

**Whanganui River and Te Urewera Treaty Settlements:
Innovative developments for the practice of rangatiratanga
in resource management**

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Abstract

This thesis concerns the recent innovative developments in the Whanganui River and Te Urewera Treaty settlements of 2014. The Whanganui River has become the first specific environmental resource to receive the rights and status of a legal person. Te Urewera has been removed from the 1980 National Parks Act to also become its own legal person. Both legal personalities will be co-managed by boards of equal Crown and iwi members. The Te Urewera Board will, however, be rearranged in 2018 to have a Tūhoe majority, another first for Treaty of Waitangi settlements. These new features are considered particularly innovative in this thesis because of the context of Crown indivisible sovereignty and its unequal share of power in negotiating settlements. This thesis considers the ability of these settlements to provide space for iwi to practice rangatiratanga in relation to the resource that is central to their history and identity. If rangatiratanga is considered in this context to be the ability of iwi to practice self-determination and autonomy, then these settlements go further than previously seen because the application of the legal personality and the way it is co-managed is based for the most part on the worldview of the iwi. However, this worldview will continue to be practiced within the wider context of the English political and legal system. Because the improvement of the health and wellbeing of the Whanganui River and Te Urewera will be based on tikanga and mātauranga, Whanganui iwi and Tūhoe have been provided with more space than the Crown has previously conceded to practice rangatiratanga over these resources.

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Introduction

In 1975, following more than a decade of increasing Māori activism about the Crown and its disregard of the Treaty of Waitangi, the Treaty of Waitangi Act brought about an enquiry process for modern breaches of the Treaty. The Act established the Waitangi Tribunal and gave it non-binding power to make recommendations to the Crown based on the findings of Waitangi Tribunal reports. In 1985, an amendment to the Act meant that the Tribunal could hear claims that dated back to the signing of the Treaty in 1840. In the late 1980s, there was a large influx of historical claims regarding Crown breaches of the Treaty. The Office of Treaty Settlements was first implemented as the Treaty of Waitangi Policy Unit in 1988, to deal with the negotiation, settlement and legislation of the huge backlog of claims. While the rate of settlement has increased dramatically in recent years, it can still take many years for an iwi to reach their final settlement as they make their way through what can be a very difficult, time-consuming and expensive process.

Treaty settlements have been covered by relatively few books, considering the significance of Treaty settlements for Crown-iwi relationships in the last forty years. Much of the written material on Treaty settlements relates to specific claims and settlements and is written by an iwi member or another individual which specialises in the area, such as *Whatiwhatihoe: the Waikato raupatu claim* by David McCan (McCan 2001). There are other theses which critically engage with specific settlements. A recent and noteworthy addition to the field is the Ph.D. thesis by Martin Fisher called *Balancing rangatiratanga and kāwanatanga: Waikato-Tainui and Ngāi Tahu's Treaty settlement negotiations with the Crown* (Fisher 2015). Many of the texts relating to the settlement process are produced by the Office of Treaty Settlements and explain the intent and principles of the settlements but do not engage with the difficult issues in the process. One of their most informative productions is *Healing the past, building a*

future: a guide to Treaty of Waitangi claims and negotiations with the Crown (Office of Treaty Settlements 2004). A notable addition to the critical analysis of the Treaty settlement process, in general, is the text, *Treaty of Waitangi Settlements*, edited by Nicola R Wheen and Janine Hayward (Hayward and Wheen 2012). *Treaty of Waitangi Settlements* draws together scholarship that critically engages with the complex issues with the settlement process. It is a necessary and helpful addition to the scholarship. Such a critical approach to the Crown's unequal power in the creation of settlements and the implications of this for iwi is the starting point of this thesis.

Whanganui River and Te Urewera

While the claim to the Waitangi Tribunal for the Whanganui River was brought on behalf of Te Atihaunui-a-Pāpārangi, 'the parent name for the river hapu', this thesis will refer to the claimant group as "Whanganui iwi" (Waitangi Tribunal 1999:2). Whanganui iwi is the term used in the *Deed of Settlement* and is defined as the group whose members descend (by birth, adoption or whāngai) from Ruatipua, Paerangi and/or Haunui-ā-Pāpārangi (Whanganui River Māori Trust Board 2014: 21).

Whanganui iwi have been demanding their interests in the Whanganui River be recognised by the Crown since the 1870s (Young 1998: 113). The Crown's control over the river degraded its ecology without consultation with Whanganui iwi and often against their expressed opposition. The ecological damage was caused by gravel extraction, the introduction of foreign marine species, the destruction of pā tuna by steamboats and the removal of rapids, and the diversion of water by the Tongariro Power Division. The Coal-mines Amendment Act 1903 vested the bed of navigable rivers in the Crown though this assertion of Crown ownership was carried out without the agreement of Whanganui iwi, as was typical of this period of New Zealand history.

Whanganui iwi began to negotiate the resolution of their claim to the Whanganui River in 1988. Following years of inconclusive negotiations with the Crown, Whanganui iwi brought their claim to the Waitangi Tribunal in 1994. The Tribunal report was completed in 1999 and the parties have since negotiated their *Deed of Settlement: Ruruku Whakatupua*. It was signed in 2014 and included a landmark provision for the Whanganui River to be vested as a legal personality, with a two-member co-management board. One member will be appointed by Whanganui iwi and the other appointed by the Crown. The settlement has been ratified by Whanganui iwi members and is currently being drafted into legislation (Office of Treaty Settlements 2014c: 9).

The relationship between Tūhoe and the Crown differs from that between Whanganui iwi and the Crown in many ways, including the fact that Tūhoe did not sign the Treaty of Waitangi in 1840. They did, however, agree to the Urewera District Native Reserves Act in 1896, which was originally intended to be a formal recognition of Tūhoe's autonomy in Te Urewera (Binney 2009: 398). Their relationship was fraught over the nineteenth and twentieth centuries, with Crown raids into Te Urewera in the 1860s, alienation of their land in Te Urewera at the turn of the twentieth century, and the Crown's assertion of ownership of Te Urewera through the creation of the Urewera National Park in 1954 (Ruru 2014). The Crown appropriation of land combined with the lack of provision of basic services to the region has had devastating effects on the Tūhoe population that have resulted in high levels of poverty in the present day (Waitangi Tribunal 2014: 275).

Tūhoe's claims were heard by the Waitangi Tribunal from 2002 to 2005. The negotiations between the Crown and Tūhoe began in 2008. A settlement reached in 2010 was cancelled at the last minute due to the Crown removal of Te Urewera from the *Deed of Settlement*. After renegotiation, the new *Deed of Settlement* was signed in 2013 and was passed into two pieces of legislation in 2014, the Tūhoe Claims Settlement Act and the Te Urewera Act. The Te Urewera Act will be the focus of this

thesis as it provides for the legal personality of Te Urewera and co-management of Tūhoe and the Crown over this entity.

The practice of rangatiratanga

There are two versions of the Treaty of Waitangi, the English text and the Māori text called Te Tiriti o Waitangi and this thesis will discuss both. The current position of the Crown is that while there are differences in the texts, there is just one Treaty and both texts should be considered together (Waitangi Tribunal 2014: 521). The Waitangi Tribunal also does not attempt to resolve the differences, but in cases of ambiguity between the texts the Tribunal places 'considerable weight' on Te Tiriti o Waitangi as this was the text that the majority of rangatira signed (Waitangi Tribunal 2014: 522). The Treaty of Waitangi states that full sovereignty was transferred to the Crown while Te Tiriti o Waitangi guarantees the tino rangatiratanga of Māori. This mistranslation has been an underlying difficulty of the Treaty relationship that has not been reconciled. It is well known in New Zealand that Māori and the Crown signed the Treaty for different reasons and had different understandings of what they were agreeing to. It has most often been this understanding of the transfer of indivisible sovereignty that has caused Crown breaches of the Treaty. However, the dominance that the Crown gained in the decades following the signing in 1840, by way of a demographic majority, the administration of governance and access to military supplies, has meant that the Crown has been able to enforce its view of the Treaty and the transfer of sovereignty. The settlements do not deal with the sovereignty issue and mostly conform to the Crown interpretation of the Treaty, as evidenced in the 1989 *Principles for Crown Action*. Thus, the ability of settlements to fully provide for the practice of tino rangatiratanga is ultimately restricted.

Tino rangatiratanga was guaranteed in Article Two of Te Tiriti o Waitangi. Many have translated this concept as self-determination or autonomy and others

have gone so far as to equate it with full, undisturbed sovereignty. It is doubtful that the tino rangatiratanga that was confirmed in Te Tiriti o Waitangi will be practiced in the same way today as it was in 1840. Just as, and perhaps because of, the way that the Crown's kāwanatanga is not practiced today as it was defined in Te Tiriti o Waitangi. The practice of the Crown's full sovereignty will not be dismantled by the Treaty settlements process and tino rangatiratanga, as Māori full sovereignty, will not likely be provided for. It is thus useful, given these circumstances, to consider the innovations of the settlements in the way they provide for the practice of rangatiratanga, which this thesis will define as the ability and right to practice self-determination and autonomy. It is outside the scope of this thesis to consider how the settlements provide for the practice of mana, or more specifically, mana whenua. While mana whenua is a particularly relevant concept for the analysis of settlements containing new arrangements for resource management, the issue is so complex it could not have been done justice in this thesis. It is my hope that further research, by this author or another, will consider these innovative new settlements for how they provide for the practice of mana.

This thesis deals with the provision for rangatiratanga because it was guaranteed by Te Tiriti o Waitangi, whereas mana was not, and it is the breaches of the Treaty that the settlements process attempts to resolve. The intended outcome of Treaty settlements is to resolve iwi grievances. In some cases, this could be interpreted as the resolution of the Crown's previous refusal to allow for the practice of rangatiratanga in resource management. Considering this, the provision for more space through settlement legislation to exercise rangatiratanga in the present may seem a fair and just result for Treaty settlements. However, due to the huge imbalance of power between iwi and the Crown in creating the settlements the Crown's view of its indivisible sovereignty has been maintained and all of the settlements to date have fallen short of fully providing for the exercise of rangatiratanga.

Therefore, the creation of settlements that do have space for iwi to practice rangatiratanga can be considered innovative, simply because the Crown is not legally obliged to provide for this. As the Crown holds the power in the Treaty relationship to enforce its interpretation of the Treaty and of New Zealand history, the inclusion of Whanganui iwi and Tūhoe's perspective in the settlements can also be considered good progress for the settlement process. This thesis is based on the understanding that the unequal power relationship between the Crown and Māori in the Treaty settlement process means that the new elements in the Whanganui River and Te Urewera Treaty settlements are progressive in their innovations and perhaps point to exciting developments for the future. Treaty settlements are therefore considered in this thesis as 'a case study in power relationships' (O'Sullivan 2008: 322).

Motivations

Because the innovative features of the Whanganui River and Te Urewera Treaty settlements have been agreed to voluntarily by the Crown which has the power to enforce its own preferences, it is important to consider why such changes have occurred. From this analysis, conclusions may be drawn as to whether the changes will have a significant impact on the relationship between Whanganui iwi and the Crown, and Tūhoe and the Crown, on future settlements, and on renegotiated settlements. There is a multitude of factors which have influenced these settlements and each will be discussed over the course of this thesis. The term "Crown" is used throughout this thesis to refer to the central government of New Zealand. It is important to note that framing the argument in Crown-iwi relations does not conflate the Pākehā-Māori dichotomy often seen in New Zealand history. The Crown has a diverse membership and includes seven guaranteed Māori seats in parliament. This thesis, therefore, does not define the Crown by its membership, but as a system based on English law and ideologies. In this way, it is discussed as the antithesis of iwi governed by tikanga.

In the final analysis, the motivation for the Crown to agree to such innovative developments has political, social and economic influences. Māori activism in the late 1960s and 1970s was hugely significant for bringing the Treaty of Waitangi back to public consciousness. Crown action from 1840 was retrospectively understood to breach the Treaty of Waitangi. Māori activists ensured that the issue would not be put to rest until the Crown resolved those breaches of the Treaty. The aim of settlements was to remove these historic grievances which the Crown viewed as standing in the way of progress. Former Treaty Minister, Douglas Graham, stated in 1997 that the aim of the Treaty settlement process was to move iwi 'from grievance mode to development mode' (Graham 1997: 49). Therefore, the Crown motivation is generally for the pragmatic resolution of current problems and not a huge amount of attention is given to the guarantee of rangatiratanga in Te Tiriti o Waitangi. This pragmatic focus places some limits on the potential of settlements as they are based on Western notions of sovereignty and progress. However, the settlement process is also based on Māori concerns and their view of New Zealand history and the Treaty, which means that the settlement process has great potential to incorporate Māori perspectives into settlement legislation in a meaningful way that impacts on the future of the iwi and their practice of rangatiratanga.

Innovations

This thesis will discuss the settlements as both innovative in their entirety and containing innovative features. The innovative features are the treatment of Te Urewera and the Whanganui River as legal personalities and the co-management structure for the advocacy of the legal personality with equal numbers of iwi and the Crown members. The legal personality that Te Urewera and the Whanganui River have gained ensures their legal rights as the owners of their own lands. The legal status gained by these resources is a world first for a specific natural feature and is certainly an innovative development for Treaty settlements. However, the issue that will be addressed here is if the legal personality has been used as a way for the

settlement to conform to the Crown policy that no person or organisation can own a body of water or a national park, or whether the settlements are innovative for the way they are grounded in a Māori understanding of the environment as an inalienable living entity.

Rangatiratanga is also an important consideration when analysing the status of the legal personality and the Western concept of ownership. The concept of rangatiratanga has an interesting history of use for different iwi, activists and urban Māori groups. Some have equated it with notions of ownership when in dialogue with the Crown. Despite this use, many still argue that ownership is not the best expression of rangatiratanga in relation to the environment. Therefore, this thesis will consider whether a co-management arrangement over an inalienable legal personality creates sufficient space for iwi to exercise rangatiratanga.

While co-management arrangements are not a new innovation for Treaty settlements, there are certain aspects of the Whanganui River and Te Urewera co-management boards which can be considered innovative. In the case of both Te Urewera and the Whanganui River, the boards operate according to a set of values and all plans are made according to those values. In both the Whanganui River and Te Urewera Treaty settlements the operating values conform to the worldview of the iwi.

The Te Urewera and Whanganui River Treaty settlements are also innovative in their entirety for how they utilise te reo Māori and apply Māori concepts and tikanga. The settlement process is premised on the English legal system and Western views on ownership and management. The use of te reo Māori is notable in both settlements, particularly in how it features meaningfully in the body of the legislation and settlement documents, not just symbolically in the preamble as in past cases. The use of te reo means that Māori concepts have often not been translated into English, a task which has produced a variety of definitions across

different legislation. The concepts remain vulnerable to interpretation by New Zealand Courts. Using Māori concepts for settlement legislation is an innovative practice, particularly because of the overarching context of Crown control.

If these settlements can be considered innovative, it is hugely important to both Whanganui iwi and Tūhoe, as well as the few other iwi who are yet to settle their claims. This thesis aims to evaluate why the innovations have occurred, in order to determine whether they have the potential for long-term developments of the Crown-iwi relationship, or if they are a product of current circumstances and should be viewed as isolated incidents of variation from the status quo. Certain aspects of the settlements that can be considered innovative may have an important impact on the settlement process, as iwi will have a wider range of options to choose from that suit their situation and a precedent of using innovations if no current options suit. The innovation of utilising Whanganui iwi and Tūhoe concepts and te reo Māori will have an important enduring effect for these iwi and their relationship with the Crown, which will be a central aspect of their co-management of the legal personalities for the foreseeable future. As rangatiratanga is practiced in relation to other concepts in tikanga, the expression of these concepts in the settlements provides space for the practice of rangatiratanga.

Outline

This thesis is set out in four chapters. Chapter One will cover the background information for the analysis of the Treaty settlements. It will examine the notions of sovereignty, rangatiratanga, colonialism and continued Crown control. The first chapter will also briefly canvass the history of settlements, beginning with a discussion of the increased Māori activism, moving to the Waitangi Tribunal and the negotiation of the Waikato River Treaty settlement which had a huge influence on the Treaty settlements discussed in this thesis.

Chapter Two will address the Whanganui River Treaty settlement and will briefly discuss the legal history of ownership of the river and, in particular, the way the Crown and the iwi have developed in their approach to the river. The concept of the legal personality will be discussed, as well as the potential issues arising from the use of the legal personality, such as the competing interests that the Whanganui River will face, and the changing human interests that it will rely upon.

The 2014 Te Urewera Act will be the focus of Chapter Three. The concept of *mana motuhake* is important for this settlement and its relationship with *rangatiratanga* will be discussed. The vesting of Te Urewera with a legal personality was a long and difficult journey with many setbacks and compromises. These compromises are important when considering the typical power imbalance of the Crown and iwi in settlements. Tūhoe's history of autonomy is also a consideration for the analysis of their co-management agreement with the Crown.

The fourth chapter will canvass the main themes that have emerged from the analysis. Firstly, it will discuss the Crown's political, economic and social motivation in creating settlements and whether that will allow for the innovative developments of these settlements to achieve their potential. It will also discuss how the tensions between Māori and Western worldviews are a constant complication in settlements, but how an effective use of both, including the provision for the practice of *rangatiratanga*, may be a solution to creating more durable settlements.

The majority of quotes used in this thesis do not include macrons on all of the appropriate Māori words. In order to both represent the material accurately and save this thesis from unnecessary confusion and clutter, I have quoted material exactly as it was in the original document and have not included [sic] and the end of every quote which does not include macrons.

The main contention of this thesis is that while the exercise of *rangatiratanga* could be a fair and just outcome of Treaty settlements, this has mostly not been the

case due to the unequal power of the Crown in negotiating the settlements and its attitude towards its own indivisible sovereignty. Therefore, while the inequality of the power relationship has not changed, the willingness of the Crown to consider different approaches to resource management and especially approaches based on Māori perspectives, is innovative. This thesis will evaluate why the Crown has been willing to consider these approaches and whether the reasoning will provide for longer term changes in the ongoing relationship between Whanganui iwi and the Crown, and Tūhoe and the Crown, and provide a precedent for other Treaty settlements and post-settlement negotiations.

Chapter One: Background

Before the settlements are discussed in any detail, some contextual information is required. For the settlements to be considered innovative, the unequal power relationship between the Crown and iwi in creating Treaty settlements must be examined. The Crown's lack of recognition for the rangatiratanga of iwi in past decision-making over the Whanganui River and Te Urewera breached the guarantee of tino rangatiratanga over taonga in the Article Two of Te Tiriti o Waitangi (Waitangi Tribunal 1999: 338-339). Therefore, the provision for rangatiratanga in settlements may be considered a fair and just resolution of the claim. However, settlements are 'negotiated compromises' due to the transfer of sovereignty that has occurred over the last 176 years since the Treaty of Waitangi was signed (Te Aho 2009b: 292). As the Crown claims it holds indivisible sovereignty, iwi pragmatically negotiate for the most practical result in the current circumstances, aware that settlements are limited by 'fiscal prudence' and public opinion (O'Sullivan 2008: 322).

Rangatiratanga and sovereignty

The term tino rangatiratanga was used in the Māori Treaty text, Te Tiriti o Waitangi, to translate 'the full chieftainship of their lands, their settlements, and all their property' (O'Malley, Stirling and Penetito 2010: 41). Claudia Orange argued that tino rangatiratanga was 'a better approximation to sovereignty than kāwanatanga', particularly as it had been used in the translations of the Bible to mean God's 'kingdom' and in the 1835 Declaration of Independence to mean Māori 'independence' (Orange 2011: 31-2). The concept of tino rangatiratanga has been used by different iwi and Māori groups for different purposes over the years since the Treaty was signed. There was a resurgence of its use during the Māori "Renaissance" from the late 1960s. Donna Awatere wrote *Māori Sovereignty* in 1984

and reinvigorated the connection between tino rangatiratanga and sovereignty for another generation (Awatere 1984). While this connection was useful for the political aspirations of the time, Sir Mason Durie has argued that because sovereignty is a concept rooted in a Western worldview, defining and measuring tino rangatiratanga against the parameters of Crown sovereignty cannot help to fulfil its aspirations for iwi in the twenty-first century (M. Durie 2009: 10).

When the Treaty of Waitangi was signed, the Crown gained kāwanatanga, the right to form a government. The Waitangi Tribunal defined kāwanatanga in the 1983 Motunui report as 'something less than' absolute sovereignty (Waitangi Tribunal 1983: 66). The Crown sovereignty practiced during the colonial era was not immediately acquired upon signing the Treaty, but was gradually acquired over time. F.M. (Jock) Brookfield has stated that this process was the transfer of 'sovereignty de facto' to 'sovereignty de jure' (Brookfield 2006: 35). Crown sovereignty has been justified as legitimate due to its durability (Brookfield 2006: 35). Brookfield has discussed the acquisition of Crown sovereignty in depth over multiple publications. He states there is an important difference between the legality and the legitimacy of Crown sovereignty. While Crown sovereignty can be considered legal, 'considerations of morality and justice' may refuse the Crown full legitimacy as the indivisible sovereign (Brookfield 2006: 34). Crown kāwanatanga was defined in the 1989 *Principles for Crown Action* as Crown sovereignty, qualified by Māori 'interests' or 'appropriate priority' (New Zealand Department of Justice 1989: 8). The rangatiratanga alluded to in this principle seems a diluted version of the sovereignty or self-determination that many academics argue for and Crown sovereignty appears largely indivisible. However, the recognition of rangatiratanga in the *Principles for Crown Action* went further than before and was an important step in the Crown's growing acknowledgement of Māori perspectives of the Treaty. An awareness of the Crown's understanding of its own sovereignty, and of

rangatiratanga, is essential in the analysis of whether settlements between iwi and the Crown can meaningfully allow for the practice of rangatiratanga.

As the Treaty of Waitangi was written in both te reo Māori and English, it inherently contained two understandings of sovereignty and of the relationship between the Crown and iwi that was to proceed from 1840. The Crown acquisition of sovereignty over the following decades did not extinguish rangatiratanga. Most recently, it has been found by the Waitangi Tribunal in the *Te Paparahi o te Raki Stage One Report* that Ngāpuhi (and similar arguments could be made for other iwi) 'did not cede their sovereignty to Britain' (Waitangi Tribunal 2014: 529). The Waitangi Tribunal has previously held that Crown sovereignty and Māori rangatiratanga can coexist without conflict, especially as this was the fundamental intention of the Treaty of Waitangi (Hill 2009: 282). How this coexistence functions in the present, however, has been somewhat complicated. The opportunity to practice rangatiratanga over possessions has been affected by the diminished resource base of iwi following Crown colonisation.

While the current government is generally considered to no longer be a colonial government, the argument that New Zealand has become a post-colonial state remains problematic. Despite kāwanatanga equating to "something less than" supreme sovereignty, the 'growth of state power has enabled the state to re-frame the relationship' (Jones 2013: 258-59). Crown sovereignty was gained due to colonisation. Through Treaty settlements, the Crown attempts to make amends for breaches of the Treaty of Waitangi caused by colonisation, but it is very unlikely to create space for iwi to operate outside of Crown sovereignty. The sovereignty of the Crown in government is non-negotiable in Treaty settlements. Dr. Carwyn Jones has noted that through the course of New Zealand's colonial history, the Treaty relationship was overlaid by a colonial relationship (Jones 2013: 258-9). While the Crown is no longer colonial, effects of this colonial relationship between the Crown and iwi persist today. While a nationwide return to the New Zealand society of 1840

is not feasible because of irreversible changes in the last 176 years, concessions can be made within individual settlements, as iwi re-gain rangatiratanga over certain resources, their membership, and their affairs.

This thesis will deal with the concept of rangatiratanga as a discussion of tino rangatiratanga as full sovereignty is not useful in the context of Treaty settlements because the idea of 'a nation within a nation' is as foreign for the Crown today as it was in the nineteenth century (Higgins 2010). Rangatiratanga has been most commonly translated by the Waitangi Tribunal as self-determination or autonomy (Jones 2013: 249-50). Māori rights to self-determination are also supported by the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which states that indigenous people have the right to 'freely determine their political status and freely pursue their economic, social and cultural development' (United Nations 2008: 4). Rangatiratanga in this sense has the ability to function within the rubric of Crown sovereignty and does not require autonomous space outside of the New Zealand state (Jones 2013: 250). Dominic O'Sullivan notes that when New Zealand ceased to be a British colony in the mid-twentieth century, it gained the popular sovereignty of liberal democracy where 'sovereignty belongs to the people' (O'Sullivan 2011: 96). Therefore, iwi can share in the national sovereignty on the basis of their Article Three Treaty rights to equal citizenship. Furthermore, the representation of Māori at the central government level in the guaranteed Māori parliamentary seats is indicative to some extent of a share in Crown sovereignty (O'Sullivan 2011: 97). The tino rangatiratanga guaranteed by the Treaty certainly allowed for the coexistence of the governance of the Crown. As engaging in the Treaty settlements process necessarily involves an acceptance of the Crown sovereignty that makes such a process possible, it is the provision for the practice of rangatiratanga within this context which can be measured in the final settlements.

Western and Māori worldviews

An integral part of the colonisation project was the dominance of Western perspectives on the encounter and it is one of the key features that has continued to the present day. In descriptions of first encounters, paintings, scientific descriptions, legislation and modern media, the relationship between Māori and the Crown has largely been defined from a Western perspective. Post-colonial theorist Edward Said has defined this as 'positional superiority' (Smith 2012: 61). Linda Tuhiwai Smith, in her seminal text *Decolonising Methodologies*, stated that the Western control of knowledge 'reaffirms the West's view of itself as the centre of legitimate knowledge, the arbiter of what counts as knowledge and the source of 'civilised' knowledge' (Smith 2012: 66). Marxist philosopher Antonio Gramsci has famously called this control of knowledge "cultural hegemony" and it is a significant ramification of colonisation across the world. This issue is a very important consideration for the analysis of Treaty settlements because the practice of rangatiratanga can occur where tikanga is articulated, as rangatiratanga is meaningfully realised in te ao Māori, the Māori world governed by tikanga (Turner 2002: 71). While te ao Māori has remained in existence throughout colonial history, despite the dominance of the Western worldview, it has not often been articulated in past legislation. Settlements would more readily provide for the practice of rangatiratanga if the Māori worldview on which it is based is expressed.

A significant impact of the dominance of the Western perspective has been the treatment of the environment. This has an important effect on the Whanganui River and Te Urewera Treaty settlements in particular, as they are settlements where alternative views of the environment are negotiated in order to find a management scheme that provides for both views. The Crown's lack of recognition of the perspectives of iwi has been the cause of breaches of the Treaty in the past, as certain resources have been exploited and degraded without consultation or acknowledgement of the iwi. An ongoing theme of the Western attitude towards the

environment is that it should be exploited for human gain and commercial benefit (Shiva 2002: 53-4). The exception to this is the rise of the conservation movement from the early twentieth century, where nature was preserved so that the public could continue to enjoy it undisturbed (Castagna 2005: 56). Both of these views are underpinned by the idea that the environment serves the public (Stone 1972: 463). The Crown also maintains in common law that no one can own water and only the Crown can own National Parks (Ruru 2009a: 221). However, the Crown still holds radical title over all land, meaning that it always has the power to re-acquire land and resources, despite Treaty settlement legislation (Ruru 2009a: 221).

The Māori worldview in relation to the environment differs from the Western perspective of ownership and exploitation. While the use and management of resources vary greatly between iwi and regions, an underlying element is the way the resources are considered an integral and interconnected living part of the Māori world. Resources are not considered as commodities but as 'being[s] with which one must interact in order to ensure the rights and participation of all living beings' (Solon 2006: 36). Stephen Turner calls this relationship a kind of sovereignty of the land's claim on people (Turner 2002: 71). As the environment is personified, some aspects of nature are considered ancestors of certain iwi and thus strongly connected through whakapapa. They are indivisible entities with mauri, mana and tapu (Te Aho 2012: 103). Richard Hill has argued that through New Zealand's post-1840 history, particularly since the 1960s, the Western understanding of Māori quest for rangatiratanga has been the possession of land (Hill 2012: 26). However, people and land are holistically intertwined, represented by the words 'tangata whenua' (Hill 2012: 31). Rangatiratanga is less about the possession of the land, which is a Western understanding, and more about the practice of an important connection to the land that is required for the health and wellbeing of both people and land.

An important concept in how the connection between people and the environment is managed is kaitiakitanga. Kaitiakitanga, like other concepts in

tikanga, is hard to translate into English due to the immense difference between a Western and a Māori understanding of the environment. Kaitiakitanga is commonly defined as stewardship and guardianship. The practice of kaitiakitanga restores the balance between the wellbeing of the people, in how they use resources for their own benefit, and the wellbeing of the environment, and its ability to provide for future generations. In many definitions of rangatiratanga, the ability to practice kaitiakitanga and tikanga is considered essential (Jones 2003: 129). Kaitiakitanga has gained more Crown attention in recent decades. Of particular significance is its use in the 1991 Resource Management Act (RMA) as this legislation redefined environmental management law in New Zealand (Jones 2013: 118). While the exclusion of tikanga and Māori perspectives from previous legislation has been problematic, their inclusion in legislation has also caused some trepidation as the concepts are then vulnerable to interpretation within a wider Western-dominated political and legal system. Therefore, the inclusion of Māori concepts in settlements is indeed an improvement from past exclusion, but in the context of the unequal relationship between the Treaty partners, caution should be exercised in analysing how effectively the Māori perspective is articulated by the inclusion of these concepts.

The RMA is an important piece of legislation for its inclusion of tikanga and the requirement for local authorities to consult relevant Māori groups over certain decisions. The Act was greeted, both locally and internationally, as 'a significant step forward in making room for a Māori voice in environmental management' (Te Aho 2012: 105). The requirement for local authorities to consult with Māori groups and consider tikanga was an important development as typically local government, more so than central government, has been ignorant of Māori culture and Māori perspectives of the environment and 'resisted meaningful engagement on the premise that they maintained absolute power and authority over resource management decision-making' (Hall 2012: 127). Following the creation of the Crown

principles in 1989, the RMA's inclusion of these principles was greeted with some optimism (Te Aho 2009). However, the potential for greater participation of Māori in resource management has not been realised (Te Aho 2012: 105). Many Māori groups have found that even when the consultation has occurred, their concerns were not included in the policy, or that decisions had already been finalised before they were consulted (Ruru 2009: 16). An important aspect of the RMA is the way issues of resource ownership have been disconnected from resource management and the issue of Māori customary ownership has been sidelined (Jones 2013: 240). Some still see the Act as unrealised potential and perhaps Treaty settlements can help to ensure that consultation and communication between local authorities and iwi are both required and advantageous to resource management.

Māori activism and the "Renaissance"

As the settlement process moves to a greater recognition of Māori views, it is important to consider what has caused such a development to come about. An essential driver of the Treaty settlement process has been the Māori "Renaissance". The late 1960s and 1970s saw a huge increase in the visibility of Māori activism and '[i]ncreasing Maori demands for recognition of rangatiratanga' (Hill 2009: 149). The term "renaissance" may not be wholly appropriate as it signifies that something was reborn that was previously dead. Māori culture never died or was dying, despite popular Crown rhetoric to that effect (Hill 2009: 150). Iwi groups consistently raised their concerns with the Crown over the last 176 years in relation to certain Treaty breaches, particularly in regard to land confiscations. However, during the 1960s and 1970s, Māori culture flourished in rural and urban centres and became more visible to the general public.

The Māori "Renaissance" in New Zealand was part of an international civil rights movement. In particular, it drew on the burgeoning rhetoric around indigeneity in other former colonies. Indigeneity is the political status of the first

inhabitants of a country to belong 'not just to a national jurisdiction but to their own communities with independent political status in their own right' (O'Sullivan 2008: 326). Land marches and occupations were particularly effective in gaining attention for the Treaty of Waitangi and the unresolved breaches of it (Walker 2004: 209-19). In a democratic society, the nationwide spotlight on Treaty issues was hugely effective for initiating a genuine response from the Crown. In a democratic political system, political participation is protected and fostered and Māori dissent could not be ignored or silenced as it had often been in the colonial era (O'Sullivan 2011: 87). The Crown almost wholly abandoned the long-standing policy of assimilation and began to address the challenge set by the Māori "Renaissance" to reconcile the past and the breaches of the Treaty (Hill 2009: 165-6).

The significant impact of Māori activism on the creation of the settlement process means that it is important to consider the style of leadership and how this continues to impact Treaty settlements. The nature of Māori leadership and organising is very different to traditional Western approaches. This is particularly pertinent for the Post-Settlement Governance Entities (PSGE) which result from the settlements. While the Crown has a top-down approach, the mana of rangatira depends on their followers and thus follows a more bottom-up style of leadership (E. T. Durie 1996: 449; Tutua-Nathan 1992: 192). In the Treaty settlement process, for a leader to have the mandate to represent the iwi they must be voted for by a majority of the iwi members. Jones has argued that rangatiratanga reflects the autonomy of the community, not the power of the individual (Jones 2013: 115). However, the ballot system used in the process is a Western democratic process and thus has had an effect on who is appointed as a leader of an iwi organisation (Jones 2013: 8). Therefore, the leadership style both in the mandated claimant negotiators and in the PSGE is influenced both by Māori ways of organising and by the requirements of the Western political and legal climate in which the settlement process functions. In order for claimant negotiators to be mandated and representative of the iwi, they

need to fulfil Crown requirements and be able to operate based on tikanga (Jones 2003: 73).

Regardless of the skills of Māori leaders and the support they receive from their communities, there have always been significant challenges in dealing with the Crown. Exclusion from participation has been one of the biggest issues. There has historically been a huge lack of consultation with relevant Māori groups over decisions that affect them. In some pieces of legislation, such as the RMA, there has been a duty to consult included as a requirement for any action that impacts on iwi and their rohe (Resource Management Act 1991: 605). Such provisions have not resulted in a genuine change to iwi participation in decision-making outside of Treaty settlements. This issue continues today despite the settlement process. For example, despite the transfer of Te Urewera to a legal personality, the Crown has maintained ownership of minerals for mining (Te Urewera Act 2014: 40). Most iwi appeals to the Crown over resources have been taken through the Courts (Te Aho 2009b: 285). As well as the majority of cases meeting little success, the costs of taking such action has excluded many from participating from the outset (Wevers 2013: 691). The settlement process is thus important for addressing these challenges. While the process is still costly and can be very drawn out, which can cause further economic hardship, iwi actively participate in the negotiations and have a direct impact on the outcome of the settlements. Though their case will be vulnerable to the Court's interpretation of the legislation resulting from the settlement, it may then give iwi the legal grounds on which to stand if further court cases are required in the future.

Waitangi Tribunal

The Waitangi Tribunal was created by the 1975 Treaty of Waitangi Act in response to the increasing pressure of Māori activism to address the breaches of the Treaty of Waitangi. It was charged with the responsibility to report on findings of

fact, which were based on the submissions and evidence of the iwi, as well as that of the Crown and independent historians. Since the 1985 Amendment to include historical claims dating back to 1840, the Tribunal has analysed past Crown action based on a modern understanding of the Treaty and the Treaty principles which emerged from the *Principles for Crown Action*, Court judgements and previous Waitangi Tribunal reports. This has incurred criticism by some, mainly historians, who argue that the Tribunal practices historical presentism, that is, using present concerns to judge past actions (Morris 2003: 8; Oliver 2001: 10). W. H. Oliver has argued that the Tribunal creates a 'retrospective utopia' where it is imagined, after the Treaty was signed in 1840, that the Crown and Māori proceeded in a partnership of power-sharing, and then criticises the Crown for falling short of this ideal (Oliver 2001: 10). However, the Tribunal was created as a response to contemporary concerns. Ewan Morris argues that a critique of its presentism is like 'indicting water for being wet' (Morris 2003: 8). The Tribunal can provide findings of fact and non-binding recommendations to the Crown on how to resolve past Treaty breaches based on the present day context. This function of providing recommendations necessarily gives the Tribunal not only a present focus, but functions to sketch 'out a path for the future' (Morris 2003: 2). While the Tribunal recommendations can do much to empower iwi claimants, the 'moral expectations' that many hold of it to 'deliver social justice solutions' is beyond its scope (Byrnes 2010).

Waitangi Tribunal reports contain highly detailed and specific regional histories for many parts of New Zealand. In some cases, these histories may be the first time such information is published and available to the public. In other cases, the published history of an area may be dominated by colonial literature and the Tribunal reports do an important job of portraying a more rounded history. They, therefore, join the corpus of revisionist history which has been hugely important for re-telling New Zealand history in a more balanced way and dismantling long-entrenched colonial perspectives of history. As a Western perspective has become

normalised through colonialism, it has been an important function of revisionist history to upset the normal narrative with an indigenous perspective which has usually been hidden from view in colonial narratives. The change to revisionist history mostly occurred in the 1970s and 1980s, from a celebratory to critical account of colonialism (Veracini 2001). As the Tribunal primarily writes about the relationship between the Crown and particular iwi, a significant aspect of the revision has been the inclusion of multiple perspectives of history.

One of the most significant ways Waitangi Tribunal reports have added to the revision of New Zealand history is with the inclusion of Māori historical perspectives. Sir Edward Taihakurei Durie has stated that his original vision of the Tribunal was of a 'people's forum' where Māori issues and complaints will be heard 'according to their own laws and perspectives' (E. T. Durie 2010). The collection of Māori oral history and oral submissions is an integral part of the research process for the Waitangi Tribunal. While the inclusion of Māori perspectives is increasingly common in the production of New Zealand history, the use of oral history is not as commonly apparent. Hill has commented of the Tribunal that the inclusion of Māori perspectives on the Treaty has been vital for the recognition of the right of iwi to practice rangatiratanga (Hill 2009: 188). This is important for the settlement process because while the Crown holds more power in the relationship to enforce their view in negotiations, the substantial Tribunal reports ensure that the perspective of the iwi on their own history is acknowledged.

Treaty Settlements

Treaty settlements are created according to English legal traditions within a English political system. The Crown is both the guilty party and arbiter of reconciliation (Gibbs 2009: 52-3). This makes the restoration of justice difficult, as the Crown is biased in determining what an ideal resolution of the breach is and instead focuses on what can realistically and conservatively be offered in present

circumstances. As the Crown holds an unequal share of the power, Treaty settlements are generally not considered in terms of justice, but 'the return of land is spoken about in popular discourses as 'giving" (O'Sullivan 2008: 322). J. G. A. Pocock has noted that in order for indigenous groups to make claims to restorative justice in settler colonies they have to translate their concerns into the terms and principles of the English justice system (Pocock 1997-1998: 484). This creates an inherent difficulty in creating settlements where the outcome for iwi genuinely articulates their worldview. Jones has argued that this dominance of the Western perspective is causing Māori legal traditions to alter in ways that are contrary to rangatiratanga and, therefore, the process causing this ought to be altered to allow for the practice of Māori legal traditions (Jones 2013: iii). Care must be taken in including Māori concepts in settlements, as their meaning may be vulnerable to distortion within this Western context.

The Crown also has the power in this relationship to define who they will be negotiating with. While the legislation states that anyone, individual or group, can lodge a claim, in reality, the Crown 'strongly prefers' to negotiate with 'large natural groupings' (Office of Treaty Settlements 2004: 32). This is mostly a logistical issue, as the Crown seeks efficiency in settling claims: the logic is that the bigger the group the faster settlements will proceed. Because the Crown has imposed Western requirements on the claimant groups, difficulties arise for claimants when the groups do not conform to Māori ways of organising, which are typically at the hapū level. Jones argues that the Crown has tended to focus more on the large than the natural criterion (Jones 2013: 167). There are often tensions around membership of the claimant group, which people best represent it, and where the boundaries of their rohe lie. Smaller hapū groups which operate partially or fully independently may find themselves with limited power to achieve their goals when grouped within a large iwi organisation. Therefore, the requirement for "large natural groupings" may stand in the way of the exercise of rangatiratanga of hapū groups. These issues

also resurface post-settlement. For the settlement funds and assets to be transferred to the iwi, they must have an approved PSGE. The PSGE has certain Crown imposed requirements before it can be recognised and these are 'based on Western law and values with only a limited recognition of Māori legal traditions' (Jones 2013: 233-4). The ability of an iwi to practice rangatiratanga post-settlement is then made difficult by the requirement to conform to principles that are often at odds with tikanga.

As the 'dispenser of justice' in the Treaty settlements, the Crown also has the power to decide what is on offer in terms of redress (Gibbs 2009: 46). It is widely acknowledged that financial redress offered by the Crown does not equate to anything close to a fair compensation considering what was taken. In 1994, the Crown introduced a fiscal envelope policy, to cap the total financial redress to one billion dollars. This was widely contested and rescinded in 1996, but it was understood that the Crown would continue to severely limit financial redress. The Crown has an incentive to stay as close as possible to the one billion dollar limit due to the relativity clauses in the Ngāi Tahu and Waikato-Tainui settlements. The Crown can only offer in redress what it can currently afford and adds other justifications such as the principle of redress in the *Principles for Crown Action*, which states that redress 'must take account of its practical impact and of the need to avoid the creation of fresh injustice' (New Zealand Department of Justice 1989: 15). Therefore, financial redress must always be limited to match those settlements with limited redress that have already taken place. The Crown's insistence on these parameters does not provide for equal dialogue with the iwi on what is an ideal resolution of the Treaty breach and necessitates the compromise of iwi to provide for Crown requirements (Jones 2013: 277). While this unequal power relationship is not ideal, it 'is sometimes seen as necessary and justified to achieve the greater goal of securing the funds by which tribal self-determination will be provided for in time' (E. T. Durie 2010). Therefore, the Treaty settlements are generally not viewed as a

process which allows for the practice of rangatiratanga, but a necessary step on the road to achieving a post-settlement state where such a thing can be provided for.

The most practical aspect of Treaty settlements is how they provide the economic basis for future iwi development, including the ability to practice rangatiratanga over their own affairs, and a healthier relationship with the Crown. However, a central part of the dominant rhetoric around the settlements is that the resolution of claims is considered to be "full and final". While the intention of such a requirement is to ensure all claims with an iwi are fully resolved and settled, the reality of the situation is that it can often cause further problems that are harder to resolve because of that very finality (Powell 2015: 77). Though settlements are considered "full and final", there has been instances where settlements have been revisited. For example, Waikato-Tainui, Ngāi Tahu and Taranaki all received compensation for damage inflicted by colonialism in the mid-twentieth century, but all three have negotiated new settlements with the Crown (Hill 2009: 48-9).

If the process were not so Crown controlled, the "full and final" aspect would be fairly innocuous. However, the fact that the process conforms to English legal traditions, the Crown's power to define a claimant group, requirements for the PSGE, and its control over what kind and how much redress on offer, has meant that to finalise these settlements is to finalise Western definitions of 'a universal commonsense vision of justice' (Jones 2013: 221). In any case, this well-publicised aspect of Treaty settlements gives the wrong impression to New Zealanders that the claim is over and Māori issues or "problems" have been dealt with (McCreanor 2009: 2). This kind of rhetoric conceals the potential outcome of Treaty settlements; a new relationship between the Crown and iwi to progress into the future. While it is important to finally bring resolution and justice to historical breaches of the Treaty of Waitangi, it should not 'locate the Treaty debate in the past', but view the Treaty as an agreement 'to plan ahead' (M. Durie 2009: 4).

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act

Innovative settlements did not begin with the Whanganui River and Te Urewera Treaty settlements and they are unlikely to end there either. The progress of Treaty settlements since negotiations began in 1989 has been remarkable. The Whanganui River and Te Urewera Treaty settlements are influenced by previous settlements as early as the Ngāi Tahu Claims Settlements Act 1998. The 2008 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act achieved an important and innovative step forward for Treaty settlements, particularly in regard to new co-management structures. This settlement, in particular, can be seen as an important step that led to the innovations in the Whanganui River and Te Urewera Treaty settlements. The Act importantly acknowledges the mana of the Waikato River as a Waikato-Tainui tupuna which should be restored for its own mana, not for further exploitation (Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010: 6). The inclusion of Waikato-Tainui's understanding of the river was a significant step for the Crown. The second part of the agreement, *Mana Whakahaere*, ensures that Waikato-Tainui has authority to 'exercise control, access to and management of the Waikato River and its resources in accordance with tikanga' (Te Aho 2009b: 290). The goals of this authority are to restore the relationship between the iwi and the river, to utilise tikanga and mātauranga, and to improve the health of the river (Wevers 2013: 701). There are some clear links here to what makes the Whanganui River and Te Urewera Treaty settlements innovative in their entirety: the recognition and articulation of the iwi's view of their relationship with the environment.

The main innovative element of the Waikato River Treaty settlement is the co-management structure that has been put in place between the iwi and the Crown. The authority of Waikato-Tainui over the river is effected through the co-management board, the Waikato River Authority (WRA). There are government and Māori co-chairs, as well as five river iwi members and five Crown appointees

(Wevers 2013: 699). Co-management has been championed in the last decade as a strategy to reconcile Māori interests in a resource with Crown reluctance towards iwi ownership and has gained significant traction in New Zealand (Te Aho 2012: 110). Like the RMA, co-management agreements do not address underlying issues of sovereignty and ownership but deal only with the ongoing management of a resource. Despite this, the importance of the use of co-management regimes is the focus on furthering the interactive relationship between iwi and the Crown. It has been called a 'future-looking redress' (Linkhorn 2010). The co-management arrangement in the Waikato River Treaty settlement is significantly not only a high-level relationship between central government and mandated iwi leaders, but also involves a high level of community involvement within the iwi and creates a direct working relationship between the iwi and various government departments and local government (Linkhorn 2010). Greater community involvement will likely lead to a greater enactment of the iwi values that were included in the settlement legislation.

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, like all settlements, is a "negotiated compromise". The main priority of Waikato-Tainui in the negotiations was to end the 'paradigm of exclusion' and create an opportunity to restore the Waikato River (Te Aho 2009b: 292). On the other hand, through the use of the co-management arrangement, the Crown has maintained the view that the iwi should not own the river and that the public has the right to continued access and enjoyment of it. The use of a co-management structure also ensures that the governance of the river conforms to an inherently Western model (Muru-Lanning 2012: 130). However, the goals set by the WRA also promote tikanga and mātauranga in developing ways to restore the river (Wevers 2013: 705). Therefore, the relationship of the Crown (and with it public interests) and the rangatiratanga of Waikato-Tainui shows how the Waikato River Treaty settlement represents a compromise where both groups can gain from the agreement that which they

consider being of prime importance while acknowledging the same for the other. The compromise creates a shared platform for both parties to work together in the WRA to restore the Waikato River for future generations, a goal which they both share. The example of the Waikato River Treaty settlement shows how far the Crown has progressed in acknowledging iwi perspectives in settlement legislation and the promising results that can come from this progress.

Conclusion

This chapter has set out the context for suggesting that the Whanganui River Treaty settlement and the Te Urewera Treaty settlement are innovative agreements. The Crown certainly retains control over the settlement process, as the Crown's *kāwanatanga* is performed as indivisible sovereignty. But the fact that the Treaty settlements process initially came about due to Māori concerns and political pressure has meant that there is potential for these concerns to further guide settlements and the resulting legislation. While providing for the practice of the *tino rangatiratanga* guaranteed in Article Two of Te Tiriti o Waitangi may not be an achievable outcome for the settlement process in the present context, there is potential for the settlements to provide for the practice of *rangatiratanga* within co-management structures and to incorporate the expression of the worldview of the iwi in the settlement. Avenues for the practice of this *rangatiratanga* will, for the time being, be within the overarching context of the English political and legal system. Just as the *tino rangatiratanga* of iwi in the Treaty of Waitangi provided for the *kāwanatanga* of the Crown, iwi can practice *rangatiratanga*, or self-determination, within this context.

Chapter Two: Whanganui River Treaty Settlement

The focus of this chapter is the Whanganui River *Deed of Settlement*, called *Ruruku Whakatupua*. While the settlement has not yet been enacted in legislation, the *Deed of Settlement* has been signed and the two settlement documents, *Ruruku Whakatupua: Te Mana o te Awa Tupua* and *Ruruku Whakatupua: Te Mana o te Iwi o Whanganui*, have been ratified. The main innovative element that will be investigated in this settlement is the application of a legal personality for the Whanganui River. I will investigate whether the Western concept of the legal personality can give expression to values of Whanganui iwi and their view of the river. The co-management board, Te Pou Tupua, will act and speak on the river's behalf. It will be examined for how it provides for the practice of the rangatiratanga of Whanganui iwi.

E rere kau mai te awa nui nei
Mai i te kāhui maunga ki Tangaroa

Ko au te awa

Ko te awa ko au

The river flows

From the mountains to the sea

I am the river

The river is me

(Office of Treaty Settlements 2014b: 1)

Whanganui River Catchment Map



(Office of Treaty Settlements 2014b: 52)

Origins

While there are many versions of the creation mythology of the Whanganui River, the version which has been agreed to by Whanganui iwi is set out in David Young's *Woven by Water*. This account asserts that the river was initially a single tear drop from Ranginui, the sky father (Young 1998: xi). Five mountain atua; Ruapehu, Tongariro, Taranaki, Ngāuruhoe, and Pihanga, the maiden mountain and wife of Ruapehu, formed an enclave around the tear drop and lived there together (Young 1998: xi). Taranaki was the 'custodian of tapu' and, after finding that Pihanga loved him too, left in order to keep the tapu of the enclave intact (Young 1998: xi). He moved west and formed the path that would become the Whanganui River and settled near the ocean to become the guardian of the setting sun (Young 1998: xi).

There are also varied accounts of the origin of the name "Whanganui". Some accounts state that the iwi's tupuna Haunui-a-Pāpārangi named the Whanganui river and the name meant 'great harbour' (Young 2012). Others hold that its name is derived from the story of Tamatea-pōkai-whenua, who was an explorer from Te Atihaunui-a-Pāpārangi, who left his servant at the mouth of the river (Young 2012). Within this narrative, the meaning of Whanganui is 'long wait', referring to the servant's wait for his master (Young 2012).

The origins of Whanganui iwi are set out in the agreed historical account in *Ruruku Whakatupua: Te Mana o te Iwi o Whanganui*. There are two ancestors of Whanganui iwi, Ruatipua and Paerangi-i-te-wharetoka (Office of Treaty Settlements 2014a: 12). They arrived here around five generations before the great fleet from Hawaiki and, at the time of the arrival of the Aotea waka, their rangatira was Paerangi (Whanganui River Māori Trust Board 2014: 40). Haunui-a-Pāpārangi arrived on the Aotea waka and settled along the banks of the Whanganui River with the people of Ngā Paerangi (Young 2012). The twelve hapū represented by Whanganui iwi in the settlement are Ngāti Hāua, Ngāti Patutokotoko/Ngāti

Peketuroa, Ngāti Kura, Ngāti Hau, Ngāti Ruakā, Ngā Poutama, Ngāti Pāmoana, Ngāti Tuera, Ngā Paerangi, Ngatu Tupoho, Ngāti Rangi and Ngāti Uenuku (Whanganui River Māori Trust Board 2014: 21).

History

The Whanganui River has been the centre of an ongoing conflict between Whanganui iwi and the Crown since the 1870s (Young 1998: 113). The sale of Whanganui land to the New Zealand Company in 1839, confirmed by the Crown in 1848, did not affect the ownership of the Whanganui River and contained an agreement to protect the eeling rights of the iwi (Young 1998: 182). The ongoing iwi protest against the Crown's 'interference' with the Whanganui River and their subsequent legal battles has been well documented by the Waitangi Tribunal WAI 167 report (Waitangi Tribunal 1999: 179). The Tribunal concluded that the concerns of the iwi centred around their exclusion from the development and maintaining their interests and rights in the river (Waitangi Tribunal 1999: 179). Under the mounting pressure of European migration, the river was further interfered with through gravel extraction for road building, and removing eel weirs for steamboat travel. Two petitions in 1887, signed by 230 iwi members in total, claimed the destruction of eel weirs was caused by the steamers and that the deepening of the river for their navigation was never agreed to by the iwi (Waitangi Tribunal 1999: 184). No action was taken by the Crown in response to these petitions (Waitangi Tribunal 1999: 185).

In the 1890s, the Whanganui River became known as a premium tourist destination, with riverboat tourism as the main attraction (Young 2012). In 1891, the Wanganui River Trust Act created the Wanganui River Trust to 'preserve the... scenic beauty' and navigation of the river, partly through removing the rapids from the upper reaches of the river (Waitangi Tribunal 1999: 170). The Trust, chaired by the Mayor of the Borough of Wanganui, had no iwi representation but consisted

only of Crown-appointed members (Wanganui River Trust Act 1891: 2). The rapids hold special importance for the iwi, and are necessary for the function of their eel weirs, and so a number of Whanganui iwi members obstructed the Trust workers in 1891 (Waitangi Tribunal 1999: 182). In 1893, the Trust's powers extended to the removal of earth, stone and other materials from the river (Brookfield 2000: 10). Whanganui iwi brought a claim to the Supreme Court in 1895 for the recognition of their fishing rights, however, the Courts responded by placing more control in the Wanganui River Trust (Hsiao 2012: 372). Whanganui iwi was consistent in advocating for their interests in the river in the latter decades of the nineteenth century but was unsuccessful in having those interests recognised by the Crown.

Throughout the nineteenth and twentieth century debates over the Whanganui River, Whanganui iwi argued for their rights to practice rangatiratanga over the river. Those rights were confirmed by the Treaty of Waitangi and were to remain until they were 'freely and willingly relinquished' by Whanganui iwi (Waitangi Tribunal 1999: xiii). In 1903, the ownership of the Whanganui River was assumed by the Crown through the enactment of the Coal-mines Amendment Act 1903. The Act stated that the beds of navigable rivers 'shall remain and shall be deemed to have always been vested in the Crown' (Coalmines Amendment Act 1903: 297). The Waitangi Tribunal stated in their WAI167 report that Whanganui iwi would still possess the river today, were it not for the Coal-mines Amendment Act 1903 (Waitangi Tribunal 1999: 4). The Coalmines Amendment Act 1903 was used by the Crown in subsequent legal battles in the twentieth century against Whanganui iwi to justify further acquisitions of parts of the river, such as the riparian lands (Hsiao 2012: 372).

Whanganui iwi continued to apply to the Courts and used petitions to assert their rangatiratanga over the Whanganui River in the twentieth century. The Wanganui River Trust continued to control the river and by excluding the iwi from decision-making, heavily impacted on the relationship between Whanganui iwi and

the river. In 1920, the Wanganui River Trust Amendment Act gave the Trust authority to extract and sell gravel from the Whanganui River with no requirement to consult with or provide compensation to the iwi (Waitangi Tribunal 1999: 172-3). In two petitions in 1927, a total of 337 iwi members unsuccessfully sought compensation through the Courts for the taking of gravel and land and for damage done by the steamship company (Waitangi Tribunal 1999: 193). The iwi took their claims to the Native Land Court in 1938, in an attempt to receive a 'native freehold order for the riverbed', though not for the river in its entirety (Waitangi Tribunal 1999: 197). The Native Land Court refuted the Crown's claim to ownership based on the transfer of sovereignty in Article One of the Treaty of Waitangi and the view that ownership of land is separate from the rivers that run through it (Waitangi Tribunal 1999: 204). The case known as *The King v Morison and Another* was unsuccessfully appealed by the Crown in 1944 and brought to the Supreme Court in 1949 (Waitangi Tribunal 1999: 207). The judgement, in this case, was that under section fourteen of the Coal-mines Amendment Act 1903, the Crown had 'always' owned the beds of navigable rivers and that the Native Land Court and the Appellate Court did not have the jurisdiction to investigate the title of the riverbed (Waitangi Tribunal 1999: 210-1).

Whanganui iwi did not appeal the 1949 Supreme Court decision, but their representatives suggested to government ministers that a Royal Commission of Inquiry could determine whether Whanganui iwi would have owned the river, were it not for the Coal-mines Amendment Act 1903, and if they were therefore entitled to compensation due to the transfer of ownership that the Act caused (Waitangi Tribunal 1999: 212). In 1950 Sir Harold Johnston, the only member appointed to the Royal Commission, concluded that Whanganui iwi held customary title to the river and stated that in past cases the Crown had not 'paid significant regard to the principles of tribal administration and organisation' that were different but no less legitimate than the English understanding of ownership (Johnston 1950: 13). He

recommended compensation for gravel extraction, though he did not advise an amount, but recommended the Crown establish a committee to determine the amount of compensation (Johnston 1950: 13-4). The compensation suggested by Whanganui iwi following the report, though not recorded, was viewed by the Crown as 'so exaggerated as to be ridiculous' and was not agreed to (Waitangi Tribunal 1999: 220). The Crown did not agree with the Johnston report and none of the recommended actions were taken (Young 1998: 245). The Crown instead referred to the Court of Appeal in both 1953-4 and 1960-62. The outcome of the latter was the application of the *ad medium filum* rule to customarily held Māori land, meaning that when the land was sold, the new owners also owned the riverbed up to the centre line and thus extinguished the rights of Whanganui iwi to the riverbed (Waitangi Tribunal 1999: 220-30). Over the court cases brought by Whanganui iwi and the Crown in relation to the ownership of the Whanganui River, most judges ruled that Whanganui iwi held customary title to the river in 1840, but that ownership of the river was transferred to the Crown through the Coal-mines Amendment Act 1903. Ownership of the riverbed was re-transferred to new owners upon the sale of adjoining land, as per the *ad medium filum* rule. These court judgements generally relied on English common law, New Zealand legislation and Western concepts of ownership to make their decisions.

In contrast to the New Zealand Courts over the nineteenth and twentieth centuries, the Treaty settlements process draws on the principles of the Treaty of Waitangi to determine whether iwi require compensation for the loss of land and resources, and therefore, an important concern is whether the rights of Whanganui iwi to the river were willingly relinquished. When the 1985 Treaty of Waitangi Amendment Act empowered the Waitangi Tribunal to hear historic claims dating back to 1840, the relationship between Whanganui iwi and the Crown entered a new phase. In 1988, the Whanganui River Māori Trust Board Act established a Trust Board whose nine members were appointed by the Minister of Māori Affairs

(Waitangi Tribunal 1999: 246). The Trust Board represented the iwi in further litigation and negotiations with the Crown over compensation and, along with Whanganui kaumātua Hikaia Amohia, lodged their claim to the Waitangi Tribunal in 1990 (Office of Treaty Settlements 2011: 5; Waitangi Tribunal 1999: 1). Their claim was heard by the Waitangi Tribunal in 1994 and was followed by a long and rigorous process of research and public hearings (Hsiao 2012: 372). As Whanganui iwi is a 'large and dispersed tribal group', a wide variety of people gave submissions at the hearings so that the Tribunal could better account for the differing interests of the iwi (Waitangi Tribunal 1999: 8). The WAI167 report was completed in 1999 and the active negotiations between Whanganui iwi and the Crown through the Office of Treaty Settlements began in 2009, after inconclusive negotiations in 2002-2004 (Office of Treaty Settlements 2011: 6). This gap between the publishing of the Tribunal report and the beginning of negotiations is unusually long for a Treaty settlement. However, these last decades are only a small fraction of a much larger history. The claim for the Whanganui River has been continually advocated for by Whanganui iwi for nearly 150 years. The current settlement, though well overdue, finally resolves the issue of the ownership of the Whanganui riverbed (but not the river itself) and acknowledges the right of Whanganui iwi to practice rangatiratanga over the Whanganui River.

The Settlement

The Whanganui River Treaty settlement, *Ruruku Whakatupua*, deals only with the Whanganui River. The rest of the claims of Whanganui iwi will be dealt with in a future settlement. The framework for the settlement was set out in 2011, in the *Record of Understanding*, which included key ideas for the next formal phase of negotiations, such as the recognition of the river as Te Awa Tupua, the appointment of River Trustees, and the use of co-management arrangements (Office of Treaty Settlements 2011: 7). In the following year, the high-level agreement, *Tūtohu Whakatupua*, was published. This confirmed the agreement that recognised the Whanganui River as Te

Awa Tupua, an indivisible entity (Office of Treaty Settlements 2012: 3). On August 5 2014, the *Deed of Settlement* was signed by the Crown and Whanganui iwi. The settlement has drawn from features of other freshwater settlements, including the Waikato River Treaty settlement's focus on the improvement of the health and wellbeing of the river and the co-management structure of both iwi and the Crown to achieve that goal (Te Aho 2014). *Ruruku Whakatupua* has been ratified by Whanganui iwi and the legislation is currently being drafted by the Office of Treaty Settlements.

The financial redress included in the settlement package will total \$80 million. One million dollars was paid in advance as a transitional fund and \$15 million of the \$80 million was transferred when the *Deed of Settlement* was signed in August 2014 (Te Aho 2014). The remaining \$65 million will be paid when the draft legislation is agreed to (Te Aho 2014). Ngā Tāngata Tiaki o Whanganui is the Post Settlement Governance Entity (PSGE) which has replaced the Whanganui River Māori Trust Board and will receive the financial redress on behalf of Whanganui iwi (Whanganui River Māori Trust Board 2014: 9). \$30 million of the \$65 million will be administered by co-management board Te Pou Tupua, which means 'the human face of the river', to develop the Te Awa Tupua strategy, which will be called *Te Heke Ngahuru ki Te Awa Tupua* (Office of Treaty Settlements 2014b: 35; Te Aho 2014). *Te Heke Ngahuru* will be created by Te Kōpuka nā Te Awa Tupua, a collaborative group of Whanganui iwi, other iwi with interests in the Whanganui River, local and central government, and other key stakeholders (Whanganui River Māori Trust Board 2014: 23). The financial redress in this settlement is important for the way it will enable Whanganui iwi to participate in the creation of the strategy and the key underlying principles and values which will guide the management of Te Awa Tupua and thus directly affect the health and wellbeing of the Whanganui River (Whanganui River Māori Trust Board 2014: 60).

There is also social and cultural redress in the *Ruruku Whakatupua* settlement. Under this new agreement Ngā Tāngata Tiaki o Whanganui will partner with the Ministry of Social Development, Ministry of Education, Te Puni Kōkiri, New Zealand Police and Department of Corrections to improve the government social services to the region (Whanganui River Māori Trust Board 2014: 59). The creation of *Te Heke Ngahuru* will allow the collaborative group of iwi and Crown members to identify and create a plan to address social, cultural, and wellbeing issues in relation to the Whanganui River (Te Aho 2014). The Crown and Whanganui iwi have agreed to work towards creating a new overarching relationship agreement, *Te Pākurukuru* (Whanganui River Māori Trust Board 2014: 52). "Te Pākurukuru" is a figurehead for a waka tētē. The term is used for the relationship agreement to signify that the relationship agreement will guide the Crown and Whanganui iwi 'as they navigate forward and work together to give effect to this settlement' (Office of Treaty Settlements 2014a: 38). The agreement recognises that the settlement is a 'beginning of a renewed and enduring relationship' with Te Awa Tupua at its centre (Office of Treaty Settlements 2014a: 38).

Changing approaches

The Whanganui iwi approach to the management of the river has changed over time, both in iwi organisation and how the iwi relates to the Crown. The Whanganui iwi approach evolved as colonialism gained a greater hold over New Zealand. They first petitioned directly to the Crown as kaitiaki, guardians of the river, and their protest against the degradation of the river caused by the Crown was articulated in terms of their mana and rangatiratanga over the Whanganui River. The iwi and the river are linked by 'ancestral ties' as the 'river can be described as a tupuna or matua as with a caring parent' (Waitangi Tribunal 1999: 38). As the Crown gained control of the river through legislation, Whanganui iwi turned to the Courts to assert their ownership rights, an argument that was based on English common law. They sought to prove that the iwi owned the river in 1840, even though the concept of ownership

in a Western sense did not exist in Māori worldview at that time (Mutu 2010: 26). Throughout the legal processes in the mid-twentieth century, the relationship between the Whanganui River and the iwi was discussed in terms of proprietary interests and rights, not mana or rangatiratanga. In fact, in the Māori Appellate Court in 1958, the Crown's counsel explicitly requested that 'any attempt to introduce matters of Maori mythology into a mundane matter' such as ownership should be discouraged (Waitangi Tribunal 1999: 226).

As the long legal battle over the ownership of the Whanganui River was unsuccessful for Whanganui iwi, they have used the last available avenue to raise these issues with the Crown, the Treaty settlement process. Within this process, the Crown is positioned as the authority with complete control over the river and Whanganui iwi have negotiated to establish an arrangement where they are involved in the management of the river (Waitangi Tribunal 1999: xviii). The Waitangi Tribunal acknowledged in their WAI 167 report that according to the Treaty, Whanganui iwi should own the river and the Crown should be negotiating to join the management of the river, not the other way around (Waitangi Tribunal 1999: xviii). The summary of settlement for ratification states that the Crown acknowledges the compromise and generosity of Whanganui iwi for negotiating with the Crown in this context (Whanganui River Māori Trust Board 2014: 50). Crown control over the New Zealand environment and the dominance of the Western worldview in how that environment is managed has been strengthened by legislation, court judgements and the practice of government departments since 1840. However, since the Māori "Renaissance" from the 1970s, which has included important protest action by Whanganui iwi, the Crown has succumbed to the pressure to acknowledge and attempt to rectify Māori grievances. Whanganui iwi have returned to the position of advocating for their own relationship with the Whanganui River based in tikanga to be recognised by the Crown. Their claim to the river has not been articulated in terms of ownership as it has been in the past, but

around the health and wellbeing of the river and the historical and ancestral ties it has to the health and wellbeing of the iwi. The Treaty settlements process has provided space for the perspective of Whanganui iwi to be articulated at a central governance level and included in the legislation.

The Crown attitude towards water has centred around divisibility and ownership. In the Crown's view, the water is divided from the riverbed and the banks. In the court cases and Royal Commission of the mid-twentieth century, only the ownership of the riverbeds was debated, with water excluded from the discussion. The Crown has ruled that no one can own water, 'since it was wild and untamed, freshwater was held to exist in this state of nature where property rights did not apply' (Salmond 2014). If water cannot be owned, then the Crown has the highest power over it in the allocation of use and management. A common approach for Western river management worldwide has been the view that the river is wasted if it is not utilised for the benefit of the human population, such as in the production of hydro-electricity (Shiva 2002: 79). Therefore, the recognition of the river as Te Awa Tupua, an indivisible and living whole, is a significant change for the Crown, as viewing the riverbeds and banks as one whole entity goes against the past Crown position on the separation of river property rights and it fits more within the Māori worldview instead. However, the water still remains separated from the land. Te Awa Tupua is also recognised by the Crown as a living being, incapable of being owned. This has side-stepped the re-emergence of the ownership debate. The Crown has not moved from its position against Whanganui iwi ownership, but it has conceded its own ownership of the riverbed, gained through the Coal-mines Amendment Act 1903, by vesting the ownership of the riverbed in the legal person, Te Awa Tupua.

While it is evident in *Ruruku Whakatupua* that the Crown has taken greater notice of the interests of Whanganui iwi in the ongoing management of the river, it has also maintained that the public non-Māori interest in the river cannot be

compromised. The *Whanganui River Settlement Ratification Booklet* includes the Crown acknowledgement of the national importance of the river and lists five arguments for the public good of the river: its scenic and conservation value, tourism, historical value as a steamship highway for settlers, its value for gravel extraction, and its value for electricity generation (Whanganui River Māori Trust Board 2014: 50). These last three, in particular, have been part of the cause of Whanganui iwi petitions and legal action against the Crown for the degradation of the river. The Crown has maintained ownership of the minerals in the Whanganui River under the Crown Minerals Act 1991 (Office of Treaty Settlements 2014b: 15). It has also retained part of the riverbed at the Tongariro Power Division under the 1981 Public Works Act for the purpose of electricity generation (Office of Treaty Settlements 2014b: 30). The agreement has been signalled by some as a balance between recognising the interests of Whanganui iwi while maintaining the rights of private landowners and Crown-owned land for the public interest (M2 Presswire 2012). The settlement recognises that the interest of Whanganui iwi is greater and different from that of the public (Whanganui River Māori Trust Board 2014: 54).

It was concluded by Sir Harold Johnston in the 1950 Royal Commission and the Waitangi Tribunal in 1999 that Whanganui iwi would have owned the river were it not for the Coal-mines Amendment Act 1903, which did not fairly and willingly relinquish the ownership from the iwi. However, the Treaty settlements do not fully rectify the grievances of the iwi but provide the best compromise for the current circumstances. Therefore, the settlement for the Whanganui River contains the compromise that the interests of the iwi are balanced by the interests of the New Zealand public in general.

Tikanga and te reo Māori

The use of te reo Māori throughout the Whanganui River Treaty settlement is striking and something not seen in past legislation. Both *Ruruku Whakatupua: Te*

Mana o te Awa Tupua and *Ruruku Whakatupua: Te Mana o te Iwi o Whanganui* settlement documents begin with the famous saying 'Ko au te awa, ko te awa ko au', which translates as 'I am the river and the river is me' (Office of Treaty Settlements 2014b: 1; 2014a: 1). The use of this saying shows that the underlying understanding of the river that the legislation is based on is that of Whanganui iwi, who view the river as a whole living being interconnected with the identity of the iwi. While many settlements in the past have included te reo Māori symbolically in the preamble, background and/or the historical account of the settlement, both *Ruruku Whakatupua* documents and the settlement document for ratification have each section structured around whakataukī (Jones 2013: 208). For example, the section on Te Karewao, the advisory group, in *Ruruku Whakatupua: Te Mana o te Awa Tupua*, begins with the whakataukī: 'Te rau whātoro, te whanaketanga mai i te Uma Tūānuku - The entwining vine springing from the bosom of Papatūānuku' (Office of Treaty Settlements 2014b: 10). It states that this whakataukī symbolises support, which is the primary function of Te Karewao - which means 'supplejack vine' (Office of Treaty Settlements 2014b: 10). In a later section dealing with the vesting of Crown-owned parts of the riverbed in Te Awa Tupua, the section begins with 'Whekere rā mau ai te tieke, matara, rawa - Where there is obscurity, one must begin to untangle the threads of confusion' (Office of Treaty Settlements 2014b: 29). The vesting of Crown-owned parts of the riverbed resolves the decades of confusion in varied court judgements about who owns the river, though not who owns the water. The use of te reo Māori and whakataukī in the bulk of the settlement documents implies that the worldview of Whanganui iwi has been central to the creation of this Treaty settlement.

The values that underpin the Whanganui River Treaty settlement are based on the worldview of Whanganui iwi. *Ruruku Whakatupua: Te Mana o te Awa Tupua* contains 'Tupua te Kawa', four values which form the 'natural law and value system of Te Awa Tupua' (Office of Treaty Settlements 2014b: 6). The first value is 'Ko te

Awa te mātāpuna o te ora - The River is the source of spiritual and physical sustenance'; the second is 'E rere kau mai te Awa nui mai te Kahui Maunga ki Tangaroa - The great River flows from the mountains to the sea'; thirdly, 'Ko au te awa, ko te awa ko au - I am the river and the river is me'; and finally, 'ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua - The small and large streams that flow into one another and form one river' (Office of Treaty Settlements 2014b: 7). These values define the Whanganui River as a whole entity intrinsically connected to Whanganui iwi, who have a responsibility to ensure the health and wellbeing of the river and to, in turn, ensure the same of the iwi (Office of Treaty Settlements 2014b: 7). The use of these values for Te Awa Tupua is important for the way it differs from Western thinking about the value of a river as a divisible resource to be used for public good. These 'Tupua te Kawa' values are not only symbolic but will shape *Te Heke Ngahuru* and how the river is managed by iwi, the Crown, and local government for the foreseeable future. Therefore, the way the values underpin the settlement will have an important future impact.

The way in which te reo Māori and Whanganui concepts are used in the Whanganui River Treaty settlement marks some significant progress in the Treaty settlements process, compared to those which have preceded it and in the context of Crown control. The Waikato River Agreement, for example, has been hugely influential for moving the Crown towards greater engagement with iwi values, particularly that of kaitiakitanga and rangatiratanga (Hall 2012: 125; Wevers 2013: 705, 09). However, Linda Te Aho has called other river settlements reached since 2009, including those relating to the Rangitaiki, Mōhaka, Waikari and Waihua Rivers, 'less bold' and states that they indicate that 'the Government is reining in its approach' (Te Aho 2010: 2). While there has been an increase in co-management arrangements in settlements, they still operate on Western governance models (Muru-Lanning 2012: 130). Therefore, basing *Ruruku Whakatupua* around Whanganui concepts and using te reo Māori indicates that the settlements represent the views of

both the Crown and Whanganui iwi. The inclusion of this iwi perspective in the operational parts of the settlement will have a meaningful effect on the iwi-Crown relationship that is born out of the settlement. The inclusion of the worldview of Whanganui iwi is an important precursor for allowing space for the iwi to practice their rangatiratanga over the river. It may also provide for a more durable relationship between iwi and Crown because the inclusion of both parties' perspective may forestall fresh injustices that could have been caused a continuation of the Crown's unequal power in the relationship.

Legal Personality

The way that the Whanganui River will be officially recognised as Te Awa Tupua, a living whole, is by the use of a legal personality. Legal personality is the name of the rights status that identifies the legal standing of an entity that has the 'rights, powers, duties and liabilities of a legal person' (Office of Treaty Settlements 2014b: 6). Its application to the Whanganui River is significant because it affords the river its own inalienable rights and protection, rather than continuing to enforce the Crown view that nature should be used for the public good. While the idea of a legal personality does not originate in the history of Whanganui iwi, it is able to account for their perspective of the river as a whole and indivisible being. In 1972, Christopher Stone first put forward the idea that the environment should be able to gain rights similar to a human, just as corporations, trusts and other 'inanimate right-holders' had already done (Stone 1972: 452). He argued that while it may seem jarring at first, it was a natural development of the extension of rights which had been occurring for over a century (Stone 1972: 452). While it had once seemed unthinkable to grant the rights of a legal person to women in the nineteenth century, for example, the concept has since become an accepted part of society and there is now no question that it is natural and normal for a woman to be considered a legal person (Stone 1972: 453). Therefore, it can be argued that while it may first seem

strange to have an item in nature with a legal personality, once implemented, society will soon see how necessary and useful it can be.

Environmental protection is a central benefit that Stone, and others, have identified in the application of a legal personality to a natural resource (Morris and Ruru 2010: 50; Stone 1972: 461). While legal action can currently be taken against a person or company for causing environmental degradation, the environment often does not benefit from such action, as money awarded goes to the plaintiff can choose whether or not to spend it on environmental reparation (Stone 1972: 461). However, when an aspect of the environment is a legal personality, courts must take an injury to the legal person into account and the relief gained must be used for the benefit of the legal person (Stone 1972: 458). Thus, the benefits of environmental protection that the legal personality can provide addresses both the interests of Whanganui iwi and the public interest in the health of the Whanganui River.

According to legal commentators in New Zealand, there is only one major case worldwide where the rights of a legal person have been extended to the environment and it occurred in 2008. The lack of interest from state governments for decades in Stone's argument for environmental legal personalities may be caused by the slow growth of concern for worldwide environmental degradation. The twenty-first century has seen greater interest and subsequent action taken against the global environmental crisis by state governments. Ecuador, a country which has suffered huge environmental destruction of the Amazon rainforest as a result of extractive mining, was the first country to apply a legal personality to the environment. In 2008, Ecuadorians voted to institute a new constitution which gave pachamama, their term for mother earth, legal rights to 'exist, flourish and evolve' (Charman 2008: 131). As Ecuador is the only other well-known example of the application of a legal personality to the environment, it is important to consider how this constitutional change has worked in practice.

There are important differences between this and the Whanganui River case which need to be noted. Ecuador has included in its constitution very general rights for the entire environment, whereas New Zealand will only adopt very specific rights on a case by case basis. So far in Ecuador, no one has brought a case for pachamama to the Ecuadorian courts (Good 2013: 38). Some critics claim this is due to the lack of definition about who has standing to bring such a case and on what grounds they are able to sue on behalf of pachamama (Whittemore 2011: 666). Stone argued that a guardianship approach, as opposed to a liberalised standing approach where any citizen can theoretically take a case to court as in Ecuador, is a better way to ensure that the legal personality has an effective voice as there is no uncertainty on who has standing (Stone 1972: 470). While the word "guardian" was removed from the definition of Te Pou Tupua in the last draft of *Ruruku Whakatupua* and was replaced with 'human face', it still follows the guardianship approach advocated by Stone (Salmond 2014). It is likely to have a better chance of ensuring the Whanganui River's rights are defended in court when necessary, as Te Pou Tupua's role as the Whanganui River's advocate has been clearly defined.

Another important difference to note in the Ecuadorian case is that the indigenous groups who were initially lobbying for such a change were overlooked by President Correa and the Ecuadorian central government throughout the process to the point where they had very little say in how the legal personality was embodied in the new constitution (Becker 2011: 58-9). The trouble that the indigenous groups had with the government in that case is indicative of the 'deep tensions inherent' in pursuing change at the constitutional level where they hold a small, unequal share of the power (Becker 2011: 47). Within a political system that has an exceptionally high turnover of leaders, Correa's election campaign focussed more on popularising the new constitution in a bid to gain the support of the majority, than the environmental importance of protecting pachamama (Whittemore 2011: 661). Thus, the 2008 constitution did not embody the indigenous groups'

interests, but they were not able to oppose it based on principle because they would then be siding with their conservative enemies and losing what they had worked towards (Becker 2011: 58-9). This situation has meant that the rights of pachamama were not implemented in a way that the indigenous groups had hoped for and they have very little power to actually defend the rights of pachamama through legal action (Becker 2011: 60). The case for the Whanganui River differs significantly because the claims of Whanganui iwi have been central in defining an appropriate outcome for the management of the river. While there are still issues in the unequal power of the Crown in creating the settlements and the importance of the public interest in determining solutions, the progress that the Whanganui River Treaty settlement has made in incorporating the perspective of Whanganui iwi has meant that the legal personality is implemented in a way that articulates the interests of the iwi.

The biggest challenge for the implementation of pachamama's legal personality rights in Ecuador is the government's economic reliance on Chinese mining corporations (Zuckerman 2015). When these two issues are at odds, Correa has prioritised political and economic concerns over environmental concerns (Whittemore 2011: 665). Ecuador is heavily dependent on financial lending from China, with a debt of \$25 billion in 2015 (Zuckerman 2015). In his re-election campaign in 2013, Correa used the catchphrase 'We can't be beggars sitting on a sack of gold', referring to the gold, copper, silver and platinum in the Cordillera del Condor rainforest (Clarke 2015). China is currently involved with many large-scale mining projects in Ecuador, despite indigenous resistance (Clarke 2015). The 2008 constitution was very unclear as to whether human rights or economic concerns would have more weight than pachamama's rights (Whittemore 2011: 670). So far, it would appear that economic concerns far outweigh other concerns for the central government, despite the huge ramifications of environmental destruction that Ecuador is facing. This issue is hugely relevant for the Whanganui River, as *Ruruku*

Whakatupua is also unclear about how a legal case between competing interests will fare in the Courts. *Ruruku Whakatupua* bridges the gap between private owners, public access and indigenous interests, but does not acknowledge the potential for these seemingly equal concerns to compete in a legal case. As there is no other known example of an environmental legal personality in the world, and no example at all of it working well, there are still many unknowns for the implementation of the Whanganui River's rights as a legal personality.

The legal personality of Te Awa Tupua

The Whanganui River will become Te Awa Tupua, 'a legal person in its own right', when the settlement is enacted in legislation (Whanganui River Māori Trust Board 2014: 31). *Ruruku Whakatupua* recognises the 'inextricable relationship' between the river and Whanganui iwi (Finlayson in Environmental News Service 2012). Just as corporations derive their legal personality from the people within the corporation, the legal personality of the Whanganui River is derived from Whanganui iwi members (Hutchison 2014: 180). There have been questions raised about whether the legal personality will have human rights, corporation rights, or 'river-specific' rights (Hutchison 2014: 182). A spokesperson for the Crown negotiators was quoted in 2012 as stating that the Whanganui River will be recognised as a person 'in the same way a company is, which will give it rights and interests' (Environmental News Service 2012). The two *Ruruku Whakatupua* settlement documents have not been clear on the exact nature of Te Awa Tupua's rights and this issue may be clarified when the settlement is enacted in legislation.

The concept of a legal personality represents the Whanganui iwi perspective of the Whanganui River as a living entity, yet the idea originated with an American academic in the 1970s. The ability of a Western notion to articulate a Māori view is worthy of analysis. The concept of a legal personality is underpinned by Western culture and it fits within the Western history of slowly extending the borders of what

counts as a legal person. It is therefore not too foreign a concept for the Crown to accept as part of a Treaty settlement. James Morris and Dr. Jacinta Ruru argue that the legal personality forms an 'exciting link between the Maori legal system and the state legal system' because it provides for 'the Maori legal concept of a personified natural world' (Morris and Ruru 2010: 50). While the use of legal personality rights in the settlement of Treaty claims is a new and innovative approach for the Crown and iwi, it is important that the concept draws on the history of both Western legal precedents and a Māori understanding of the environment. A Māori approach to future development is to 'walk... backwards into the future', meaning that past experiences and culture are used to work through new challenges, such as negotiating with the Crown, to create a mutually beneficial Treaty settlement (Carter 2010).

The application of a legal personality to the Whanganui River illustrates an important shift in the way the river is viewed by the Crown. As discussed, the Crown has long considered the environment as a divisible resource, valuable for what it can produce for people, whether that is minerals, electricity, navigation, scientific study, aesthetic beauty or leisure activities. Cormac Cullinan has argued that the type of rights that are held by a river depend on 'what we consider the essential nature of a river to be' (Cullinan 2003: 121). The lack of river rights in New Zealand before now is indicative of the dominant Western view that humans are 'at the top of the hierarchy, above the natural world and animals' (Hutchison 2014: 180). Because the concept of a legal person is a legal fiction, it can easily be applied to non-human entities; it really just depends on the values of the society as to what is seen as an entity and what is seen as property (Hutchison 2014: 179). In the case of the Whanganui River, it is the values of Whanganui iwi that have determined the use of the legal personality for the river as it is now viewed as a living entity (Hutchison 2014: 179). The river's mauri has been recognised (Morris and Ruru 2010: 50).

As the settlement's hearing and negotiation documents are not yet available to the public, it cannot be stated with certainty where the idea for vesting the Whanganui River with the rights of a legal person came from. The 1999 WAI 167 report recommended that the ownership of the river should be shared equally between the Crown and Whanganui iwi, not that it should be vested in the Whanganui River itself (Waitangi Tribunal 1999: 347). In 2010, Morris and Ruru wrote their article, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water', seemingly without precedent. They argued that New Zealand rivers should be given legal personality rights in the settlement of Treaty of Waitangi claims (Morris and Ruru 2010). Wherever the idea of using a legal personality for the Whanganui River originated, this article was likely an important influence. It was published a year before the 2011 *Record of Understanding in Relation to Whanganui River Settlement*, which was where the key ideas of the settlement were first formally published. The Crown was perhaps better positioned to accept the idea of a legal personality because of the precedent set by Te Rūnanga o Ngāi Tahu (TRONT) in their settlement negotiations in 1992. TRONT ensured that additional legislation was created for the iwi corporation, TRONT, to become a legal entity and gain 'rangatiratanga in its own chosen fashion' (Hill 2009: 260).

As a legal person, Te Awa Tupua is incapable of speaking for itself and so the settlement includes the appointment of Te Pou Tupua as its advocate. It operates in a co-management framework as one member is appointed by the Crown and the other member is appointed by Ngā Tāngata Tiaki o Whanganui. Te Pou Tupua will act like the river's trustees and exercise landowner responsibilities on behalf of Te Awa Tupua (Office of Treaty Settlements 2014a: 11). The two members will have equal standing and be appointed for a period of three years each (Office of Treaty Settlements 2014b: 12). Te Pou Tupua will receive \$200,000 per year from the Crown for twenty years to cover the cost of its functions (Office of Treaty Settlements 2014b:

14). The members of Te Pou Tupua will be supported by the three-member advisory group Te Karewao and the seventeen-member collaborative group, Te Kōpuka (Office of Treaty Settlements 2014b: 13, 23). These two groups have a diverse membership, with members appointed by Whanganui iwi, other iwi with interests in the Whanganui River, central government, local government, and Non-Government Organisations such as Fish and Game New Zealand and Genesis Energy (Office of Treaty Settlements 2014b: 23). Te Pou Tupua, Te Karewao and Te Kōpuka will work together towards effectively advocating the physical, ecological, spiritual and cultural rights of Te Awa Tupua and, despite their different interests, the health and wellbeing of Te Awa Tupua will be their central concern (Office of Treaty Settlements 2014a: 38).

Competing Interests

Due to the requirement for Te Awa Tupua to have the advocacy of Crown and Whanganui iwi members in Te Pou Tupua, Te Karewao and Te Kōpuka, the Crown will be a central part of the Whanganui River's governance for the foreseeable future. The context of the Crown's unequal power over the Treaty settlements means that co-management arrangements have been the best case scenario to date for iwi to practice their rangatiratanga in resource management. While co-management arrangements are currently considered innovative in the context of the unequal power relationship, there may still be developments in the future of Treaty settlements that will be considered innovative because they include more autonomous structures for iwi. However, for now, the guardianship approach used for the legal personality of the Whanganui River ensures that the Whanganui iwi member and Crown member will, on the face of it, have equal influence over the river. The interests of Whanganui iwi in the Whanganui River will be mediated by the Crown presence in Te Pou Tupua and thus, the Crown perspective will always have an important impact (Hardcastle 2014). Te Awa Tupua will also be fitted into

the pre-existing English legal system in New Zealand when it comes to enacting its rights. Therefore, while the definition of Te Awa Tupua as a legal personality expresses the view of Whanganui iwi, the application of its rights will be carried out within a Western context and the rangatiratanga of Whanganui iwi will be practiced within the limitations of the Western context.

Te Pou Tupua comprises of two equal members and so the enforcement of its rights is very dependent on two individuals who may have very different ideas on the best approach given their likely differing cultural backgrounds. The guardianship of a legal person is based on the assumption that the human guardians are 'capable of defining and defending' the best interests of Te Awa Tupua (Good 2013: 38). When a legal personality is applied to a corporation, those tasked with advocating for the interests of the corporation are ultimately representing themselves and the other humans that make up the corporation. Te Pou Tupua, however, represents the interests of the river as well as the people connected to it. As Te Awa Tupua's rights will be interpreted by humans, there is a chance that they may become subject to political agendas, particularly as some of the appointments to Te Pou Tupua, Te Karewao, and Te Kōpuka will be made by Crown Ministers (Good 2013: 38). Te Awa Tupua will also be subject to changing interests at a society-wide level. While the societal importance of environmental concerns is currently evident in New Zealand, other interests may take greater precedence in the future. Economic concerns, for instance, the national reliance on the dairy industry which is a cause of pollution in New Zealand waterways, may be prioritised over the health and wellbeing of Te Awa Tupua in the future, just as the reliance on mining has outweighed the protection of pachamama in Ecuador.

The difficult question that remains in regard to the legal person is how these new rights will fare against the pre-existing rights of competing parties. Given the Whanganui River's continued obligation to the public good and the private interests that are protected by the settlement, its rights may not be strong enough (Hutchison

2014: 182; Presswire 2014c). While the river will have rights similar to the legal personality of a corporation, it cannot be sued in the same way as a corporation can because it cannot be held accountable for its actions (for example, if there was flood damage caused by the river) (Hardcastle 2014). While Te Pou Tupua can sue on behalf of Te Awa Tupua, there is no precedent for how successful they might be. Ruru has analysed past court cases where Māori groups have tried to sue companies for the protection of the environment and the track record is not very positive (Ruru 2011). Of nineteen cases, there were only two clear wins for the Māori claimants (Ruru 2011). Te Pou Tupua will be in a better position than these claimants as the settlement legislation will confirm that they have standing to represent the health and wellbeing of Te Awa Tupua. While it is stated in *Ruruku Whakatupua: Te Mana o te Iwi o Whanganui* that Whanganui iwi will have a greater and separate interest in Te Awa Tupua than the public, it is unclear whether the rights of Te Awa Tupua can be enforced when they compete with the rights of private owners and companies with vested interests in the river (Office of Treaty Settlements 2014a: 42). Multi-national corporations could also become a powerful competing interest with the passage of the Trans-Pacific Partnership Agreement. These corporations will be able to sue the New Zealand government for creating legislation and regulations for the protection of the environment if it causes a loss of their anticipated profits (Joint Media Statement 2015). Without a clear precedent for the application of a legal personality to the environment and a host of national and international competing interests, it remains to be seen if the innovations in *Ruruku Whakatupua* will adequately provide for the protection of the Whanganui River and the rangatiratanga of Whanganui iwi.

Ownership

The use of the legal personality can be considered as a careful mediation between both Whanganui iwi and Crown notions of ownership. In the application of a legal personality 'ownership is excluded: one cannot own a natural person, and nor can one own a legal person' (Morris and Ruru 2010: 53). As has been noted,

Whanganui iwi have claimed ownership of the Whanganui River in the court cases of the twentieth century and the river was discussed in terms of property. In the WAI167 report, it was stated that at the time of these discussions 'Maori law was being reconstructed to fit an English framework' (Waitangi Tribunal 1999: 26). Thus, the sentiments expressed by Whanganui iwi claimants may not have reflected their personal worldview, but their political expediency to achieve the best results in the context of Crown control. While it has been argued that Article Two of Te Tiriti o Waitangi 'included ownership, use and control of waterways in their entirety', Professor Margaret Mutu has argued that the concept of ownership did not exist for Māori when the Treaty was signed (Mutu 2010: 30; Te Aho 2012: 106). The absence of the ownership argument in the settlement of the Whanganui River Treaty settlement has been a notable development, as it shows that Whanganui iwi can make claims against the Crown in their own worldview, which is then provided for in the *Deed of Settlement*.

The Whanganui riverbeds have been vested in Te Awa Tupua, thus reversing the acquisition of Crown ownership by the Coal-mines Amendment Act 1903. However, this transfer of ownership to the Te Awa Tupua does not resolve an issue which remains contentious; it 'does not resolve the issue of rights and interests in water' (Whanganui River Māori Trust Board 2014: 19). In Morris and Ruru's article on the use of legal personality for New Zealand rivers, they had intended the water to be vested in the legal person, along with the riverbeds (Morris and Ruru 2010: 56). The Crown maintains the view that water cannot be owned, a view which is based on British common law, particularly the doctrine of *publici juris* which states that water is 'common to all who have access to it' (Ruru 2009a: 221-2). This view was reaffirmed by the National-led government in response to a Waitangi Tribunal Claim by the Māori Council which attempted to halt the government sale of State Owned Enterprises (SOE), such as Mighty River Power in 2012 (Salmond 2014). The resolution of the water ownership issue has been sought through the WAI 2358

National Fresh Water and Geothermal Resources Claim. The stage one report on the claim was published in 2012, with the stage two inquiry delayed by the Crown until February 2016 (Isaac 2015: 1). The stage one report concluded that the sale of SOE's should be halted until a national hui has been held between Māori groups and the Crown to determine the best resolution of Māori interests in water, such as the allotment of shares in SOE's to relevant Māori groups (Waitangi Tribunal 2012: 143).

Ownership of water remains very uncertain at this stage, as the doctrine of *publici juris* does not allow for it, but the common law doctrine of native title may and is arguably supported by Article Two of Te Tiriti o Waitangi (Ruru 2009b: 7). The WAI 167 report also stated that because Whanganui iwi viewed the Whanganui River as a whole, water included, they rightfully possessed the water as well as the riverbed (Waitangi Tribunal 1999: 50). There are further limitations on the ownership of Te Awa Tupua. *Ruruku Whakatupua: Te Mana o te Awa Tupua* states that the vesting of the riverbeds excludes legal roads, existing structures, land held under the Public Works Act, the bed within the marine and coastal area, and private property (Office of Treaty Settlements 2014b: 29-31). Therefore, while the legal person of Te Awa Tupua is legally recognised as a living whole, it has still remained somewhat separated. There is certainly progress apparent in the use of the legal personality rights, but it is limited by the balancing act between the interests of Whanganui iwi and public interest, and between native title and common law.

Conclusion

While there have been many arguments made in the past that ownership is required for the practice of rangatiratanga, it now can be argued that legal personality rights go some way to provide for the practice of rangatiratanga. If rangatiratanga is considered to be autonomy, then there is perhaps a greater provision for it in being able to relate to the river in a way that is consistent with one's worldview, rather than acting within Western definitions of property

ownership. *Ruruku Whakatupua* notably includes statements on water ownership, something not often seen in settlement documents (Office of Treaty Settlements 2014b: 45). Alongside the Crown's reiteration that water cannot be owned, a Whanganui iwi statement is included, confirming that its relationship with the river is not viewed in terms of ownership, but they have rights and responsibilities towards the Whanganui River, which are similar to an owner's responsibilities (Office of Treaty Settlements 2014b: 45; Te Aho 2014). The practice of these responsibilities can be characterised as kaitiakitanga and by the definition of Whanganui iwi, does not require ownership of the river. Freshwater settlements have a focus on 'enhanc[ing] the ability of Māori to have a stronger voice within resource management planning processes, which are usually for the purpose of restoring sources of physical and spiritual well-being' (Te Aho 2012: 102). The settlement has avoided the contentious issue of ownership and has instead focussed on an issue both parties can work towards, recognising the mana of Te Awa Tupua (Presswire 2012).

Chapter Three: Te Urewera Treaty Settlement

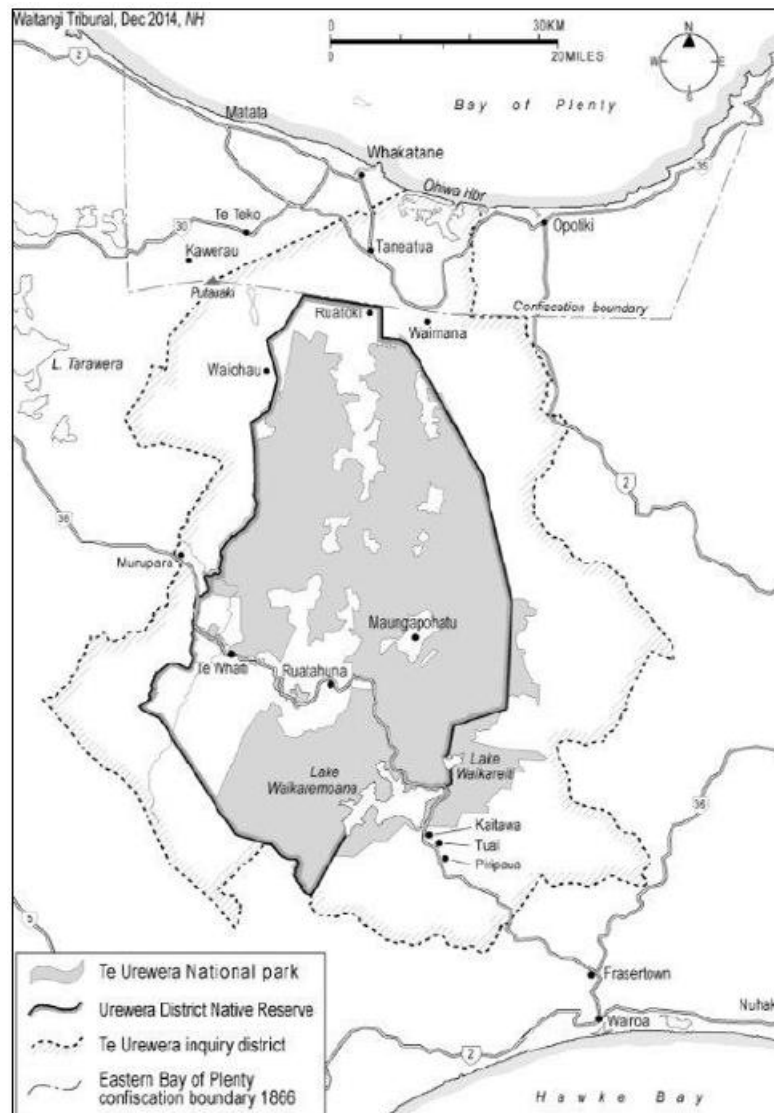
The Tūhoe Claims Settlement Act and the Te Urewera Act came into effect in 2014 as a result of the Tūhoe Treaty settlement. The focus of this chapter is on the Te Urewera Act, as the innovations studied in this thesis are mostly contained within this Act. The road to legislation has been difficult for Tūhoe, with many compromises made. The settlement is a "negotiated compromise", like all settlements, and one that Tūhoe appears satisfied with. The settlement legislation contains the innovation, following the example of the Whanganui River Treaty settlement, of Te Urewera gaining the rights of a legal personality. As the Te Urewera Act has been legislated first of the two, Te Urewera is the first non-human or corporate entity to become a legal person in New Zealand, but it is the second example of this innovation in Treaty settlement negotiations. Another innovative feature of the Te Urewera Act that will be focussed on is the co-management structure which provides for a Tūhoe majority from 2018. This chapter will analyse how the practice of Tūhoe rangatiratanga, especially in relation to their long history of defending their autonomy, has been provided for in the co-management arrangement over Te Urewera.

Nā Toi rāua ko Pōtiki te whenua, nā Tūhoe te mana me te rangatiratanga.

The land comes from Toi and Pōtiki. The power and prestige comes from Tūhoe.

(Binney 2009: 23)

Te Urewera Location Map



(Waitangi Tribunal 2014: 358)

Origins

The Waitangi Tribunal hearings drew many contesting histories of the early occupants of Te Urewera and these tūpuna have varying levels of importance to different hapū (Waitangi Tribunal 2009: 24). The peoples of Te Urewera have complex and interconnected whakapapa and a full account is not attempted in this thesis (Binney 2009: 24-25). Te Urewera is the maunga which is the heart of the fish of Māui, the North Island (Te Urewera Act 2014: 8). Tūhoe have rangatiratanga over Te Urewera due to their descent from both Toi and Tūhoe-Pōtiki, the original inhabitants and new settlers, as the above whakataukī demonstrates (T. R. Williams 2010: 27).

According to the findings of the Waitangi Tribunal, which is based on claimant evidence, the original inhabitants of Te Urewera were Te Tini o Toi, the descendants of Toi (Waitangi Tribunal 2009: 21). Distinctive groups formed near Te Urewera, including Ngāi Tūranga, Te Mārangaranga, Te Hapuoneone, Ngā Pōtiki, and Ngāi Tauira (Waitangi Tribunal 2009: 22-24; T. R. Williams 2010: 28). Ngā Pōtiki and its eponymous ancestor Potiki-Tiketike (Potiki I) is said to be born of the union between Te Maunga, the mountain, and Hine-Pukohurangi, the mist, and thus born of the land at Te Urewera (Waitangi Tribunal 2009: 23). When the Mataatua waka arrived in the Bay of Plenty, the rangatira Toroa and his tohunga wairua brother Tāneatua established links with these original inhabitants of Te Urewera (Waitangi Tribunal 2009: 24; T. R. Williams 2010: 28). Tāneatua married Hinemataroa of Ngā Pōtiki and Te Tini o Toi. Their daughter, Paewhiti, then went on to marry Tamatea-ki-te-huarahi, who was the grandson of Toroa (Binney 2009: 22; T. R. Williams 2010: 28). Their three sons; Ueimua, Tānemoeahi and Tūhoe-Pōtiki were descendants of both the original inhabitants and the Mataamua settlers (Binney 2009: 22; T. R. Williams 2010: 28).

Te Rangimārie Williams, Wellington academic and lawyer, has given an account of the history of Te Urewera and the origin of Tūhoe's mana motuhake, which has been a central concern in their negotiations with the Crown (T. R. Williams 2010). She states that it originates from a dispute between the brothers Tūhoe-Pōtiki and Ueimua (T. R. Williams 2010: 28). As indicated by his name, Tūhoe-Pōtiki was the youngest child. He contested his older brother's authority and to secure the leadership he killed Ueimua and ate his heart, literally consuming his mana as rangatira (T. R. Williams 2010: 28). Tūhoe-Pōtiki gained mana motuhake and the drive for independence and sovereignty was inherited by the generations of his Tūhoe descendants (T. R. Williams 2010: 28).

History

Tūhoe and the Crown have had a contentious history. The Treaty of Waitangi was not taken into Te Urewera and so no representative of Tūhoe signed it in 1840. Tūhoe had little sustained contact with the Crown until the New Zealand Wars of the 1860s. Part of Tūhoe land at Te Urewera was included in the 1866-7 confiscation of a Bay of Plenty block under the 1863 New Zealand Settlements Act (Binney 2009: 101). Tūhoe began to resist the confiscation of their Northern land and, in 1867, adopted their first aukati, a defensive line around their lands over which access was forbidden (Binney 2009: 112-3). This was the origin of Tūhoe's rohe pōtae, the land of Te Urewera which was protected by an encircling boundary. The line was not a declaration of war, which the Crown understood, but Tūhoe defended it with guerrilla warfare tactics (Binney 2009: 113).

Military fighting broke out between the Crown and Tūhoe over Te Kooti Arikirangi Te Tūruki, the leader of the Ringatū faith. Te Kooti was imprisoned without trial on the Chatham Islands in 1866 and, following his escape in 1868, he was provided with shelter in Te Urewera in 1869 (Binney 2009: 138-9). In the Crown's view, the provision of aid to Te Kooti was a rebellion against the Crown

and they sent armed forces to ruthlessly carry out scorched earth tactics against Tūhoe, which resulted in the widespread starvation and death of Tūhoe people (Binney 2009: 148-52; O'Malley 2014). Tūhoe and the Crown reached a peace agreement in 1871, where Tūhoe would hand over Te Kooti (though Te Kooti escaped to Waikato instead) in exchange for the Crown's recognition of Tūhoe autonomy (O'Malley 2014). Tūhoe reinstated their aukati 'as the basis for sustained peace' (Binney 2009: 163). The second part of the Waitangi Tribunal's WAI 894 report states that the Crown denies any official recognition of Tūhoe autonomy at that stage (Waitangi Tribunal 2010: 251). The subject of Tūhoe's autonomy was an ongoing feature of the Crown-Tūhoe relationship thereafter though each party did not have the same interpretation or intentions for the practice of this autonomy.

As a result of the 1871 peace agreement, the rūnanga called Te Whitu Tekau (The Seventy) was created and this organisation represented Tūhoe and their ongoing battle for the recognition of their autonomy with the Crown for the next few decades (Waitangi Tribunal 2010: 259). By the 1890s, Tūhoe's rohe pōtae was completely encircled by Crown land or land that was in the process of being bought or confiscated by the Crown (O'Malley 2014). Disputes over the surveys of this land on the border of Te Urewera served as a catalyst for a legislated Crown-Tūhoe agreement (O'Malley 2014). The 1896 Urewera District Native Reserve Act (UDNRA) is hugely important in the history of Crown-Tūhoe relations and for Tūhoe autonomy though there have been differing accounts of its significance. On the one hand, Associate Professor Danny Keenan, along with others, states that UDNRA was simply a means to open Te Urewera 'to the ever-expanding process of colonisation' (Keenan 2008: 82). Dame Judith Binney, on the other hand, has argued in her extensive history of Te Urewera, *Encircled Lands*, that while the opening of Te Urewera to the Crown was the result, the original intention of Richard Seddon's government was to provide for the self-governance of Tūhoe (Binney 2009: 398). Seddon stated at the time that it was 'much better to have a reserve such as this

made now, with the sanction and approval of our Parliament, with the mana of the Queen admitted freely and without the slightest reservation' than for Tūhoe's de facto autonomy to continue (Binney 2009: 404). There is likely truth to both Keenan and Binney's interpretations. In going some way to recognising Tūhoe autonomy (and in doing so bringing it within the context of Crown sovereignty), the Crown was able to bring Te Urewera within the Native Land Court system and within the Crown's grasp.

Whatever the original Crown intention for Tūhoe autonomy, important changes were made to UDNRA during the legislative process, but not all were carried out with Tūhoe's knowledge, consultation or permission (Binney 2009: 392; Blumhardt 2012: 268). Hone Heke Ngapua, who represented Northern Māori in the House of Representatives at the time, observed that the power retained by the Crown would make the Act a 'sham' and attempted, unsuccessfully, to include an amendment that would guarantee Tūhoe's Article Two Treaty rights (Binney 2009: 402). Tūhoe were not even mentioned in the final wording of UDNRA and therefore, the Act was too vague for Tūhoe to use to press for the establishment of their self-governance in the way they saw fit (T. R. Williams 2010: 66). Despite the failure of UDNRA, the original Crown assurance of official provision for Tūhoe self-governance remains important today and has had an impact on the Te Urewera Treaty settlement.

Tūhoe autonomy is a necessary consideration when analysing their settlement due to the official recognition of their autonomy in UDNRA, an agreement unique to Tūhoe. The relationship between the Crown and Tūhoe is based both on UDNRA and the Treaty of Waitangi. Even though Tūhoe were not given the opportunity to sign the Treaty of Waitangi in 1840, the Crown's responsibilities in the Treaty were written to apply to Māori as a whole population. Brookfield has stated that the acquisition of Crown sovereignty occurred not in the signing of the Treaty, but in its subsequent declarations of sovereignty in May and June 1840, which applied to the

North and South Island respectively and all of the inhabitants of each (Brookfield 2006: 105). In signing the Treaty, the Crown acknowledged the rangatiratanga of Tūhoe. In the hui surrounding the creation of UDNRA, Tūhoe leaders formally acknowledged the Crown's government and thus the Waitangi Tribunal argues they entered into a Treaty relationship (Waitangi Tribunal 2010: 468). The Crown stated in their WAI 894 submissions that UDNRA had no constitutional significance and did not alter Crown sovereignty in any way, but they did concede that UDNRA was 'an important symbolic affirmation of a new relationship with the government' (Waitangi Tribunal 2010: 467). This is certainly evidenced by the fact that Tūhoe have engaged in a Treaty settlement process based on the Treaty relationship. Therefore, both the Treaty relationship, with its guarantee of Māori rangatiratanga in exchange for an acceptance of Crown kāwanatanga, and UDNRA, with its guarantee of Tūhoe autonomy within the bounds of Crown kāwanatanga, have an important impact on the Te Urewera Treaty settlement.

The Crown came to possess much of Te Urewera through UDNRA by forcing Tūhoe into debt to pay for the extensive land surveys for the original purpose of providing hapū titles to blocks of land though they were never completed (Binney 2009: 418). After three amendments in 1900, 1909 and 1910, UDNRA was officially abolished in 1922 by the Urewera Lands Act and so ended 'the "experiment" in tribal self-government' (Binney 2009: 602). The Urewera Lands Act allowed the Crown into the heart of Te Urewera as it acquired Waikaremoana land for forest preservation and hydro-electricity (Binney 2009: 602-3). By 1927, the Crown had acquired two-thirds of the land that had been protected under UDNRA (Binney 2009: 603). The Crown came to own the entirety of Te Urewera through the 1954 Te Urewera National Park Act (Ruru 2014). The creation of national parks in New Zealand follows a national movement from considering the area for the resources it provides, to romanticising it for its untouched natural beauty (Castagna 2005: 99). The colonial rhetoric in this latter case deliberately silenced the centuries of Tūhoe occupation.

The 1976 Management Plan for the Urewera National Park is an important document to consider for how Te Urewera was defined by the Crown for the general public (Castagna 2005: 99). Not only were Tūhoe silenced, but the Crown's slow acquisition of Te Urewera was forgotten and Tūhoe is only mentioned as part of a distant past, despite the fact that many Tūhoe people still occupied Te Urewera (Castagna 2005: 103). In 1999, the Department of Conservation (DoC) took over the management of the National Park and when the Management Plan was rewritten in 2001, it was required to include mention of the relationship with Māori and the Treaty of Waitangi (Castagna 2005: 111). However, Western preservationist ideologies still underpinned the document and only lip-service was paid to Tūhoe while the New Zealand public remained ignorant of the history of the Te Urewera National Park and important issues that remained unresolved (Castagna 2005: 111).

The settlement

Twenty-nine of the Tūhoe claims lodged with the Waitangi Tribunal were settled in the *Deed of Settlement* (Office of Treaty Settlements 2014a: 15-16). The Tribunal began hearings for the claim in 2002 and closing submissions were received in 2005 (Waitangi Tribunal 2009: 6). The WAI 894 report was produced in five sections and published between 2009 and 2014. The organisation mandated to represent Tūhoe in negotiations was Te Kotahi ā Tūhoe (T. R. Williams 2012). The first round of negotiations with the Crown began in 2008, before the publication of the Waitangi Tribunal report (T. R. Williams 2012). In these negotiations, Te Kotahi ā Tūhoe was very clear about Tūhoe's intention to both own and manage the Te Urewera National Park (Herald 2010). Te Kotahi ā Tūhoe negotiated for Tūhoe to manage the park in partnership with the Crown for ten years (Herald 2010). After this initial period, the agreement would be reconsidered and either extended or terminated with Tūhoe fully taking over the management (Herald 2010). The *Deed of Settlement* that was prepared in 2009 contained an ownership and co-management arrangement for Te Urewera National Park and \$130 million in financial redress.

However, before it could be signed, Prime Minister John Key intervened and completely removed both the ownership and co-management of Te Urewera National Park from the settlement, because the idea of Tūhoe ownership of Te Urewera was not well supported by the Cabinet, perhaps due to the widespread concern for public access to the park (Higgins 2014; Tahana 2011). Tūhoe rejected this first *Deed of Settlement* because ownership of Te Urewera was their bottom line (McGarvey in T. R. Williams 2010: 31). This was a hugely significant decision, particularly because many people of Tūhoe were living in poverty as a result of Crown alienation of land and resources. Following this upset in the Crown-Tūhoe relationship, the parties signed a relationship agreement in 2011, called *Nā Kōrero Ranatira ā Tūhoe me Te Karauna*, to get negotiations back on track and led towards a second *Deed of Settlement* in 2013 (Higgins 2014). While Tūhoe did not gain ownership of Te Urewera in the 2014 Te Urewera Act, the application of a legal personality may have been considered by Tūhoe to be a good compromise, as the Crown did not retain ownership of Te Urewera either.

Te Kotahi ā Tūhoe accepted the Crown offer to settle the historic claims in September 2012 (T. R. Williams 2012). The second *Deed of Settlement* was signed in 2013. In 2014, the settlement was divided into two pieces of legislation, the Te Urewera Act and the Tūhoe Claims Settlement Act. The Tūhoe Claims Settlement Act contains financial, commercial, and cultural redress, as well as the Crown apology (T. R. Williams 2012). The Tūhoe Post Settlement Governance Entity (PSGE), Te Uru Taumatua, was established and received \$170 million in financial redress, including the value already transferred in 2008 under the Central North Island Settlement (Office of Treaty Settlements 2014c: 3). Tūhoe have gained the right of first refusal on the sale of Crown lands until the year 2186, as well as the opportunity to buy five Crown properties (Office of Treaty Settlements 2014c: 3).

Within the cultural redress, seven significant sites were transferred to Tūhoe; Onīnī, Waikokopu, Te Tii, Ngā Tī Whakaaweawe and Kōhanga Tāheke (Tūhoe

Claims Settlement Act 2014: 32-5). Tūhoe also has an 'area of interest' formally acknowledged by the Crown that extends beyond the current borders of Te Urewera (Office of Treaty Settlements 2014c: 3). Six place names have been changed to Tūhoe's preferred spelling (Office of Treaty Settlements 2014c: 3). As part of the cultural redress package, Tūhoe have also gained the right to appoint one member of the Rangitaiki River Forum (Office of Treaty Settlements 2014c: 3). There are four main items for which the Crown has acknowledged and apologised: indiscriminate warfare and raupatu, the denial of self-governance under UNDRA, the exclusion of Tūhoe from the management of Te Urewera National Park, and treating Lake Waikaremoana like Crown property (Office of Treaty Settlements 2014c: 2). These features of the Tūhoe Claims Settlement Act are common to many previous settlements. It is the Te Urewera Act which contains innovations relevant to this thesis.

Te Urewera Act

The Te Urewera Act will be the primary focus of this chapter, as within this legislation Te Urewera has gained its own legal personality and the structure of the co-management board, the Te Urewera Board, has been defined. The Minister for Treaty of Waitangi Negotiations, Christopher Finlayson, has stated that the Te Urewera Act recognises that 'Te Urewera is treasured by Tūhoe people and by the nation as a whole' (Presswire 2014a). Thus, the settlement may have gone some way in the resolution of the ongoing tension between Tūhoe and Crown intentions for Te Urewera. The Crown has maintained public access to Te Urewera while Tūhoe have gained a significant share of decision-making power and, therefore, may be able to practice their rangatiratanga over their close connection with it. The Te Urewera Act amends the 1980 National Parks Act to remove its inclusion of Te Urewera (Te Urewera Act 2014: 17). Te Urewera as a legal person still meets the criteria of a Category II Protected Area (the same level as a National Park) of the International Union for Conservation of Nature (M2 Presswire 2014b). As with the

Whanganui River, Te Urewera will have human advocates with legal standing to ensure Te Urewera's newly acquired legal rights are acted upon. The Te Urewera Board is a board of eight people, half appointed by the Crown and half appointed by Te Uru Taumatua (Te Urewera Act 2014: 21). It is the co-management of Te Urewera that is the main innovative feature of the Te Urewera Act. Despite the mix of Crown and Tūhoe members on the Te Urewera Board, it will always aim to resolve issues with unanimous decisions (Office of Treaty Settlements 2014c: 2).

While co-management arrangements have become an increasingly common feature of settlements over natural resources, the Te Urewera Board differs significantly from the co-management boards of the Waikato River and Whanganui River Treaty settlements. In 2018, the Te Urewera Board will increase in membership from eight to nine members in total. Tūhoe will gain the majority with the appointment of six members and the Minister of Conservation and the Minister for Treaty of Waitangi Negotiations will jointly appoint the other three members (Te Urewera Act 2014: 21). The decision for the appointments will be based on the 'mana, standing in the community, skills, knowledge, or experience' of the members (Te Urewera Act 2014: 21). The Te Urewera Board will fulfil the landowner obligations for Te Urewera and produce a ten-year management plan (Te Urewera Act 2014: 18-9).

The plan to change to an iwi majority in 2018 for the co-management of a resource is a first for Treaty settlements and is perhaps indicative of further potential in future settlements to provide for rangatiratanga of iwi through a majority share of the power. Rawinia Higgins, who was a trustee of the Te Kotahi ā Tūhoe negotiating group, has argued that co-management with the Crown does not allow for the expression of Tūhoe's mana motuhake, their autonomy (Higgins 2010). She stated that co-management of Te Urewera was not a favourable option for Tūhoe as they had opted to work with the Crown in the creation of UDNRA, but the 'compromise left Tūhoe wounded' (Higgins 2010). However, Higgins noted that their settlement

can only be considered against the 'specific context' of the time (Higgins 2010). Tūhoe would need to consider at what cost would they settle their claim in the current context, which would not allow for the transfer of ownership of Te Urewera to Tūhoe (Higgins 2010). While still a compromise for Tūhoe, the provision for a Tūhoe majority after 2018 is as far as the Crown has ever gone in providing for iwi autonomy, whether in terms of rangatiratanga or mana motuhake. UDNRA may have set an important precedent for this settlement, as the Crown had officially acknowledged Tūhoe autonomy in the past though forestalled it from being practiced following the 1896 legislation. There is no reference in the Te Urewera Act of the Te Urewera Board structure changing beyond 2018 and so it can be assumed that the Crown will have appointed members on the Board for the foreseeable future. Therefore, while not allowing for full Tūhoe autonomy, the co-management arrangement for the Te Urewera Board is a promising development in the current context.

The Tūhoe Treaty settlement has seen the historically adversarial relationship between Tūhoe and the Crown develop into a working relationship to create a settlement that both parties appear satisfied with. In July 2015, a post-settlement agreement was made between Tūhoe and the DoC. The DoC employees working in Te Urewera have been seconded to Te Uru Taumatua (Akuhata 2015: 1). Mike Slater, the deputy director of general conservation services for DoC, said 'the agreement would facilitate a true partnership where resources, costs and decision-making would be shared' (Akuhata 2015: 1). The agreement is being reported as 'an outcome of the new and growing relationship' between the Crown and Tūhoe (Akuhata 2015: 1). Higgins asked in 2010 whether the owners or the trespassers would remain in Te Urewera when the settlement was complete (Higgins 2010). Due to the co-management arrangement, both will remain for the foreseeable future. Perhaps the secondment of DoC workers to Tūhoe would help to resolve the historical hostility between these two groups.

Tūhoetanga, mana motuhake, and rangatiratanga

This thesis deals with the way in which rangatiratanga is provided for in current Treaty settlements. A concept that is closely related to rangatiratanga but perhaps more fitting to discuss for Tūhoe's settlement is mana motuhake. Mana motuhake exists throughout Māoridom and is commonly translated as autonomy or independence (Higgins 2014). As Tūhoe articulate their mana motuhake strongly and the concept is tied to their Tūhoetanga, it is, therefore, an important consideration for analysing whether the Te Urewera Act is innovative in the way it has recognised and provided for this. Patrick McGarvey, a trustee of Te Uru Taumatua, has stated that mana motuhake is 'only exercised when one is able to practice Tūhoe tikanga, Tūhoe reo, and express one's Tūhoe identity' (McGarvey (interview) in T. R. Williams 2010: 23). Mana motuhake also involves a resistance to hegemony and a belief in 'the separateness of power. There is no need for the power to depend on anything else to validate itself; one is in control of one's own affairs and one's own destiny' (T. R. Williams 2010: 20, 23).

Tāmati Kruger, who was Te Kotahi ā Tūhoe's chief negotiator and is now chairman of the Te Urewera Board, has stated in an interview that mana motuhake is the reason why Tūhoe have retained their Tūhoetanga over the decades of contact with the Crown (Kruger (interview) in T. R. Williams 2010: 22). Retention of their culture has been a central priority and, therefore, Tūhoe have economically disadvantaged themselves as the alternative would put Tūhoetanga at risk (Kruger (interview) in T. R. Williams 2010: 22). Kruger states that Tūhoe 'have rejected the view [that] a temporary place of safety is better than resistance' (Kruger (interview) in T. R. Williams 2010: 22). With this in mind, it can be easily understood why Tūhoe could not accept the 2009 *Deed of Settlement* offer without Te Urewera because mana

motuhake is more important than economic advancement and Te Urewera is central to Tūhoetanga.

The concepts of rangatiratanga and mana motuhake have an interconnected relationship. Sometimes the terms are used interchangeably to mean self-determination, but Williams' research has shown the subtle differences between the concepts are quite significant for their application to Crown legislation (T. R. Williams 2010). As discussed, tino rangatiratanga was guaranteed to Māori in Article Two of Te Tiriti o Waitangi. However, Williams notes that mana motuhake cannot be guaranteed by the Crown in the same way because mana motuhake is the ability to control one's own destiny completely beyond outside power (T. R. Williams 2010: 20, 22). Kruger has argued that rangatiratanga is the desired state of independence while mana motuhake 'is the driving force behind our struggle to achieve that state' (Kruger (interview) in T. R. Williams 2012: 25). Williams was doubtful in 2010 that mana motuhake would be recognised by the Crown in the Tūhoe Treaty settlement (T.R. Williams 2010: 32). She argued that ensuring mana motuhake would be up to Tūhoe and the re-education from older to younger generations so that they could, in the future, re-open the mana motuhake dialogue with a more open-minded future government (T. R. Williams 2010: 32). To provide for mana motuhake in a Treaty settlement, the legislation would need to ensure that Tūhoe had full control of their decision-making, without being restricted by Crown power, which does not appear likely in current circumstances.

For mana motuhake and, therefore, the practice of rangatiratanga to be provided for in law, the settlement would also need to recognise and provide for the practice of Tūhoetanga. The Te Urewera Act is innovative for the importance that has been placed on Tūhoetanga, as the Crown has gone further than previously seen in recognising the specific history and identity of the iwi. The Te Urewera Board is required to give expression to Tūhoetanga and Tūhoe concepts of management 'such as rāhui, tapu me noa, mana me mauri, and tohu' (Ruru 2014). If one of the central

tenets of mana motuhake is the ability to practice Tūhoetanga, the settlement then goes some way to provide for mana motuhake within the law. Williams has argued that the practice of mana motuhake does not preclude the involvement of the Crown, so long as the Crown is included in order to 'further Tūhoe aspirations for mana motuhake' (T. R. Williams 2010: 72). This would include steps towards autonomy and full management of their own affairs, as that is Tūhoe's 'natural condition and aspiration' (Stephens 2014). While there is no indication in the Te Urewera Act that any further steps will be taken towards Tūhoe autonomy in the governance of Te Urewera, the change to a Tūhoe majority in 2018 will still be significant as the Tūhoe members will be able to further ensure that Te Urewera is managed according to Tūhoetanga.

Mana motuhake redress

Mana motuhake was acknowledged in the apology section of the 2014 Tūhoe Claims Settlement Act though it was not mentioned in the Te Urewera Act. The mana motuhake redress was a unique and innovative feature of the 2013 *Deed of Settlement* (Stephens 2014). Minister Finlayson has been quoted in July 2014 stating that mana motuhake redress would allow Tūhoe to 'take a leadership role in delivering social services in their rohe' (Presswire 2014b). However, later in the same month, the Tūhoe Claims Settlement Act and Te Urewera Act were released with no mention of mana motuhake redress. A striking difference between the 2013 *Deed of Settlement* and the Acts is the removal of the main feature of this redress, the Service Management Plan (SMP) (Stephens 2014). The *Deed of Settlement* states that by the ethos of mana motuhake, Tūhoe 'will pursue and enhance the autonomy of its people and its homeland, deciding how they will develop, including in respect of health, education, infrastructure, employment, capability and leadership' (Office of Treaty Settlements 2013: 153). The SMP was based on the principle of Crown acknowledgement of mana motuhake, the use of shared knowledge to work as equal partners with a spirit of good faith (Stephens 2014).

Māmari Stephens has argued that the administration of social policy is a place where the inherent tension between Te Tiriti o Waitangi Article Two rights to tino rangatiratanga and Treaty of Waitangi Article Three equal citizenship rights are apparent (Stephens 2014). Social laws are intended to be universally applied to New Zealand citizens, however, the practice of rangatiratanga requires iwi to have greater control over their members' health and development (Stephens 2014). While the SMP may have allowed for the practice of Tūhoe's mana motuhake, Stephens argues that only the Crown has the adequate resources to ensure that Māori 'achieve social equality with other New Zealanders' and is required to do so by Article Three of the Treaty (Stephens 2014). The absence of mana motuhake redress in the final legislation has impacted the ability of the settlement to provide for the practice of Tūhoe mana motuhake and rangatiratanga. There have been no public statements from either side on this removal and as the negotiations are carried out in the strictest confidence the documents that may account for the change have not been released.

There have been separate negotiations between Te Uru Taumatua and the Crown over the provision of social services. In November 2015, Kruger made a public statement 'declaring war on dependency' (Whakatane News 2015). Te Uru Taumatua is negotiating to take over the \$55 million a year welfare payments to Tūhoe beneficiaries (Whakatane News 2015). The proposal is currently being researched by government advisors (Whakatane News 2015). An arrangement such as this would provide for the practice of Tūhoe mana motuhake as the role of the Crown in the welfare of Tūhoe members would be dramatically reduced and also ensure that Tūhoe is not financially disadvantaged in providing the services that the government would normally provide for all citizens.

Post-settlement governance

The establishment of Te Uru Taumatua was a Crown requirement for the settlement assets to be transferred to Tūhoe. This requirement has caused some critics of the settlement process to question whether rangatiratanga can be practiced by an organisation which must fit within English legal structures (Higgins 2010; Joseph 2012). Higgins argued that these structures 'do not provide iwi with the agency to create structures that are uniquely Māori beyond the bounds of the law' (Higgins 2010). She also states that PSGEs, in general, are structured in a way to emphasise their economic functions, to the detriment of the cultural functions and the symbiotic relationship between both of these elements (Higgins 2010). The Office of Treaty Settlements requires prospective PSGEs to satisfactorily answer twenty questions 'based around the themes of good governance, representation, accountability and transparency' (Joseph 2012: 155; Office of Treaty Settlements 2004: 75-7). Dr. Robert Joseph states that nineteen of these questions relate to 'Western standards of corporate governance' while only one question deals with the tikanga and kawa of the iwi (Joseph 2012: 155). He fairly assesses that these Crown requirements for PSGE's are assimilationist in nature, though less overt than previous assimilation policies, as they require the corporatisation of iwi authorities to function within the predominant neoliberal market (Joseph 2012: 161-2). This impacts on the ability of iwi to practice their rangatiratanga through the PSGE as iwi should be able to 'determine their own identity and representation according to tikanga Māori' (Joseph 2012: 164).

While PSGEs are created within the parameters of Crown control, once established, they are able to act with the iwi's best interests as their priority. The Tūhoe iwi website states that the 'purpose of the Governing Board of Te Uru Taumatua is to lead and serve the cultural permanency and prosperity of Tūhoetanga by unlocking the unity potential of Mana Motuhake' (Tūhoe 2013-2015). Though the Treaty settlement process is controlled by the Crown, there is perhaps

more freedom for the iwi post-settlement to practice their rangatiratanga and mana motuhake, once Crown requirements have been satisfied.

The settlement context of over-arching Crown control may also impact on the innovation of Tūhoe gaining a majority on the Te Urewera Board in 2018. This provision may be a progressive step towards a greater application of Tūhoe mana motuhake in the future and the Tūhoe settlement may be an innovative new step in a series of settlements which may continue to improve in their innovations. However, an analysis of Crown responses to Māori assertions of rangatiratanga, such as that in Hill's *Māori and the State*, shows three main strategic aspects of how the Crown deals with seemingly "progressive" steps for the practice of Māori rangatiratanga. Firstly, that 'Crown-franchised and Crown-assisted rangatiratanga' would always be constrained by Western 'rules' (Hill 2009: 194). Secondly, advances in policy are invariably followed by a period of backlash (Hill 2009: 27). This is often due to a lack of public education on the Treaty issues, which leads to a growing public resentment for that progress. When this resentment reaches a perceived majority, it then has an effect on a democratic government, particularly so in an election year. Thirdly, in many cases where the Crown has seemingly positively responded to Māori assertions of rangatiratanga and implemented strategies for Māori autonomy, the Crown often appropriates these efforts back towards Crown goals (Hill 2009: 275). This has often been able to occur because, in all of these situations, the Crown has had an unequal share of the power in creating the new policy, legislation or other measure. Therefore, given this track record of Crown action, it may be prudent to expect that the innovative feature of providing for a Tūhoe majority on the Te Urewera Board may not have the full extent of results that Tūhoe may hope for as it remains to be constrained within a rubric of Crown dominance.

The legal personality of Te Urewera

Following the example set by the Whanganui River Treaty settlement, Te Urewera has gained the status of a legal personality, an entity with 'all the rights, powers, duties, and liabilities of a legal person' (Te Urewera Act 2014: 16). This is an innovative development in resource management, as well as Treaty settlements. What is innovative about its use for Te Urewera is that it has been against Crown policy to remove a national park from Crown ownership (Ruru 2014). Conservation land has generally not been made available for the settlement of previous Treaty claims (Jones 2013: 198). This is the first time in New Zealand history that a national park has been removed from the jurisdiction of the 1980 National Parks Act (Te Urewera Act 2014: 14; Ruru 2014). The ownership of the land in the former Te Urewera National Park has been vested in the legal personality of Te Urewera (Te Urewera Act 2014: 17). Conservation areas, Crown land and reserves in Te Urewera have also been removed from the jurisdiction of the Conservation Act 1987, Land Act 1948 and Reserves Act 1977, respectively, and vested in Te Urewera (Te Urewera Act 2014: 17). The use of the legal personality was decided on after years of negotiation over Te Urewera. As evidenced by its removal from the 2009 *Deed of Settlement*, the Crown ultimately did not want to transfer the ownership of Te Urewera to Tūhoe, but Tūhoe were not willing to accept a settlement that did not include Te Urewera. The vesting of Te Urewera land and lakebeds (though not the water in the lakes) in the legal personality of Te Urewera is, therefore, a compromise that was deemed acceptable by both parties (Ruru 2014).

As discussed in relation to the Whanganui River, while the legal personality is ultimately a Western legal concept, it provides for Māori views of the environment and specifically Tūhoe's view of Te Urewera. The legal personality resembles the tūpuna title, which was first proposed by the prominent constitutional lawyer Moana Jackson in an unpublished paper presented at Whanganui (T. R. Williams 2010: 69). The tūpuna title does not vest ownership in the iwi itself, but in an

ancestor of the iwi, with the iwi fulfilling the guardianship role to protect the resource for future generations (Ruru 2011). The tūpuna title was used in the 1995 Waikato Raupatu Claims Settlement Act, where land could be vested in Pōtatau Te Wherowhero, the first Māori king, instead of a named land holding trustee (Waikato Raupatu Claims Settlement Act 1995: 34). The 2010 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act also vested sites of significance in Pōtatau Te Wherowhero (Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010: 61). While the legal personality rights were not created by Māori to articulate tikanga as the tūpuna title was, it provides for a similar relationship between iwi and the environment. Kruger stated that the use of the legal personality confirms Tūhoe's view that 'Te Urewera exists in its own right' and that Tūhoe, and New Zealanders in general, have a duty to recognise its mana and protect it from harm (M2 Presswire 2014a). Higgins has argued that the legal personality rights recognise the existence of Te Urewera well before people and reflects Tūhoe's role as kaitiaki of Te Urewera (Higgins 2014). It is stated in the Te Urewera Act that protecting Te Urewera with a legal personality also 'reflects New Zealand's culture and values' (Te Urewera Act 2014: 9). An ongoing feature of the negotiation of the Tūhoe Treaty settlement has been the Crown requirement to balance Tūhoe and public interests in Te Urewera. The legal personality rights have been used in the Te Urewera Act with the apparent conviction that it will achieve this task.

The concerns that were identified in the previous chapter about how the legal rights of the Whanganui River will be interpreted and applied by their human advocates and by the Courts is also an issue for the legal personality of Te Urewera and is perhaps amplified by a larger board of eight members. The political environment and shifting societal concerns may have a greater impact on the Te Urewera Board and, therefore, Te Urewera. Te Urewera is also reliant on the interpretation of the Courts to have its concerns heard (Hardcastle 2014). With the rights of a legal person, Te Urewera would be able to sue, but the Te Urewera Act

has clearly defined what constitutes an offence and the penalties for such offences and arguably precluded the ability of the Te Urewera Board to judge an offence based on its own interpretation (Hardcastle 2014; Te Urewera Act 2014: 46-50). As the offences against Te Urewera are pre-defined, the Act's role in recognising the 'mana and individual identity' of Te Urewera has been undermined (Hardcastle 2014). The Te Urewera Act also includes the provision for the creation of future bylaws for Te Urewera, for things like the 'management, safety and preservation of Te Urewera' and the exclusion of the public (Te Urewera Act 2014: 42-3). However, because these bylaws have to be approved by the Minister for Conservation, they constrict the autonomy of the Te Urewera Board to protect Te Urewera in the way they see fit. This is particularly relevant for when Tūhoe members occupy the majority of the Te Urewera Board because decisions will often still need to be approved by Crown Ministers.

Changing Crown perspective

The Crown approach to the environment is based on Western science. The view that the Crown, and the majority of people in New Zealand, have of Te Urewera is partly influenced by science and partly by early colonial writings which hugely romanticised Te Urewera as 'wild nature' unspoiled by human occupation (Castagna 2005: 40-41). In the 1950s, the value of the Urewera National Park evolved from the preservation of aesthetic beauty to a more science-based conservation (Castagna 2005: 96). However, as Smith argues, modern discourses are a 're-presentation of fragments from the cultural archive in new contexts' and there is little difference in the shift of the Crown's rhetoric over the twentieth century (Smith 2012: 62). Western perspectives, rooted in their colonial history, have become so normalised that they persist in current discourses.

The central issue with both of these Crown approaches to Te Urewera has been the silencing of Tūhoe occupation and connection to Te Urewera, as the underlying

attitude is that 'wild nature' and 'human occupation [are] mutually exclusive' (Castagna 2005: 40-1). The list of offences in the Te Urewera Act have a clear basis in Western conservationist strategies, as they focus on the protection of Te Urewera flora and fauna (Te Urewera Act 2014: 46-8). While it is an offence to remove taonga tūturu, there are no other offences that relate to Tūhoe tikanga or kawa (Te Urewera Act 2014: 51). Nevertheless, the main change in the Crown's discourse around Te Urewera and the application of conservationist policies is the acknowledgement of the inextricable link between Tūhoe and Te Urewera and their continual occupation. The Te Urewera Act states that 'Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are the tangata whenua and kaitiaki of Te Urewera' (Te Urewera Act 2014: 9). This may have an important impact on the New Zealand public, particularly visitors to Te Urewera who may gain a better understanding of the history of Te Urewera and its importance to Tūhoe.

There has been a strong "public good" theme to the Crown's rhetoric on the settlement of Te Urewera. The New Zealand landscape became hugely important to Pākehā identity following their arrival because, as immigrants, Pākehā have lacked a connection to the history of the environment on which they could base a common identity (Johnson 2011: 188). In more recent times, conservation of the environment has become highly valued in the public psyche and so public opinion tends to weigh in on Treaty negotiations that concern natural resources. O'Sullivan notes that settlements are limited by Crown 'caution about alarming an already suspicious non-Maori electorate' (O'Sullivan 2008: 322). A good example of this is the public uproar when the proposition of the 2004 Foreshore and Seabed Act was announced. The proposition by some New Zealanders that they may have their access to beaches restricted led to street protests in some areas, including the 'whites have rights' protest in Nelson (Exceltium Limited 2010: 3). As public opinion is of great importance in a three-year democratic cycle, it is one factor that influences the

Crown side of negotiators in Treaty settlements. The Te Urewera Act includes the statement, immediately following the section on the important connection between Tūhoe and Te Urewera, that

Te Urewera is also prized by all New Zealanders as a place of outstanding national value and intrinsic worth; it is treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection (Te Urewera Act 2014: 9).

Another aspect which has been carried through this settlement is serving the public good through the extraction of resources for profit. In the Te Urewera Act, the Crown has retained the right to mine Te Urewera, as the 'land is to be treated as if it were Crown land described in Schedule 4 of the Crown Minerals Act 1991' (Te Urewera Act 2014: 40). While the Crown has progressed in their approach by viewing Tūhoe concerns alongside public concerns, the persistence of the public good argument limits the ability of the settlement to provide for Tūhoe rangatiratanga and mana motuhake.

Conclusion

Despite the continuation of long-standing trends in Crown action towards Māori aspirations for a greater practice of rangatiratanga, the Tūhoe Treaty settlement has specifically acknowledged mana motuhake and Tūhoe's perspective of Te Urewera. The settlement can be seen as a balancing act between recognising and respecting Tūhoe's perspective while retaining Crown management ideals and protecting the public interest. Therefore, while the settlement legislation does not go the entire way to allow for the full practice of Tūhoe's mana motuhake and rangatiratanga in relation to Te Urewera, it is an innovative step along this road. The use of legal personality rights for Te Urewera both articulates Tūhoe's relationship to

and perspective of Te Urewera as a living entity and conforms to Western legal traditions and systems. Tūhoe's compromise with the Crown is to equally share the management of Te Urewera with the Crown for the next three years. While this does not provide for full Tūhoe autonomy, it is an important concession from the Crown in the current circumstances. Beyond that, while the Crown will always have representatives on the Te Urewera Board, the Tūhoe members will be in the majority from 2018. The enforcement of Te Urewera's rights will always be filtered through the New Zealand Courts and Crown Ministers, but Tūhoe may be able to further negotiate for a greater practice of Tūhoe's rangatiratanga and mana motuhake over Te Urewera in the future. As has been noted in this chapter, there have already been further agreements made in the post-settlement Crown-Tūhoe relationship towards this goal.

Chapter Four: Analysis

The Whanganui River and Te Urewera Treaty settlements can both be considered innovative for their use of legal personality rights and co-management structures. This fourth and final chapter will focus on the way the settlements can be considered innovative in their entirety for the way they have expressed aspects of both the Crown and iwi perspectives in legislation. While the innovative aspects discussed in the previous chapters will be important for other settling (and re-negotiating) iwi, the way the view of Whanganui iwi and Tūhoe has been incorporated into the body of the settlements is going to be hugely important for the future of those iwi and their relationship with the Crown. Settlements necessitate an ongoing relationship with the Crown for the foreseeable future, which can have both promising and concerning repercussions. As the Crown claims indivisible sovereignty in New Zealand, it is likely to maintain its unequal share of power in the relationship and the Western worldview is likely to remain dominant in the society that the legislation is enacted in, as well as in the Courts which will interpret it. On the other hand, the relationship which has been formally defined in legislation includes both Crown and iwi concerns, which means there will always be a structure for ongoing dialogue and potential for further innovative developments in the future.

The economic focus of settlements

In order to analyse where on the spectrum these innovative developments sit between a permanent new benchmark and a one-off concession that will revert to settlements dominated by the Crown's perspective, it is necessary to consider the cause for the Crown's adoption of a Māori worldview in the settlement legislation. The reason why such a change occurred is complex and rooted in a much longer history of Crown-Māori interactions. Many of the visible changes in the relationship

can be traced to the increased Māori activism of the Māori "Renaissance" in the late 1960's, 1970s and 1980s. The 'pressure from Māori produced both tension and 'productive change' (O'Regan 2010: 234). The Crown fully acknowledged that action had to be taken to resolve the "problem" of Māori demands for historical justice. The 1975 Treaty of Waitangi Act and 1985 Amendment was the chosen resolution. O'Sullivan argues that reconciliation for 'objective wrongs' is an important feature of liberal democracy in former colonies such as Australia and New Zealand (O'Sullivan 2011: 98). He states that recognising 'objective wrongs requires consensus, but when societies come to consider the nature and form of recompense there remains space for the plurality and contestation of ideas... essential to democratic politics' (O'Sullivan 2011: 98). Thus, the inclusion of Māori perspectives in the resolution of grievances has a basis in the origin of settlements and in the political system. Although, it is only recently that these perspectives have appeared in the resulting legislation in such a meaningful way beyond the preamble and historic background of the settlement. The basis of the settlement process in Māori concerns bodes well for these current developments becoming an entrenched aspect for future settlements.

The notion of Treaty grievances as a "problem" (as opposed to seeing the Treaty breaches as the root problem) has become an ingrained perspective for the Crown and a huge influence on their continued effort to resolve Treaty claims (Kukutai 2010). While there are certainly positive outcomes in the resolution of grievances, this perspective can have an adverse effect on the settlements. While the resolution of grievances is a political process, it also has an economic rationale that should be considered. The neoliberal reforms of the late 1980s have an important impact on the settlements as they have hugely affected the way the Crown views the market and ways of organising within it. The functions of society came to be seen as market mechanisms and transactions, where economic relations are considered natural (Bargh 2007: 1, 14). Neoliberalism is justified by its proponents with the assumption

that 'economic growth equals human improvement' (Bargh 2007). However, as Tūhoe showed in their rejection of the 2009 *Deed of Settlement*, they view the practice of their mana motuhake as human improvement, more so than narrowly defined economic development. The neoliberal market was seen as 'enhancing the freedom of the individual' and people were viewed more as individuals rather than as members of social and cultural groups (Bargh 2007: 8). A person's culture is seen as an available skill set to aid them in the market, rather than a specific way of seeing the world (Gershon 2008: 429-30). Therefore, while mātauranga and Māori ways of interacting with the environment can be utilised in settlements for their utility in resource management and environmental protection, in a neoliberal lens Māori cultural practice is considered just a useful skill-set to give Post-Settlement Governance Entities (PSGE) an edge within a broader Western system, rather than these being perceived as a completely alternative and autonomous way of organising. Within a neoliberal market, the ability of iwi to practice rangatiratanga is inhibited by this overarching context which ultimately does not provide for self-determination based on the perspective of a non-Western cultural group. In a neoliberal economy, culture is a skill-set to use in a Western context, rather than the context itself.

An aspect of neoliberalism that has a huge effect on the Crown-Māori relationship is the preference for a smaller government, with many of its functions dispersed out to organisations and individuals (Bargh 2007: 1). In the late 1980s, the fourth Labour government 'abandoned the principles of the welfare state and replaced them with those of capitalist individualism' (Hill 2009: 202). The issue of Māori reliance on welfare and of the negative impact neoliberalism initially had on the Māori population has been depicted as compatible with the general iwi desire for rangatiratanga as the iwi could then provide the social services for their own members (Hill 2009: 202; Kelsey 2015: 34-5). The Crown has implemented this through various Treaty settlements, as well as other initiatives including the

governmental empowerment schemes in the 1980s (Hill 2009: 206). *Ruruku Whakatupua* introduces a 'social services project', whereby Whanganui iwi will collaborate with various government ministries for the 'better delivery of services and outcomes to the communities of the Whanganui region' (Office of Treaty Settlements 2014a: 50). As *Ruruku Whakatupua* only settles the claims of the iwi in relation to the Whanganui River, there may be further devolution of social services to the iwi in the settlement of the grievances in relation to the people and the land. Though Tūhoe did not have mana motuhake redress included in the settlement legislation, they are in post-settlement negotiations with the Crown over the provision of welfare services to Tūhoe members. The sentiment of economic independence still remains in these settlements, as the financial redress transferred is not intended to compensate for the losses of the iwi, but to settle the iwi's sense of grievance and provide for the development of their economic independence (Bargh 2012: 168). Therefore, while neoliberalism does not support the articulation of a Māori worldview, it does encourage the practice of iwi rangatiratanga over their economic development and the social services for their members.

The relevance of the prioritisation of economic development to the Whanganui River and Te Urewera is that, at some point in the future, there will quite likely be a case where the need to protect and enhance the Whanganui River or Te Urewera will stand in direct opposition to economic gain. This is likely to occur in the realm of power generation, pollution from farming, and mining. Given how far-reaching the impact of the neoliberal reforms has been, it would be hugely optimistic to assume that the legal personality will receive priority in such cases. The only precedent that New Zealand has for the treatment of legal personalities is the Ecuadorian pachamama, which has not been protected but further damaged by Ecuador's economic reliance on foreign mining corporations (Zuckerman 2015). Te Aho notes that local councils have been criticised in the past for being too heavily influenced by 'powerful and wealthy applicants such as electricity generation companies and

strong farming lobby groups' when dealing with freshwater issues (Te Aho 2012: 105). Previous consultation procedures have been called 'tokenistic', given that iwi groups' opposition to oil exploration or mining on the grounds of environmental implications has been regularly ignored (Howard 2015: 5). While these issues are somewhat overcome for particular iwi with settlements that confirm their 'place in the circle' of consultation, it is still unclear how the legal personalities will be treated when acting in their best interests hinders present economic gain (Howard 2015). The emphasis placed on the profits of international corporations in the Crown's recent dealings over the Trans-Pacific Partnership Agreement with countries including the United States have not been encouraging indications of its priorities (Joint Media Statement 2015).

Another issue of the economic focus of the Crown concerns the question of whether or not the settlements are innovative, or perhaps whether they are able to be in these circumstances. The practice of rangatiratanga in New Zealand presently is 'dependent on a balance between cultural values and economic wealth' (Hall 2012: 120). If the balance of the two settlements studied is tipped towards economic wealth, the practice of rangatiratanga may be made more difficult as the settlement may conform to neoliberal values which are often at odds with Māori values. Pita Sharples, the former co-leader of the Māori party, has stated that the ideal outcome of settlements is to enhance and develop a resource base, but to do this under the assertion of rangatiratanga is to measure the success of this development in its contribution to the ongoing survival of the people, not in profit made (Kennedy 2012). Survival, in this sense, involves both material and immaterial taonga such as language and culture.

The difficulty faced by iwi after Treaty settlements are reached is the requirement of PSGE to conform to Western standards and then operate within a neoliberal, capitalist market. Maria Bargh argues that because neoliberalism has been naturalised and now interferes in states as well as indigenous communities and

nations within states, it has 'a rich connection with colonial attitudes of civilising indigenous peoples' (Bargh 2007: 12). For these settlements to provide for the practice of rangatiratanga, the Crown's neoliberal mindset may need to be abandoned, or at the very least able to co-exist with Māori ways of viewing the environment and not colonise them by enforcing the neoliberal view of the environment as a source of economic gain (Bargh 2007: 15). The lands most sought by claimant iwi are 'often sacred sites of little economic value, such as mountains or the beds of rivers and springs', those that the iwi has an important historic and ancestral connection to (Hill 2012: 35). The PSGEs, therefore, explore two avenues of development with their property investments. By negotiating for settlement land or purchasing land with cultural significance post-settlement, the iwi work towards the restoration of the connection between iwi and land, as tangata whenua. Through the purchase of land for economic development, they work towards providing the necessary economic base for their development in the current context of New Zealand. In practicing self-determination in the current context, Māori groups have the 'opportunity to live in the modern world while at the same time preserving an ancient cultural heritage' (O'Sullivan 2008: 326). The practice of rangatiratanga does not necessitate a rejection of the English political system or economy, but it can utilise these to advance the iwi's development.

The motivation of the Crown has a huge impact on Treaty settlements, given their control over the process, but it does not forestall iwi from ensuring they have an innovative settlement which allows for the practice of rangatiratanga. While the Crown has the majority of the power in the process, the minority power of iwi should not be underestimated. Tūhoe practiced this power when they rejected the 2009 *Deed of Settlement* which did not include Te Urewera and then worked very hard to ensure that the Te Urewera was included in the final accepted settlement. Even if the creation of a PSGE must adhere to English legal requirements, these do not stop the PSGE from developing its economic resources in a way that is

underpinned by tikanga. Bargh argues that reasserting and strengthening cultural practices is a way that iwi can 'challenge the neoliberal form of world construction' (Bargh 2007: 16). While Treaty settlements define co-management arrangements with the Crown which incorporate English legal traditions, the co-management boards may develop in the future to further incorporate tikanga, particularly in the case of Tūhoe with their 2018 Te Urewera Board majority. Autonomous aspirations, Hill argues, will not go away when Treaty settlements have been completed (Hill 2009: 287). Therefore, settlements can achieve innovative results for the practice of rangatiratanga, even if the Crown views the settlement only as a resolution to a historic grievance and an enabler of Māori economic independence.

Legal pluralism

Though the Treaty settlement process was initially brought about in response to increased Māori activism from the late 1960s onwards, the settlement process is heavily controlled by the Crown and it subscribes to Western political theory and legal traditions. A strong discourse in New Zealand, both within the government and in the New Zealand public, is of unity. The unspoken assumption of this unity of 'all New Zealanders' is that it is based on a Western worldview and that diversity, 'particularly... strong, self-determining Maori identities', threaten that unity (McCreanor 2009: 7). The former long-standing Crown policy of assimilation was based on the idea of 'one nation', again based on a predominantly Western culture (Hill 2009: 169). Recognising Māori cultural and legal traditions as distinct and separate has been a difficult process for the Crown, as there has been widespread resistance to anything which might challenge the 'social democratic 'equality' paradigm' (Hill 2009: 169). Therefore, Hill has argued, in the settlement of Treaty breaches 'the advancement of Maori aspirations was tempered by Pakeha understanding and acceptance': 'the government of the day could only go as far as they could without alienating voters' (Hill 2009: 169). In recent decades, there has been a greater acceptance of a 'two peoples, one nation' discourse, which provides

for a separateness of Māori perspectives and legal traditions (Hill 2009: 169-70). Therefore, while the political process of settling claims is positioned within a English legal system, the increasing awareness and acceptance of separate Māori legal traditions and culture may mean that the resulting legislation can set up a framework where tikanga can be utilised and developed independent of Crown control and, therefore, provide space for rangatiratanga to be practiced.

An important part of the incorporation of Māori perspectives in the settlement legislation is the use of Māori legal traditions. Māori legal traditions are based in tikanga and they provide an important foundation for the practice of rangatiratanga by iwi in the post-settlement relationship with the Crown. O'Sullivan argues that 'practical self-determination' requires an acceptance of the unequal relationship between state power and minority power in New Zealand (O'Sullivan 2007: 3). But the use of Māori legal traditions can mean that self-determination is approached from 'an unapologetically Māori-centred view' (O'Sullivan 2007: 3). Jones notes that a system of legal pluralism is apparent in Treaty settlements where expression is given to both Western and Māori legal traditions, but that there are strong and weak forms of legal pluralism (Jones 2013: 233). The strength of legal pluralism impacts on the ability of iwi to practice their rangatiratanga. The Treaty settlement process has most often employed a weak form of legal pluralism because Māori legal traditions have been forced to engage with the Crown and be Crown-centred in their function and is thus often inconsistent with the practice of rangatiratanga (Jones 2013: 233). Jackson has argued that for legal pluralism to deliver justice to Māori, it needs to acknowledge the effect of colonialism on Māori legal traditions and take Māori concepts of justice and power into account (Jackson 1995: 243). Stronger forms of legal pluralism 'assist with decentring the state' from the relationship and do not force Māori legal traditions to bend and develop in response to Crown requirements (Jones 2013: 233). While the settlements are still focussed around Western legal

traditions, such as the Crown requirements for the establishment of PSGEs, the form of legal pluralism remains closer to the weak end of the spectrum.

While the form of legal pluralism in the Treaty settlements has been quite weak to date, post-settlement Crown-iwi arrangements may have greater potential to provide for stronger forms of legal pluralism. If the way the co-management arrangement is set out in the settlement articulates tikanga without subjecting it to the prioritisation of Western legal traditions and requirements, it is likely to allow for the practice of rangatiratanga. Tikanga is already present in some legislation and has been taken into account in some court cases, such as custody disputes and family protection cases (Jones 2013: 273). A notable use of tikanga in legislation is in the 1991 Resource Management Act (RMA). But the inclusion of tikanga into RMA processes was not required to be anything substantial and it became clear the inclusion of Māori legal traditions, such as kaitiakitanga, had very little practical application and was certainly not prioritised over Western legal traditions (Jones 2013: 129). The use of Māori legal traditions in the Whanganui River and Te Urewera Treaty settlements indicate a stronger form of legal pluralism. Whanganui iwi and Tūhoe concepts of justice and leadership are utilised and the relationship between people and the environment defined in tikanga is articulated in the use of legal personality rights for the Whanganui River and Te Urewera. This is important as Jones notes '[s]elf-determination and reconciliation in this [Treaty settlement] context require that Māori legal traditions be recognized as part of a legitimate social and political culture' that has been developing in New Zealand for many centuries (Jones 2013: 284-5).

Māori and Western worldviews

Both Western and Māori worldviews are visible in the Whanganui River and Te Urewera Treaty settlements. This is particularly apparent in the application of the legal personalities. Their use not only articulates a Māori view of the Whanganui

River and Te Urewera as whole and inalienable beings, it also provides for both Western and Māori views on authority and organisation. Jones has argued that for environmental protection to occur meaningfully in New Zealand, Māori legal traditions, such as kaitiakitanga and the belief in the interconnected relationship between people and the environment, should be used in partnership with Western legal traditions (Jones 2003: iv). The legal personality combines the Māori concept of kaitiakitanga with the Western concept of individual ownership rights (Jones 2003: iv). The fact that the Crown still maintains the majority of power but has conceded some conceptual ground in these two recent settlements is worthy of attention as a promising development. The centrality of iwi perspectives in the settlements provides a good basis for the development of the ongoing relationship between the Crown and iwi. Future developments are likely to occur in a manner that is consistent with the iwi worldview when the *Deed of Settlement* and subsequent legislation articulates this view.

Different worldviews in the settlements are apparent in the relationship between mātauranga and Western science. Mātauranga is the local knowledge base of the environment and as such it is specific to each hapū and/or iwi in each locality though it is connected across the country with its basis in tikanga. While mātauranga is underpinned by common principles, it is locally adapted, as each iwi and region have their own specialised knowledge of the local environment and how best to manage it (Hall 2012: 134). Mātauranga has existed for thousands of years, but it only began to be utilised by the Western scientific community in the 1980s (Hall 2012: 47). Mātauranga is important for the management of resources because it is based on Māori values and is thus independent of the otherwise dominant values of science and capitalism (Hall 2012: 134). The concept of whakapapa is important in the use of mātauranga, as it emphasises the interconnectedness of people and the environment, given their distant but important shared origins in Ranginui and Papatūānuku and 'bestows on descendants a legacy of obligation and responsibility

to maintain and protect the environment' (Hall 2012: 24). This obligation is embodied in the three concepts in tikanga of 'mana, rangatiratanga and kaitiakitanga' (Hall 2012: 24). An approach to resource management based on mātauranga would measure success by the sustainability of the resource, rather than using outside indicators like revenue and its use to humans. This differs greatly from the universalised approach of science.

The scientific approach to resource management, based on European culture, has been normalised in New Zealand. A significant part of this normalising has been the claim that science is an 'objective' perspective of the environment gained through rigorous observation (Smith 2012: 46). As discussed in the first chapter, part of the colonial mission was to normalise a colonial view of the world and thus maintain control through the ability to make definitions (Smith 2012: 61). Mātauranga was discredited for over a century after Europeans arrived in New Zealand and it was largely relegated to the category of "myth" (Smith 2012: 63). The scientific approach is hugely important to these Treaty settlements which deal with resource management, as it dominates the perspectives of government departments such as the Department of Conservation (DoC). The Crown has managed the Te Urewera National Park since its inception in 1954 and thus the scientific view is entrenched in the management, which is something Tūhoe will have to deal with in working with DoC for the foreseeable future.

Western values in relation to the environment, such as resource exploitation for the benefit of society, has not proved particularly useful for sustainability. Because humans and nature are considered to be closely connected, the mātauranga approach to environmental management is arguably premised on sustainability, as 'they actively utilised and developed nature for subsistence and cultural purposes' (Chanwai and Richardson 1998: 162). There have been many arguments made that the best results will occur with a collaboration between the approaches (Harmsworth 2007: 717; O'Regan 2010: 242; Te Aho 2009a). Sir Tipene O'Regan, has used the

metaphor of a waka unua, a double-hulled waka: '[r]ather than us all being packed into 'the same waka', we should be looking to voyaging in our own waka of cultural preference. We can then live our shared lives on the kaupapa - the platform that joins the two hulls' (O'Regan 2010: 234). The principle of cooperation in the *Principles for Crown action* states that there should be distinctive cultural development for a common purpose, which ensures that results are achieved whilst maintaining the integrity of each cultural group (New Zealand Department of Justice 1989: 14).

Garth Harmsworth and Dr. Nigel Jollands have argued that the combination, or pluralism, of approaches is beneficial for sustainability monitoring from an ecological perspective, as it increases 'the odds of making a good choice... legitimises the ultimate choice... [and] makes for better decisions in terms of distributive justice' (Harmsworth and Jollands 2007: 717). The use of mātauranga is important for the way it challenges the Western view that scientific knowledge should be objective because the link between mātauranga and its social and spiritual context is clearly acknowledged and utilised for more specific and localised management (Hall 2012: 50-51). For mātauranga to be implemented correctly, it must be applied with the Māori values and concepts which underpin it and not taken out of its context (Hall 2012: 136). O'Sullivan also argues that accepting 'difference can strengthen social cohesion by giving indigenous peoples grounds for believing their value systems have a place in the public realm' as they can belong to the nation-state 'in their own terms' (O'Sullivan 2011: 101). It, therefore, seems as though Treaty settlements which give expression to both mātauranga and science would meet the Crown's Treaty principles as well as iwi aspirations for rangatiratanga.

Ownership

The issue of ownership is a central concern for both the Whanganui River and Te Urewera Treaty settlements. The Crown argument for why these things cannot be privately owned is that a natural resource such as water and a national park should

be maintained for the 'public good to benefit all New Zealanders' and not one person or group in particular (Ruru 2013: 341-2). The Māori view is that because aspects of the environment, such as rivers, lakes, and mountains, are entities in themselves, they cannot be owned as mere property. Hill notes the indigenous perspective of land, people and ancestors as an interconnected being, but that if the environment needs to be discussed in terms of ownership then 'the people belong to the land' (Hill 2012: 30).

There have been difficulties in having this special connection to the environment acknowledged by the Crown and so Māori have in the past attempted to claim ownership of various aspects of the environment. There is a legal difficulty in definitively resolving the question of iwi ownership over water, because while common law does not recognise ownership of water, it is not so clear whether the common law doctrine of native title could recognise Māori water ownership (Ruru 2009b: 8). Also, while the Treaty of Waitangi guarantees Māori tino rangatiratanga over their taonga, it is not clear whether this relates to ownership in the present day (Ruru 2009b: 8). For the Whanganui River, the issue of ownership over water has not been resolved, as that is the subject of a separate WAI 2358 National Freshwater and Geothermal Resources Claim. In the WAI 2358 stage one report, the Waitangi Tribunal concluded that 'Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership rights' but they may not have residual property rights (Waitangi Tribunal 2012: 81). The legal personality of the Whanganui River and Te Urewera is a resolution of the different perspectives towards the environment in a way that does not diminish the perspective of the other.

In past Treaty settlements and debate over Māori land and resources in general, many Māori have used the guarantee of tino rangatiratanga in Article Two of Te Tiriti o Waitangi to argue for ownership rights over land and resources. It remains unclear whether those proponents of the ownership argument thought a modern

translation of tino rangatiratanga was ownership, or if translating Māori concepts and ambitions into terms that the Crown could readily understand was simply an effective way to interact with the Crown which was unwilling to acknowledge a Māori worldview. Iwi ownership aspirations are often referred to in early Waitangi Tribunal reports though this may be an example of utilising Pākehā tools while holding fast to Māori ideologies to give them expression, as Sir Apirana Ngata advised in his famous whakataukī (Kora 1965: 5; Te Aho 2012: 102). In the WAI 2358 report, the Māori claimants' argument was that they 'have very little choice but to claim English-style property rights today as the only realistic way to protect their customary rights and relationship with their taonga' (Waitangi Tribunal 2012: 32). Te Aho has argued that lobbying for ownership was not about subscribing to the Western values surrounding ownership, but was a pragmatic decision to be included in the decision-making process when interacting with a Crown that was prone to ignoring Māori viewpoints (Te Aho (interview) in Hall 2012: 110). Therefore, ownership of a resource does not necessarily relate to the practice of rangatiratanga as rangatiratanga is based in a Māori worldview that does not include ownership in a Western sense. But in a context where a Western worldview dominates the Crown use of resources and controls the Treaty settlements process, arguing for ownership is an avenue available for iwi who want greater stakes in the management of the environment.

Ownership does not equate to rangatiratanga because it gives expression to a different set of cultural values. Co-management arrangements can subscribe to Western modes of organisation, but they also allow iwi to have an important say in the management and future of their local environment. A permanent position on a co-management board, particularly as a majority, can be used to further articulate Māori values and practice rangatiratanga. O'Sullivan has argued that while sovereignty is indivisible, 'in a plural society it can be shared' (O'Sullivan 2011: 97). A way for iwi to have a share in the national sovereignty is through high-level

representation, such as on co-management boards, where they are recognised as participants and not just interest groups (O'Sullivan 2011: 97). Some commentators have expressed scepticism about whether co-management arrangements go far enough to resolve Treaty grievances and provide for rangatiratanga (Higgins 2010; Te Aho 2012: 102). Ownership may be a good way to guarantee that iwi views are catered for, but the practice of rangatiratanga does not necessarily require ownership of the resource. Particularly in the cases when there is declared to be an absence of ownership, such as that of water and national parks, then management and use rights 'are effectively a form of ownership' because there is no higher power over the resource (Sproat 2014). However, if the resource is owned by a corporation or private owner, such as the banks and beds of the Whanganui River have been for many decades, and they are used in a way that degrades the health of the river, then ownership becomes more of a necessity for iwi who wish to restore the health and wellbeing of the resource.

The vesting of land in a legal personality does not pass the ownership to the iwi, as they have previously argued for, but it ensures that the Crown does not own this land either. Therefore, the management role of Whanganui iwi and Tūhoe in these settlements is evidently an acceptable compromise for these iwi, as their co-management is the highest level of authority over the resource for the time being. To practice rangatiratanga as self-determination, iwi seek autonomy in the articulation of their worldview, but also inclusion in state services (O'Sullivan 2014: 27) As Māori cultural values underpin the co-management arrangements in these settlements, space has been provided for the practice of rangatiratanga based on those values.

Ongoing relationships

The Whanganui River *Deed of Settlement* and Te Urewera Act necessitate an ongoing relationship between these iwi and the Crown for the foreseeable future, particularly in relation to co-management over their resources. There have been

arguments that there should be a partnership between iwi and the Crown based on a balance between the kāwanatanga of the Crown from Article One of the Treaty of Waitangi and the tino rangatiratanga guaranteed to Māori in Article Two of Te Tiriti o Waitangi (Potaka 2010: 87). There has not been as much of a consensus, however, as to how this relationship works in practice, given the issue of having alternate versions of the Treaty in English with entirely different meanings, especially in a modern context. The ability of Crown and iwi to be partners is diminished by the unequal share of the power held by the Crown, as iwi groups would be positioned as the junior partner and not in a good position to practice their rangatiratanga (O'Sullivan 2014: 30).

The *Principles for Crown action* include a 'Rangatiratanga Principle', but the perspective of rangatiratanga is quite limited compared to the common translations of self-determination or autonomy and it is certainly far removed from sovereignty. It states that rangatiratanga is the 'right to manage and enjoy resources and taonga. [This was t]he price the Crown paid for sovereignty' (New Zealand Department of Justice 1989: 10). The partnership between Māori and the Crown was an important factor of the Māori version of the Treaty, but was evidently not the Crown's intention, as its policy of assimilation continued right up until the 1970s (Hill 2009: 165). This imbalance of attitudes towards partnership has continued into the twenty-first century. In the ongoing debates over the ownership of freshwater, the Crown called Māori 'very important stakeholders', while the expectation of the Māori claimants was a partnership, rather than stakeholder, relationship with the Crown (Ruru 2009b: 7). While the concept of partnership has 'strong legal authority' from its basis in the Treaty, O'Sullivan argues that the unequal power of the Crown and the lack of both political and public support for partnership makes it unlikely to be realised in the current context (O'Sullivan 2008: 329). He states that the Treaty 'requires that Maori are part of the New Zealand nation-state, not partners with it' (O'Sullivan 2008: 325-6). Therefore, participation through equal representation on a

co-management board perhaps responds to the Treaty of Waitangi, including the Article Three rights to equal citizenship.

Treaty settlements which focus on providing a framework for ongoing cooperation with the Crown and local bodies may be more durable than those which do not. The co-management boards ensure there is equal say between members and decisions are based on the values of the iwi, whereas if this framework is not established then the iwi will continue to relate to the Crown in an unequal power relationship. Even if the co-management of natural resources such as the Whanganui River and Te Urewera is ecologically focussed on the health and wellbeing of the environment, there are important practical implications as co-management is 'fundamentally an issue of dialogue, deliberation and engagement' (Dodson 2014: 63). Jones argues that the more provisions there are in the settlements for ongoing relationships with the Crown, the 'less problematic the settlement process will be' (Jones 2003: 71). Because even though the settlement process is dominated by the Crown, if the settlement includes strong co-management arrangements, the iwi can ensure that their 'values and processes are included in the development of government policies, laws and by-laws' in the future (Jones 2003: 71). Although seventeen years old, Mason Durie's argument that the challenge for Treaty settlements is to develop 'a spirit of co-operation and mutual regard, rather than perpetuating conflict and collision' still rings true (M. Durie 1998: 18). It was also stated in the 2011 WAI 262 report, *Ko Aotearoa Tēnei*, that it is 'expected and intended' for iwi-Crown relationships to 'shift to a less negative and more future-focussed relationship at all levels' (Waitangi Tribunal 2011: 16). The full and final settlement of claims does not settle the Treaty of Waitangi relationship to become a relic of New Zealand's past but resolves the grievances caused by colonisation and allows iwi and the Crown to enter a new era Treaty relationships which are future-focussed and based on co-operation.

The analysis of the Treaty settlements has shown that the legal personalities and the co-management over them have provided more space for the practice of rangatiratanga than in previous settlements because it draws on both a Western and Māori worldview. However, while the settlements could have gone further to ensure the practice of rangatiratanga to be a full resolution of Crown breaches of the Treaty, it is not overly helpful to consider what the settlement could have done but did not. Settlements are generally not considered to be a totally fair resolution, but the "best in the circumstances" and a "negotiated compromise" (Te Aho 2009b: 292). Most importantly, they are a basis on which future dialogue about rangatiratanga can occur. While iwi aspirations for autonomy have not been entirely met, they will not go away in the post-settlement era. Jones states that the settlements do not alter the structure of Crown-iwi relationships, but the ongoing engagement between the Crown and iwi that the settlements require are 'an important ingredient in shifting the broader dialogue about reconciliation and self-determination' (Jones 2013: 25). Mai Chen states that one of the biggest challenges for the post-settlement era is 're-conceiving the Crown-Māori relationship to enable the transfer of greater autonomy to Māori' (Chen 2012: 182).

The relationship set out in a Treaty settlement does not resolve the fundamental differences between iwi and the Crown, particularly their perspective on sovereignty and rangatiratanga, but it does provide a framework for an ongoing debate on these issues. Dr. Ralph Bathurst and Dr. Margot Edwards have argued that 'continual relational tension' is actually beneficial for co-management structures as it 'allows for dialogue, interchange and co-creative problem solving' (Bathurst and Edwards 2011: 64, 65). Productive tension, they state, mitigates 'the tendency towards control and domination' of one party over the other (Bathurst and Edwards 2011: 65). The Whanganui River and Te Urewera Treaty settlements have set up a constantly developing relationship that may, in the future, see an increased practice

of rangatiratanga as the Crown makes further attempts to understand a Māori perspective of the Treaty and the environment.

The WAI 1040 Te Paparahi o te Raki Inquiry is a recent development which may soon raise the question of sovereignty and rangatiratanga between iwi and the Crown. The stage one report was published under the title *He Whakaputanga me te Tiriti = The Declaration and the Treaty: the report on stage 1 of the Te Paparahi o te Raki Inquiry* in 2014 (Waitangi Tribunal 2014). This claim has been made by the Ngāpuhi iwi, but its conclusions may be put to use by other iwi in their dealings with the Crown in the future. The report concludes that Ngāpuhi did not cede sovereignty, which is defined as 'their authority to make and enforce law over their people and within their territories. Rather they agreed to share power and authority with the Governor' (Waitangi Tribunal 2014). Ngāpuhi hold that never in their history have they ceded sovereignty to the Crown, therefore, the indivisible sovereignty that the Crown practices today was improperly acquired (Howard 2015: 2).

The immediate and calculated response of the Crown was a dismissal of the claim (Radio New Zealand 2014). Minister Finlayson stated on Radio New Zealand that '[n]othing will change. New Zealanders can rest easy in their beds tonight and wake up in the morning happy in the knowledge that the Queen still reigns over us and that the government still rules over us' (Radio New Zealand 2014). While this might have been just a statement to ease the instant public uproar over the Waitangi Tribunal's conclusions on Ngāpuhi's sovereignty, the issue will not be so easy to disregard in future negotiations between iwi and the Crown (D. Williams 2014). While the Tribunal's findings are not binding, the Crown generally acknowledges that their reports are well researched and accurate portrayals of the history of a claim and generally accepts their thrust if not all of their details. This Tribunal report, and likely those that follow, hold the prospect of being a significant resource for future settlements and will put the impetus on the Crown to further

acknowledge Māori perspectives of their own history and thus create settlements that articulate this perspective.

Rangatiratanga

The co-management structures in the Whanganui River and Te Urewera Treaty settlements do not address the root Treaty issue of sovereignty in New Zealand. The statutory authority under which the co-management arrangements are made maintains the status quo of indivisible Crown sovereignty and deals with practical management arrangements, but not the underlying ideology behind them (Wevers 2013: 713). Little more can be expected of a settlement at this time, especially as these settlements were created before the Te Paparahi o te Raki Inquiry when there was less pressure on the Crown to genuinely question its claim to sovereignty. Arguing for Māori sovereignty is, in any case, perhaps not the most useful outcome to argue for, as well as not the most common translation of rangatiratanga, and may distract from 'achievable forms of 'autonomy' (Hill 2009: 272) The settlements have been positively received by the majority of Whanganui iwi and Tūhoe for the way the legal personality articulates tikanga and, in particular, the concept of kaitiakitanga. Though understandings and applications of rangatiratanga differ widely, the use of tikanga will provide for the practice of rangatiratanga by Whanganui iwi and Tūhoe over the Whanganui River and Te Urewera respectively. While there may be future developments that provide more room for the practice of rangatiratanga, such as the increase to a majority of Tūhoe members on the Te Urewera Board in 2018, it seems fitting to observe these settlements for how they have developed the relationship between iwi and the Crown in the present.

A state of "decolonisation" is an outcome that has gained popularity in former settler colonies, but it is worthwhile to consider whether this is an achievable state, let alone a desirable one. First of all, former settler colonies will always be connected to their colonial history. This is due to the demographic of a majority of the

population being settler descendants and the effect of this for over one and a half centuries ensures that no one could imagine that it is possible to return to a pre-colonial society. Secondly, for New Zealand in particular, while the Treaty was consistently breached by the Crown almost immediately after signing it, it was arguably (in the Māori interpretation) an acceptance of European settlers and the Crown to rule over those settlers. Even though Māori did not necessarily accept the British government as sovereign when they signed the Treaty and Tūhoe also did not by not signing it, in settling their Treaty claim with the Crown they acknowledged the current practical sovereignty of the nation state. The Treaty settlement process is a necessary 'by-product of colonial domination' but rangatiratanga does not require a dismantling of the sovereignty gained by the Crown's colonial past and 'does not disregard the rights of others, nor imply either political isolation or political privilege' (M. Durie 1998: 20; O'Sullivan 2007: 7). Mason Durie argues that there is 'no inherent incompatibility between self-governance and sovereignty since self government is a process, occurring as much at community levels as at tribal or even confederated levels' (M. Durie 1998: 18-9). Rangatiratanga can perhaps then be practiced within the context of Crown sovereignty, provided that sovereignty does not heavily impact on the autonomy and self-determination of iwi.

Rather than viewing Māori aspirations for rangatiratanga as a challenge to the New Zealand status quo, Associate Professor Tahu Kukutai states that a more accepting and productive stance would leverage these aspirations for national advancement and the collective good (Kukutai 2010). The Treaty settlements process may not offer closure on New Zealand's colonial history but instead requires both the Crown and iwi to be open to different interpretations of the past and utilise these for more creative strategies for the future challenges (Morris 2010). Just as the Waitangi Tribunal has been criticised for creating an alternate vision of colonialism and held the Crown accountable for not living up to it, the current settlements may

be able to give practical representation to this alternative form of history and attempt to enter into a relationship that is closer to the Māori interpretation of the Treaty (Morris 2003: 8). It should also be noted that the rangatiratanga of the iwi will be practiced beyond their relationship with the Crown in the post-settlement context, including through relationships with the private sector, overseas companies and other indigenous peoples and measured, among other things, by the strength of the Māori economy, culture, and multinational connections (M. Durie 2009: 10).

Conclusion

This chapter has canvassed many issues in the Whanganui River and Te Urewera Treaty settlements. The Crown's perspective on the purpose of settlements and the options for how these can be carried out remains to be a significant constraining feature of the Treaty settlements process. The post-settlement co-management boards must operate within a Western political and legal context, which limits the ability of the iwi members on the board to practice their rangatiratanga over their important resource. While this context remains, the Whanganui River and Te Urewera Treaty settlements have gone further than previous settlements in recognising and articulating the perspective of the iwi over the environment and their values have formed the basis for the operation of the co-management boards. The legal personality gained by the Whanganui River and Te Urewera is a compromise between tikanga and the Western notion of ownership and management. Rangatiratanga can be practiced within a system of Crown sovereignty, as long as the iwi can be participants in this sovereignty and space is provided for iwi autonomy.

Conclusion

This thesis does not argue that Treaty settlements nor Crown recognition can create rangatiratanga. The continuation of rangatiratanga is up to the iwi members and their transfer of knowledge and history from generation to generation, perhaps constrained or enabled by the contexts they live in. However, what Treaty settlements do for rangatiratanga is provide a space for it to be practiced in New Zealand legislation and ensure that it is officially acknowledged by the Crown. While the overarching context of Treaty settlements is Crown sovereignty, the innovative aspects of the Whanganui River and Te Urewera Treaty settlements that provide for a greater practice of rangatiratanga mark very significant progress in the Crown-iwi relationship.

Since it was signed in 1840, the progress of the Crown understanding the Māori interpretation of Te Tiriti o Waitangi has been slow. The decades since the 1970s have seen the greatest amount of change. While there have been periods of great progress, often followed by periods of backlash against that progress, there has been an overall forward movement that is very likely to continue into the future. The progress is mediated by the fact that settlements are "negotiated compromises". They are balanced between a greater expression of iwi values and perspectives while retaining Western management structures and the protection of public interests. While the Crown has made progress in providing for a greater practice of rangatiratanga, the practice of its indivisible sovereignty remains unaddressed in settlements. Rangatiratanga will continue to exist despite Treaty settlements, as it has always existed despite colonisation.

If rangatiratanga is viewed as autonomy and self-determination, and not as full sovereignty, then the Whanganui River and Te Urewera Treaty settlements can be

considered innovative for how they have provided for the practice of rangatiratanga to a certain extent. The way rangatiratanga is provided for is in the reduction of Crown control in the co-management boards and the ability of iwi to practice self-determination over their people and their future in their own worldview, importantly including the future of the Whanganui River and Te Urewera. Providing for rangatiratanga is innovative because the Crown has the majority of the power in creating settlements and could have refused to allow for the practice of rangatiratanga in the settlement legislation. It is also innovative simply because the level of rangatiratanga provided for in these settlements has previously only been evident in the Waikato River Treaty settlement.

These innovative developments have occurred in the Whanganui River and Te Urewera Treaty settlements in order to resolve a grievance that is both political and economic. The ability of iwi to practice rangatiratanga also has benefits for the Crown. The economic self-determination of the iwi can relieve the Crown from the provision of welfare services, either because more iwi members are employed by the PSGE to work on their various development projects, or because the iwi provides the welfare services themselves. A greater practice of rangatiratanga over the Whanganui River and Te Urewera can be hugely advantageous for environmental conservation. The legal personality, in particular, is a new level of environmental protection that will be of great benefit to iwi, public interest, and the environment.

The Whanganui River and Te Urewera Treaty settlements do not fully provide for the practice of rangatiratanga and further developments are required to reach this goal, a goal that is healthy for New Zealand as rangatiratanga was guaranteed to Māori in Te Tiriti o Waitangi. These settlements may not fully meet Whanganui iwi and Tūhoe aspirations for autonomy and self-determination, but that does not mean that these aspirations will now go away. The settlements have ensured, in setting up a long-term relationship between these iwi and the Crown in the co-management of the legal personalities, that there may be an avenue for continued dialogue on the

topic of rangatiratanga in the future as evidenced already by the negotiations for Te Uru Taumatua to take over the management of welfare to Tūhoe beneficiaries.

Innovations

While the Crown controls the options and limits of the settlements, from the availability of redress items to the approval of Post-Settlement Governance Entities (PSGE), iwi are able to negotiate over the finer details of the settlements. These details, however small, can make a huge difference to the operating relationship between the Crown and iwi that emerges out of the legislation. While the overall context that the co-management boards operate in is a English political and legal system, the Crown does not have the same unequal share of power on the co-management board as it does in the settlement negotiations. One of the smaller details which may provide for a greater practice for rangatiratanga for the iwi post-settlement is the inclusion of operating values which are based on the worldview of the iwi. Both the Te Urewera and Whanganui River Treaty settlements include a list of values which guide the action of the Te Urewera Board and Te Pou Tupua, as well as underpin their strategy documents and plans. This ensures that the future action of these co-management boards will continue to subscribe to the worldview of the iwi for the foreseeable future. Rangatiratanga, as autonomy, can be considered practicable where the iwi can operate without being constrained by Crown power. Therefore, the co-management structures create the opportunity for further innovative developments and an increase in the practice of rangatiratanga because the relationship is more free from the burden of Crown control than it has previously been in colonial history.

The use of a legal personality contributes to the ability of Whanganui iwi and Tūhoe to practice rangatiratanga over the Whanganui River and Te Urewera, respectively. The application of a legal personality to a non-human being depends entirely on the values of a society, what is considered property and what is

considered to be an entity. The environment has been dealt with in a Western worldview in most previous legislation, as property that can be utilised for the benefit of humankind. However, the values of the iwi have been adopted in the use of the legal personality of the Whanganui River and Te Urewera, which is a hugely significant innovation for the Crown which maintains the vast majority of the sovereign power in New Zealand. Because these legal personalities are interconnected with their respective iwi, it impacts importantly on their practice of rangatiratanga as they are able to relate to the Whanganui River and Te Urewera in accordance with their own worldview, rather than as property owners or managers within a Western worldview. The legal personality must still operate within a English political and legal system as their rights will be advocated through the New Zealand Courts where there will be competing interests. The advocacy of the Te Urewera Board and Te Pou Tupua also subscribes in part to Western management principles as well as a Māori kaitiakitanga approach. The use of a legal personality can thus be viewed as a "negotiated compromise" between Western and Māori views on ownership, environmental protection, and management.

The finer details that have such an important impact on the ability of the iwi to practice their post-settlement rangatiratanga are the inclusion of Māori legal traditions and the worldview of the iwi throughout the body of the settlements. Therefore, when both Crown appointed and iwi members of Te Pou Tupua and the Te Urewera Board work towards restoring and protecting the health and wellbeing of the Whanganui River and Te Urewera, they are working towards a future based on the worldview of the iwi which is a necessary ingredient for self-determination. It is this kind of change which will have a genuine and enduring effect on the settlement and the relationship between the Crown and the iwi which is born out of it. While the application of legal personalities is certainly a New Zealand first and an interesting innovation, it is its basis in the Māori worldview which makes it such an encouraging development. Both Whanganui iwi and Tūhoe have at different points

in their past dealings with the Crown articulated their arguments within Western concepts in order to be heard by the Crown which was unwilling to engage in Māori concepts. Tūhoe and Whanganui iwi have articulated their own view of the environment and their relationship with it in their Treaty settlement negotiations. In having that officially acknowledged and legislated by the Crown, their ongoing co-management of the legal personalities will be based on this perspective.

Rangatiratanga and sovereignty

The underlying Treaty issue that has not been dealt with in these Treaty settlements is Crown sovereignty. Some have translated the tino rangatiratanga in Article Two of Te Tiriti o Waitangi into sovereignty and require a dismantling of the Crown's indivisible sovereignty in order for tino rangatiratanga to be fully practiced. Many others do not support this requirement and argue that the practice of tino rangatiratanga in terms of the Treaty of Waitangi involved an acceptance of Crown authority, though in a lesser form than is currently practiced. The practice of rangatiratanga in the present context requires autonomy from Crown control and a share in the sovereignty rather than its complete removal from New Zealand. Treaty settlements are most often approached pragmatically by iwi, who see it not as a complete resolution of their grievance, but a means to an important end; the cultural and economic development of their members and local environment. The tino rangatiratanga guaranteed in Te Tiriti o Waitangi relates to taonga. The relationship between Whanganui iwi and river, and Tūhoe and Te Urewera, reveals this kind of taonga relationship. Therefore, to be able to manage the resource through a kaitiaki position on the co-management board goes some way to provide for the practice of rangatiratanga over the resource, within a wider system of Crown sovereignty. The rangatiratanga provided for in the settlement is then perhaps resource specific, but importantly provides a basis for future development.

As well as the practice of rangatiratanga over the Whanganui River and Te Urewera, the PSGEs of Whanganui iwi and Tūhoe also practice rangatiratanga over those who choose to be included in their membership. With a recognised and mandated governance entity, the iwi has taken greater control over their development, particularly in regards to the social services that these settlements include. Many have agreed that self-determination is an adequate translation for rangatiratanga and it can be seen that this aspect is provided for in the settlements. However, members of the iwi still retain their individual independence that was guaranteed by their Article Three rights to equal citizenship, as people may freely opt-in (if they meet the iwi criteria) or opt-out of membership. There is greater opportunity for community involvement in the co-management arrangement for the Whanganui River and Te Urewera, as iwi members will make up the various consultation and advisory boards and there is more of a provision for community consultation than seen in the majority of local government environmental management. This is an important development for the practice of rangatiratanga because rangatiratanga is the autonomy and self-determination of the community, not just of the leader who represents them. Through these innovative settlements, the iwi can practice rangatiratanga over their people and land while also sharing in the sovereignty of the New Zealand state as a whole.

Future developments

The Whanganui River and Te Urewera Treaty settlements can be situated within a longer timeline of the development of the Crown's attitude towards Treaty settlements and the practice of rangatiratanga. As such, they are not likely to be one-off innovations and similar measures may be seen in future settlements. The 1975 Treaty of Waitangi Act was also coupled with the Crown's increasing abandonment of its assimilation policy, which is now wholly abandoned and extremely unlikely to be reinstated. At a societal level, New Zealanders have been moving further away from the once popular notion of unity as "one people", which included an

intolerance of non-Western worldviews. Many more people, particularly at the government level (except on the far-right/conservative end of the political spectrum) are comfortable with a "two people, one nation" rhetoric. The impact of these settlements on the relationship between iwi and local government is particularly significant, as the latter has been in control of local environmental management, often with a reluctance to allow for iwi involvement. These settlements can show that two worldviews can be applied to one piece of legislation without one needing to colonise the other and for the noticeable benefit of the health and wellbeing of the Whanganui River, Te Urewera and their respective iwi. There remain significant issues with the application of a Māori worldview in a Western political context that will continually need to be dealt with. Ideally, the equal membership of the co-management boards with their pre-defined iwi values will be in a good position to resolve these without compromising the practice of the rangatiratanga of the iwi or the health and wellbeing of the environment.

Each new settlement with a significantly new and innovative feature can provide a new standard by which new settlements can be judged. Though there have been periods of regression in Crown actions following particularly innovative steps forward, the overall trend is an increasing provision for the practice of rangatiratanga. It may also provide a good basis for iwi who have settled claims in previous decades to have their settlement revisited and updated to the new standard. The use of a legal personality may not be considered appropriate for all settlements involving important resources. The precedent that may be used is that the type of management agreed to conforms to the perspective of the iwi of their relationship and history with the resource. While the Crown holds the majority of power in the Treaty settlement process, the minority power of the iwi still remains an important aspect of the settlements and can have a significant impact on the resulting settlement. As it was the Māori "Renaissance" which initially began the process of acknowledging the breaches of the Treaty of Waitangi which required a

process for resolving them, Māori concerns remain central and can guide legislation to an agreeable compromise with the Crown. The Crown has made important changes in policy while attempting to resolve the political issue of Māori grievances and iwi have utilised these changes to ensure they achieve good results for their members and their resources.

This thesis has attempted to analyse the innovative use of legal personalities, co-management boards, and use of Māori concepts in the Whanganui River and Te Urewera Treaty settlements of 2014. The use of a legal personality is certainly innovative as, apart from in Ecuador, there are no precedents for its use in the world, but it has great potential for environmental protection. However, its use represents more than an innovative approach to environmental protection, it will also show what can be achieved for the health and wellbeing of natural resources when indigenous worldviews and mātauranga are utilised. When the settlements are considered for how they have resolved the Crown's past failure to recognise and provide for the practice of the rangatiratanga of iwi, it can be concluded that the Crown has moved further than previously seen in their acknowledgement of the perspective of the iwi and to give that expression in the legislation. Rangatiratanga is ultimately based in te ao Māori, the Māori world, and thus this world and its tikanga need to be articulated in the settlements for the practice of rangatiratanga to meaningfully occur. Through the use of co-management arrangements, these settlements have importantly provided a basis for an ongoing dialogue between the Crown and the iwi and, thus, an extension of the practice of this rangatiratanga appears to be possible for the future.

It is my hope that this research will add to the increasing scholarship around Treaty settlements. Particularly, it aims to add to the expectation of future progress from the Crown to further acknowledge and provide for iwi perspectives on how best to resolve Treaty claims and how to best provide for the practice of rangatiratanga. In analysing the Te Urewera and Whanganui River Treaty

settlements, this thesis has attempted to show that achievable forms of the practice of rangatiratanga, autonomy and self-determination, can occur within the context of Crown sovereignty both within settlements and most importantly, in the post-settlement world.

Glossary

ahikāroa	continuous occupation, burning fires of occupation
atua	deity
aukati	boundary marking a prohibited area
hapū	sub tribe
hui	meeting
iwi	tribe
kaitiaki	guardian, steward
kaitiakitanga	guardianship, stewardship
kaumātua	elder
kaupapa	topic, theme, programme
kawa	protocol
kāwanatanga	governorship
mana	prestige, authority, status
mana whenua	authority over land
mana motuhake	autonomy, independence
Māori	the indigenous people of Aotearoa New Zealand
mātauranga	knowledge, education
Māui	a famous character in Polynesian narratives
maunga	mountain
mauri	life force
noa	free from tapu, unrestricted
pā tuna	eel weirs

pachamama	mother earth (Ecuador)
Papatūānuku	Mother earth, origin of all living things
rāhui	temporary ritual prohibition, ban
Ranganui	Sky father, origin of all living things
rangatira	chief, leader
rangatiratanga	autonomy, self-determination
raupatu	confiscation
rohe	boundary, territory, region
rohe pōtae	tribal territory, homeland
rūnanga	council, board
tangata whenua	people of the land
taonga	possession, treasure
taonga tūturu	permanent possession, treasure
tapu	sacred, prohibited
te ao Māori	the Māori world
te reo Māori	the Māori language
tikanga	correct procedure, custom
tino rangatiratanga	self-government, sovereignty
tohu	guidance, advice
tohunga wairua	priest
Tūhoetanga	Tūhoe-ness
tupuna	ancestor (single)
tūpuna	ancestors (plural)
waka	canoe

waka tētē	fishing canoe
waka unua	double-hulled waka
whakapapa	ancestry
whakataukī	proverbial saying
whāngai	adoption

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