also, has deemed it a just act to send here a chief to be the person to arrange for the native people of New Zealand to agree to the governorship by the Queen of all places of that land and of the islands. Already many of her people have settled in this land or are coming there. Now the Queen desires that the governorship may be settled to stem the evils that would come upon the native people and the British who dwell there in lawlessness. Now therefore it is good that the Queen has sent me, William Hobson, a captain in the Royal Navy as governor for all areas of New Zealand that are given over to the Queen now or later. She gives to the chiefs of the Confederation of Tribes of New Zealand, and to the other chiefs as well, these laws which will be spoken about now.

THE FIRST

The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England forever ***the complete government over their land.***

(PCFE, 1988, 102)

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof ***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;*** but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty. [Here follows signatures, dates, etc]

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani ***te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.*** Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON
Consul and Lieutenant-Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

THE SECOND

The Queen of England agrees to protect the Chiefs, the sub-tribes and all the people of New Zealand in ***the unqualified exercise of their chieftainship over their lands, villages and all their treasures.*** But on the other hand, the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being appointed by the Queen as her purchase agent).

THE THIRD

For this agreed arrangement therefore, concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will given them the same rights and duties of citizenship as the people of England.

(Signed) WILLIAM HOBSON
Consul and Lieutenant-Governor

We, the chiefs of the Confederation of the Tribes of New Zealand who are gathered here at Waitangi, and we also the Chiefs of New Zealand, understand the meaning of these words which we have accepted and totally agree. Thereby we have marked our names and our marks.

This has been done at Waitangi on the sixth day of February, in the year of our Lord 1840.

(PCFE, 1988, 103)

APPENDIX F

Sections 175 and 178 of the Harbours Act 1950

Harbour Works on Tidal Lands

175. (1) Except as otherwise provided in this Act, no land shall be reclaimed from the sea or from the waters of any harbour, and no graving dock, dock, or breakwater shall be constructed in any harbour or in the sea, except under the authority of a special Act:

Reclamations, &c., to be authorized by special Act or Order in Council.

Cf. 1923, No. 40, s. 168

Cf. 1933, No. 31, s. 23

Provided that the Governor-General may from time to time, by Order in Council, authorize any local authority or Harbour Board to reclaim areas not exceeding five acres in extent in any case where he considers that the reclamation will not affect navigation and is for the benefit of the public, and in that case it shall not be necessary to obtain a special Act:

Provided further that it shall not be necessary to obtain a special Act in any case where land is leased under the provisions of section one hundred and fifty-two or section one hundred and fifty-three hereof on condition that the land is reclaimed from the sea for pastoral or agricultural purposes.

(2) The applicants for any such special Act or Order in Council shall deposit at the office of the Marine Department a plan, on a scale not less than three chains to one inch, prepared by a licensed surveyor, showing all tidal waters coloured blue, and the extent of the land sought to be obtained for the purpose of the said Act or Order.

Restriction on works affecting harbours or navigation under statutory powers.
Cf. ibid., s. 171

178. Except where this Act or any other Act otherwise specially provides, the following provisions shall have effect with respect to harbour works or any other structure of any kind undertaken or constructed by any Board or any local authority or other body or person (hereinafter called the constructing authority) on, in, over, through, or across tidal lands or a tidal water, or the seashore below low water mark, or in the bed or bottom of any port or harbour, by virtue of this or any other Act, namely:—

(*a*) Before commencing the making or construction of the work the constructing authority shall deposit at the office of the Marine Department a plan in duplicate of the whole work, showing all the details of the proposed work and the mode in which it is proposed the same shall be carried out:

(*b*) If it appears to the Governor-General in Council that the proposed work will not be or tend to the injury of navigation, he may approve the deposited plan, with or without modification or addition, and subject or not to any restriction or condition necessary for the preservation of any public right:

(*c*) The work shall not be made, constructed, altered, or extended without the like approval; but any such approval shall not confer on the constructing authority any right to construct, alter, or extend any work which independently thereof it would not have had:

(*d*) If the constructing authority acts in any respect in contravention of any provisions of this section in relation to any work, the Minister may, at the expense of the constructing authority, take all necessary steps and proceedings and employ persons to abate and remove the work and restore the site thereof to its former condition:

(*e*) No constructing authority or person who, with such approval as aforesaid, constructs, makes, or erects any harbour work or any structure shall be liable to indictment for nuisance, encroachment, or obstruction on account thereof.

Works to be lighted.
Cf. 1923, No. 40, ss. 172, 173

179. (1) The constructing authority shall, at its own expense, during the whole time of the making, constructing, altering, or extending of any such work as aforesaid, exhibit and keep burning every night from sunset to sunrise on or near the work such lights (if any) as the Marine Department from time to time requires or approves; and shall also on or near that work, when completed, always maintain, exhibit, and keep burning

APPENDIX G

Fourth Draft of Amendment to The Waikareao Estuary Empowering Act

TAURANGA DISTRICT COUNCIL (WAIKAREAO ESTUARY EXPRESSWAY) EMPOWERING AMENDMENT ACT

ANALYSIS

TITLE

An Act to amend the Tauranga District Council (Waikareao Estuary Expressway) Empowering Act 1989 and recognise the significance and importance of the Waikareao Estuary to the tangata whenua and others.

BE IT ENACTED by the Parliament of New Zealand as follows:

1. **Short Title and Commencement:**

   (1) This Act may be cited as the Tauranga District Council (Waikareao Expressway) Empowering Amendment Act 1991 and shall be read together with and deemed part of the Tauranga District Council (Waikareao Estuary Expressway) Empowering Act 1989 (hereinafter referred to as "the principal Act").

   (2) This Act shall come into force on the day on which this Act receives the Royal assent.

2. **Interpretation:**

Section 2 of the principal Act is hereby amended by adding the following definitions:

"the Estuary"	means the Waikareao Estuary within the Tauranga Harbour
"Motu-o-pae"	means Motu-o-pae Island within the Waikareao Estuary
"Reclamation"	means the reclamation authorised by section 4 of the principal Act

3. **Act to bind Crown:**

This Act shall bind the Crown.

4. **Pollution and Restorative Works:**

The principal Act is hereby amended by inserting, after section 4, the following sections:

4A. **Pollution:**

(1) The power to reclaim part of the Estuary granted to the Council pursuant to section 4 of the principal Act shall be exercised in conjunction with the requirements of subsection (2) of this section.

(2) When preparing its annual report under section 223D of the Local Government Act 1974 the Council shall, in consultation with the tangata whenua and any other person or organisation, provide for the following:

(a) The identification of sources of pollution of the Estuary; and

(b) The development of a plan to reduce to the greatest practicable extent pollution in the Estuary.

(3) Nothing in subsection (2) of this section shall impose any duties powers or functions on the Council additional to those imposed by any other Act.

4B. **Restorative Works:**

(1) The Council shall take such measures as are reasonably practicable in the circumstances to carry out the reclamation and the construction of the road with sensitivity and respect for the spiritual significance of Motu-o-pae.

(2) In partnership with the tangata whenua shall by the best practicable means available to it:

(a) Carry out such works as are appropriate to remedy previous erosion to Motu-o-pae and to protect Motu-o-pae from adverse effects of the reclamation;

(b) Monitor the effects on Motu-o-pae of the reclamation and use of the road.

4C. **Savings:**

(1) Nothing in this Act shall limit or extend the application of any other statutory provision affecting the reclamation, the construction of the road and the protection of the Estuary and Motu-o-pae or the powers and functions of the Council.

(2) Nothing in this Act shall prejudice or limit any claim under the Treaty of Waitangi Act 1975 for compensation or other remedy in respect of the loss of land or reclaimed foreshore and seabed vested in the Council pursuant to the principal Act.

(3) Except as provided in subsection (2) of this section no claim under the Treaty of Waitangi Act 1975 shall be made or enure in respect of the principal Act, and this Act shall be deemed to fully satisfy any such claims.

APPENDIX H

Issues raised in the Upper Waitaki Working Party

UPPER WAITAKI WORKING PARTY INVESTIGATIONS

Tekapo:

Tekapo River fish Studies - South Canterbury Acclimatisation society. An investigation of trout numbers and habitat in some of the catchments and an investigation of the impact of flow levels on trout movement.

Forks stream culvert fish pass - M.A.F.fisheries - an investigation of the alternatives for a fish pass on Forks stream.

Tekapo River Flood Hydrology - Works Consultancy Services,Wellington.

Dust storms (Loess Generation) at Lake Tekapo - Dr R Kirk - investigations of the dust storms at Lake Tekapo in 1989.

Lake Tekapo October 1989 Drought - Works Consultancy Services,Wellington- an investigation of the Drought at Lake Tekapo October 1989.

Comparison of Seasonality Between Lake Tekapo and the Opihi rivers - Works Consultancy Services, Wellington - a comparison of river characteristics on a seasonal basis.

Opihi Irrigation Engineering Component - Works, N.Z.A.E.I. - an investigation of the feasibility and impacts of removing 4 cumecs of water from Lake Tekapo and discharging it in the head waters of the Opihi.

Pukaki:

Pukaki River Environmental Spill Trials - Works Consultancy Services, Wellington - the effects of controlled flows on the recreational use (particularly canoeing) of the river.

Conservation Management for Wildlife of Waitaki Basin Braided Rivers - Key Hughy, Department of Conservation - an investigation of flows which may provide the best habitat for wild life.

Ohau:

Upper Ohau River Fisheries Report - M.A.F.fisheries, fresh water fisheries centre - an investigation of the impact of flows on trout and trout habitat.

Lake Ohau Levels - R Henderson, D.S.I.R. Hydrology - investigation of the mean level of lake Ohau.

Lake Ohau: Quatic Plant Survey - R D S Wells and J S Clayton.

Lake Ohau Shoreline Study - Dr R Kirk - investigation of the changes in lake Ohau's shoreline.

Upper Ohau Periphyton - Barry J F Bigss, Hydrology Centre, D.S.I.R. - investigation of algal biomass and nutrient loading.

Benmore Irrigation Scheme Pre-feasability Study - Attewell Irrigation Consultants - investigation of possible irrigation scheme alternatives and their environmental impacts.

Upper Waitaki - General:

Assessment of Caonoeing Opportunities - J Rekker, N.Z. Canoe Executive - investigation of the impact of the schemes on the canoeing amenities of the Upper Waitaki.

News Paper Files - Historical Record - Rick Ramsey (Twizel).

Tekapo, Pukaki, Ohau River Inspection Botanical Values - Amanda Baird, Department of Consevation - investigation of areas "worthy of D.O.C. assuming responsibility."

Mid Waitaki:

Elver Passes Mid Waitaki - Charley Mitchell, M.A.F.fisheries, Rotorua - investigation of the requirements for eel passes on the power scheme.

Lower Waitaki:

Lower Waitaki Flow Regime studies - M.A.F.fisheries Freshwater Fisheries Centre - impact of flows on fisheries and other aquatic resources.

APPENDIX I

Proposal for a Kaitiaki Structure

KAITIAKI O MANUKA

One of Tangata Whenuas' greatest calls, in recent years, has been for the formation of a body of kaitiaki for the Manukau. Kaitiaki means 'guardianship'.

> "The kaitiaki is the tribal custodian or guardian who can be spiritual, (the tribal taniwha (plural and singular) can be the kaitiaki of water ways, or of specific areas with in the central tribal lands) or physical who's role is to protect all tribal taonga." (Minhinnic, 1989, 4)

Kaitiaki is appointed by tribal kaumatua, kuia, tohunga or all three. Kaitiaki has responsibilities which include being custodian, guardian and protector. tangata whenua are the only people who can be appointed kaitiaki and are the only people who 'can determine the form and structure of kaitiaki.' (Minhinnic, 1989)

The Waitangi Tribunal's Recommendations For Kaitiaki

In 1985, in its report on the Manukau claim, the Waitangi tribunal recommended the setting up of a body of kaitiaki:

> "To restore the mana of the tribes and to protect their particular interests one set of guardians, the kaitiaki o manuka should be appointed by the minister of Maori affairs to seek the well being and preservation of thre traditional status of the tribes in the harbour and environs." (Wai 8, 1985, 106)

The report also recommended the formation of a body called the guardians of the harbour which would combine with kaitiaki to form the Manukau Guardians. as was pointed out in Chapter 4 these recommendations were not acceptable to tangata whenua involved in the Manukau Harbour Task Force.

Kaitiaki Acceptable to Tangata Whenua

In a paper written for submission to the Resource Management Law Reform process Minhinnic (1989) outlines two 'options' which tangata whenua would find acceptable for kaitiaki management of the physical resources of the harbour.

Option 1, entitled 'Representational Equity - Power of Veto', proposes an Auckland Regions Resource Mangement Authority. This authority would be comprised of a committee of ten. Five members would be kaitiaki, the other five would be a resource committee of the Auckland Regional Council. Each kaitiaki would have a deputy and while deputising would have full voting rights. the chair person would be kaitiaki and have the casting vote.

The ten kaitaki would be elected from the five major water ways in the auckland region: Kaipara; Waitemata; Manukau; Waikato; Hauraki. Thus the Manukau would have a kaitiakirepresentative.Each tribe in the Manukau would elect two members. all these 'tribal members' would then elect two representatives for the resources committee.

Option two proposes a one hundred percent kaitiaki structure for tangata whenua. This means total authority over the lands and waters of the Manukau. Minhinnic believes this would ...

> "... reflect the status of tangata whenua and recognise their rights in terms of article II of the Treaty of Waitangi." (Minhinnic, 1989, 19)

However Minhinnic acknowledges that the 100% kaitiaki proposal could not function with out adequate information and resources.

Minhinnic draws upon the Daes report to the United Nations, on maori rights, to justify her claim for self government.

> "To this end, a secure financial basis must be created preferably through the establishment of rights to land and resources and taxation powers ... It should never be an excuse for curtailing the powers of self government that these may prove to be mistakes. All individuals and governments make errors and learn from the experience, with out the experience they cannot be expected to learn the lesson." (Minhinnic, 1989, 20)

The Huakina development trust has proposed its own kaitiaki structure. They believe title to the harbour should be vested in the crown. A kaitiaki would be comprised of tangata whenua from the various Tainui hapu on the Manukau. (Its activities would be coordinated by the Huakina Development Trust.) Legislation

would protect the body and require the crown, local government, and harbour users to recognise it.

Kaitiaki would work in conjunction with the Manukau Restoration and Management Committee (M.R.M.C.). This organisation would have responsibility for implementing the 'action plan'. The M.R.M.C. would be appointed by tangata whenua and the Ministry for the Environment. Both Kaitiaki and M.R.M.C. would be funded by local authorities and government departments with authori ty in the harbour.(HDT, 1990)

APPENDIX J

Facsimilie and letter referred to in Manukau Task Force case study

FACSIMILE TRANSMISSION

TO Warren Kyd
MP. CLEVEDON

FAX NUMBER _____ NO. OF PAGES 1 (including cover)

DATE 24 4 91

FROM JOHN MCCAFFERY Ph. 2668934

FAX NUMBER (64) (09) 689-756 PHONE NUMBER (64) (09) 687-009
Answer Phone Ext 8709

MESSAGE 1. Manukau Task Force.?
2. AK MPs brief. How soon could we meet?

Warren, Greetings.

Further to our conversation at Conifer Grove last week find below the information you requested.

WE BELIEVE FROM A WATON SOURCE THAT.

1.C Min For. Environment. Simon Upton has instructed Ministry for Env to withdraw from the Manukau Harbour Task Force proposal. This proposal would have brought Central Govt, ARC. Councils Environ Groups and Tangata Whenua together around the table to jointly work on Manukau Harbour clean up issues. Would also have met the Waitangi Tribunals Rec to explore a Guardianship and Kaitiaki scheme. Now 5 yrs work is undone by this action. We are very upset. We want the opportunity to have the decision reviewed.

2.C Could we meet National Party Auckland MPs as soon as possible to brief you all on The environmental movements perceptions of what needs to be done to restore the Manukau (Any action here acts as a model for other areas of course) Abolishing the ARC will creat MAJOR PROBLEMS. Regards John.

MINISTER FOR THE ENVIRONMENT

7 May 1991

Mr John McCaffery
Manukau Harbour Protection Society
PO Box 109
MANUREWA

Dear Mr McCaffery

MANUKAU HARBOUR TASK FORCE RECOMMENDATIONS

I have considered the recommendations of the Task Force and have come to the following conclusions.

GUARDIANS

I see little additional benefit in establishing a further watchdog group on the Manukau. While the concept of Guardians has undoubted merit there are already enough groups undertaking this function. I believe that general awareness about the Manukau has now reached a level from which progress is inevitable. I am confident that both voluntary and statutory agencies will continue to monitor the environmental health of the Manukau and work toward its betterment. If this does not happen Government will be made aware through its own agencies and will have to consider what further action may be appropriate. A further Guardian body will make little difference to this.

KAITIAKI

I acknowledge that the issue of Kaitiaki is one that needs to be addressed. However, the issue relates directly to the Treaty of Waitangi and, as such, is one that is a matter for the Crown and Tangatawhenua to work through. I do not believe that Crown responsibilities in this area can or should be left to local authorities - although these need to examine ways in which the spirit of the Treaty can be given expression. Government needs to meet with Tainui to discuss the issue of Kaitiaki further.

ARC COMMITTEE

The ARC should make its own decision on the Committee structures necessary to fulfil its responsibilities. The Resource Management Act will more than adequately provide the tools with which to improve and restore the Manukau Catchment and Harbour. I have referenced some of the available mechanisms in the appendix.

An underlying concern of the Task Force was that effective coordination has been less than optimal. The Resource Management Act will give the ARC clearer and more substantial coordination responsibility in the resource management area as a whole. This, coupled with ARC restructuring, should enable the ARC and other parties to more effectively take appropriate Manukau initiatives.

I appreciate that the Task Force has created high expectations from participants that substantial progress would be made on the recommendations. I expect the ARC to take note of the Task Force's recommendations and the issues it raised. I also expect these matters to be addressed by the ARC as it develops its regional policy statement and regional coastal and other Manukau plans. But it is not just an ARC responsibility. Other constituent agencies must also work within a more clearly defined policy framework for the Manukau.

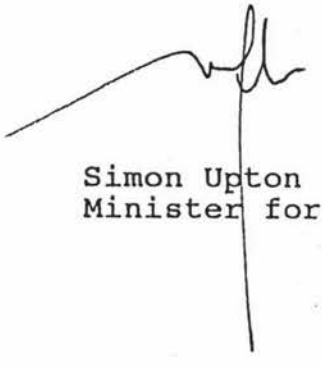
I believe the Resource Management Bill contains potent tools for improved environmental management. I do not think it desirable for me to tell the ARC how to use these in the first instance. As Minister for the Environment I will be asking the Ministry for the Environment to monitor progress on this issue once the Resource Management Act is in place. Should there be subsequent problems then I will expect the whole issue to be revisited.

CONCLUSION

I see no need to call together a further meeting of the Task Force as I consider it to have discharged its function. Should you feel that a meeting is in fact necessary, please write to me with your reasons.

I would like to express my appreciation to all members of the Task Force for the work done. I trust that the cooperative spirit in which you worked will translate itself into further cooperation for the environmental good of the Manukau.

Yours sincerely



Simon Upton
Minister for the Environment

APPENDIX

MANUKAU HARBOUR AND THE RESOURCE MANAGEMENT BILL

The major resource issues are:

a Fisheries - both commercial and recreational.

b Water quality - including point and non-point discharges.

c Amenity values.

d Recognition of Kaitiaki.

MECHANISMS OF THE BILL

Fisheries

Fishery management is not directly included in the Resource Management Bill. However, a link is made between the fisheries legislation and the RMB in Schedule 6. In preparing a fisheries management plan within the coastal marine area, regard is to be taken of plans prepared under the RMB. Similarly any regional plan must have regard to any management plan prepared under other legislation [cl 56(2)(b)] - this would include any approved Taiapure management plans under the Fisheries Act.

Water Quality

Government could set national water quality standards through regulations, these would bind regional rules. A minimum standard is provided in the Act. The regional council can use the third schedule to classify the waters and formulate rules about discharges. If the council feels it is appropriate it can adopt more stringent standards than those outlined in the third schedule. These could in effect force improvements back up the pipe. The council could also choose to apply the principle of best practicable option to force discussion of alternatives when issuing discharge permits.

The area of the Manukau that is part of the coastal marine area will be covered by the New Zealand Coastal Policy. In this area discharge permits will in fact be part of the coastal permit. The rules relating to these will be set in the regional coastal plan. The New Zealand Coastal Policy will set the framework in which the Regional Coastal Plan will be developed. It could be used to recognise the particular requirements of urbanised harbours. This will need to be considered at the time the NZCP is developed.

Regional plans can be explicitly developed for the restoration or enhancement of any natural or physical resources in a deteriorated state [cl 55(1)(f)].

Regional Rules will be able to be set to address non-point source discharges providing that they can be justified. Concepts such as buffer zones for filtering out pollution, appropriate yard practices and the like could be implemented through this mechanism. Concepts such as buffer zones etc. may be implemented through district rules as well as regional rules. Land uses are controlled through district plans, these could make rules about the siting of certain industries based on their adverse effects on the environment (which could cover, for instance, contamination of the adjacent water body).

There is a requirement that there be no significant inconsistencies between regional policy statements or plans and district plans. Both must not be inconsistent with a National Policy Statement. Existing inconsistencies between district, regional and central government plans will therefore be able to be resolved in a more direct manner.

The regional coastal plan can be included in a larger regional plan allowing coverage of the whole catchment. This could remove the "hard planning edge" between shore and water that has caused so many problems previously.

Joint hearings on consents will encourage integrated decision making on proposals and encourage integrated pollution management.

Amenity Value

Iwi have the opportunity to protect waahi tapu sites etc through the Minister of Maori Affairs. If iwi is a body corporate it can apply to become a Heritage Protection Authority through the Minister for the Environment. The Minister of Maori affairs or any local authority can act as an HPA at the behest of iwi.

Water Conservation Orders could be used to protect special interests in and adjacent to ephemeral streams around the Manukau.

Concepts like Net Environmental Benefit, while not explicit in the RMB, could be used in the consent process to obtain some quid pro quo improvements if the Review Group recommendation on environmental compensation [cl 93] is adopted. For example industry planting up their yard areas. Incentive mechanisms could also be built into plans and policies.

Recognition of Kaitiaki

Cl 32 of the RMB allows for the transfer of powers from the local authority to any public authority. This could allow for the transfer of certain powers to the Kaitiaki. It is understood that funding could also be transferred with the powers.

APPENDIX K

Questionnaire and Questionnaire Data

RESOURCE MANAGEMENT ACT 1991 SECTION 99

QUESTIONNAIRE

Should you find there is not enough room to answer these questions please feel free to include comments on the other side of this paper.

Name:_____

Position:_____

Council:_____

1. How many notified applications has your department processed since 1/10/91 (the operative date of the R.M. Act)?

Number:_____

2. In how many of those notified applications was section 99 employed?

Number:_____

3. In how many of the applications, employing section 99, were disputes between submissioners and applicants resolved?

Number:_____

4. How many notified applications, employing section 99, went on to the Planning Tribunal on appeal?

Number:_____

5. Are the reasons for the non use of section 99:

(Please tick the appropriate response. There may be more than one.)

(a) A lack of awareness of mediation/conciliatory processes? _____

(b) An unavailability of qualified mediators or people with suitable mediation experience? _____

(c) A lack of awareness of the potential use of section 99 on the part of submissioners and applicants? _____

(d) Some other reason(s) _____

Please stipulate other reason(s):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

6. Are there people, either in your organisation (e.g. councillors) or known to you outside the organisation, who have the ability to conduct section 99 mediations? Yes / No

7. Do you see the need for some form of training in mediation and conciliation techniques for potential mediators (either in your organisation or in the wider community) so that the section 99 provisions can be more widely used? Yes / No

If 'Yes' to question 7:

(a) Do you think your council should pay for such training? Yes / No

(b) Do you think the N.Z.P.I. should conduct training courses for prospective mediators? Yes / No

Comments:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

8. Have you any general comments on the usefulness of section 99?

_____

_____

_____

_____

_____

_____

_____

_____

_____

9. Have you used or would you consider using negotiation techniques, e.g. working party processes, in issues other than resource consents? Yes / No

10. Would your department or council be willing to pay for the services of an outside mediator, bearing in mind that rates vary from $75 to $90 an hour plus travel expenses (As quoted by the Centre for Resolving Environmental Disputes at Lincoln University)? Yes / No

Data Clearance: I understand that the data and comments contained in this questionnaire may be used as a data base and incorporated in an M.Phil thesis dealing with Alternative Dispute Resolution. I also understand that upon my request comments will not be used in the thesis.

Date:_____

Signature:_____

Councils Submitting Returns

Ashburton D.C.
Auckland City Council
Buller D.C.
Carterton D.C.
Central Hawkes Bay D.C.
Central Otago D.C.
Christchurch City Council
Clutha D.C.
Dunedin City Council
Far North D.C.
Franklin D.C.
Gisborne D.C.
Gore D.C.
Grey D.C.
Hamilton City Council
Hastings D.C.
Hauraki D.C.
Horowhenua D.C.
Hurunui D.C.
Hutt City Council
Invercargil City Council
Kaikoura D.C.
Kaipara D.C.
Kapiti Coast D.C.
Kawerau D.C.
Manawatu D.C.
Manukau City Council
Masterton D.C.
Matamata Piako D.C.
Napier City Council
Nelson City Council
New Plymouth D.C.
North Shore City Council
Opotiki D.C.
Palmerston North City Council
Papakura D.C.
Porirua City Council
Queenstown Lakes D.C.
Rangitikei D.C.
Rodney D.C.
Rotorua D.C.
Ruapehu D.C.
Selwyn D.C.
South Taranaki D.C.
South Waikato D.C.
South Wairarapa D.C.
Southland D.C.
Stratford D.C.
Tararua D.C.
Tasman D.C.
Taupo D.C.
Tauranga D.C.
Timaru D.C.
Upper Hutt City Council
Waikato D.C.
Waimakariri D.C.
Whangarei D.C.
Waimate D.C.
Waipa D.C.
Wairoa D.C.
Waitakere City Council
Waitaki D.C.
Waitomo D.C.
Wanganui D.C.
Wellington City Council
Western Bay of Plenty D.C.
Westland D.C.
Whakatane D.C.

Bay of Plenty R.C.
Hawkes Bay R.C.
Manawatu Wanganui R.C.
Northland R.C.
Otago R.C.
Southland RC
Taranaki R.C.
Waikato R.C.
West Coast RC
Wellington R.C.

D.C. District Council RC Regional Council

C/P	1	2	3	%	4	%	5	6	7	A	B	9	10
1	-	2	2	100	0	0	C	Y	N	—	-	Y	Y
2	12A	3	2	66.67	0	0	D	Y	Y	Y	Y	N	N
3 NR													
4	7	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
5	4	0	0	0*	0	0	D	Y	N	--	--	--	N
6	2	1	1	100	0	0	D	Y	N	—	--	--	N
7	52	0	0	0*	0	0*	D	Y	N	--	-.	Y	N
8 NR													
9	87	1	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
10	15	0	0	0*	0	0*	A/D	Y	Y	Y	Y	Y	N
11	30	4	1	25	0	0	C/D	Y	Y	Y	Y	-.-	Y
12	11	5	5	100	0	0	D	Y	Y	Y	Y	Y	N
13	18	0	0	0*	0	0*	D	Y	--	--	-.	--	--
14	87	10	9	90	1	10	D	Y	Y	Y	Y	Y	Y
15	0	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
16	6	1	1	100	0	0	D	Y	Y	—.-	Y	Y	N
17	36	^	0	0	0	0	C	Y	Y	Y	Y	Y	Y
18	11	5	2	40	0	0	D	Y	Y	Y	Y	Y	N
19	7	1	0	0	0	0	C	Y	Y	Y	Y	N	N
20	5	3	2	66.67	0	0	D	Y	N	--	-.-	-.-	--
21	8	1	1	100	0	0	C	Y	N	Y	N	Y	N
22	80	2	2	100	0	0	C	N	Y	Y	Y	N	N
23	71	1	0	0	0	0	D	Y	Y	Y	Y	Y	N
24	2	0	0	0*	0	0*	D	Y	N	--	-.	Y	-.-
25	6	0	0	0*	0	0	D	Y	Y	Y	Y	Y	N
26	8	3	1	33.33	0	0	D	Y	N	--	--	Y	N
27	8	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
28 NR													
29	12	1	0	0	0	0	C/D	Y	Y	Y	--	Y	Y
30	75	5	3	60	1	20	C/D	Y	Y	Y	Y	Y	N
31 NR													
32	12	3	1	33.33	0	0	D	Y	Y	Y	Y	Y	Y
33	8	1	0	0	1	100	D	Y	Y	Y	Y	Y	Y
34	26	2	0	0	0	0	D	Y	Y	Y	Y	Y	Y
35	9	4	3	75	0	0	C	N	Y	Y	Y	Y	Y
36	69	10	3	30	4	40	—.	Y	Y	Y	Y	Y	N
37 NR													
38	20	4	2	50	0	0	D	Y	Y	Y	Y	Y	N
39	14	0	0	0*	0	0*	D	Y	N	--	—	Y	N
40	4	1	1	100	0	0	D	Y	Y	Y	Y	Y	--
41	7	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
42	18	0	0	0*	0	0*	D	Y	--	—	—	—	—
43	115	2	0	0	1	50	D	Y	Y	Y	N	Y	—
44	2	1	1	100	0	0	D	Y	Y	Y	Y	--	Y
45	26	2	0	0	0	0	D	Y	Y	Y	Y	Y	Y
46	18	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	N
47	13	0	0	0*	0	0*	D	N	Y	—	Y	Y	Y
48	73	1	1	100	0	0	—	Y	Y	N	Y	Y	N
49	--	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	N
50	7	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y

C/D	1	2	3	%	4	%	5	6	7	A	B	9	10
51	37	1	0	0	0	0	C	Y	N	--	--	--	N
52	177	5	5	100	0	0	C	Y	Y	Y	Y	Y	Y
53	3	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	N
54	4	2	0	0	0	0	D	Y	N	--	--	Y	N
55	161	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
56	18	1	0	0	1	100	D	Y	Y	Y	Y	Y	N
57	11	7	6	85.71	1	14.28	O	Y	Y	Y	--	Y	Y
58 NR													
59	24	0	0	0*	0	0*	C/D	Y	Y	--	--	Y	Y
60	16	0	0	0*	0	0*	D	Y	Y	--	--	Y	N
61	24	0	0	0*	0	0*	C/D	Y	N	--	--	Y	N
62	42	1	1	100	0	0	D	Y	Y	N	N	Y	Y
63	6	0	0	0*	0	0*	D	N	Y	Y	Y	Y	Y
64	12	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
65	3	0	0	0*	0	0*	C/D	--	Y	Y	Y	Y	Y
66	50	5	0	0	0	0	D	Y	Y	Y	Y	Y	Y
67	13	7	5	71.43	1	14.28	D	Y	Y	Y	Y	Y	Y
68	4	0	0	0*	0	0*	D	Y	N	--	--	Y	N
69	14	2	0	0	0	0	D	Y	N	--	--	N	N
70	56	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	N
71	5	0	0	0*	0	0*	D	Y	Y	Y	Y	Y	Y
72	3	1	0	0	0	0	C	Y	N	--	--	Y	Y
73	15	4	3	75	0	0	C	Y	Y	Y	N	Y	Y
74	26	4	2	50	0	0	C/D	Y	Y	Y	Y	Y	Y
75 NR													
76 NR													
77	160	3	2	66.67	0	0	D	Y	Y	Y	Y	Y	Y
78	18	3	3	100	0	0	D	Y	Y	Y	Y	N	N
79	228	25	17	68	1	4	--	--	—	—	~	--	Y
80 NR													
81	158	10	7	70	2	20	—	Y	Y	Y	---	Y	--
82	210	7	1	14.2	0	0	C	Y	Y	Y	Y	Y	Y
83	26	8	8	100	0	0	—	Y	Y	Y	Y	Y	---
84	49	70	68	97.14	0	0	---	Y	Y	Y	N	Y	N
85	604	34	6	17.65	1	2.94	D	Y	Y	Y	--	Y	N
86	60	1	0	0	0	0	D	Y	N	--	--	Y	Y
87	44	8	3	37.5	2	25	D	Y	N	--	--	--	N

City/District Council Responses To Question 5.

1. Political Motivation.

"There has been a reluctance to implement section 99 procedures for what I believe are politically related reasons.

I prepared draft guide lines for pre - hearing meetings in November 1991 and reviewed/ refined them in February of this year. However I believe that some members of the Council view pre - hearing meetings as a means of 'side stepping' their decision making responsibilities. ... This view cannot, of course, be supported. What it reflects, in my opinion, is the concern that the adoption of section 99 procedures, if successful, will see a consequent reduction in the number of hearings, thus remuneration to Councillors."

2. Prefers Arbitration To Negotiation/Mediation.

"Believe the potential is there to use s.99 but it does not go far enough. Experience of NSW mediation system leads me to believe that section 99 doesn't go far enough. It should enable a definite outcome to be determined. In other words there is not enough guarantee that you are going to achieve any more than you can possibly achieve by informal means."

3. Good Fourth Schedule Environmental Impact Assessment.

"Good ground work in the preparation of applications is essential. The first question to be answered in any E.I.A. (4th Schedule) should be - who have you consulted, what issues arose out of the consultation and how did you intend to address those issues?"

4. Time Frame Of Act Too Short.

a)

"Time frame of Act makes it difficult to fit in pre hearing meetings unless applicants are willing to extend them."

b)

2) The time constraints in the Act relating to the processing of Resource Consents applications is such that it is difficult to make use of section 99 provisions.

Also see responses in Question 8 supporting this response.

5. Preferring To Have Council Hearing.

a)

"1)Quite a few notified applications there are no submissions/objections made, though effect on environment is not minor.

2)Others the difference of opinions between the parties is long standing, bitter and has little or nothing to do with the application at hand.

3)Sometimes the neighbours concerns can be met by conditions on quite minor matters which can be fixed by the planners report and at the hearing with out the need for a "pre-hearing". N.B. - our Council prefers to have a hearing in each case to improve quality of information upon which they base a decision and to directly answer any queries Councillors may have."

b)

"To date this Council has not found reason to use section 99 nor have applicants or submissioners requested that section 99 be used. A reason that we have not used section 99 is that it could involve a duplication of the hearing. That is if a hearing is still involved after mediation - two instead of one meeting of the applicants and objectors would have to be organised. This situation would use more staff time and resources than a single hearing."

c)

2) The time constraints in the Act relating to the processing of Resource Consents applications is such that it is difficult to make use of section 99 provisions.

d)

"1)Where an application generates a large number of submissions, the mediation process is not practicable.

6. Using Informal A.D.R. Or Carrying Over A.D.R. Methods From The Town and Country Planning Act Era.

a)

"Similar, but informal arrangements used prior to R.M. have continued to be used. Applicant often discusses particular concerns with individual submittors or groups of submissioners - issue by issue."

b)

"While there has been no formal mediation between applicant and submittors, we have spent considerable time in discussing the issues with an applicant or submittor. The situation has not arisen whereby we have considered it appropriate to bring parties together for a pre hearing meeting. Time has often been spent prior to lodging an application discussing the issues with applicant and neighbours. This has been helpful in many cases in avoiding public notification. We have received 136 resource consents since 1/10/91 and have notified only 18 of these."

"We are processing a resource consent application at present which has received a large number of submissions, proposing to hold a meeting to discuss one of the aspects (traffic implications) raised by objectors. All submittors will be invited to the meeting which will be run by Council officers, not elected Councillors. The purpose of the meeting will not be to negotiate, but to discuss a matter which appears to be of most concern, and for the applicant to show alternatives. We will not be resolving the matter but hope that everyone will be more informed by the time the formal hearing takes place."

c)

3) Applicants are encouraged to resolve issues prior to lodging applications."

Also see responses in Question 8 supporting this response.

7. Submissioners Not Wishing To Use A.D.R..

a)

"In my experience the main reason for difficulty is that objectors lodge their objection with the primary aim of taking the matter to appeal if necessary. The thought of compromise is anathema. With many people there is the preference for the formal resolution of the Tribunal Hearing - it can be more cut and dried.

I have been involved with some successful mediations carried out prior to the R.M.A. but none since."

b)

"People by their very nature, over land disputes are often not willing to meet/talk/mediate and are most often advised not to by their legal advisers! It is the legal professionals who should encourage their clients to settle land disputes early on rather than continue on to appeal over civil or petty matters which get blown way out of proportion."

c)

"- We have struck one instance where an applicant did not want to use section 99 as they did not want to embarrass themselves in confronting the objector in an informal discussion. The matter was heard by the Planning Committee but the objector did not turn up. The application was granted."

d)

"The only time section 99 hasn't been used is when the parties concerned see no use in having a pre-hearing and are too set in their objections to discuss any options before the hearing."

e)

"2)One or other of the parties are not always interested in any form of mediation."

Regional Councils Responses To Question 5.

5. Preferring To Have Council Hearing.

"When a submission opposes the granting of an application and the person making the submission requests the Council to decline the application we consider attempts at mediation a waste of everyone's time and go straight to a hearing. There is not much time in the 25 working days to try to resolve objections informally and still give 10 days notice of a hearing if negotiation does not work."

6. Using Informal A.D.R. Or Carrying Over A.D.R. Methods From The Town And Country Planning Act Era.

"This Council has always used pre-hearing meetings to some degree when processing applications with submissions. A pre-hearing meeting may involve an on site visit with the submittors, on site meeting with applicant and submittors (where staff member has the role of negotiator or mediator, or an off site meeting either in the locality or at Councils office which is slightly more structured with a chair person and note taking."

c) 84 Taranaki Regional Council:

"This Council and the Catchment Board before it have placed much value on mediation. It is undertaken by senior staff, generally either the Operations or Permits Manager. The provisions, particularly the time frame of the R.M.A., do not assist in effective resolution of conflicts. Often resolution can take some months, and we, in those cases, ignore the time constraints in the Act with the agreement of all others involved." (Feely, Questionnaire, 1992,2)

d)

"Pre hearing meetings are difficult to organise as they require all parties to be in one place at one time. Disputes can usually be settled with out a pre - hearing meeting via modern technology e.g. faxes, 'conference' calls e.t.c..

This Council has not yet granted a 'major' consent - there are a number of projects that may require pre-hearing meetings and hearings in the near future."

7. Submissioners Not Wishing To Use A.D.R..

a)

"Unable to see the potential benefits of this type of mediation. Some submittors still see the formal hearing as the 'final outcome'. i.e. the ultimate decision. Therefore this tends to undermine the effectiveness and purpose of the pre- hearing meeting."

"Mediation should focus on "win/win" situations. The legal process doesn't tend to focus in this mind set, hence the preferability of mediation to the end. The aim should be that all parties should be able to benefit from mediation."

City/District Council Responses To Question 7.

1. Infavour Of Training.

a)

"In my view the success of pre hearing meetings will be due to their informality, flexibility and the ability of Council Officers to convene them at short notice. In practical terms this means avoiding any political input and the consequent delays due to procedural requirements.

However the need for informality, flexibility perhaps belies the need for officers conducting pre - hearing meetings to be skilled in Alternative Dispute Resolution. The application of these skills will in most cases I belive determine the outcome of those meetings. Hence my recommendation for training."

b)

"The Regional Council locally ran a training course on mediation to which one of the staff went. If further training was on offer other staff would also be sent. Training may also need to cover specialist techniques, e.g. mediation involving Maori issues, dealing with large hostile groups, or ... issues."

c)

"On going training for staff is fully supported by Council as its importance is recognised to enable staff to fulfil their duties competently in the face of changing legislation. "

d)

"This Council has resolved both to conduct training sessions on mediation for staff and to employ outside mediators where appropriate on resource management and other issues."

e)

"I do not think the NZPI is responsible for mediation training as not only planners would be involved in the process. It is the responsibility of any Council to ensure it has a range of staff with the skill."

2. Infavour Of Training Conducted By Planning Institute.

a)

"With this question (7) Council Could contribute some funding towards such a programme. There appears to be a lack of people trained in this area. The District Plan Group has discussed such matters and foresees the need for such a resource.

With regard to pre hearing meetings Council has delegated this to Council's planning consultant E. New, myself and director of works and services."

b)

"Using the NZPI would be an appropriate forum for this type of training. Particularly given that I believe that in the majority of cases it will be the planning staff who will 'chair' 'facilitate' the meetings."

c)

"As well as training courses for mediators I think a training course/seminar by the NZPI on the benefits and problems with using section 99 provisions is necessary. Such a seminar could use case studies and identify in what situations the use of section 99 provisions are appropriate."

d)

"As with many aspects of the Resource Management Act 1991 the institute should provide training ... taking particular care to hold these trainings at venues accessible to those in the south island. i.e. not always in Auckland. "

3. Infavour Of Training Organised By Institute But Conducted By Professional Organisations.

a)

"Yes but probably arranged by branches of NZPI. (I am in the process of organising a seminar for the Canterbury Branch in November. Gay Pavelka From CRED will be taking the seminar.)

b)

"The private sector already provides excellent courses in mediation techniques. The N.Z.P.I. could perhaps coordinate sessions in the four main centres if demand existed by practicioners."

c)

"At least N.Z.P.I. could promote such training. Perhaps not conduct such courses themselves, but encourage use of existing courses e.t.c."

d)

"But this should also involve the N.Z. Mediator Association. There are no recognised environmental mediation courses in NZ, it may be that the NZPI prepares a study grant ... to go to the USA to study."

e)

"Training should be conducted by people trained in mediating techniques. NZPI could arrange these but not necessarily be in a position to conduct them. They should not be the only avenue for training.

Such training is now part of the basic requirement for planners and forms an essential part of on going professional development."

f)

"Mediators require particular skills, training and practice. This is best achieved in my view through them forming professional a association or through bodies such as CRED - Lincoln or CERS - University of Waikato. Sponsorship of courses could by NZPI could be a possibility, however the requisite skills are not able to be acquired by workshops seminars."

5. Not In Favour Of Training.

a)

"At this stage we have used the skills of the Planning Staff with total success."

b)

"The pre hearing meetings (are) required to be structured and all parties need to be aware that it does not displace the actual hearing. There can be no specific 'training' but an experienced planner, with knowledge of dealing with (the) public, should be able to conduct a pre hearing."

Regional Council Responses To Question 7.

1. Infavour Of Training.

"In October 1991 this Council engaged consultants to run a 2 day course on negotiation and mediation. The course was specifically designed for the Council. It has been invaluable, in my experience."

4. Infavour Of Training By Professional Organisations.

a) 84 Taranaki Regional Council:

"I think the NZPI as a professional group is not the most appropriate to run these courses. I think the work involved is more of a legal/technical nature than a pure planning process and as such I feel centres such as at Lincoln, or in house training by individual Councils may be more appropriate." (Feely, Questionnaire, 1992,3)

b)

"Do not know enough about the Planning Institutes modus operandi to know if they should conduct courses or not. There are a range of organisations that already provide training courses - some of which have already been used by this organisation."

City/District Council Responses To Question 8.

1. Submissioners And Applicants Must Be Open Minded And Submissioners And Applicant Need To Know A.D.R. Techniques.

"The application of section 99 is only appropriate if the parties are open minded. The first pre hearing conducted by this Council was in respect of a piggery and those persons making submissions were long standing neighbours of the applicant and had genuine concerns at possible smell nuisance. The applicant had a genuine desire to accommodate his neighbours and conditions controlling efficient spreading (i.e. time, place, regulatory) were agreed upon. The meeting was held in the applicants kitchen around the table, it was chaired by the local councillor (not a member of the planning committee) and in our opinion was the "copy book" pre - hearing conference. We don't believe that this result would be achievable if the parties were inflexible, such an attitude we believe would probably aggravate the situation.

The second "conference" was between two people one being the applicant for a dog breeding and training establishment. This was held with the planning officer in his office. He (the P.O.) advised both of the District Plan provisions, the Health Act provisions, the Dog Control Act requirements, the applicant spoke of his previous experience, gave contact addresses of previous neighbours. The person opposing stated his concerns, (noise, smell, ...) and the pair resolved the matter themselves by agreeing on conditions controlling the activity. Both men were reasonable and this attribute prior to organising the meeting.

There are some issues at hand now where I would not suggest a pre hearing conference, neither would I wish to be involved.

The system has tremendous merit, but not in all cases. Its a matter of judgement."

2. Isolating And Defining Issues.

a)

"Pre hearing meetings are a good means of isolating and determining issues as soon as possible. They offer an opportunity to minimise delays in the processing of notified applications with out diminishing effective control for neighbours or Councils or affecting rights of other parties.

I believe that as administrators we should explore any avenue that will minimise delays and costs."

b)

"Section 99 is useful, as it could well resolve applications where there is difficulty in understanding the proposal, or if there is need for further information."

c)

"The provisions of section 99 are an excellent tool to resolve issues raised by the consent process or provide a better understanding or clarification of points of interest. However contentious issues will in most cases only be resolved by the decision maker."

d)

"Useful to have the process recognised in the legislation. Its use will increase as people become familiar with the total R.M. Act. May not resolve all conflict but may aid in narrowing range of issues in complex matters."

e)

"So far no compromises have been obtained as a result of mediation, but atleast the issues have been identified and people have a chance to discuss them them.

It is an excellent forum for both sides to gain a better understanding of the issues but it does not always result in any different result."

f)

"If s 99 is used successfully it will usually result in cheaper hearing costs for the applicant, and a clarification of the issues involved in the proposal.

s 99 if used properly can speed the decision making process.

Those involved in mediation should always take minutes of any meeting so that any further conflicts can be resolved."

g)

"As I mentioned earlier, most of our mediation is done by the officer responsible for the writing of a planning report for a consent. Pre hearing meetings are viewed as useful in that they enable a wider understanding of the issues by the parties involved. Often the matter will still go to a hearing but this is not necessarily an indication of a failure to successfully negotiate a solution as in some instances one or two people out of a large group of objectors would not withdraw their submission; this is not necessarily a reflection of the ability of the mediator as there are often time constraints involved also."

h)

"Early discussion is often helpful, but I am not sure as to how often issues will be able to be resolved outside the formal hearing."

i)

"I have found the pre hearing meetings useful in that issues are identified, clarified and if possible resolved. However a further advantage is that if used properly it can also 'de-mystify' the process for people not familiar with the planning/resource management process. It allows questions to be asked directly from submittor to applicant (and vice versa) which is not promoted in the formal hearing. Consequently submittors feel part of the process. Know what is going on - and can obtain the necessary information in an informal meeting and find the formal hearing less daunting. The hearings are likely to be focussed thereby saving time."

j)

"We have found that s.99 assists in clarifying issues that initially appear contentious but following discussion are able to be resolved very easily. The use of s.99 keeps the cost of formal hearings down e.g. the cost of a 1.5 hr pre-hearing meeting was $93 but if that time had been spent before the planning committee the costs for thee same time period would have been $675. Following the formal hearing, the applicant only had to pay a hearing cost of $330 (.75 hr) plus all parties had a decision that they could live with."

k)

"In the situation of the --------- District Council hearings are scheduled for regulatory committee meetings of Council so do not require much organisation where a section 99 meeting would be a separately organised event, to organise such a meeting could mean that the hearing has to be put back costing applicants time. However, I could see that for a contentious issue with a large number of submissioners a pre hearing meeting could make the final hearing a more orderly and less drawn out affair. In this situation a pre hearing meeting would have benefit in terms of making the issues clearer to the Councillors."

3. General Support Of Section 99 And General Comments On Section 99.

a)

"We fully support the pre hearing approach. We use it in all appropriate cases. Please note, while we have only had 5 notified applications (fully notified, i.e., newspaper notice and street sign), we have had 31 non notified applications (notified in the sense that neighbour comments have been sought) and of these only 2 required pre hearing meetings. Only one of these was resolved at the pre hearing meeting, the other had to go to a Council meeting.'

b)

"In general terms the section is extremely useful and has, as seen above resulted in a number of (generally not overly contentious) issues being resolved with out the need fro a hearing.

In instances however, where protagonists are "worlds apart", the process is of little us, apart from allowing parties to air their respective views in an informal manner."

c)

"Section 99 can be useful in providing an opportunity to resolve objections before the need for a formal hearing. It has worked in the case referred to, although not strictly as set out in the section. This section does have its place when there is the possibility of resolution. In a lot of cases however there can be nothing gained by holding such hearings."

d)

"Extremely useful. It has cut processing time by encouraging a final negotiated solution at the first hearing."

e)

"It has its uses but is already subject to abuse. There are many cases where it costs an applicant to obtain a favourable position from an objector. I know of one where a signature of consent cost $5000!"

f)

"S.99 provides a formal opportunity to use mediation/negotiation as part of the consents process. W.D.C. has also found mediation/negotiation a valuable tool in helping resolve neighbours disputes over nuisance allegations, conflict over in compatible adjacent uses and disputes over the interpretation of consent conditions and existing use rights."

4. The Need To Train Associated Professions.

a)

There is a need to educate professional advisers to Resource Applicants of the availability of sec 99 e.g. lawyers, Architects, Engineers, Surveyor. The Planning Profession is well aware of sec 99."

Responses In Support Of Question 5.

4. Timeframe Of Act Too Short.

a)

"-Difficulty in scheduling a pre hearing meeting with in the statutory time frames.

- The status of decisions reached at pre hearing meetings when not all submissioners attend is unclear.

In most cases, despite general agreement reached on conditions, submissioners reserved the right to be heard at a formal hearing."

6. Using Informal A.D.R. Or Carrying Over A.D.R. Methods From The Town And Country Planning Act Era.

a)

"It is an 'encouragement section' only. This Council adopted a similar mediation approach prior to R.M.A. and the effect of section 99 has been to 'formalise' this approach. Mediation is effective in some cases."

b)

"It is useful to have the technique spelt out in law. However in reality, this process has been used to help settle consents for some time, with out any formal standing."

Regional Councils Responses To Question 8.

1. Submissioners And Applicant Must Be Open Minded And Submissioners And Applicant Need To Know A.D.R. Techniques.

"Very effective and very useful if people who come into contact with it know how to use it properly or are able to grasp effective employment techniques to employ in conflict or potentially conflicting situations."

"2) Section 99 is a very broad section which can be widely construed in relation to what constitutes a "Pre hearing meeting".

It is difficult to estimate how many pre hearing meetings have been held in relation to the 210 notified applications received.

For certain, whenever a submission has been received in respect of a notified application, then a pre hearing meeting of some form has been held.

This may not necessarily involve getting all the parties together with a Council Staff member (although this is the most common form of pre hearing meetings undertaken).

Other variations on this include encouraging the applicant to initiate resolution with the submittors.

What form each pre hearing meeting will take is situation fact specific."

2. Isolating And Defining Issues.

"Section 99 Gives submittors a chance to find out more about the application in an informal basis and lets them have their say with out prejudice or the restrictions that a formal hearing may have. The pre-hearing meetings that we have had are successful even if resolution is not reached. The response from submittors and applicants alike has been positive. At formal hearings, the same ground is covered as at the pre-hearing meetings and generally the staffs recommendation is not changed from that proposed as a result of the pre-hearing meeting. In conclusion when ever a submission is received there is always some form of pre-hearing meeting held to help the submittor understand the application ad to hopefully avoid a formal hearing.

A lot of time is spent on resolving issues, some times more than if it went straight to a hearing but the submittors appreciate that time and feel they've had a fair hearing."

Responses In Support Of Question 5.

4. Time Frame Of Act Too Short.

"As stated earlier there is not much time to hold a pre-hearing meeting. We have found that if objections can be resolved informally this is readily done by a round of letters and proposed conditions which are agreed to by all parties. In my answer to to question 2 I did not include applications and submissions resolved in this manner. Possibly another 8-10."

6.Using Informal A.D.R. Or Carrying Over A.D.R. Methods From The Town And Country Planning Act Era.

"The principle embodied in s 99 is not new, and has been used prior to the Resource Management Act coming into force.

S 99 has been used to good advantage here since 1/10/91 and even in the cases where a mediated outcome was not achieved prior to a hearing - there can be longer term benefits in terms of communication/consultant, PR and on going liaison - not immediate tangible results."