Report of Independent Assessor

on evidence supporting claims by

Ngati Pahauwera

under

Marine and Coastal Area (Takutai Moana) Act 2011

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Preface

This Report has been prepared by me in my capacity as Independent Assessor appointed by the Minister for Treaty of Waitangi Negotiations.

The role of an Independent Assessor is to produce an independent, non-binding assessment, supported by reasons, on whether the evidence presented to the Assessor provides a legal basis on which an applicant under the Marine and Coastal Area (Takutai Moana) Act 2011 could satisfy the Crown that various statutory requirements have been met. The process is designed essentially as a prelude to the Crown and an applicant negotiating and entering into a recognition agreement.

The role of an Independent Assessor is set out in greater detail in a document entitled "Operational Framework for Independent Assessors" which was produced in June 2013.

The evidence I have been asked to assess relates to claims under the Act brought by the iwi Ngati Pahauwera seeking customary marine title (s 58), wahi tapu recognition (s 78), and protected customary rights (s 51).

I am grateful to both the iwi and the Crown for the comprehensive nature of the evidence they have produced. I am particularly grateful to both parties for their focused and helpful submissions.

Shortly after my appointment I was able to visit the claimed area on 19 December 2014. I revisited it on 2 September 2015. During the course of my investigations, I issued two memoranda inviting both the iwi and the Crown to comment on certain issues.

The contents of this independent Report and its conclusions are self-explanatory. I express my gratitude to Ngati Pahauwera for hospitality on their marae and for their efforts in assisting with my two site visits. I am also grateful to the Office of Treaty Settlements for its input and logistical support.

Hon John Priestley, CNZM, QC
15 December 2015

Part I

The application and an Independent Assessor's approach

Ngati Pahauwera has made claims under ss 51, 58 and 78 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

The iwi's rohe is in northern Hawkes Bay, centred (in extremely general terms) around the lower reaches of the Mohaka River. The iwi's application relates to a clearly specified marine and coastal area extending on both sides of the Mohaka River mouth.

The iwi's claim under s 58 of the Act is for recognition of customary marine title (CMT) throughout the common marine and coastal area between the Poututu Stream and the Ponui Stream, extending from mean high-water springs to the 12 nautical mile limit of New Zealand's territorial sea. The application additionally seeks to include the mouths of rivers (including the Mohaka River mouth) inside that area to the extent that they are part of the common marine and coastal area.

"Common marine and coastal area" and "marine and coastal area" are both defined in s 9 of the Act, the former definition essentially incorporating the latter. The defined areas are those bounded by mean high-water springs and the outer limits of the territorial sea.

The iwi apply under s 78 of the Act for a recognition to be included in any CMT that the application area is also wahi tapu area. This application for wahi tapu seeks specific restrictions on access to protect the wahi tapu, such restrictions (in summary form) being:

(a) Restricting access only to those parts of the application area where there has not[1] been a drowning, death, or a body or koiwi found, or where the iwi has taken necessary steps to deal with those occurrences designed to protect the wahi tapu and restore tapu to the correct level, but it being envisaged appropriate members of the iwi might take necessary steps to deal with drownings, deaths, and discovery of bodies and koiwi by performing karakia or completing a rahui period.

(b) Restricting access to people who do not pollute, litter, gut fish on the beach or in the water, or over-exploit or waste resources in the application area.

(c) Restricting access to parts of rivers between river mouths and the up-river boundary of the common marine and coastal areas to those who "do not go to the toilet in the rivers".

[1] The "not" may well be a typographical error in the application, having the opposite effect to what was intended.

A third limb of the iwi's application is to seek recognition under s 51 throughout the application area of protected customary rights to take, use, gather, manage, and preserve all natural and physical resources other than those expressly prohibited by statute or listed in s 51(2) of the Act. The resources are listed to include sand, stones, gravel, pumice, driftwood, and other resources (such as kokowai, kokopu and inanga) when required and subject to the iwi's subjective determination of tikanga and kaitiaki obligations.

Lest it be thought that I have paraphrased the application inadequately or misinterpreted its scope in this Report, I attach as Annexure "A" Ngati Pahauwera's application, which I have considered in its entirety.

The task of an Independent Assessor

An Independent Assessor under the Act is not a creature of statute. The specific function of Independent Assessors is to provide an independent, non-binding, assessment to the parties (in this case Ngati Pahauwera and the Crown), supported by written reasons, on whether the evidence the parties have presented to the Assessor "provides a legal basis on which the applicant group could satisfy the Crown that the requirements for a protected customary right or customary marine title (as the case may be) are met".[2]

In a wider context, the role of an Independent Assessor is part of the overall engagement between the Crown and an applicant iwi under s 95 of the Act. That provision, sitting in Part 4, provides for the responsible Minister on behalf of the Crown and an applicant group to enter into a recognition agreement. Recognition agreements will, as the name suggests, recognise protected customary rights and customary marine titles. A recognition agreement relating to a particular customary right has no effect until it is essentially validated by an Order in Council (s 96(1)(a)). A recognition agreement relating to customary marine title has no effect until brought into effect by an Act of Parliament.

[2] The task and mandated approach of Independent Assessors are set out in a document entitled "Operational Framework for Independent Assessors" prepared in June 2013.

Part II

The Act

The Act came into force on 1 April 2011. It is neither appropriate nor necessary for this Report to discuss the Act in its entirety or the various disputes (some of which are mentioned in the Act's Preamble) which led to its enactment.

It is pertinent to observe that, as an Independent Assessor with no statutory or quasi-judicial function, I do not have the appropriate status to interpret in a binding way the various provisions of the Act. The Independent Assessor, and the non-binding report he or she presents, is part of a process which may lead to a recognition agreement. Subpart 2 of Part 4 of the Act (ss 98 to 113) provides a judicial pathway, starting in the High Court, for applicants to obtain a recognition order. Critical sections of the Act await judicial interpretation. The timing and results of such interpretation, at various levels of the judicial hierarchy, are problematic. Until such time, all an Independent Assessor can do is his or her best to use traditional methods of statutory interpretation and apply the results to the evidence.

The purpose of a statute must inform its interpretation.[3] Before turning to the specific statutory provisions on which the iwi rely, I examine briefly the three traditional pointers to the purpose of the Act.

The fourth preamble (which follows three preambles dealing with the enactment and repeal of the Foreshore and Seabed Act 2004) states that the Act takes into account the intrinsic inherited rights of an iwi "... derived in accordance with tikanga and based on [its] connection with the foreshore and seabed and on the principle of manaakitanga".[4] The preamble goes on to state that the Act:

> ... translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.

The above extract from the fourth preamble points to a very clear policy designed to bridge a tension between the relationship between Maori and the foreshore and seabed on the one hand and, on the other hand, the significance of the coastal marine environment to all New Zealanders, both present and future.

The second pointer is to be found, unsurprisingly, in s 4, which articulates the purpose of the Act. The s 4(1) purposes are:

(a) To establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area.

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[3] Interpretation Act 1999, s 5(1).

[4] This being a claim by an iwi, I have omitted in the text the fourth preamble references to hapu and whanau.

(b) To recognise the mana tuku iho[5] exercised in marine and coastal areas by iwi, hapu and whanau as tangata whenua.

(c) To provide for the exercise of customary interests in the common marine and coastal area.

(d) To acknowledge the Treaty of Waitangi.

Section 4(2) refers to the statutory purposes, which include contributing to the continuing exercise of mana tuku iho, giving legal expression to customary interests, recognising and protecting existing lawful rights and uses of the marine and coastal area, and recognising the importance of common marine and coastal areas (both its intrinsic worth and the benefit, use and enjoyment of all New Zealanders) by protecting public rights of access, navigation and fishing.

The third pointer is to be found in some of the Parliamentary speeches during the passage of the Marine and Coastal Area (Takutai Moana) Bill before its final enactment. When introducing the Bill for its First Reading in Parliament on 15 September 2010, the Hon Tariana Turia (on behalf of the Attorney General) outlined the Bill's purpose.[6]

> The preamble acknowledges the intrinsic inherited rights of whanau, hapu, and iwi derived in accordance with tikanga and based on their connection with the foreshore and seabed. In doing so, it responds to the call from many who simply asked for recognition of their ancestral connection to the coastline. The mana tuku iho provision is an acknowledgement of ancestral connections....
>
> The Bill sets out a process by which customary rights that were exercised by iwi and hapu in 1840 and continue to be exercised today in accordance with tikanga Maori will be recognised and the future exercise of such rights can be protected. The Bill also provides for the right to seek customary title to a specific part of the common coastal marine area if that area has been used and occupied by a group according to tikanga and to the exclusion of others without substantial interruption from 1840 to the present day....
>
> The right of public access to the marine coastal area is also a vital part of this Bill. The irony is, of course, that whanau, hapu and iwi have always been willing to share with all New Zealanders. It is the essence of the indigenous heart. Denial of access was never an issue.

The Attorney General, in the First Reading debate, also dealt with an aspect of the Bill's purpose:[7]

> The Bill does not take away rights; rather it recognises and protects the rights of all New Zealanders, including Maori, to the common marine and coastal area of this country. Recreational interests in this area ... are accepted as a

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5 Mana tuku iho is defined in s 9 as inherited right or authority derived in accordance with tikanga.
6 Parliamentary Debates (Hansard), Vol 666, 13999.
7 Ibid, 14003.

> birthright of all New Zealanders. This is why public access, fishing, and navigation in the common marine and coastal area are guaranteed....
>
> Maori interests in the common marine and coastal area are provided for in a number of ways. First the mana of iwi and hapu is recognised by the status of mana tuku iho. Mana tuku iho is an acknowledgement that iwi and hapu have a traditional role in caring for the common marine and coastal area in their rohe. It allows participation in statutory conservation processes....
>
> Second, the Bill sets out the means by which customary rights can be recognised and protected. The Bill also provides for the right to seek customary title to specific parts of the common marine and coastal area if the area has been used and occupied by a group according to tikanga without substantial interruption from 1840 to the present day....
>
> This Bill provides for the exercise of a number of valuable ownership rights because, once granted, such titles will have the following rights in the customary title area: the right to permit or not permit applications for new resource consents, with limited exceptions defined in the Bill; the right to give or withhold permission for conservation activities; the protection of wahi tapu; the ownership of minerals other than petroleum, uranium, silver and gold; the right to create a planning document; and the presumed ownership of taonga tuturu, which are Maori cultural historical objects.

The Attorney General outlined those provisions of the Bill which guaranteed public access rights to common marine and coastal areas. He also pointed to an accidental omission from the Bill, which has now become s 59(3) of the Act.

There is nothing in the Parliamentary debates relating to the Bill's committee stages or Third Reading which detract from the above pointers to the Act's statutory purpose. The purpose of the Act is tolerably clear. It provides various statutory mechanisms whereby, within statutory parameters, the ancient and spiritual connection between Maori and the marine and coastal area can be recognised.

The next section of this Report examines in greater detail the statutory provisions relevant to Ngati Pahauwera's application.

Part III

Statutory provisions relevant to Ngati Pahauwera's application

(a) Customary marine title, s 58 application

Ngati Pahauwera apply under s 58 of the Act for recognition that there is a customary marine title (CMT) throughout a specified common marine and coastal area. Annexed to this Report as "B" is a simple map of the application area. The Crown and iwi are agreed on the location and extent of this area. The shore boundary of the application area comprises approximately 25 kilometres of beach and river mouths. The outer boundary (consistent with the s 9 definition of "marine and coastal area") is the 12 nautical mile limit of New Zealand's territorial sea. The coastal area runs from the northern or true left bank of the Poututu Stream at the (approximate) eastern edge of the application area to the northern or true left bank of the Ponui Stream at the (approximate) western edge. The area thus includes the mouths of the Mohaka and Waihua Rivers and the Poututu Stream.

The application area, which I have visited and viewed twice, comprises a beautiful yet isolated and remote section of coastline. It is backed by high, steeply sloped (in some areas near-vertical) greywacke cliffs. The area is unprotected from oceanic waves. Erosion by sea and wind is constant. Earthquakes (and in particular the 1931 Napier earthquake) have caused slumping. The shoreline and cliff faces have changed physically during the lifetimes of Ngati Pahauwera kaumatua.

It is for Ngati Pahauwera to point to evidence which establishes on the balance of probabilities that customary marine title exists in the specified area (s 58(1)). CMT will exist if:

(a) Ngati Pahauwera holds the specified area in accordance with tikanga (s 58(1)(a)); and

(b) Ngati Pahauwera has in relation to the area exclusively used and occupied it from 1840 to the present day without substantial interruption (s 58(1)(b)(i)).

Sections 58(2) and (3) have no apparent relevance to the iwi's claim. Section 58(4) may have relevance to the Mohaka River mouth. The provision states that CMT does not exist if that title is extinguished as a matter of law.

Section 59(1) states that ownership of abutting land may be taken into account in determining whether CMT exists (s 59(4) expands somewhat the definition of abutting land). Section 59(3) specifies that the use at any time by people who are not members of [Ngati Pahauwera] of a specified area of a common marine and coastal area for

fishing or navigation "... does not of itself, preclude the applicant group from establishing the existence of customary marine title."

Between the Waihua River and the Poututu Stream, all abutting land is owned by third parties or the Crown. The beach in this sector of the application area is difficult to access. The abutting land in effect runs to the tops of the cliffs. Between the Mohaka River and the Ponui Stream, freehold title to much of the abutting land is held by third parties. Ngati Pahauwera interests currently own just over 50 percent of abutting land between the Mohaka and Waihua Rivers, particularly on the northern side of the Mohaka River, abutting that river's lower reaches on the northern bank.[8] For these reasons, the s 59(1) discretion to take into account the ownership of abutting land has little relevance to Ngati Pahauwera's claim. Of much greater relevance is the physical nature of the coastline and the extremely limited means of gaining access to the beach.

(b) Section 78 wahi tapu claim

Ngati Pahauwera's claim under s 78 (with proposed access restrictions)[9] raises statutory issues. Under s 78(2) a wahi tapu protection right may be recognised if there is evidence to establish:

(a) The connection of the group with the wahi tapu or wahi tapu area in accordance with tikanga; and

(b) The group requires the proposed prohibitions or restrictions on access to protect wahi tapu and wahi tapu area.

If a CMT is embodied under a Part 4 recognition agreement or court order, then the wahi tapu conditions that apply must be set out (s 78(3)).

Section 79(1) specifies what wahi tapu conditions must be set out in a CMT order or agreement. They include the location of the boundaries of the wahi tapu or wahi tapu area; the prohibitions and restrictions which apply and the reasons for them; and exemptions for specified individuals to carry out protected customary rights (s 79(1)).

Ngati Pahauwera's application sets out the specific restrictions the iwi seeks.[10] The wahi tapu protection sought applies to the entire application area. There are no specific wahi tapu boundaries other than the boundaries of the entire application area.

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8 See paras 107-110 of Joint Report to Independent Assessor dated 19 December 2014.
9 Set out on page 2 of this Report.
10 Ibid.

(c) Protected customary rights under s 51

Ngati Pahauwera's s 51 application for protected customary rights extends to "all natural and physical resources". Its detail is set out in an earlier section of this Report.[11]

Section 51(1) defines a protected customary right as one that has been exercised since 1840 and continues to be exercised in a particular part of the common marine and coastal area "in accordance with tikanga by the applicant group". The protected customary right must not have been extinguished as a matter of law (s 51(1)(c)). It is immaterial whether the protected customary right is one which continues to be exercised in the same or a similar way since 1840 or has evolved over time (s 51(1)(b)).

An applicant group does not need to have an interest in land in or abutting a specified part of the common marine and coastal area to establish a protected customary right (s 51(3)).

Section 52 further details the scope and effect of protected customary rights with particular reference to provisions of the Resource Management Act 1991. In essence, a resource consent under that statute is not a prerequisite to establishing and exercising a protected customary right.

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[11] See page 3.

Part IV

The evidence and an agreed approach

Section 95(4) of the Act prohibits the Crown, in effect, from entering into a recognition agreement unless Ngati Pahauwera satisfies the Crown that the statutory requirements of ss 51 and 58 relating to protected customary rights and customary marine title are met. This lies at the core of an Independent Assessor's task. My role (clearly specified in paragraph 7 of the "Operational Framework for Independent Assessors") is to assess whether the evidence presented provides a legal basis on which Ngati Pahauwera can satisfy the Crown that the relevant statutory criteria have been met.

The view has been expressed by both parties that the evidence necessary to satisfy the relevant statutory criteria must clear the hurdle of the balance of probabilities. That assessment by the parties is correct.

Ngati Pahauwera are to be thanked and complimented for the evidence they have submitted. I have considered it all and assessed it to the best of my ability. The evidence includes affidavits and briefs (some by people now deceased) prepared not only for the iwi's application under the Act but for previous hearings. These include evidence presented in relation to Planning Tribunal hearings and Waitangi Tribunal hearings in 1990-1991 relating to the Mohaka River; Maori Land Court hearings in 2007-2008, in which the iwi sought a customary rights order; and 2013-2014 affidavits and statements relating to the iwi's application under the Act.

Crown officials too have provided evidence. There has been painstaking and useful historical research. Officials have been both realistic and appropriately sympathetic in their assessment of and comments on the iwi's evidence.

Both the Crown and the iwi have agreed that it is not necessary for me to set out in detail the nature of the evidence submitted by the iwi. Rather, it is for me to assess, with reasons, whether the accumulated evidence presented by Ngati Pahauwera satisfies the relevant statutory criteria.

Both the iwi's submissions and the Crown officials' Assessment contain extensive footnote references to relevant affidavits and statements supporting the various statutory criteria. There is, in effect, a mine of relevant and compelling information, the reliability of which has not been challenged.

Part V

Customary marine title claim under s 58

Holds the specified area in accordance with tikanga

I am satisfied that the evidence presented by Ngati Pahauwera establishes, on the balance of probabilities, that the entire area over which the iwi apply for CMT recognition is held in accordance with tikanga. There is no evidence to the contrary. Importantly, the Crown officials in their submissions state that the collected evidence satisfies them that the criterion of being held in accordance with tikanga has been met.[12]

It is not really necessary for me to discuss in detail the meaning and parameters of the s 58(1)(a) requirement. The juxtaposition of "holds" and "in accordance with tikanga" has not, as yet, been the subject of judicial discussion. "Tikanga" is appropriately defined in s 9 as "Maori customary values and practices". This definition is consistent with case law (which I do not discuss). The definition expression "tikanga" is also consistent with a statement in a 2001 report of the Law Commission that:

> Tikanga Maori [is] the body of rules and values developed by Maori to govern themselves – the Maori way of doing things ... It is also important to note that the application of tikanga differs from group to group.[13]

I am satisfied, as a matter of statutory interpretation, given the clear purpose of the Act, that the word "tikanga" must inform the verb "holds". Parliament when it used the word "holds" was clearly not referring to ownership in a legal sense. No iwi "owns" marine and coastal areas (as defined) in that sense. As submitted by Ngati Pahauwera, there is force in the Maori Land Court dictum of Judge Spencer in the *Da Silva* case:

> The important word here is "held". There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Maori.

The Judge had earlier said that the Court had to make its determination "... according to tikanga Maori – from the inside".[14]

Consistent with sensible statutory interpretation, the use of "hold" in s 58(1)(a) must fall well short of legal ownership, since no iwi is in a position to claim legal ownership of a marine and coastal area. The use is equivalent to saying something is "held" in high regard.

The evidence presented by Ngati Pahauwera containing the reasons which satisfy me on the s 58(1)(a) limb include the following:

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12 Para 47 officials' Assessment of the evidence.

13 Law Commission, *Maori Custom and Values in New Zealand* (NZLC SP9 2001) 1.

14 *Da Silva – Aotea* (1998) 25, Auckland MB 212-245 at 217 and 215. The Judge's comments are certainly obiter and the words were being looked at in a different statutory context. Nonetheless they are helpful.

- Maintenance of ahi kaa.
- Assumption of kaitiakitanga obligations.
- Recognition of a manaakitanga obligation.
- Ancient and ongoing whakapapa connections.
- Inclusion of various geographic features in korero.
- An uninterrupted practice of imposing, when required, rahui.
- Tikanga and rules governing iwi behaviour in the area.
- Uninterrupted use of the area as a source of kaimoana.
- Juxtaposition of the area to Ngati Pahauwera rohe.
- Proximity (and indeed ancient use of parts of the area) as urupa.
- Weaving the area into Ngati Pahauwera oral history, including waiata.
- Proximity of current and past marae and pa sites.

The Crown officials, in their submissions, correctly and fairly point out that although the iwi evidence provides little information about tikanga prior to 1840 (the statute does not require this), nonetheless it can be inferred that there has been a transmission of tikanga from the pre-1840 era. It was further observed that no other Maori group disputes Ngati Pahauwera's tikanga; that fishing around the mouths of the Mohaka and Waihua Rivers and gathering shellfish from various reefs and occasional fishing ventures are ongoing; that the iwi has various evolved practices relating to use of the beach; and that the supporting affidavits illustrate consistent explanations of iwi behaviours and rules.

All these reasons lead irresistibly to the conclusion that s 58(1)(a) has been satisfied.

Exclusive use and occupation from 1840 to present day without substantial interruption

Under s 58(1)(b)(i) the iwi must establish by evidence, on the balance of probabilities, the following:

(a) Use and occupation of the area from 1840 to the present day.

(b) Such use and occupation to be exclusive.

(c) The exclusive use and occupation to have been without interruption of a substantial kind.

The provision must be read in the light of s 59(3) to the effect that use by people other than Ngati Pahauwera of the area for fishing and navigation "does not, of itself, preclude" the establishment of a CMT.

I am satisfied, on the basis of the evidence presented and the submissions received, that the s 58(1)(b)(i) limb has been satisfied with two exceptions. The two exceptions are:

(a) The Mohaka River mouth.

(b) The entire marine area beyond 250 metres from mean high-water springs.

I shall deal with the two exceptions in following sections of this Part.

In reaching my decision that, with the exception of the Mohaka River mouth and the seabed and marine area beyond 250 metres, s 58(1)(b)(i) criteria have been satisfied, I have been greatly assisted not only by site visits but in particular by the physical constraints of the claimed area. With the exception of river and stream mouths, the entire claimed area is backed by steep cliffs. Access to the beach (other than from the sea) is limited and restricted. Although much of the abutting land has passed out of Ngati Pahauwera hands, there is no evidence that farm owners whose holdings run to the cliff tops have attempted to forge access roads or tracks to the beach. There are no moorings, marinas, beach facilities, picnic areas, carparks, or structures on or immediately proximate to the claimed area. These physical realities have greatly assisted the merits of Ngati Pahauwera's claim. I have little doubt that s 58(1)(b)(i) factors will be much more difficult to assess with other claims under the Act.

The s 58(1)(b)(i) provisions have not been the subject of judicial determination. Ngati Pahauwera's helpful submissions suggested two alternative approaches. Central to both approaches was the evidence that the iwi had used and occupied the claimed area since 1840. Indeed, the topic of Ngati Pahauwera use and occupation of rohe areas was the subject of detailed evidence and accepted in an earlier Waitangi Tribunal claim.[15]

The first approach urged by the iwi is to adopt what they called "Canadian common law". Certainly there was discussion of Canadian jurisprudence and Canadian common law[16] in the publication *Reviewing the Foreshore and Seabed Act 2004*. The approach urged by the iwi was that the statute required only "exclusive occupation at 1840 to be proved and thereafter a substantial connection." Thus, it was submitted (although not in these precise words) that the adverb "exclusively" could be read down to "substantial". So far as occupation at 1840 was concerned, there had to be evidence of an intention and capacity to retain control without any need to show positive acts of exclusion.

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15 Waitangi Tribunal, the Mohaka Kiahuriri Report (Wai 201, 2004), see especially chapters 11-13.

16 The submissions of Crown officials also drew on Canadian jurisprudence.

The alternative approach submitted by Ngati Pahauwera (based on the assumption that I might not be totally attracted to what is said to be the Canadian approach) was that s 58(1)(b)(i) required exclusive occupation by Ngati Pahauwera from 1840 until the present day, demonstrated by an intention and capacity to retain control but without any need to show positive acts of exclusion. It was also necessary to interpret the provision (as required by s 4(1)(d)) of the Treaty of Waitangi). Whichever "approach" I adopted, submitted the iwi, the result would be the same. The evidence showed the statutory criteria were satisfied under either approach.

It is not my function to settle the jurisprudence of the statute. One of the effects of the acquisition of New Zealand in February 1840 by the British Crown was largely to bring to an end dispossession of Maori from their lands and rohe as a result of inter-tribal warfare. It is also arguable that, in general terms, the sovereignty of the Crown "froze" inter-iwi claims and disputes. The Canadian approach and jurisprudence focuses to some extent on the aboriginal situation at the time of sovereignty.[17]

Obviously, if a claiming iwi is not in possession of a coastal marine area at 1840 it could not meet the test. Such an approach might not necessarily favour Ngati Pahauwera since, on some of the evidence, at the time of the Treaty they and associated tribes were living in a fortified pa at Mahia, although it is alleged that iwi members stayed on the land throughout maintaining ahi kaa.[18] Fortunately, however, there is absolutely no evidence to suggest that any other iwi or group occupied Ngati Pahauwera's lands or the coastal marine area at or around 1840.

The approach I prefer is to examine the words of s 58(1)(b)(i), so far as the claimed area is concerned, in the light of the clear purpose of the Act. On this approach, the evidence satisfies me:

(a) Ngati Pahauwera have used and occupied the claimed area from 1840 to the present day.

(b) Their use and occupation has been exclusive.

(c) That use and occupation has been without substantial interruption.

(d) The use and occupation extends along the entire area of the coast from the Mohaka River eastwards to the Poututu Stream and from the Mohaka River westwards to the Ponui Stream.

(e) Such exclusive use and occupation extends, so far as the ocean and seabed are concerned, to a distance of 250 metres.

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17 See generally *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

18 Ngati Pahauwera legal submissions [149.2].

My reasons for so finding are as follows:

- The area has been central to Ngati Pahauwera life for the entire 175 years involved.
- No other group or person has, during that period, used the area exclusively.[19]
- The physical nature of the area, backed by high cliffs with difficult access from the land, has effectively impeded and restricted use and occupation of the area by others.
- The physical difficulties in gaining access to the beach over the Waihua River and the lack of any access down the cliffs between the Waihua River and Poututu Stream strengthen, in respect of this eastern sector of the claimed area, the previous reason.
- Despite restricted and/or difficult access from the land to the entire beach between the Waihua River mouth and Poututu Stream, there is evidence of members of the iwi gaining access by boat from the sea.
- There is evidence of use and investigation by iwi members for kaimoana purposes of various reefs out to an approximate distance of 200 metres.
- Use of the beach by non-iwi members of the public for walking, fishing, and boating purposes do not, having particular regard to s 59(3), weaken or destroy the evidence supporting the s 51(b)(i) criteria.
- Use of the claimed area by Ngati Pahauwera members for a variety of purposes is regular and constant.
- There has been no substantial interruption of the iwi's use and occupation. Although during the land wars the depredations of Te Kooti led to movements of both iwi and European settlers, the movement, so far as Ngati Pahauwera was concerned, did not lead to use and occupation of the claimed area by any other people or group. Nor can that movement as a matter of fairness be classified as a substantial interruption. Again, for what it is worth, there is some suggestion of ahi kaa being maintained.

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[19] On this issue, I accept the Crown officials' submission that evidence submitted by third parties (which I have read) does not demonstrate extensive or intensive third party use of the application area. The evidence describes occasional and sometimes repeated use for walking, fishing, boating, and camping. The Act ensures such use cannot be stopped or impeded.

- The iwi has exercised an organisational role and, arguably, control over such matters as fishing contests, fishing, gravel extraction, and the collection and distribution of hangi stones.
- The submissions and activities described by non-iwi submitters (third parties) such as beach walking, collecting driftwood, camping, fishing, and boating, are not inconsistent with Ngati Pahauwera's evidence. Such activities would undoubtedly continue were the area to be recognised as a CMT.

These are the main reasons for my finding that the evidence satisfies the s 58(1)(b)(i) test. The absence of other people or groups using or occupying the claimed area, coupled with the nature of the terrain which severely limits access from the landward side, were, for this claim, critical and compelling factors.

Twelve miles or 250 metres?

In my view, the evidence – weighed in a somewhat arbitrary but generous manner – justifies a finding that the outer or marine boundary of Ngati Pahauwera's CMT should be fixed at 250 metres from mean high-water springs. The iwi's submissions on this topic are understandable from a cultural and tikanga perspective. But, on the basis of the available evidence, a claim to extend the CMT to the outer limit (12 nautical miles) of New Zealand's territorial sea is aspirational and optimistic.

The view of the Crown officials from the outset was that, if the statutory criteria for a CMT was otherwise satisfied, the evidence of exclusive use and occupation did not extend beyond 100 metres seaward of mean low-water springs.

My preference for a more generous delineation of 250 metres from mean high-water springs was reached for two reasons. First, I considered it preferable to adopt the language of s 9, which refers to high-water rather than low-water springs. Secondly, there was some reference to Ngati Pahauwera individuals being able to explore through diving, reefs and shellfish sites approximately 200 metres offshore.[20]

Ngati Pahauwera's submissions urge an outer boundary of 12 nautical miles, which is the statutory maximum. Their submissions (in no necessary order of importance) make the following points:

- Iwi ownership has never been taken away.
- The iwi's rohe moana under the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which extend over a designated area to approximately six miles, only tells part of the story.

[20] Evidence of William Culshaw dated 26/11/13 at [17]-[20].

- The iwi has always had the intention and capacity to retain control of deeper water.
- No other person or body is "remotely interested" in the application area out to the 12 mile limit.
- No other group or person has ever used the area.
- Retaining control of the area is consistent with tikanga Pahauwera.
- Because, when fishing and navigation (a reference to s 59(3)) are removed, no one else is "remotely interested" in the application area between 200 metres and 12 miles, it follows that Ngati Pahauwera is entirely capable of retaining control of that part of the application area and there is no reason to doubt the iwi's exclusive use and occupation of it. (With respect, there are certain problems with the logic of this submission.)
- The iwi and their ancestors continuously travel, fish and dive throughout the deeper waters. There is no need to "police" the area because no one else is interested in it. Besides which, so far as fishing is concerned, there is protection flowing from the Wairoa Hard.
- On occasions members of the iwi have taken action by shooting at trawlers.[21]

Reference was also made to the iwi's connections with various Pacific Island whanaunga, including family connections with Rarotonga, the involvement of Cook Island soldiers in the Maori Battalion's D Company during the Second World War, and historical associations with Pacific Island groups with the Takitimu waka on which Ngati Pahauwera ancestors travelled. Similarly, perhaps, the iwi's tipuna, Paikea, travelled through the waters when arriving from Hawaiki on the back of a whale. It was submitted that the evidence was clear that the iwi did not see an artificial 12 mile limit on their influence and association with the wider sea.[22]

Clearly, the interlocking definitions under s 9 of "common marine and coastal area" and "marine and coastal area" and the ability for a customary marine title to exist in a specified area of a "common marine and coastal area" point to Parliament not ruling out the possibility of a CMT extending out 12 nautical miles. However, common sense suggests that the further away from the shoreline one moves, the more difficult it will be to argue for exclusive use and occupation of the ocean and seabed. Human beings have, for centuries, fished the ocean and passed across its face. Certainly Ngati

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21 Unsurprisingly perhaps, there is no direct evidence of this, which probably has much the same weight as a chance remark made to the Independent Assessor by a kuia on 19 December 2014 of telephoning Ministry officials when foreign trawler lights were seen close inshore at night.

22 Iwi's legal submissions [91].

Pahauwera have used the sea. Despite the reservations contained in s 59(3) that fishing and navigation do not preclude establishing a CMT, the evidence in this case falls well short of the iwi being able to claim exclusive use and occupation.

It used to be said that the old International Law recognition of a three mile territorial sea reflected in large measure the maximum reach of cannonballs from a shore battery. Exclusive ownership, use or occupation of the sea inevitably requires a degree of control. There is a significant, and in my view fatal, difference between the control which can be exerted immediately offshore and the control which can be exerted miles out into the ocean. There is no evidence of effective or continuous offshore control being exerted by Ngati Pahauwera.

Mohaka River mouth and extinguishment

I note, so far as the Mohaka River bed is concerned, that the Waitangi Tribunal, in its Mohaka River Report (Wai 119),[23] said that the bed of the Mohaka River from the Te Hohe junction to the river mouth should be vested in Ngati Pahauwera. That recommendation, for reasons which I do not know and about which it would be inappropriate for me to inquire, has not been implemented. But had the recommendation led to a statutory vesting of the bed of the river in the iwi, different legal considerations would have applied to the inclusion or exclusion of the Mohaka River mouth in the claimed CMT.

Ngati Pahauwera's claim under s 58 includes the mouth of the Mohaka River.

Behind its mouth the Mohaka descends to the sea through an unremarkable valley comprising pasture and exotic trees. Its rate of descent is slow. As is frequently the case with rivers at this point, the volume of water passing into the sea and the rate of flow slow when encountering a high tide, onshore winds, or pounding surf. Unsurprisingly, the lower reaches of the river are brackish. They provide good fishing spots used by the iwi and others. The Ngati Pahauwera device of the reti board (a carefully crafted small board attached to a line with a keel and hooks) is frequently used in river pools and water immediately behind the mouth.

As is to be expected with river mouths of this type, the location of the mouth changes periodically. Wave height and driven banks of sand may impede direct flow to the sea causing the river, in its final stages, to run parallel with the shoreline. Such sand banks may be breached by water and wave action leading to changes in the position of the mouth.

Section 58(4) of the Act stipulates that CMT does not exist if the title has been extinguished as a matter of law. Crown officials are of the view that the claimed CMT cannot extend to the Mohaka River mouth because the mouth itself, or rather its bed, is

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[23] See *supra* at page 13.

vested in the Crown pursuant to the provisions of s 14 of the Coal-Mines Amendment Act 1903.[24] That provision states:

> 14(1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown and, without limiting in any way the rights of the Crown thereto, all minerals including coal within such beds shall be the absolute property of the Crown.

The same provision defines a river bed, unremarkably, as being the space of land which the waters of the river cover at its fullest flow without overflowing its banks.

Of critical importance is the application of s 14(1) of the Amendment Act to the bed of a navigable river. "Navigable river" is broadly defined as:

> [meaning] a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts....

The adverbs "continuously" and "periodically" are of interest. But in any event matters of interpretation have been conclusively determined by the Supreme Court in *Paki v Attorney General* [2012] NZSC 50. Taking a different view from both the High Court and the Court of Appeal, the Supreme Court held that the definition of "navigable river" did not necessarily extend to the entire river or to those places which were in fact navigable. Thus a section of the Waikato River, which was not and never had been navigable, was not covered by the 1903 Amendment Act, with the result that the river bed of that section of the Waikato vested, not in the Crown, but in the riparian owners.

The relevance of all this (being essentially a legal issue) to Ngati Pahauwera's s 58 claim is that the Mohaka River mouth, both now and historically, in its various shapes and sites, is indisputably navigable. Further upstream, however, where for much of its length the river passes through narrow gorges and across rapids, the Mohaka is not navigable.

The submission of the Crown officials is that the evidence demonstrates that the section of the Mohaka River inside the common marine and coastal area was navigable within the meaning of s 14 of the Coal-Mines Amendment Act in 1903, with the result that the bed of the river at that point vests in the Crown and extinguishes customary marine title.

Ngati Pahauwera submit to the contrary. The iwi accepts that the Mohaka River mouth was used for both shelter and boat building but that in no sense was the river itself used as a highway for commerce, trade, or some form of transport connection. Iwi canoes on the river were not public transport and did not in themselves indicate navigability.

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[24] As is apparent in submissions made in *Paki (infra)*, this legislation is arguably confiscatory. See generally, K Sanders in *The New Zealand Supreme Court. The first 10 years* (LexisNexis, Wellington 2015), 337-339.

Because the river itself is gorged and full of rapids, it clearly is not navigable and thus in the context of the whole river (a reference to the *Paki* judgment of McGrath J at [249]-[251]) the Mohaka mouth was not navigable.

It is not the function of an Independent Assessor to make legal rulings. Rather, the focus must be on the evidence. What evidence there is about the navigation of the river mouth, however, both at and prior to 1903, points strongly to the river at and immediately behind its mouth being navigable. There is evidence of commercial vessels, plying both ways between Wairoa and Napier, calling into the Mohaka River mouth to collect and discharge both cargo and passengers. There is an early painting of the river mouth in the 1860s depicting what certainly seem to be signal flags to convey information about the mouth to passing and approaching vessels. There is evidence of punts and ferries crossing the river in both directions to convey passengers and goods. There is evidence of surf boats being used in conjunction with commercial steamship companies to ferry stores to the beach. There is evidence of a vessel grounding on the bar. There is evidence of wool bales being ferried down-river for collection by commercial vessels. There are references to the Mohaka mouth being regarded as part of the Wairoa port. There is the general tenor of the evidence of Mr B Parker, Senior Historical Researcher for the Crown Law Office, and the evidence he presented in October 2007 and February 2008 to the Maori Land Court.

All this evidence, in my view, results in the Crown's submission that, by virtue of the 1903 Amendment Act, the Mohaka River bed at and behind its mouth is navigable and thus vests in the Crown, being strongly arguable, and that Ngati Pahauwera's CMT is thus extinguished by virtue of s 58(4).

But even if extinguishment was not the central issue, in my view the same evidence raises real issues under s 58(1)(b)(i). Given the clear and undisputed use of the river mouth during the second half of the 19th century and the early 20th century for the purposes of pastoral trade, boat building (which requires eventual floating out to sea), ferries crossing the river, and entry across the bar by commercial vessels and schooners, a body of evidence exists which tilts against Ngati Pahauwera being able to assert on the balance of probabilities that the Mohaka River mouth has been exclusively used and occupied by it without substantial interruption from 1840.

For these reasons, in two discrete areas, I consider the available evidence does not, on the balance of probabilities, lead to a conclusion that the Mohaka River mouth can be included in the claimed customary marine title.

Part VI

Wahi tapu under s 78

Section 78 envisages that a CMT "may seek to include recognition of a wahi tapu or wahi tapu area" in any recognition agreement.

Section 78(2) states that a wahi tapu protection right may be recognised if there is evidence to establish, first, the connection of a group with wahi tapu or a wahi tapu area in accordance with tikanga and, secondly, that the group requires prohibitions or restrictions on access to protect the wahi tapu or wahi tapu area. Section 78(2) is buttressed by s 81(2) which creates an offence, punishable by a fine not exceeding $5,000, for people who intentionally fail to comply with imposed prohibitions and restrictions in a CMT area.

Section 79 for its part sets out various mandatory conditions which must be stipulated in a CMT order or agreement relating to boundaries, prohibitions, restrictions and exemptions.

I have spelled out these provisions to make, at the outset, the point that wahi tapu protection rights, for obvious reasons, require a degree of specificity. Intentional disobedience of wahi tapu prohibitions and restrictions is a criminal offence. Locations of wahi tapu and wahi tapu areas must be defined. So too must applicable restrictions and prohibitions.

Ngati Pahauwera's s 78 application is set out in an earlier section of this Report.[25] The iwi wants s 78 to extend to the entire application area it seeks. The application clearly seeks restrictions on access. So far as the entire application area is concerned, the access restrictions sought in summary are:

(a) To those parts of the application area where there has been a drowning, death, or a body or koiwi found.

(b) What I understand to be interim restrictions where a karakia or a rahui are necessary as interim measures to restore tapu.

(c) (Not formulated in terms of restriction on access) permission for appropriate members of the iwi to take necessary steps to deal with drownings, deaths, or body and koiwi discovery in accordance with tikanga.

(d) A global restriction of access to those who pollute, litter, gut their fish on the beach or in the water or over-exploit or waste resources. (The

[25] Page 8.

formulation of 2.1.3[26] of the wahi tapu claim is, with respect, somewhat clumsy and is probably using "restricted" in an ambiguous way.)

(e) For the application area which includes rivers (again ambiguous use of the word "restricted"), access is to be denied to those who go to the toilet in rivers whilst in the application area.

The clear purpose of s 78(1) is to seek *recognition* of a wahi tapu or a wahi tapu area inside a CMT. Such recognition (ss 78(3) and 79(1)) must lead to the imposition of wahi tapu conditions.

Problems immediately arise if wahi tapu is to be claimed over the entire area. With those difficulties in mind I invited the parties, in a memorandum dated 24 August 2015, to make further submissions on the topic.

Ngati Pahauwera's submissions helpfully include the following points:

(a) A wahi tapu does not have to be a small or discrete area.

(b) Respect for tapu is embedded in Maori culture and adherence to tikanga maintains social and environmental order.

(c) Prohibitions and restrictions are enforced to prevent desecration, exploitation and pollution of areas which are tapu.

(d) There are various levels of tapu.

(e) In coastal marine areas wahi tapu is relevant following events such as a drowning, which alters the degree of tapu at a place. A restriction thus needs to be imposed so that the appropriate level of tapu can be restored.

(f) The iwi requires wahi tapu protection over the entire area "so they can exercise their mana tuku iho and customary rights as guaranteed by the Treaty of Waitangi."

(g) The ability to place temporary restrictions in the application area is consistent with the purpose of the Act.

The concept of wahi tapu is indisputably deeply embedded in tikanga Maori. There is also a significant degree of overlap (so far as coastal areas are concerned) with kaitiakitanga.

The available evidence, which provides a helpful focus beyond the parties' submissions, includes:

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[26] See Annexure "A".

- There are a number of restrictions observed relating to human pollution of the fishing and marine environment through excreta, menstruation, and cleaning and gutting fish.
- Along with many other coastal iwi, Ngati Pahauwera used sand dunes as urupa. The location of many of these burial sites has been forgotten and/or the sites may have disappeared as a result of wind and sea erosion.
- As a result, koiwi are found from time to time.
- Unremarkably, rahui are imposed when a body or drowning occurs in the coastal area.
- Such rahui are used to limit fishing, collection of kaimoana, and collection of driftwood, sand or stones.
- Such rahui will apply, depending on the site of the drowning, to both the beach and the river.
- Although lacking in specificity, there is evidence that the beach in years prior to 1840 was the site of warfare between various iwi and war parties resulting in deaths, leading to burials in proximity to the beach.
- Ngati Pahauwera have been unable, or possibly unwilling, to point to any specific urupa in the claimed CMT area which require wahi tapu protection.

The Crown officials in their submissions consider that the "expansive definition" of wahi tapu advanced by Ngati Pahauwera is inconsistent with the purpose of the Act. The officials helpfully reviewed case law and other legislation (not necessary to replicate here). Certainly there is force in the officials' submission that to declare a large area wahi tapu would be rare. There are useful dicta contained in the Maori Land Law case *Horowhenua 11 (Lake) Block.*[27] The Maori Land Court, when declining to set aside all Lake Horowhenua as a wahi tapu under the Te Ture Whenua Maori Act 1993, appears to have applied some of the criteria advanced by an expert witness, Professor Sir Hirini Mead. His expert view was that the criteria for a wahi tapu were:

(a) It was a place where revered relatives and ancestors lay.

(b) It was a place which was identified and recognised as wahi tapu culturally and traditionally.

(c) It remained tapu for a long period of time and the people believed this.

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[27] *Horowhenua 11 (Lake) Block* (2014) 324 Aotea MB 144.

(d) It was a place of memories and stories that meant much to descendents.

(e) It could be a place where death occurred but the bones of the dead are somewhere else.

(f) It is invariably a place that has a name.

(g) It is a place or site under religious or superstitious restrictions beyond one's power, inaccessible or sacred, and could thus be described as a "restricted zone".

There can, of course, be layers to wahi tapu. The use to which Ngati Pahauwera put the proposed CMT for food gathering and other activities perhaps point to the area not being wahi tapu to the elevated degree suggested by Professor Mead.

In my view, the evidence falls well short of justifying recognition of wahi tapu or wahi tapu areas of the entire CMT area under s 78. The consequences of a somewhat vague and amorphous recognition would present formidable problems in respect of ss 79(1) and 81. I accept that the iwi may subjectively regard the entire area as wahi tapu. I doubt, however, whether the purpose of the Act and its provisions cover such an expansive approach.

What Ngati Pahauwera appear to seek, when one scrutinises their requested restrictions, are a modest and probably acceptable application of wahi tapu principles to permit the appropriate restoration of tapu when bodies and koiwi are discovered; to impose rahui (limited to the taking of fish, kaimoana and resources for stipulated short periods) in respect of deaths and drownings; and to prevent the beach and fishing grounds from being polluted. The evidence certainly points to such restrictions and controls within the CMT area as being justified and in accordance with the iwi's tikanga.

It should be possible, as a matter of both negotiation and careful drafting, to preserve restrictions and controls for the iwi within the CMT in those stipulated circumstances. But the achievement of such a modest acceptable result must be by some route other than the entire CMT being a wahi tapu area.

Part VII

Protected customary rights under s 51

Ngati Pahauwera's claim under s 51 has been summarised earlier in this Report.[28] In terms of s 51(1), a protected customary right is one which has been exercised since 1840 and continues to be exercised in the particular part of the common marine and coastal area in accordance with tikanga by the relevant iwi. Certain types of protected customary rights are excluded. Sections 52 and 53 of the Act specify the scope and effect of customary rights and consequential controls.

The drafting of the iwi's s 51 claim seeks a right to "take, utilise, gather, manage, and/or preserve *all natural and physical resources*". There then follow specific resources and items. They include stones. It was initially unclear to me whether "stones" included hangi stones, which are of particular significance to Ngati Pahauwera and which were mentioned and discussed frequently in the evidence I read. It is now my understanding, however, that it is common ground between the parties that agreements about hangi stones (which the Crown accepts are covered by the Ngati Pahauwera Treaty Claim Settlement Act 2012) can include the iwi's right to control the use of hangi stones as well as the current right to gather and use them. There is no need for me to expand on this any further, given that there seems to be agreement that hangi stones are included in the iwi's s 51 claim.

I am satisfied on the balance of probabilities that the *specified* items included in the claim have been taken, utilised, gathered, managed, and preserved by Ngati Pahauwera in the claimed area since 1840 and that the exercise of those rights is in accordance with the iwi's tikanga. There is no evidence that such rights have been extinguished as a matter of law.

The only difficulty arises with the broad or catch-all claim that protected customary rights should extend to the words italicised above "all natural and physical resources". I asked the iwi to provide greater specificity. They were unable to do so. The reasons advanced for this stance were, first, that the iwi's customary rights covered all natural and physical resources, so therefore the statutorily protected customary rights should do so. Secondly, it was submitted that although the iwi did not at the moment have in mind any resources other than those listed, it might in the future be the case that there were other resources which were not "barred" by legislation. No hypothetical examples, however, were given. I consider this submission, with respect, leads nowhere. If there is no specific resource which the iwi has in mind (barred or not barred) and no evidence that such a hypothetical resource has been used or gathered by the iwi, then it would be impossible to satisfy the s 51(1) requirements that a customary right had been exercised since 1840 and continued to be exercised.

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[28] See page 3.

The s 51 criteria are, in my view, made out on the evidence in respect of those specified items in the iwi's claim. What is unclear, however, are the specific areas of the CMT where those protected customary rights will be exercised by taking, utilising, gathering, managing, and preserving.

The view of the Crown officials (other than on the issue of the expansive words of "all natural and physical resources") is that the specified objects in the s 51 claim meet the s 9 definition of "protected customary right", being an activity, use or practice.

With some justification, the Crown officials' assessment is that the s 51 claim was short on the detail as to how the iwi intend to manage and preserve the protected customary right resources and in what specific areas of the CMT those management and preservation rights may need to be exercised. These are matters of detail, albeit important detail. It is for the parties to negotiate and specify those machinery matters. Absence of specificity in those areas, however, does not, on the evidence, prevent a s 51 protected customary right claim being established.

Part VIII

Conclusions

My assessment of the evidence, for the reasons detailed in previous parts of this Report, is that having regard to the purpose and provisions of the Marine and Coastal Area (Takutai Moana) Act 2011, the iwi, Ngati Pahauwera, have established a legal basis for the following:

(a) A customary marine title under s 58 in their favour in respect of the area claimed in the common marine and coastal area between Poututu Stream and Ponui Stream to a distance of 250 metres from mean high-water springs and including all river and stream mouths with the exception of the Mohaka River mouth.

(b) Recognition of wahi tapu under s 78 in the customary marine title area, limited solely to negotiated tikanga fishing practices to prevent the beach and fishing grounds from being polluted, and rahui necessary to restore tapu in the event of deaths, drownings, and the discovery of bodies or koiwi in the area. Such negotiated restrictions to be for appropriately short periods and limited to the taking of fish, kaimoana, and resources.

(c) Establishment of protected customary rights (subject to agreed area specificity on taking, utilisation, gathering, management, and preservation) to take, utilise, gather, manage, and preserve sand, stone, gravel, pumice, driftwood, kokowai, wai tapu, inanga, kokopu, tauranga waka and hangi stones. Such customary rights to be subject to the statutory restrictions, scope and effect set out in ss 51 and 52 of the Act.

Dated this 15th day of December 2015

Hon J M Priestley, CNZM, QC

"A"

Ngāti Pāhauwera application under the Marine and Coastal Area (Takutai Moana) Act 2011

Customary Marine Title

1. Ngāti Pāhauwera apply under section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 ("the Act") for recognition that customary marine title exists in their favour throughout the common marine and coastal area between Poututu Stream and Pōnui Stream, from the mean high water springs to the limits of the territorial sea, being twelve nautical miles, and including the mouths of the rivers to the extent that they are part of the common marine and coastal area ("the application area"), on the basis that Ngāti Pāhauwera holds the application area in accordance with tikanga, and has exclusively used and occupied it from 1840 to the present day without substantial interruption and is not extinguished as a matter of law.

Wāhi Tapu

2. Ngāti Pāhauwera apply under section 78 of the Act for recognition to be included in the customary marine title agreement that the application area is also a wāhi tapu/wāhi tapu area on the basis that there is evidence to establish the connection of Ngāti Pāhauwera with the wāhi tapu/wāhi tapu area in accordance with tikanga and that Ngāti Pāhauwera requires the following restrictions on access to protect the wāhi tapu/wāhi tapu area:

2.1. In the whole application area:

2.1.1. Access is restricted to only those parts of the application area where there has not been a drowning, death or a body or kōiwi found, or where Ngāti Pāhauwera have taken the necessary steps to deal with the drowning or death and the place where the kōiwi or body was found in accordance with tikanga, for example by performing karakia or completing a period of rāhui, in order to protect the wāhi tapu by restoring the tapu to the correct level; but

2.1.2. The appropriate members of Ngāti Pāhauwera may take the necessary steps to deal with the drowning or death and the place where the kōiwi or body was found in accordance with tikanga, for example by performing karakia or completing a period of rāhui; and

2.1.3. Access is restricted to those who do not pollute, litter, gut their fish onto the beach or into the water, over-exploit or waste resources while in the application area; and

2.2. In the parts of the application area which are parts of rivers (between the mouths of any rivers in the application area and the upriver boundary of the common marine and coastal area);

2.2.1. Access is restricted to those who do not go to the toilet in the rivers while in the application area.

Protected Customary Rights

3. Ngāti Pāhauwera apply under section 51 of the Act for recognition throughout the application area that Ngāti Pāhauwera have a protected customary right to take, utilise, gather, manage and/or preserve all natural and physical resources (other than those resources listed in section 51(2) of the Act or resources where such taking, utilising, gathering, managing or preserving is specifically prohibited under any legislation) including sand, stones, gravel, pumice, driftwood, kokowai, wai tapu, inanga, kokopu and tauranga waka, as and when such resources are required, for such purposes and to such extent as Ngāti Pāhauwera shall determine, subject to tikanga including their obligations as kaitiaki, on the basis that this right has been exercised since 1840, continues to be exercised in the application area in accordance with tikanga by Ngāti Pāhauwera and is not extinguished as a matter of law.

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Ngāti Pāhauwera Application Area