The Changing Face of Co-governance in New Zealand

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How are Ngāi Tahu and Ngāi Tūhoe promoting the interests of their people through power-sharing arrangements in resource management?

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1 Acknowledgments

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This thesis is dedicated to all my grandparents, for inspiring eternal intellectual curiosity.

2 Abstract

Power sharing regimes in resource management, including co-governance and co-management schemes, are now common across New Zealand. These schemes bring together iwi and the Crown to facilitate various environmental objectives. These arrangements often utilise the tenants of tikanga Māori, in particular the concept of kaitiakitanga, and are generally provided for outside of the Resource Management Act 1991. This thesis shows how two iwi, Ngāi Tahu of the South Island, and Ngāi Tūhoe of Te Urewera in the central North Island, are utilising such schemes to promote the interests of their people. It explains that Ngāi Tahu have built up co-governance in a patchwork manner, utilising the provisions of their settlement to build three distinct co-management arrangements in Canterbury. The thesis shows that Ngāi Tahu have yet to gain full co-governance capacity, but may well have a future role at the table in regional Canterbury governance from 2016 onwards. In comparison, Ngāi Tūhoe have been granted a different kind of governance arrangement that arguably goes beyond co-governance. This governance arrangement is based off the fact that legal personality has been granted to Te Urewera, and will allow Ngāi Tūhoe to promote the interests of their people in a unique way. The thesis will show that the face of co-governance is changing, and the future face of such arrangements may well give iwi more control. However, that there are pitfalls associated with such resource management power sharing schemes that must be taken into account when planning for future arrangements.

3 Glossary[1]

Anamata. Time to come, hereafter, futures.

Aroha. Love, charity, generosity.

Atua. Ancestor with continuing influence, god, demon, supernatural being, deity, ghost, object of superstitious regard, strange being.

Hapū. Sub-tribe, clan grouping.

Hui. Gathering. Meeting.

Iwi. Tribe.

Kai. Food.

Kai Awa. Food from the river.

Kai Ika. Food from fish.

Kai Manu. Food from birds.

Kai Moana. Food from the sea.

[1] Definitions are sourced from www.maoridictionary.co.nz.

Kai Rakau. Food from trees.

Kai Roto. Food from the lakes.

Kāinga. Food store.

Kaitiaki. Guardian, steward.

Kaitiakitanga. Guardianship, stewardship.

Kaiwhakahaere. Director, CEO.

Kaumātua. Tribal elder.

Kaupapa. Topic, policy, matter for discussion, plan, purpose.

Kawa. Mārae protocol.

Kererū. Wood pigeon.

Kingitanga. King Movement.

Ko au te Awa, ko te Awa ko au. I am the River, the River is me.

Kuia. Elderly woman, grandmother, female elder.

Mahi. To Work.

Mahinga Kai. Cultivation of food, food gathering.

Mana. Prestige, authority, control, power, influence, status, spiritual power, charisma.

Mana atua. Sacred spiritual power from the atua.

Mana motuhake. Self-determination, inter-dependence

Mana tangata. Power and status accrued through one's leadership talents, human rights, mana of people.

Mana whenua. People with territorial rights, power from the land, authority over land or territory, jurisdiction over land or territory.

Manaakitanga. Sharing, hospitality to the fullest extent that honour could require.

Mārae. Open area in front of the meeting house, often used to describe collection of buildings around this area.

Mātauranga. Knowledge, wisdom, understanding, skill.

Mauri. Life principle, vital essence, special nature.

Mokopuna. Grandchild.

Ngā mataa waka. Māori who are not mana whenua to the area in which they live.

Ngāi Tahu Whānui. Gathering of Ngāi Tahu people.

Ngāi Tahutanga. Ngāi Tahu tikanga.

Noa. Free from tapu or any other restriction;

Ōnukurana Tūhoe. Natural resources arm of Tūhoe.

Pākehā. New Zealander of European Descent.

Papatipu rūnanga . 18 Ngāi Tahu groups of hapū.

Papa-tū-ā-nuku. Earth mother and wife of Rangi-nui

Pōwhiri. Welcome ceremony on a mārae.

Rāhui. The customary usage of rāhui refers to a prohibition against trespassing in a particular area; used in the case of tapu or to temporarily protect natural resources.

Rangatira. Chief, to be of high rank.

Rangatiratanga. Effective leadership.

Rangi-nui. Sky father and husband of

Rohe. Tribal territory.

Rohe-pōtae. Tribal territory

Rūnanga. Tribal council.

Taonga. Treasure, anything prized.

Tamariki. Children.

Tāne. Son of Papa-tū-ā-nuku and Rangi-nui, God of Forests

Tangaroa. Son of Papa-tū-ā-nuku and Rangi-nui, God of the Sea.

Tangata whenua. People of the land.

Taniwha. Water spirit, monster, dangerous water creature

Tapu. To be sacred, prohibited, restricted, set apart, forbidden, under *atua* protection.

Tāwhirimātea. God of the winds.

Te Kerēme. The Ngāi Tahu Claim

Te Waipounamu. The South Island.

Te Whitu Tekau. The Seventy.

Tika. To be correct.

Tikanga. Rules, laws, Māori legal system.

Tino Rangatiratanga. Māori sovereignty movement.

Tohu. The metaphysical or symbolic description of things.

Tohunga. Skilled person, chosen expert, priest, healer

Tōpuni. Literally Dogskin cloak, used in a resource management context as an area of significance.

Tuākana. Elder siblings.

Tūhoetanga. Tūhoe tikanga.

Tupua. Goblin, object, strange being.

Tūpuna. Ancestors, grandparents.

Utu. Concept of reciprocity in order to maintain balanced relationships between people and the Gods.

Waiora. Health, soundness.

Wairua. Spirit, soul.

Wairuatanga. Spirituality, acknowledging the metaphysical world.

Wāhi taonga. Historical sites or places of great significance.

Wāhi tapu. Sacred place, sacred site - a place subject to long-term ritual restrictions on access or use.

Whakapapa. Genealogy, genealogical table, lineage, descent.

Whairawa. Assets, to be wealthy.

Whakataukī. Proverb, significant saying.

Whānau. Family grouping.

Whānaunga. Relative, relation, kin, blood relation.

Whānaungatanga . Kin relationships between people and the rights and obligations that follow from the individual's place in the collective group.

Whenua. Land, placenta, afterbirth.

4 Introduction and Methodology

In this thesis I explore how two very different iwi, Ngāi Tahu in Canterbury of the South Island and Ngāi Tūhoe of Te Urewera in the North Island, are using co-governance arrangements in resource management law to gain regional influence and promote the interests of their people. The thesis takes the form of four chapters. The fifth chapter outlines the relevant law and policy that affects the formulation and execution of such arrangements. The sixth chapter shows that Ngāi Tahu have used their Treaty of Waitangi Settlement as a building block to create three resource management power sharing arrangements in Canterbury but have failed to fully secure total co-governance in their efforts. The seventh chapter will detail the 2013 Ngāi Tūhoe Settlement, which is unique for its creation of legal personality for Te Urewera and the resulting governance entity that will represent this new legal entity. The Ngāi Tūhoe governance arrangements go beyond other contemporary co-governance schemes, and create a new form of governance. The eighth chapter concludes that legal personality is a crucial factor in securing good resource management power sharing arrangements, that the Ngāi Tūhoe arrangements have set the standard for future Crown-Iwi governance arrangements, and outlines some of the pitfalls of such arrangements. I will show that the future of co-governance is a scheme that involves a higher degree of participation for Iwi. I will also explain that co-governance is a political vessel into which the Crown can pour as much or as little power sharing as it wishes

4.1 Methodology

This research was undertaken at the University of Canterbury in the School of Law in conjunction with the Ngāi Tahu Research Centre, during 2013-2015.

The Ngāi Tahu Research Centre provided invaluable support and cultural guidance throughout the course of this thesis. The project was undertaken from the cultural perspective of myself, the author, who has whakapapa links to Ngāti Tama (Taranaki) and Ngāti Pamoana (Whanganui), but who grew up in Wellington in a predominately Pākehā environment. The research is therefore influenced by my cultural context.

This project focused on two main case studies, Ngāi Tūhoe in Te Urewera, and Ngāi Tahu in the Canterbury region. Ngāi Tahu has a vast rohe, and Canterbury was selected over other areas of their rohe as it is the centre for Ngāi Tahu administratively, and is also the home of the author. There are other resource management power sharing arrangements that are ongoing in other parts of the Ngāi Tahu rohe, such as the Titi Islands and Muriwai; I have chosen to focus on the arrangements in Canterbury.

This research was conducted in a sociolegal manner. Sociolegal research aims to understand how law and policy is working in practice, which is why this approach was taken. Sociolegal research can pose many challenges. The first of these is securing a solid definition of what exactly sociolegal work is: Michael Salter and Julie Mason put forward a key belief that underpins the concept, "Empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context".[2] Understood at times as 'filling a gap' between law in books and law in

[2] Michael Salter and Julie Mason *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, England, 2007) at 122.

practice, sociolegal research assesses the "practical impact of law in action"[3], specifically, "sociolegal research frequently addresses law in action in the sense that it seeks to gain empirical knowledge of the actions, relationships, and attitudes of parties affected by legal proceedings".[4] Amongst the various forms sociolegal research can take, the research undertaken in this thesis adopted the 'empirical approach'. Salter and Mason define empirical research as "the gathering of an analysis of facts about law in action, experiences of the practical impact of legal proceedings upon different groups in society".[5] The research analysed the practical effect of resource management power sharing arrangements created by policy and statute, and specifically how these arrangements affected 'different groups in society', therefore it was logical that an empirical socio-legal methodology was taken.

The research was split into three key stages:

A literature review. This involved reading historical materials on each iwi. This included books and Waitangi Tribunal papers. This literature review was undertaken to understand the relationship between the Crown and each iwi, and to understand the governance journey taken by the tribes in question.

An examination of contemporary policy. This stage required the reading of statute and policy relating to the power sharing schemes in which each iwi is involved, to understand the mechanisms that have been put in place to

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[3] At 130.

[4] At 152.

[5] At 165.

establish each arrangement. It was necessary to understand the bones of each arrangement to then apply the knowledge taken from the third stage of this project to flesh out these bones.

Semi-structured interviews. The final stage of the research was to interview key stakeholders from Ngāi Tahu, Ngāi Tūhoe, and the Crown. Each of these interviews were conducted in a semi-structured manner, the participants were given the opportunity to read the questions asked and topics to be discussed beforehand, and were then interviewed face to face and recorded using a voice recorder. These interviews were then transcribed. This stage was conducted in order to understand the practical effect of the policy and statute that provided for each iwi's power sharing arrangement with the Crown. This three stage process ensured that I covered both the theoretical and practical elements of each iwi's governance journey.

Empirical sociolegal research, when compared to traditional black-letter analysis, poses some challenges. The researcher can have difficulty obtaining raw data, and experiences further issues interpreting that data. Additionally, it can be difficult to control variables, such as consistent interview questions between differing subjects, and results can have more than one possible cause.[6] Moreover, the sociolegal researcher can face significant ethical dilemmas, such as obtaining full consent of interviewees, and protecting

[6] At 165.

confidentiality with regard to how data is utilised and published.[7] Several such challenges arose during the research process.

The biggest challenge was the interview process. Transcription work is long and tedious, and often interviews were transcribed that did not produce much data which ultimately contributed to the overall thesis. I also lost three interviews through the malfunction of equipment. The interviews and transcription period was time consuming and this was a significant challenge. Of these interviews, only some of the information obtained was eventually utilised in the written thesis.

As part of the research project, I attended Nga Matapopore meetings from September 2013 – March 2014 with the permission of the former chair of Nga Matapopore, Dr Te Maire Tau. Nga Matapopore is the steering committee that has the mandate from the mana whenua of Christchurch, Ngāi Tūāhuriri, to engage in the Canterbury Earthquake Rebuild. One of the difficulties of attending these meetings was establishing what information was available to use in this thesis, and what was restricted due to confidentiality. I also attended the Select Committee Hearings for the Te Urewera-Tūhoe Bill in Whakātane on 19 February 2014 in order to understand some of the issues that were being debated in the Bill, and to speak to stakeholders. The overall research and writing process was cohesive and the sociolegal approach was effective in answering the research question.

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[7] At 172.

5 Law and Policy Background

Naku te rourou nau te rourou ka ora ai te iwi

With your basket and my basket the people will live

Co-governance arrangements in resource management in New Zealand see iwi and the Crown co-operating together in a power sharing capacity to make important decisions about natural objects and areas. Two such iwi, Ngāi Tahu and Ngāi Tūhoe, are utilising these schemes to gain regional influence and through this influence, promote the interests of their people. The well-known whakataukī above refers to co-operation, and highlights the importance of everyone doing their part and sharing their resources. This is the very essence of a co-governance arrangement.

In this thesis I examine how co-governance in resource management in New Zealand is being used as a tool by two very different iwi, Ngāi Tahu in Canterbury in the South Island and Ngāi Tūhoe (Tūhoe) in Te Urewera in the North Island, to increase the regional influence of each iwi. In order to evaluate the different schemes that each iwi are working with and assess how they are using these to promote the interests of their people and how this, in turn, is changing the face of co-governance, it is necessary to understand the underlying law, cultural context and policy. This chapter draws on current literature to explore these factors and to explain the current landscape.

Firstly, this chapter will give some definitions of governance, in order to understand co-governance. I then seek to explain the difference between co-

governance and co-management. In this section, the positives and negatives of the concepts of co-governance and co-management will be analysed.

The second section of this chapter will provide a discussion of the interaction of tikanga Māori and the resource management legislation regime. Iwi involved in power-sharing arrangements bring tikanga Māori principles to the boardroom table, so it is necessary to understand how these work. This section will discuss the legislation that governs resource management, the Resource Management Act 1991 (RMA). I will explain how the RMA engages with iwi and hapū interests, and how the courts have analysed this engagement. This section will evaluate the provisions within the Act that specifically legislate for a form of power sharing, and will show that the Act falls short of being an effective vehicle for delivering co-governance. Therefore, Māori have to look outside the RMA to pursue effective co-governance.

The third section will discuss the interaction of resource management law and tikanga. Tikanga is Māori law and custom, and it is necessary to understand tikanga when evaluating a co-governance scheme, as Māori participants will be heavily influenced by tikanga.[8] In particular, the term kaitiakitanga will be explained. Kaitiakitanga is a tikanga environmental management ethic, and is therefore particularly relevant in iwi-Crown power sharing resource management arrangements.

This chapter will show that resource management legislation as it stands is inadequate to fully provide for tikanga Māori with relation to co-management

[8] Tikanga can be both plural and singular. In this context, the singular will be used.

and co-governance, and as such, these arrangements must be provided for outside of the RMA.

5.1 Governance and Co-Governance

Power sharing regimes between iwi and the Crown in resource management are often couched in terms of 'co-governance'. The term is rarely defined, and means different things to different people. It is often overlapped with the term co-management, and there is no official guidance in legislation as to what the term means. The root of co-governance is 'governance'. Therefore, in order to understand co-governance, I must first examine the concept of governance itself. A succinct, all-encompassing definition of the term 'governance' is hard to find. This reflects the complex nature of the term and the subjective nuances that 'governance' engenders. One useful base definition can be found in the International Encyclopaedia of Social and Behavioural Sciences, which defines governance as: [9]

> The legal rules, institutional arrangements and practices that determines who controls the entity being governed and who gets the benefits that flow from it. Governance includes how major policy decisions are made, how various stakeholders can influence the process, who is held accountable for performance, and what performance standards are applied.

This base definition can be built on depending on the context. This thesis examines iwi-Crown governance of natural resources in New Zealand. Therefore it is useful to look to how governance works in the contexts of

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[9] D A Lincove *International encyclopedia of the social & behavioral sciences* (American Library Association dba CHOICE, Middletown, 2002) at 346.

environmental and indigenous relations. Steven Bernstein, in a paper examining environmental governance, states that: [10]

> Governance, at any time and in any place, is the sum of collective understandings and discourse about *material capabilities*, *knowledge* (normative, ideological, technical and scientific), *legitimacy* (the acceptance and justification of the right to rule by relevant communities), and *fairness* (which… may include notions of accountability, representation, and responsibility, as well as distributive justice).

Robert Joseph, in a paper comparing Māori and Pākehā governance structures, notes that governance is: [11]

> The process through which institutions, businesses and citizens articulate their interests, exercise their rights and obligations and mediate their differences… Governance methods include structures, processes, norms, traditions and institutions, and their application by group members and other interested parties

I consider that these definitions build a basis for what governance is in the context of this thesis.

One aspect that is agreed upon by many authors is that governance is not to be confused with government. It is a much broader term than government "which concentrates on state actions versus society and market… 'Governance' looks

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[10] Steven Bernstein "Globalization and the Requirements of "Good" Environmental Governance" 2005 4(3-4) Perspectives on Global Development and Technology at 652.

[11] Robert Joseph "Contemporary Maori governance: new era or new error?" 2007 22(4) New Zealand Universities Law Review at 684.

at steering and self-regulation on both sides, public and private".[12] Joseph warns that the tendency to confuse these two terms leads to "unfortunate consequences" including narrowing the range of strategies available to deal with problems that might arise in a governance situation.[13] Government is only one of the many range of stakeholders that might be involved in governance decisions.

What then, is "good" governance? Joseph stresses that "there is no single world-wide model for best practice governance due to differences in legal systems, institutional frameworks and cultural traditions".[14] As a useful starting point for determining "good governance", Ulrich Karpen has highlighted as an effective measure an Organisation for Economic Co-operation and Development (OECD) list of the following priorities:[15]

- Evidence based policy making
- Integrity in the public sector, credibility and trust;
- Regulatory management,
- Multi-level government
- Interaction between the public and private sectors

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[12] Ulrich Karpen "Good governance" 2009 12(1-2) European Journal of Law Reform at 20.

[13] Joseph, above n 11.

[14] Joseph, above n 11.

[15] OECD *Public Governance and Territorial Development, Directorate, Public Governance Committee, Report on consultation with the Stakeholders, Draft Principles for Transperancy and Integrity in Lobbying* (24 Dec 2009 2009) in Karpen, above n 12.

- Human resources management; and
- Fiscal sustainability

However, I consider that good governance will be subjective and determined by the unique characteristics of each system being governed. Governance brings together the various philosophical decision-making pathways within an entity. Ultimately these governance decisions will decide the path forward taken by that entity, and are therefore crucial to the future strategy and day-to-day running of that entity.

5.2 What is Co-governance?

In New Zealand, co-governance is a way of sharing governance power that is used to recognise the role of Māori as a Treaty of Waitangi partner, in order to encourage increased tangata whenua involvement and participation. These schemes occur predominantly in the sphere of resource management, and are negotiated between "defined and identifiable Māori groups and Crown agencies".[16] Ngāi Tahu and Ngāi Tūhoe are engaged in such arrangements within their rohe, and are utilising these schemes to build regional influence.

For Māori, co-governance schemes allow them to participate in a form of resource management that they have often been locked out of for many generations, in an effort to compensate for historical injustices.[17] For the Crown, these arrangements allow them to devolve some decision making

[16] Linda Te Aho *Power-sharing and natural resources* (Victoria University of Wellington, 2011) at 1.

[17] P. Ali Memon and Nicholas A. Kirk "Maori commercial fisheries governance in Aotearoa/New Zealand within the bounds of a neoliberal fisheries management regime" 2011 52(1) Asia Pacific Viewpoint at 107.

power, while retaining overall control. In co-governance schemes across New Zealand, iwi representatives and Crown agents sit on governance boards to decide the crucial governance goals of the organisation. Membership numbers are generally equal, or close to being equal. Such boards are designed to be co-operative and are encouraged to operate in good faith and in a collaborative manner.

In co-governance arrangements, the agents that act on behalf of the Crown are generally representatives from local, district or regional government. Co-governance boards implement the Resource Management Act 1991 in relation to the resources in question and make the all-important planning decisions under the scope of the Act. Other Acts, such as the Conservation Act 1987, the Wildlife Act 1953 and the National Parks Act 1980, may well be considered by such co-governance boards when preparing conservation management strategies.[18]

In New Zealand legislation there is no written definition of the term co-governance. The term itself is mentioned in four statutes – two are Treaty settlements,[19] and two are river management schemes that are derived from Treaty settlements.[20] However none of this legislation provides an official interpretation. A term that is used in a similar context to co-governance is co-management. Co-management is provided for in three of the acts that co-

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[18] See Ngāti Tūwharetora, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 at s 16.

[19] Raukawa Claims Settlement Act 2014, Ngāti Manuhiri Claims Settlement Act 2012.

[20] Nga Wai o Maniapoto (Waipa River) Act 2012, Ngāti Tūwharetora, Raukawa, and Te Arawa River Iwi Waikato River Act 2010.

governance is set out in, and one additional piece of legislation.[21] There is a similar lack of statutory definition of this term.

However, there are sources outside of the legislation that do define co-governance and co-management. One example which deals with the terms in the specific context of iwi participation in resource management is the 2010 *Deed in Relation to Co-governance and Co-management of the Waipa River*. Paragraphs 3.6 – 3.8 set out a more structured outline of the expectations of each of these two power sharing arrangements than is found in statute. Co-governance is described as setting the primary direction to achieve outlined restoration goals, while co-management is structured as a collaborative partnership that implements the direction set under the co-governance framework. Guiding principles for these co-governance and co-management structures include respect for mana (authority), mauri (life-force) and waiora (spirituality) of the rivers involved, and principles to do with practical and effective outcomes.[22] Tikanga Māori and mainstream environmental science are considered to be guidelines of equal importance in these schemes.

Outside of legislation and Treaty Settlements, co-management and co-governance have been considered in some depth by various academic commentators. Co-management has been the focus of several studies. Jeremy Baker, in his paper 'The Waikato-Tainui Settlement Act: A new High-Water Mark for Natural Resources Co-management' gives a concise explanation of

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[21] Co-management is not set out in the Ngāti Manuhiri Claims Settlement Act 2012 but is provided for in Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

[22] NZ Government 'Deed in Relation to Co-Governance and Co-Management of the Waipa River' at 3.9.

co-management.[23] Baker describes co-management as denoting "formalized (sometimes statutory) collaborative arrangements linking local communities and governments", and notes that "there is a continuum of possible co-management schemes providing for differing degrees of power sharing".[24] This is echoed by Phillipa Norman, who agrees that co-management arrangements can vary. Nonetheless, Norman states that certain characteristics must be present in co-management arrangements. These include shared power and joint decision-making, shared responsibility, co-operation and consensus, and drawing on a range of knowledge systems.[25]

Local Government New Zealand (LGNZ) has published a guide to the co-management systems in place around the country. LGNZ show a series of structures where increased levels of community involvement flow from 'informing' to 'partnership/community control':[26]

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[23] Jeremy Baker "The Waikato-Tainui Settlement Act: A New High-Water Mark for Natural Resources Co-management" 2013 24(1) Colo J. Int'l Envtl. L. & Pol'y 163 at 166.

[24] At 166.

[25] Phillipa Norman *Crown and Iwi co-management: A model for Environmental governance in New Zealand* (University of Auckland, 2011) at 19.

[26] Local Government New Zealand *Local Authorities and Māori: Case studies of local arrangements.* (Wellington, 2011) at 33.

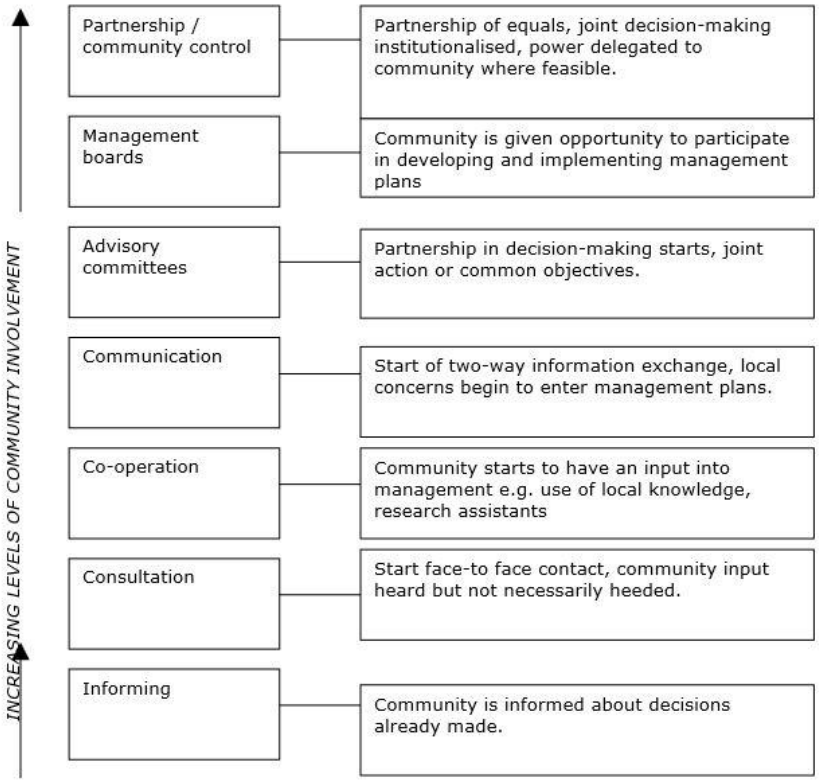

Figure 1: Co-management structures

This diagram suggests that anything as low-level as simply giving information as co-management. I consider that this is remarkable as it seems to ignore the co-operative nature of such arrangements and denotes very little practical power sharing. An iwi can share information with a local government entity that then ignores this information, reducing any influence that iwi might have and essentially making the engagement redundant. I believe it is most definitely not an equal power sharing arrangement, and does not reach the level of equality suggested by the term ‘co-governance’.

Co-governance has many similar characteristics to co-management, such as shared responsibility and decision making power. However, while the two concepts are very similar and are often used in the same context, there is some difference. Co-governance offers a higher degree of power sharing than co-management does. There has been academic discussion regarding the differences between the two concepts. Catherine Iorns Magallanes has noted the interchangeability of the terms co-management, joint management, and more recently, co-governance.[27] She explains that "any such use at the moment is probably due to a political choice based on the more normal distinction between governance and management. 'Governance' certainly has a connotation of greater authority than 'management' does".[28] It is questionable as to whether this is mere semantics, but I consider that at a practical level co-governance does entail a higher level of responsibility and input than co-management.

At a functional level, those in governance roles whom I interviewed had some distinct and contrasting views about the difference between co-governance and co-management. These stakeholders did not hold one distinct view on the topic, and in fact, in some cases, had completely differing opinions. I consider that this reflects the unclear nature of the differences between the two terms. In a Canterbury context, ECAN Commissioner Rex Williams notes: [29]

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[27] Catherine Iorns Magallanes "Co-governance and co-management of natural resources" (World Indigenous Lawyers Conference, Hamilton, 6 September 2012) at 1.

[28] At 2.

[29] Interview with Rex Williams, ECAN Commissioner (Rachael Harris, March 13, 2014).

> A governance level is very different from a management level. Management is based on expected outputs, and at co-management people just perform tasks to achieve those outputs. Co-governance is different in that you're not actually sure what the outputs are, and the co-governors have to debate the issues to define the outputs.

Williams' colleague, ECAN Commissioner Donald Couch, who is Ngāi Tahu, believes that co-governance can trigger conflicts to do with mana, and that co-management is where the real power is, as this is control at a more basic level.[30] Couch's view can be juxtaposed to that taken by Ngāi Tahu academic Dr Te Maire Tau who thinks that there is a lack of clarity between the two terms as the boundaries between governance and management are never clear.[31] In contrast to Couch, Tau believes that true power lies at a governance level, as input at a governance level allows iwi to do things how they want and in their own way. I believe that the contrast in opinion between these two Ngāi Tahu authorities highlights the lack of clear definition between these two terms. This shows that these schemes are often used interchangeably depending on the politics of each arrangement. I posit that neither type of arrangement has strict boundaries or definitions, rather, both terms can be used as a convenient vessel with which the Crown can pour into it what it likes.

Co-governance schemes are used as resource management tools and as methods of settling Treaty grievances and managing important taonga, while still allowing residual control to rest in the hands of the Crown. Consequently,

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[30] Interview with Donald Couch, ECAN Commissioner (Rachael Harris, 11 March 2014).

[31] Interview with Dr Te Maire Tau, Ngāi Tūāhuriri, Former Head of Nga Matapopore (Rachael Harris, 4 August 2014).

such schemes are likely to be more palatable to the average tax payer than a full hand over of control. When considering the differences between co-governance and co-management, an analogy with a yacht can be used: to navigate an ocean, a co-governor would set the course and man the tiller, whereas a co-manager would be raising the sails and swabbing the decks.

At a practical level, it would appear that no clearly defined boundaries exist between co-management and co-governance, despite the higher connotation of authority that the term 'co-governance' gives. There is a spectrum of power sharing arrangements in resource management. Arrangements labelled 'co-management' and 'co-governance' sit at different places along this spectrum. I will therefore use the term 'power sharing arrangement' throughout this thesis to denote any scheme that sits on this spectrum. Both Ngāi Tahu and Ngāi Tūhoe have utilised different power sharing arrangements to increase regional influence.

Resource management power sharing schemes exist across New Zealand. They have been implemented by the RMA, Treaty settlements, and policy written specifically for the scheme in question. Each of these arrangements has a certain level of power sharing involved in it, and as such some have a higher level of influence than others. Some examples of power sharing arrangements between iwi and the Crown that are currently in operation include a JMA between Tūwharetoa and Taupō District Council[32], a co-governance

[32] "Joint Management Agreement between Ngāti Tūwharetoa and Taupō District Council" (2008) <www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/JMA-Landowner-Guide.pdf>.

arrangement over the Te Arawa Lakes, [33] and co-management and co-governance structures for the Waikato River.[34]

5.3 Positives and Negatives of Co-governance and Co-management

Co-governance and co-management schemes are different, but for the purpose of investigating the positives and negatives of these power sharing systems, the literature discussing them will be examined together. These systems have been positively received by some. Linda Te Aho states that "enhancing people's rights will lead to more effective governance and management of resources".[35] Academics such as Te Aho see increased Māori decision making power in resource management as essential, explaining that power sharing schemes are empowering for Māori who have often been locked out of resource management decisions for the majority of post-Treaty history. Co-governance has positive connotations of decolonisation. Jonathan Paquette has linked the ascension of co-management with the rise of decolonisation of public administration.[36] Power is removed from the hands of central government and returned to iwi.

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[33] Local Government New Zealand, above n 26 at 6.

[34] A variety of legislation forms these arrangements, including the Waikato-Tainui Raupatu Claims (Waikato River Act) 2010.

[35] Te Aho, above n 16 at 1.

[36] Jonathan Paquette "From Decolonization to Postcolonial Management: Challenging Heritage Administration and Governance in New Zealand" 2012 12(2) Public Organization Review at 128.

Power sharing schemes in resource management are designed to give Māori increased influence. For Māori, it is a method of regaining respect for their right as tangata whenua, a recognition that "they were here first".[37] Iwi are willing to engage in co-management and co-governance systems because it is one way of establishing control over resources that they used to manage traditionally. While it is not the full hand over of control that may be preferred by some iwi, it is one concession that the central government will make. I consider that the Crown will still retain overall control, and will often set the parameters of how far it is prepared to give back authority in the context of the scheme.

Notably, both indigenous and non-indigenous stakeholders have critiqued co-management and co-governance systems. Some non-indigenous stakeholders view such systems as undemocratic. Norman observes that "detractors argue that Māori should aim to secure more influence through election to local government".[38] When the Waikato River Settlement was initiated, then-Federated Farmers President, Don Nicolson, authored an op-ed in the *New Zealand Herald* lambasting co-governance.[39] His scathing attack on the Waikato power sharing arrangements claimed that co-governance was both undemocratic and a faulty analysis of the Treaty. He argues that: [40]

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[37] Interview with Tony Sewell, CEO Ngāi Tahu Property (Rachael Harris, 11 June 2014).

[38] Norman, above n 25 at 27.

[39] Don Nicolson "Flawed concept of co-governance misrepresents Treaty" *NZ Herald* (Auckland, 11 May 2010).

[40] At 1.

> Co-governance is a new, untried way of governing the nation's resources. … Co-governance is highly undemocratic, because decisions are made by appointees. … Sacrificing democracy for the sake of a Treaty settlement is outrageous.

I consider that Nicolson's opinion is one that is particularly telling as it comes from the seat of Federated Farmers (FF). FF is often a key stakeholder in lands that are the subject of resource management power sharing schemes, such as Te Waihora/Lake Ellesmere and the Waikato River. These comments reflect that often contentious nature of the Treaty Settlement process, and the differing views that will always be taken by stakeholders that have different priorities and goals.

Scientists have also raised questions about power sharing systems in resource management, with concerns over the clash of mainstream science and tikanga Māori. Geoff Wilson and Ali Memon have studied environmental co-governance in South Island forests.[41] Their paper observes that such systems "have been far from successful as a means to empower local indigenous communities and to promote sustainable environmental practices".[42] Their critique of power sharing arrangements between iwi and central government stems from the clash between traditional management methods in tikanga and mainstream science-based forest management. Wilson and Memon state that "policy frameworks involving indigenous peoples are often based on the assumption that indigenous people and conservation managers strive for the

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[41] Geoff A Wilson and P Ali Memon "The contested environmental governance of Maori-owned native forests in South Island, Aotearoa/New Zealand" 2010 27(4) Land Use Policy.

[42] At 1198.

same ‘bio centric’ objectives, even though resource use is often more central to indigenous self-determination than altruistic frameworks”.[43] They also note that mainstream conservationists often hold the unrealistic view that indigenous people will preserve land that is given back to them in the state that they received it, despite the differences in cultural opinion about what conservation is, and the fact that Māori may wish to develop the land for economic and cultural purposes.[44]

Wilson and Memon conclude that tikanga Māori environmental management in forests may clash with mainstream science, as “cultural, economic and social factors combine to create forest management pathways that are complex and that may not necessarily be compatible with Western notions of ‘ideal’ biodiversity protection”.[45] This can be extended to co-governance and co-management regimes in other environmental contexts such as riparian repair, where tikanga and mainstream management ideologies may not be well matched. Often, Māori do not separate environmental management and sustainable economic development; activities such as the annual cull of mutton birds by southern Ngāi Tahu Rūnanga reflect this. Mainstream thinking, on the other hand, tends to separate environmental conservation and economic growth.

The clash of mainstream conservation values with tikanga Māori has been examined by others. Baker has noted “while Western and Indigenous

[43] At 1200.

[44] At 1208.

[45] At 1208.

conceptions of conservation share a common interest in sustainability, merging two systems rooted in different worldviews and unequal in power is not straightforward".[46] Mark Prystupa has examined the case of Te Waihora/Lake Ellesmere. [47] Prystupa notes that groups including Forest and Bird, Public Access New Zealand and Federated Mountain Clubs were opposed to co-management of Te Waihora "for fear that there will be degradation in conservation values and a limiting of access to these areas".[48] He also notes the efficacy of complaints from these stakeholders, as these groups retain a significant membership and have close ties with the Department of Conservation.[49] In Australia, this conflict has also emerged. In Booderee National Park in New South Wales, the government's commitment to a particular version of biodiversity "has the ability to interfere with Aboriginal cultural aspirations".[50] I consider that co-governance and co-management regimes in New Zealand challenge the mainstream management system. As such, those in the dominant culture may be less inclined to apply management perspectives from a different culture.

Academics who are of Māori heritage have also explored some of the challenges that arise with resource management power sharing regimes. Rawinia Higgins argues that co-management is a compromise that has arisen

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[46] Baker, above n 23 at 171.

[47] Mark V. Prystupa "Barriers and strategies to the development of co-management regimes in New Zealand: the case of Te Waihora" 1998 57(2) Human Organization [H.W. Wilson - SSA] at 140.

[48] At 140.

[49] At 140.

[50] David Farrier and Michael Adams "Indigenous-Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia" 2011 at 37.

as a result of the parameters of negotiation and settlement that "change as quickly as the governing political parties".[51] She draws attention to the existence of the post-settlement entities that often form the Māori side of co-governance, observing:[52]

> These legal structures do not provide iwi with the agency to create structures that are uniquely Māori beyond the bounds of the law. Iwi are forced into a dichotomy over their cultural and economic capital that appears to emphasise the latter rather than a symbiotic development of both.

I consider that co-management will by its very nature affect the self-determination of an iwi, as they are forced into a mainstream model. Such a power sharing system is a concession, rather than an outright victory for Māori. Ngāi Tahu Adjunct Professor and member of the Te Waihora Co-governance group, Anake Goodall, has described it as "horse-trading".[53] The late Nin Tomas saw such systems as a compromise, although she considered that there was a positive effect by such power sharing arrangements on mainstream thought, describing co-management as "a halfway house to re-educating Western thinking away from the micromanagement of 'my' 'sacred' 'individual' 'property' 'rights' and towards accepting, if not adopting, a broader environmental indigenous-based worldview".[54] The concerns of these

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[51] Rawinia Higgins *"Those that trespass will be relish for my food"* (Victoria University of Wellington, 2011) at 2.

[52] Above n 51.

[53] Interview with Anake Goodall, Member of the Te Waihora Co-Governance Board (Rachael Harris, 17 July 2014).

[54] Nin Tomas "Māori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability – the evolution of property rights to meet ecological challenges* (Martinus Nijhoff Publishers, The Netherlands, 2011) at 220.

prominent Māori reflect the compromising nature of collaborative management and governance.

I therefore posit that while co-governance and co-management schemes are aspirational and generally well received by Māori, the system is not perfect. This reflects the diverse and evolving nature of Treaty relationships, and the ongoing development of law and policy in this area. Treaty settlements continue to test the limits of how far the Crown is prepared to relinquish authority. I conclude that the spectrum of resource management power sharing schemes provide convenient vessels that the Crown can use to give back iwi some decision making, while allowing it to retain overall control.

5.4 Resource Management in New Zealand

In order to examine how resource management power sharing arrangements between iwi and the Crown are changing the face of co-governance, it is necessary to explore the foundations for resource management in New Zealand. The very basis for iwi management and governance of their own natural resources in New Zealand is found in Article Two of the Treaty of Waitangi, New Zealand's founding document. The English version of Article Two provides that:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

A widely accepted translation of the Te Reo version of the Treaty gives Article Two as:[55]

> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.

Both translations provide for ongoing Māori environmental management over their own resources. As such, in the context of resource management power sharing arrangements it is necessary to examine traditional Māori resource management practice and law, or tikanga, as well as mainstream law.

This thesis examines co-governance in a resource management context. The overarching legislation in this context is the Resource Management Act 1991 (RMA). Enacted expressly to consolidate a variety of legislation that covered various environmental regulations, the RMA acknowledged that the environment and the economy in New Zealand are interlinked. The RMA consolidated legislation including the Water and Soil Conservation Act 1967, the Clean Air Act 1972 and the Town and Country Planning Act 1977. The original architect of the Act, Sir Geoffrey Palmer QC, noted that the Act "represented a deliberate shift on the part of New Zealanders away from economic advancement at any cost towards long term economic and environmental sustainability".[56] The Act is also recognised as the one of the first major pieces of overarching environmental legislation to broadly

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[55] John Wilson "Nation and government - The origins of nationhood" (2012) <http://www.teara.govt.nz/en/document/4216/the-three-articles-of-the-treaty-of-waitangi>.

[56] Geoffrey Palmer *Protecting New Zealand's Environment: An Analysis of the Government's Proposed Freshwater Management and Resource Management Act 1991 Reforms* (September 2013) at 3.

incorporate tikanga Māori principles, although the Town & Country Planning Act did provide for some recognition of Māori interests. Section 4 of the Conservation Act 1987 also required that the provisions be interpreted in such a way as to give effect to the principles of the Treaty.[57] This section will explain how the RMA incorporates tikanga Māori, and I will show that it is an inadequate mechanism for delivering effective co-governance.

The RMA vests day-to-day control and management of resource management in local and regional councils. The central government retains control through the creation of instruments such as national policy statements and national environmental standards, such as the New Zealand Coastal Policy Statement.[58] At a regional level, resource management planning is formulated by regional policy statements and regional plans.[59] At a district level, district plans are adopted by district and city councils.[60] The Resource Management Act is particularly important to co-governance agreements, as within its purpose and principles we find the very basis for the legislation that allows such agreements to exist.

Part 2 of the Act contains the purpose and underlying principles of the Act. Section 5 provides that sustainable management is the concept that underpins the entirety of the RMA. Palmer defines sustainable management as

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[57] Derek Nolan *Environmental and resource management law* (LexisNexis N.Z, Wellington, N.Z, 2011) at 877.

[58] National policy statements are governed by s 45, national environmental standards are governed by ss 43-44.

[59] Regional policy statements are governed by ss 59-62.

[60] District plans are governed by ss 72-77.

"development that meets the needs of the present without compromising the ability of future generations to meet their own needs" and stresses that this principle of sustainable management is not about economic development at the expense of the environment.[61] Section 6 is designed to give guidance to some of the matters that should be considered in achieving sustainable management, including the relationship of Māori to their lands and taonga. Section 7, particularly the subsection that recognises kaitiakitanga, will be discussed later. Section 8 provides that any person undertaking functions under the Act shall have regard to the principles of the Treaty.

The RMA and the Treaty of Waitangi have had significant interaction since the establishment of the legislation. The Treaty is a hugely influential document, and the enunciations of its principles have been explored in depth by the courts over the past thirty years since the landmark *SOE Case* in 1987.[62] In *Carter Holt Harvey Ltd v Te Rūnanga o Tūwharetoa Ki Kawerau* a list of 'central principles' of the Treaty was said to include: partnership; mutual obligations to act reasonably and in good faith; active protection; mutual benefit; development; and Rangatiratanga, which was given as 'a tribal right to manage resources in a manner compatible with Māori custom'.[63] These principles are highly influential on the collaborative nature of power sharing arrangements.

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[61] Palmer, above n 56 at 10.

[62] *New Zealand Maori Council v Attorney-General* [1987] INTLR 641; This case was known as the '*Lands Case'* for many years until Elias CJ renamed it the '*SOE Case'* in *Paki v Attorney-General* [2012] NZSC 50 at [48].

[63] *Carter Holt Harvery Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 in Nolan, above n 57 at 898.

Derek Nolan explains that it has been long established law that the Treaty of Waitangi Act 1975 and the RMA are distinct regimes and that Treaty claims are not to affect RMA processes.[64] He notes, however, that there are links between these two regimes, such as in the instance of power sharing agreements. Nolan specifically highlights the review of regional and district plans available to Waikato River Iwi under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 as an example of this.[65]

The Waitangi Tribunal in the WAI 262 report, released in 2011, argues that the RMA is not "Treaty Compliant" and requires reform to comply with the Treaty.[66] The reasoning for this is that several sections intended to give Māori more representation have become essentially irrelevant. The accusation of irrelevancy includes s 33, discussed below. The Tribunal also recommended reforms that go beyond amending s 8, including: providing for enhanced iwi management plans, improving mechanisms for delivering control, a commitment to capacity building, and greater usage of national policy statements.[67] These principles all echo the power sharing ethic of co-governance agreements.

Sections 6 and 7 are currently undergoing reform. They are to be consolidated into one section, ostensibly to speed up the process for property

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[64] Nolan, above n 57 at 898.

[65] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

[66] Waitangi Tribunal *Ko Aotearoa Tēnei: Report on the Wai 262 Claim* (Wellington 2011); Gerald Lanning and Kathleen Bell "Making the RMA "Treaty-compliant" - the Waitangi Tribunal's report on WAI262" 2012 Resource Management Bulletin at 122.

[67] Lanning and Bell, above n 66.

developments.[68] These reforms, targeted as they are to increase economic development through the building of housing and commercial developments more efficiently, are highly unlikely to provide iwi much more decision making power in their rohe. I therefore conclude that the RMA is an insufficient vehicle for delivering effective power sharing arrangements, despite some provisions that, on face value, are designed for this purpose.

5.5 Section 36 Joint Management Agreements

The basis for resource management power sharing arrangements should logically be the RMA. One section of the RMA that does provide for a lesser form of power sharing arrangement in resource management is found in ss 36B-36E, which provide for Joint Management Agreements (JMAs). JMAs emerged as a result of a 2005 amendment to encourage collaboration between Māori and central government.[69] The amendment was introduced following commentary that the language of the RMA meant that Māori were reduced merely to a consultation role, rather than fulfilling a full role as a Treaty Partner. Baker, in a 2013 commentary, noted in many cases "decisions have been made on a non-notified basis, denying Māori any participation in the management process… Māori appeals against decisions made under the RMA have been largely unsuccessful".[70] JMAs were offered as a solution to this dissatisfaction. Section 36(B)-(E) provides:

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[68] Isaac Davison, "Auckland Council Red Tape in the Spotlight" (New Zealand Herald, online ed. 22 January 2015) url: http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11389946.

[69] Baker, above n 23 at 180.

[70] At 180.

36B Power to make joint management agreement

(1)A local authority that wants to make a joint management agreement must—

(a) notify the Minister that it wants to do so; and

(b) satisfy itself—

(i) that each public authority, iwi authority, and group that represents hapū for the purposes of this Act that, in each case, is a party to the joint management agreement—

(A) represents the relevant community of interest; and

(B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and

(ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and

(c) include in the joint management agreement details of—

(i) the resources that will be required for the administration of the agreement; and

(ii) how the administrative costs of the joint management agreement will be met.

(2)A local authority that complies with subsection (1) may make a joint management agreement.

36C Local authority may act by itself under joint management agreement

(1)This section applies when a joint management agreement requires the parties to it to perform or exercise a specified function, power, or duty together.

(2)The local authority may perform or exercise the function, power, or duty by itself if a decision is required before the parties to the joint management agreement can perform or exercise the function, power, or duty and the joint management agreement does not provide a method for making a decision of that kind.

36D Effect of joint management agreement

A decision made under a joint management agreement has legal effect as a decision of the local authority.

36ETermination of joint management agreement

Any party to a joint management agreement may terminate that agreement by giving the other parties 20 working days' notice.

Baker notes that iwi have been unenthusiastic about entering these agreements, as they require Māori decision makers to balance Māori interests with other matters of national importance. Consequently, this seriously constrains Māori self-determination with respect to resource management.[71] Natalie Coates has observed that JMAs can be problematic as implementation requires that the agreement is an 'efficient' method of exercising function, power, or duty.[72]

[71] At 180.

[72] Natalie Coates "Joint-management agreements in New Zealand : simply empty promises?" 2009 13(1) Journal of South Pacific Law) at 33.

'Efficiency' as a measure is challenging as, if the JMA requires more tax payer money for it to function, it will not be deemed efficient.[73]

A second issue raised by Coates is the lack of certainty surrounding the arrangements; the agreements can be cancelled by either party at any time, indeed, if there is any distrust between the parties this could potentially discourage iwi from entering into joint management agreements.[74] Additionally, there are requirements that iwi entering into JMAs under the Act are to work within the parameters and restrictions of the Act; this may well discourage iwi seeking these types of arrangements.[75] In comparison, resource management power sharing schemes that are enacted under their own legislation such as the Waikato River arrangements statutorily compel the relevant authorities to work with the iwi.[76] I contend this provides a much more certain and attractive environment management option for mana whenua than a JMA under the RMA.

One currently functioning JMA is the Joint Management Agreement between Taupō District Council and Tūwharetoa Māori Trust Board, which came into force on 17 January 2009. The agreement allows for joint decision-making regarding resource consent and private plan change applications in relation to Māori land in the Taupō District that is part of the Tūwharetoa rohe. The

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[73] At 33.

[74] At 34.

[75] At 36.

[76] Ngāti Tūwharetora, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Taupō District Council and Tūwharetoa Māori Trust Board have each appointed two commissioners who have then selected one further commissioner and appointed a Chairperson to make decisions under this JMA.[77] The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 also provides for JMAs to provide decision making in relation to river related activity including planning, consenting and monitoring.[78]

The Tūwharetoa agreement has set out principles to do with the development and operation of JMAs, including "promoting the overarching purpose of the settlement to restore and protect the health and wellbeing of the Waikato river; promoting the principle of co-management; respecting the rights and responsibilities of Waikato-Tainui to the river; and using best endeavours to ensure joint management agreements are achieved and enduring". The creation of a JMA under s 36 is one statutory method that can be used to create power sharing arrangements, although I consider that such schemes are not suitable for allowing full self-determination of iwi and are therefore less popular than other co-management and co-governance options.

5.6 Section 33 Delegation of Functions

Another section of the RMA that allows for a lesser form of power sharing between iwi and Crown is s 33. Under this provision, a local authority may transfer authority to an iwi for functions such as deciding resource consents, joint procedural involvement for policy statements and plans, and issuing

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[77] Joint Management Agreement between Ngāti Tūwharetoa and Taupō District Council, above n 32.

[78] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 ss 41-55.

requirements for heritage orders to protect places of special significance on spiritual and cultural grounds.[79] Section 33 states:

> **33 Transfer of powers**
>
> (1) A local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.
>
> (2) For the purposes of this section, **public authority** includes—
>
> (a) a local authority; and
>
> (b) **an iwi authority**; and
>
> (c) [Repealed]
>
> (d) a government department; and
>
> (e) a statutory authority; and
>
> (f) a joint committee set up for the purposes of section 80; and
>
> (g) a local board (within the meaning of section 4(1) of the Local Government (Auckland Council) Act 2009.
>
> (3) [Repealed]
>
> (4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—
>
> (a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and

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[79] Nolan, above n 125 at 904.

(b) before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and

(c) both authorities agree that the transfer is desirable on all of the following grounds:

(i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:

(ii) efficiency:

(iii) technical or special capability or expertise.

(5) [Repealed]

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

When s 33 was enacted, it was hailed as a "significant section".[80] Despite the existence of this provision, which allows for co-management of functions under the framework of the Act, its implementation has fallen well short of its potential.[81] Hamish Rennie has explained that the very inclusion of iwi authorities as public authorities "reflects in part the intention of the Labour Government in 1990 to facilitate the empowerment of Māori". The 2011 Waitangi Tribunal report on the WAI 262 claim observed that the potential for s 33 has not been realised.[82]

While there have been over twelve requests to transfer powers to iwi, none of these have been granted.[83] Robert Joseph and Tom Bennion have questioned whether iwi would even want such a transfer of power under the RMA, noting that "if an iwi authority has a s 33 transfer of power it will have to act judicially – that is, fairly and impartially and in accordance with the RMA and relevant plans… For example it will have to weigh Māori concerns in balance with other matters of national importance".[84] I consider that this is a fair comment, and helps us to understand why this provision has not been utilised to the extent that legislators perhaps envisaged. Rennie has noted that iwi authorities do not often have the resources to support such a transfer under s

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[80] Robert Joseph and Tom Bennion "Challenges of incorporating Maori values and Tikanga under the resource management act 1991 and the local government bill - possible ways forward" (2003) 6 Yearbook of New Zealand Jurisprudence **Error! Bookmark not defined.** at 24.

[81] Hamish Rennie *Section 33 Transfers - Implications for co-management and kaitiakitanga* (looseleaf ed, DSL Environmental Handbook).

[82] Lanning and Bell, above n 66.

[83] Joseph and Bennion, above n 80 at 24.

[84] At 26.

33, as they "do not have the powers to obtain rates to support their administration of transfers". [85] Without the financial support from central government to enact the duties that would otherwise be required of central government agents, iwi authorities are unlikely to show enthusiasm for such a transfer. I posit that if central government was truly committed to providing iwi with the ability to utilise this section, adequate funding should be made available.

Rennie argues that there is an inherent power imbalance in s 33. He notes that due to the fact that the Crown authority has the capacity to unilaterally revoke a transfer of power, any iwi authority recipient would be at a disadvantage.[86] This power differential is at odds with the principles of the Treaty of Waitangi, which promote co-operation and equal partnership. I believe it reflects the traditional iwi-Crown relationship provided by colonisation, where there is a power disparity in favour of the Crown.

Sections 33 and 36B-36E of the RMA provide some foundational attempt to allow for power sharing in resource management. These two sections do allow, at least in theory, for some form of power sharing under the Act. However, as these forms of power sharing provided for in the Act do not allow for equal sharing of power, consequentially I consider that they are less useful to tangata whenua than other power sharing arrangements. While the existence of these two sections is a step in the right direction, their restrictions have

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[85] Rennie, above n 81.

[86] Rennie, above n 81.

meant that iwi have had to look beyond the RMA to secure more meaningful resource management power sharing arrangements.

Sections 33 and 36B-E do not allow iwi to fully invest in resource management in a method compatible with tikanga Māori. They restrict iwi self-determination, and the fact that s 33 has never seen a transfer of powers to an iwi authority is telling. This thesis will examine two iwi that are engaged in resource management power sharing arrangements that have been specifically provided for outside of the RMA.

5.7 Tikanga and Western Law

Co-governance schemes between iwi and Crown do not sit in an isolated vacuum. Such arrangements will be influenced by the context in which they operate. In order to understand how these power sharing arrangements are working, we must therefore examine the exterior influences. Where iwi and the Crown work together the tenants of tikanga Māori should be considered.

Tikanga Māori is the term used to describe Māori customary law. Tikanga Māori principles are incorporated throughout New Zealand's legal system in a variety of formats. Tikanga has become increasingly more recognised as part of the common law over the past thirty years. Historically, as Robert Joseph explains, tikanga was recognised by the colonial government as a genuine source of law.[87] Initially, following the signing of the Treaty of Waitangi, tikanga was acknowledged by authorities – in 1840 Governor Hobson "issued

[87] Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Waikato Law Review: Taumauri at 74.

orders to Shortland, police magistrate of Kororāreka, that 'a rigid application of British law to the Māori should be avoided in favour of some sort of compromise'".[88] Joseph suggests that the most important yet overlooked acknowledgement of tikanga Māori was s 71 of the New Zealand Constitution Act 1852:

> And Whereas it may be expedient that the Laws, Customs, and Usages of the Aboriginal or Native Inhabitants of New Zealand, so far as they are not repugnant to the general principles of Humanity, should for the present be maintained for the Government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which Laws, Customs, or Usages should be so observed. It should be lawful for Her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom from time to time to make Provisions for the purposes aforesaid, any repugnancy of any such Native's Laws, Customs, or Usages, to the Law of England or to in any part thereof, in any wise notwithstanding.

Despite this provision clearly acknowledging the legitimacy of tikanga Māori, s 71 was never used, and eventually was repealed in 1986. It does, however, give us an insight into early colonial legal thought on Māori customary law. At this point, before later court rulings nullified the Treaty of Waitangi, and tikanga was actively repressed through legislation such as the Tohunga Suppression Act 1907,[89] tikanga Māori was recognised as a legitimate legal source.

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[88] Joseph, above n 87 at 7.

[89] Tohunga Suppression Act 1907.

Initially, native custom and native proprietary right were acknowledged by the colonial courts. In 1841, the first major case to recognise tikanga Māori in the form of a native proprietary right was *R v Symonds.*[90] *Symonds* upheld the doctrine that "upon the assumption of sovereignty by the British Crown over New Zealand, the indigenous inhabitants' customary title continued… to be incorporated into the mainstream legal system". This acknowledgement was followed by *Re the Lundon and Whitaker Claims Act 1871,* where the Court clearly stated "the Crown was bound, both by the common law of England and by its solemn engagements, to a full recognition of native proprietary right".[91] 'Solemn engagements' is the wording used to acknowledge the Treaty of Waitangi, and 'native proprietary right' are the tikanga principles acknowledging property rights.

This recognition of legitimacy, however, was later to be restricted by the courts in a complete judicial denial of tikanga Māori. In *Wi Parata v Bishop of Wellington*, the court in effect held that all property rights under Māori customary law (tikanga Māori) were extinguished simply by the Crown's acquisition of sovereignty.[92] This ruling asserted, essentially, that tikanga Māori depended "on the grace and favour of the Crown" and that accordingly "there is no customary law of the Māoris of which the Courts of law can take cognizance".[93] With one judgment, Prendergast CJ reduced the Treaty of

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[90] *R v Symonds* (1847) NZPCC 387.

[91] *Re the Lundon and Whitaker Claims Act* (1872) NZPCC 387.

[92] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72.

[93] RH Bartlett *Native Title in Australia* (LexisNexis Butterworths, Australia, 2004) at 8.

Waitangi and its recognition of tikanga Māori to the "simple nullity" he declared it to be. Despite the argument "being given short shrift" by the Privy Council in *Nereaha Tamaki v Baker*,[94] this attitude permeated the general stance towards tikanga and customary rights for many more years.[95] The substantive effect of *Wi Parata* was to remove tikanga Māori as a source of law from the New Zealand legal system, despite early recognition from the settler government.

In the 1970s and 80s, there was a shift in societal thought towards the recognition of tikanga Māori. The Māori cultural renaissance of this time period saw an increased focus on Treaty rights. This was instrumental in the institution of the Waitangi Tribunal as an independent commission of enquiry through the Treaty of Waitangi Act 1975. Jurisdiction was given to the Tribunal by s 6 of the Act to inquire into the claims of any individual Māori or group of Māori.[96] Section 8 of the Act gave the Tribunal jurisdiction to enquire into proposed legislation.

The first significant legislative attempt of the government to recognise Treaty obligations was the State Owned Enterprises Act 1986. Section 9 of the Act explicitly stated, 'nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'. Section 9 led to the *SOE Case*, a Court of Appeal judgment that recognised the principles of the Treaty included issues of sovereignty, active protection, partnership, and

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[94] *Nereaha Tamaki v Baker* (1901) NZPCC 371.

[95] Bartlett, above n 93 at 8.

[96] The Treaty of Waitangi Act 1975 at s 6 and the preamble of the Act.

consultation. The *SOE Case* was crucial for Māori as for the first time in close to one hundred years the validity of the Treaty and the rights that stemmed from it were recognised. The case acknowledged the importance of partnership, fiduciary duty, and good faith. From these principles, which recognise the sharing of power and delegation of management, the beginning of the development of resource management power sharing arrangements can be seen.

Tikanga Māori is an established part of New Zealand's legal history. It was first explicitly recognised in the early days of settlement, then completely ignored and buried, before being reborn in the 1980s with the recognition of the 'Principles of the Treaty'. The next question that must be considered is what exactly is tikanga?

5.8 Understanding Tikanga in a Modern Setting

Just as Western law changes as new legislation is enacted to reflect differing social norms, tikanga Māori is not a static concept. What is considered appropriate conduct in tikanga varies from tribe to tribe – in the context of this thesis, Tūhoetanga will be different from Ngāi Tahutanga in some aspects. Nonetheless, with respect to the dynamic nature of tikanga, there is a common basis and a set of core values that underpins tikanga.[97]

Tikanga Māori concepts of ownership of environmental resources are derived from guardianship, in contrast to the exclusive ownership model currently seen

[97] Linda Te Aho "Tikanga Maori, historical context and the interface with Pakeha law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence at 10-14.

in New Zealand land law. Traditionally, tikanga Māori customs and values derive from the Māori world view of the creation of the universe, the importance of genealogy (whakapapa) and personification of natural forms and phenomena.[98] Māori cosmology is intricately linked with what is accepted environmental management. In their mythology, the Earth and the Sky are personified in the form of Papa-tū-ā-nuku, the Earth Mother, and Rangi-nui, the Sky Father.[99] The offspring of Rangi and Papa have also received personification and deification, and include Tāne, the God of the Forest, Tangaroa, the God of the Sea, and Tāwhirimātea, the God of the Winds, amongst others.[100] In a Māori cosmological world view, these gods are seen to be guardians of the natural resources that they are responsible for and certain protocol must be observed in respect of this..

For Māori, their connection to the land is based in these whakapapa and guardianship concepts, and is deeper than a fee simple title, or a life interest in a lease. As Robert Hay explains, Māori cosmology and resource management are interlinked:[101]

> The term "living planet" could be used to describe the world as seen in the Māori worldview. They believe in a spiritual essence (wairua) in all things, animate and inanimate. People are seen as only one small part of a "great chain of being" (and not of any greater importance than other beings). Respect for the spirits in

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[98] M. Roberts "Kaitiakitanga: Maori perspectives on conservation" 1995 2(1) Pacific conservation biology at 10.

[99] Te Ahukaramū Charles Royal *Māori creation traditions* (9 November 2012 ed, 2012) at 1.

[100] At 1.

[101] Robert Bruce Hay *The contribution of Maori cosmology to a revision of environmental philosophy* (1989) at 158.

> things (shown through their religious practices) and reverence for certain paramount gods (atua) is woven into the fabric of their lives, in their thinking, and in their perceptual style. The gods are considered a family, representing all aspects of their environment.

Te reo Māori reflects the deep connection of Māori to the land and waters of Aotearoa; whenua means both land and afterbirth, hapū means both sub-tribe and to be pregnant, whānau means both family and to give birth.[102] This spiritual regard for natural resources as ancestors is interlinked with other principles of tikanga Māori.

The Māori cosmological world-view is reflected in the tenets of tikanga Māori. There are several common core principles that underpin tikanga, although no full list has ever been agreed upon. Robert Joseph gives a list of fundamental tikanga lore and values, including:[103]

- Whānaungatanga – kin relationships between people and the rights and obligations that follow from the individual's place in the collective group;
- Wairuatanga – spirituality, acknowledging the metaphysical world;
- Mana – encompasses political influence as well as intrinsic authority, honour, status, control, and prestige of an individual and group;

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[102] James D. K. Morris and Jacinta Ruru "Giving voice to rivers : legal personality as a vehicle for recognising Indigenous peoples' relationships to water?" (2010) 14(2) Australian Indigenous Law Review at 49.

[103] Joseph, above n 87 at 88.

- Tapu – generally seen as part of a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places and objects and traditional values; restriction laws;

- Noa – free from tapu or any other restriction;

- Utu – concept of reciprocity in order to maintain balanced relationships between people and the Gods;

- Rangatiratanga – effective leadership; and

- Manaakitanga – sharing, hospitality to the fullest extent that honour could require;

- Aroha – charity, generosity;

- Kaitiakitanga – stewardship and protection, often used in relation to natural resources.

These values are common to most iwi, although their application may change from iwi to iwi and hapū to hapū. The tenets of tikanga do not stand alone; they will be interlinked in their application.

Tikanga Māori is not to be confused with kawa. Where tikanga is law, kawa is ritual and procedure.[104] Both tikanga and kawa are very much still in practice. Such law and rituals are still followed at pōwhiri, on mārae, and tikanga Māori customary references can be found in the constitutional documents of a number of Māori legal entities such as Te Kauhanganui o Waikato and Te

[104] At 88.

Rūnanga a Iwi o Ngapuhi.[105] Values derived from tikanga Māori are not rigid, frozen concepts that are locked in the past. These values are historic, but change as the modern context requires them to.[106] Tūhoe social worker Nikapuru Takuta explains, "The tikanga you were born with and grew up with on the mārae doesn't fit with the tikanga in town. You have to manoeuvre through new tikanga around alcohol, drugs, sex, relationships, work".[107] Tikanga, therefore, must be flexible, and able to change with variances in culture and values. I consider that the adaptation of co-governance as a working resource management power sharing model can be seen to be an embodiment of that flexibility.

Tikanga values control the approach taken by Māori to resource management. The connection between tikanga Māori and the environment means that the traditional Māori system is holistic. It ensures harmony within the environment, and provides measures, checks and balances daily, as well as preventing intrusions that cause permanent imbalances and ecocide.[108] In a co-governance context, the concept of mauri is important. Mauri is life force or state of wellbeing, and natural resources have their own mauri.[109]

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[105] At 88.

[106] Robert Joseph "Frozen rights?: The right to develop Maori treaty and aboriginal rights" 2011 19(2) Waikato Law Review: Taumauri at 132.

[107] Kennedy Warne "Who are Tūhoe? And what do they want?" 2013 January/February New Zealand Geographic at 32.

[108] Nganeko Kaihau Minhinnick *Establishing Kaitiaki: a paper* (N.K. Minhinnick, Auckland, N.Z. , 1989) at 6.

[109] Maori Marsden and T A Henare *Kaitiakitanga - A definitive introduction to the holistic world view of the Maori* (Ministry for the Environment, Wellington, 1992) at 5-7.

Restoring the mauri of a degraded resource has become an important tikanga-based concept in environmental management. In a paper on Canterbury Water Management, Caygill emphasises the importance of addressing the mauri of Te Waihora/Lake Ellesmere in its restoration.[110] The concept has recently been brought into the digital age with the establishment of the Mauri-ometer website by Ngā Pae o te Māramatanga.[111] This site allows the user to assess environmental impacts of various case-studies under the framework of restoring mauri. Mauri is a crucial Māori concept in resource management.

Nganeko Kaihau Minhinnick displays the interaction between Māori and natural resources in the diagram below:

[110] David Caygill "Irrigation in Canterbury" 2014 (Unpublished) Primary Industry Management at 2.

[111] Ngā Pae o te Māramatanga "Mauri-ometer" <http://www.mauriometer.com/>.

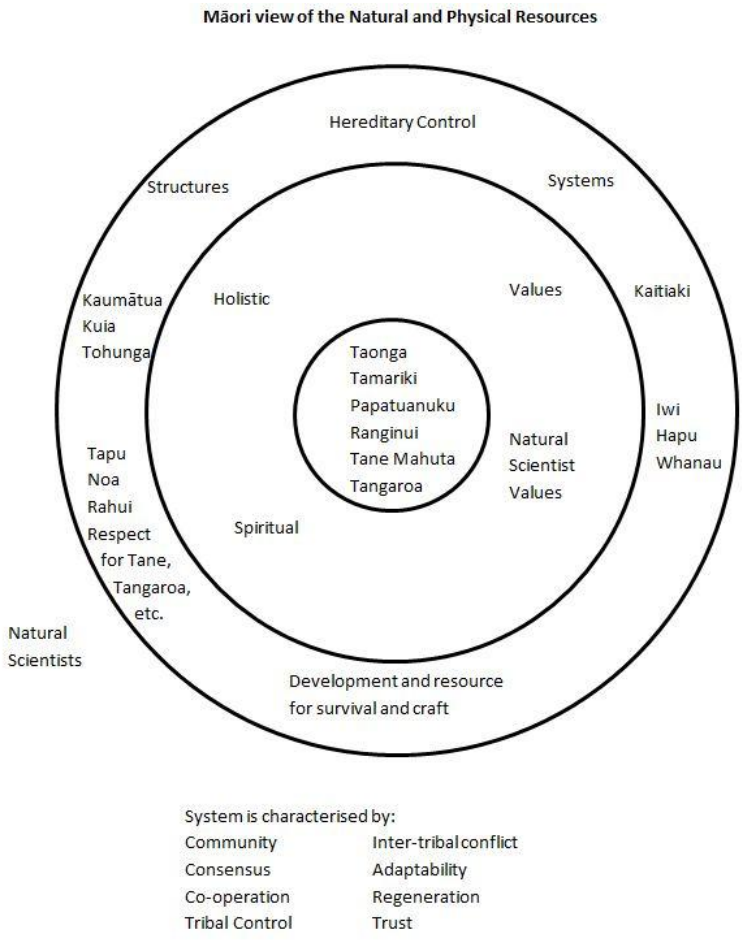

Figure 2: A Māori view of the Natural and Physical Resources (Minhinnick, 1985)

This diagram displays the importance of tikanga principles such as genealogical links, and spiritual balance. Note the closeness of holism and spirituality to the central personifications of the resources, and the overall holistic and community centred approach to resource management. I consider that this diagram fits with comments made by Nin Tomas, "we are the subjects

of the environment, and to believe that we are its masters is delusional".[112] Tikanga Māori environmental management can be compared to Minhinnick's diagram of the mainstream Pākehā system.

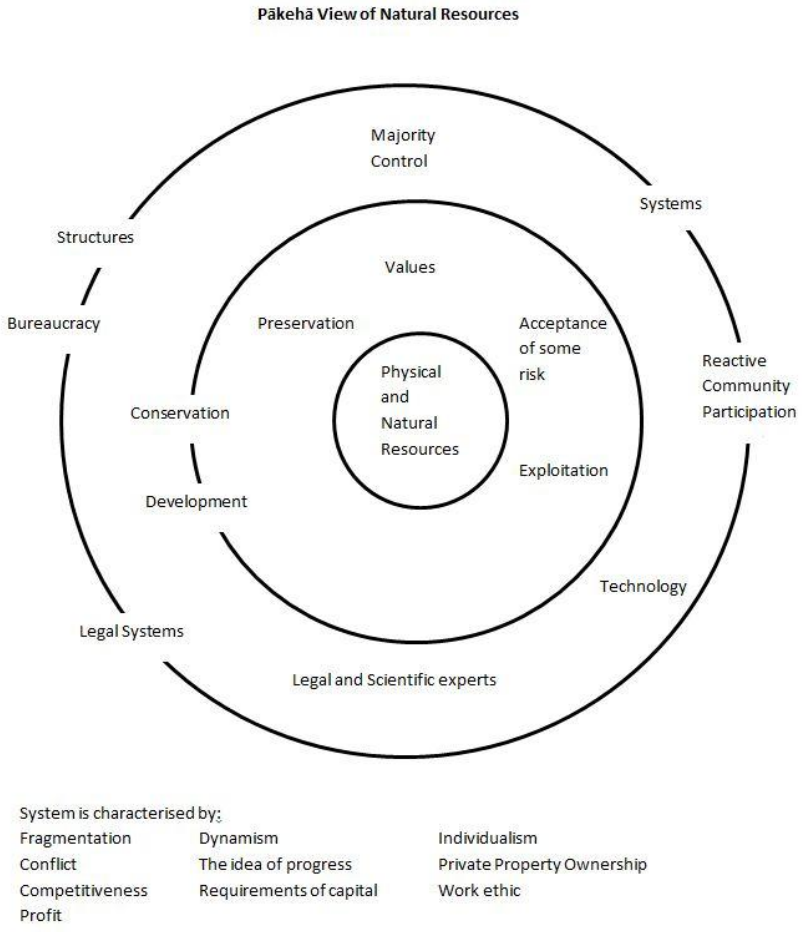

Figure 3: Pākehā view of Natural Resources (Minhinnick, 1985)

[112] Thomas in Grinlinton and Taylor, above n 54 at 226.

In comparison, a mainstream view of natural resources has a tendency to be much more aligned with capitalism and resource exploitation, with the exception of the conservationists who take a preservationist approach to environmental management. Whereas Māori intrinsically link whānau, hapū and iwi participation with resource management, in comparison the mainstream system only involves community participation as a reactionary measure. I contend that a Māori approach to environmental management is very much governed by the values of tikanga Māori. A power sharing resource management scheme will see an attempted amalgamation of these two sets of values.

Tikanga Māori is a legal system in its own right that affects the decisions and values made by people in New Zealand to this day. It is a living and breathing system of laws that change dynamically to reflect social norms and values, as mainstream law does also. Tikanga values reflect the Māori cosmological worldview. Māori do not see themselves as removed from the environment, they see themselves as very much belonging to the planet. This is reflected by the terminology 'tangata whenua' or people of the land. I believe that iwi participants in a co-governance scheme will bring tikanga to the co-governance board room table, and as will be discussed in chapters 6 and 7, an effective resource management power sharing scheme will see an amalgamation of two world views.

5.9 Kaitiakitanga

Tui tu te mārae a tane. Toi tu te mārae a Tangaroa. Toi tu te Iwi.

If the world of Tane survives. If the world of Tangaroa survives. The people survive.*[113]*

The New Zealand legal system provides a raft of legislation to allow for environmental management. For Māori, however, the system of laws and guidelines that covers resource governance is encapsulated in tikanga, and particularly in the principle of kaitiakitanga. The above whakataukī states the important relationship between Māori and the environment. It is important to understand what kaitiakitanga is and how it works as this is the environmental ethic that will guide iwi decision makers in resource management power sharing schemes such as co-governance arrangements.

Roughly translated as 'stewardship', the word kaitiaki itself is derived from the verb 'tiaki', or to guard, to protect, to watch for. The prefix 'kai' is used to connote the doer of the action, in this case, the guardian, or protector.[114] In modern environmental planning, the use of kaitiakitanga has become more common in the mainstream and is used in legislation and planning documents, including in the RMA. Despite the increasing commonality of the term in dominant culture, it is often not understood by the majority of Pākehā.[115]

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[113] Rakiihia Tau 'Mahinga Kai in the Modern Context' (unpublished paper) at 1.

[114] Roberts, above n 98 at 12.

[115] Todd Taiepa and others "Co-management of New Zealand's conservation estate by Maori and Pakeha: a review" 1997 24(3) Environmental Conservation at 240.

In order to understand the nature of the term, it is therefore necessary to analyse Māori conceptions of Kaitiakitanga. Te Kauhanganui member Carmen Kirkwood explains the concept as:[116]

> Kaitiaki is a big word. It encompasses atua, tapu, mana. It involves whakapapa and tika; to know 'kaitiaki' is to know the Māori world. Everybody on this planet has a role to play as a guardian. But if you use the word kaitiaki, that person must be Māori because of the depth and meaning of the word and the responsibilities that go with it. The reason is that to be a kaitiaki means looking after ones blood and bones – literally. One's whānaunga and tūpuna include the plants and animals, rocks and trees. We are all descended from Papatuanuku; she is our kaitiaki and we in turn are hers.

Kirkwood's summary of the concept of kaitiakitanga is supported by other Māori commentators. Rakiihia Tau, a Ngāi Tahu elder, stated that kaitiakitanga includes the "obligation to safeguard the wellbeing and mauri of ancestral lands, water, sites wāhi tapu, value flora and fauna, and other taonga in Ngāi Tahu's rohe for future generations".[117] Rachel Selby and others echo the usage of this term as a form of intergenerational duty to the environment:[118]

> Kaitiakitanga is an inherent obligation we have to our tupuna and to our mokopuna; an obligation to safeguard and care for the environment for future generations. It is a link between the past and the future… Kaitiakitanga is not an obligation which we choose to adopt or ignore; it is an inherited commitment that links

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[116] Carmen Kirkwood in Roberts, above n 98 at 13.

[117] Tau above n 113 at 1.

[118] Rachael Selby and others *Māori and the environment: kaitiaki* (Huia, Wellington, N.Z, 2010).

> mana atua, mana tangata and mana whenua, the spiritual realm with the human world and both of those with the earth and all that is on it.

I therefore contend that kaitiakitanga is a role that is more than just on-the-ground management. Rather, it encompasses a large spiritual element, and reflects the intergenerational approach taken by Māori to resource management. Māori take a long term approach, also known as the 'seven generation rule', believing that "no environmental effect should be caused that detrimentally affects the physical, spiritual and cultural health of up to seven generations into the future – the 'not yet born'; and that the present generation does not have the right to sever the relationships it has with the environment as they have been received on trust from the ancestors".[119]

Tomas explains that the Māori approach to environmental management can be directly contrasted with the mainstream system, which focuses on shorter and shorter time frames and the rights of the individual rather than collective responsibility.[120] Regarding mainstream environmental management, she observes:[121]

> The general rule seems to be that if it is quantifiable, then it is alienable. Once it is alienable, then we can put a price on it. Once its price is known, we can stand in line to profit until its value is exhausted – and then we simply toss it aside and start again. This attitude is based on the false belief that we live in an infinite universe with infinite resources.

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[119] Tomas in Grinlinton and Taylor, above n 54 at 229.

[120] At 229.

[121] At 229.

The mainstream system of natural resource management has a tendency to conflict with kaitiakitanga, although the conservationist approach can be seen to be more in line with this concept.

In traditional Māori practice, kaitiaki were often spiritual or animal guardians, manifested through animals, birds, fish, and taniwha.[122] This reflects the Māori worldview or anthromorphism of nature, and the link between the spiritual world and the physical world. Māori Marsden has highlighted the contrast of this approach with that found in mainstream culture, and the resulting scepticism felt by Māori regarding the mainstream conservation approach and governmental resource management policies.[123] Marsden and Tau have emphasised the link between kaitiakitanga and Rangatiratanga, both have noted that practicing kaitiakitanga is the responsibility of the rangatira.[124] In a resource management power sharing context, I contend that the role of the kaitiaki will be taken on be the members of the governance or management board. Arguably then, a non-Māori member of this board could facilitate the role of kaitiaki, and questions arise as to whether this is an appropriate responsibility for someone who is not mana whenua. I posit that such schemes see a delicate interaction of mainstream policy and tikanga Māori.

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[122] ECAN *Canterbury Water Management Strategy - Kaitiakitanga* (2010) at 31.

[123] Marsden and Henare, above n 109 at 22.

[124] At 23; Tau, above n 113.

5.9.1 Kaitiakitanga – examples in legislation, case law and policy

The term kaitiakitanga has been utilised in legislation, case law and policy in New Zealand. The term is found in the RMA and in various environmental policy documents. The interpretation section of the RMA provides "kaitiakitanga means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship". However, when the legislation was first enacted, there was no definition provided, reflecting the complex nature of the interpretation of this term and the reluctance of lawmakers to define a Māori concept.

Section 7 of the RMA provides for specific concepts to be considered in sustainable management. The section provides:

> **7. Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) kaitiakitanga:
>
> (aa) the ethic of stewardship:
>
> (b) the efficient use and development of natural and physical resources:
>
> (ba) the efficiency of the end use of energy:
>
> (c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [Repealed]

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy

Section 7 forms part of the 'Māori Trilogy' in the RMA and gives statutory recognition to the importance of the term 'kaitiakitanga'. In addition to the definition given by the Act, the exact meaning of this term has been given judicial consideration in several cases. This has been discussed at length by Derek Nolan.[125] It was held by the Planning Tribunal in *Tautari v Northland Regional Council* that kaitiakitanga "requires ongoing involvement and is a responsibility to care for something of great value for the survival of the tribe".[126] In *Minhinnick v Minister of Corrections,* the Environment Court stated that kaitiakitanga "requires tangata whenua to be provided with the opportunity to exercise guardianship of the natural and physical resources of

[125] Nolan, above n 57 at 891-897.

[126] *Tautari v Northland Regional Council* PT A55/6.

the area in accordance with tikanga Māori".[127] The courts have made a specific endeavour to interpret and understand exactly what this term is.

A second issue for the courts to determine when considering kaitiakitanga is determining who exactly the kaitiaki is or are. Nolan has specifically stated that kaitiakitanga should be exercised by the hapū who have mana whenua, and that hapū should be able to give guidance on how that resource should be developed and to what extent.[128] Several cases have been decided regarding the determination of the kaitiaki of the resource. In *Tawa v Bay of Plenty Regional Council* the Planning Tribunal held that the appropriate forum to decide which tribe was mana whenua and therefore kaitiaki was in fact the realm of the Māori Land Court, not the Tribunal.[129] In the 2004 case of *Te Pairi v Gisborne District Council* the Environment Court held that the correct mechanism with which to investigate who holds the rights to claim kaitiaki when there are disputes over who has mana whenua is s 30 of Te Ture Whenua Māori Act 1993.[130] It has been expressed by the courts that the fact that the land in question was no longer Māori land and had not been owned by Māori for some time is irrelevant.[131] Nolan notes that it is possible for more than one whānau or hapū to have mana whenua over a particular area and that

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[127] *Minhinnick v Minister of Corrections* NZEnvC A43/04 in Nolan, above n 125 at 892.

[128] Nolan, above n 57 125 at 892.

[129] *Tawa v Bay of Plenty Regional Council* PT A18/95.

[130] *Te Pairi v Gisbourne District Council* NZEnvC W93/04, Te Ture Whenua Māori Act 1993.

[131] *Waikanae Christian Holiday Park v Kapiti District Council* CIV-2003-485-1764.

even when just one body is recognised as mana whenua, it is still important to acknowledge any important relationships that others may have to that area.[132]

In addition to recognition in statute and by the courts, kaitiakitanga has also been recognised in various regional policy documents. In the Canterbury context, one such document is the *Canterbury Water Management Strategy* 2010. This policy document outlines the way that Canterbury water is to be distributed and governed throughout the region. It specifically incorporates a chapter on kaitiakitanga.[133] This chapter explores the concept in a Canterbury and Ngāi Tahu context. The chapter highlights RMA duties associated with kaitiakitanga as:[134]

- Restoring and rehabilitating degraded Mahinga kai sites
- Assessing the cultural implications of proposed developments, including preparing cultural impact assessments
- Lodging submissions and presenting evidence on resource consent applications and plan development processes.
- Forming constructive relationships with environmental agencies such as councils, the Department of Conservation and the Fish and Game Council.

The chapter emphasises the weight of tikanga principles, noting "it is important to emphasise that while the role of kaitiaki has evolved to

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[132] Nolan, above n 57 at 893.

[133] ECAN, above n 122 at 31.

[134] At 32.

accommodate contemporary resource management processes, Ngāi Tahu are still guided and remain true to their cultural foundations based on mauri (life force) and mātauranga (knowledge)".[135] The full effect of utilising tikanga Māori in water management in Canterbury will be explored in Chapter 6 of this thesis.

5.9.2 Kaitiakitanga – examples in practice

I consider it useful to look at examples of kaitiakitanga in practice to understand how mainstream environmental management and tikanga interact in the context of co-governance. The function of the kaitiaki is essentially to see that correct tikanga is followed with regards to the resource that is being managed. It includes, but is not limited to: declaring tapu; applying or lifting rāhui; developing guidelines for fisheries to ensure conservation; and establishing guidelines and procedures for recreational and commercial activities involving the resource in question.[136]

A method in which a kaitiaki may help to protect the resource would be to put in place a rāhui. A rāhui is effectively a ban that restricts access to the area of resource until the tapu is removed.[137] A rāhui is temporary, an important aspect. Rāhui offers a means of adaptive control and sustainable development, as environmental indicators allowed, without locking up the resource at times

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[135] At 32.

[136] Minhinnick, above n 108 at 10.

[137] Jonathan Jull *Traditional Māori Methods for Natural Resources Management in a Contemporary World - options and implications for Te Waihora* Lincoln University (1989) at 14.

of abundance. This can be seen to be a contrast to the conservationist approach, where preservationist tactics are preferred.

In addition to tools such as rāhui, kaitiaki may act in other ways. In Te Urewera, despite its illegality since 1921, Tūhoe people have continued to manage and harvest kererū, or wood pigeon.[138] Their methods of managing the resource as kaitiaki include adhering to traditional harvest times (between April and July, with the core time of hunting May and June), and only harvesting kererū when they have been feeding on toromiro fruit.[139] Lyver et al have highlighted the importance of correctly following tikanga in the harvest:[140]

> It was widely believed among the elders (of Tūhoe) that the kererū could sense the desecration of its mana and mauri when traditional tikanga was disregarded. … For example the elders stressed that kererū should be plucked and prepared for eating only when back in the community, so that hunters did not leave feathers or other traces of the harvested kererū on the forest. They believed that, if the feathers or the remains of a harvested bird were left scattered beneath a toromiro tree or in the forest, the kererū would respond by vacating the area and making themselves unavailable to hunters.

Marsden has also highlighted the negative consequences of not appropriately following tikanga in gathering food. Toheroa are a large pipi-like shellfish, and

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[138]Philip O'B Lyver, Christopher J. Jones and James Doherty "Flavor or forethought: Tuhoe traditional management strategies for the conservation of Kereru (Hemiphaga novaeseelandiae novaeseelandiae) in New Zealand" 2009 14(1) Ecology and Society at 3.

[139] At 41.

[140] At 46.

are considered a delicacy. They were once populous in Northland, particularly on Ninety Mile Beach, and the rest of the West Coast. Gathering toheroa at the appropriate time was a significant occasion for many whānau. However, despite the restrictions put on gathering toheroa by tribal elders, toheroa canneries were set up to commercially process the shellfish. The elders warned that not following tikanga would mean that "the Mauri of the toheroa would depart and there would be no toheroa left". This proved an accurate prediction.

Kaitiaki exercise their responsibilities according to traditional tikanga up and down the country. The term has received some criticism for being "lost in translation" in legislation, with the feeling amongst some that it is not a term that can ever be correctly harnessed by mainstream policy or statute.[141] Those who are in a position of kaitiaki, the mana whenua, will often be the representatives who are engaged in co-governance arrangements. I therefore consider it necessary to understand the ethic and responsibilities of kaitiakitanga that they will be bringing to this role.

5.10 Legal Personality

In order for Iwi to be effective partners in a resource management power sharing scheme, the recognition of some form of legal personality is required. This thesis will show that both Ngāi Tahu and Ngāi Tūhoe have been able to effectively engage with the Crown as an equal Treaty Partner in governance level arrangements, partly because there has been some 'thing' that has had legal personality with which the Crown can form an effective and equal Treaty

[141] Interview with Nigel Harris, Ngāi Tūāhuriri Board Member (Rachael Harris, 23 October 2014).

partnership. In the case of Ngāi Tahu, the tribe itself has had its legal personality recognised, and in the case of Tūhoe, the area of Te Urewera has been recognised as a legal person.

Legal personality for a non-human entity has existed in some form since the 13th Century. John Dewey attributed the basis of the fiction of legal personality to Pope Innocent IV (1243-1254).[142] Pope Innocent used the doctrine to separate the legal existence of monasteries from monks, so that the infrastructure of the monasteries could exist, despite the monks themselves taking a vow of poverty.[143] The concept of legal personality for corporations is well established, and the doctrine of corporate personality has been debated at length for well over one hundred years.[144]

Sir John Salmond, one of New Zealand's greatest early legal thinkers, developed distinct views on legal fictions in our legal system.[145] In the 7th edition of his seminal work, *Jurisprudence*, Salmond discussed legal personality:[146]

> A legal person is any subject-matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the

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[142] John Dewey "The Historic Background of Legal Personality" (1926) 35(6) Yale Law Journal 655 at 665.

[143] At 665.

[144] For a review of the early jurists on legal personality, refer to Arthur Machen "Corporate Personality" (1911) 24(4) Harvard Law Review.

[145] John H. Farrar "Salmond and corporate theory." (2008) 38(4) Victoria University of Wellington Law Review at 925.

[146] John Salmond *Jurisprudence* (7th ed, Stevens & Haynes, London, 1893).

> limits of fact – this recognition of persons who are not men – is one of the most noteworthy feats of the legal imagination.

Legal personality is well-established for all sorts of entities including corporations, nation states and ships. However legal personality for an iwi in New Zealand has been a contested issue.

O'Regan describes the recognition of tribal legal personality as a "fundamental element of tino rangatiratanga".[147] With the signing of the Treaty of Waitangi, the Crown recognised the existence of iwi as a legal entity. It had to recognise the existence of iwi in order to engage in land sales. However, once land sales were completed, it was in the interests of the Crown to then deny the existence of the iwi.[148] I contend that by recognising the legal personality of tribes, the Crown acknowledged their inherent tino rangatiratanga and the mana that came with that. This tino rangatiratanga was derived from the tribal whakapapa, not the authority of the Crown. This was unpalatable to the settler government, who in 1858 had spoken freely of wanting to "stamp out the beastly communism of the Māori".[149]

It is well established that there is power in numbers – one needs to look no further than the labour union movement to see benefits of negotiation as a crowd. One method of reducing the power of an entity is to split it into its individual components. This tactic was applied by the settler government in

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[147] Tipene O'Regan "Old Myths & New Politics" (Bridget Williams Books, Wellington, N.Z, 2014).

[148] Tipene O'Regan 'Te Kereeme: The Claim' (Macmillan Brown Lecture Series 1998).

[149] At 4.

the 1860s with the introduction of the New Zealand Settlements Act 1863.[150] This Act had the effect of removing the legal status of the tribe and reducing it to a collection of individuals. Individuals have significantly less power and influence than a collective whole. This legislation invalidated legal personality for all iwi across New Zealand, an action that O'Regan believes to be "the single biggest breach of the Treaty that there has been".[151] I believe that this was one tactic that the Crown was able to utilise to deny the mana and influence of iwi in New Zealand.

A point of difference between the Ngāi Tahu settlement and every settlement since (with the exception of Waikato-Tainui), is that Ngāi Tahu lobbied for the recognition of its tribal legal personality. This is discussed in Chapter 6. The recognition of legal personality for a tribe is an important part of establishing an equal-footed resource management power sharing scheme, as recognition of legal personality is recognition of mana, and for iwi, mana is a crucial part of their authority and identity. It is a powerful tool to deny the existence of something that is trying to negotiate for past wrongs. How can you have committed any wrong against a party if that party does not legally exist?

Chapter 7 discusses how the concept of legal personality has been applied to Te Urewera. Here, the region of the former Te Urewera National Park has been made its own legal entity. Although in the Te Urewera case study Tūhoe have not had their tribal legal personality acknowledged, under Tūhoetanga Te

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[150] New Zealand Settlements Act 1863 was introduced to punish tribes who were seen to have fought against the Crown in the New Zealand Wars. Their land was confiscated as punishment.

[151] O'Regan above n 173.

Urewera and Tūhoe are an indivisible entity, thus the personality of the tribe has been recognised in effect, and an effective partner to form a co-governance arrangement has been created. This thesis will show that acknowledging the legal personality of an entity creates a legally acknowledgeable Treaty Partner with which the Crown can form a co-governance partnership. I contend that without legal personality, the Crown is simply forming a partnership with a collection of individuals. This is an asymmetrical arrangement, and I consider that such an unequal agreement does not form effective co-governance.

5.11 Conclusion

Co-governance and co-management resource management power sharing schemes operate in a complex context of different legal and cultural factors. These must be taken into account when examining how iwi have utilised such schemes in furthering the interests of their people. The various types of power sharing arrangements that currently exist sit on a spectrum, and therefore I consider that is not possible to define a bright line between co-governance and co-management. It would appear, however that co-governance schemes offer more authority and mana to the Iwi party involved than co-management schemes, but this is disputed amongst some stakeholders. I believe that the Crown uses co-governance and co-management schemes as political tools to devolve as much or as little power as it wishes to iwi.

What is clear is that the Resource Management Act provides an insufficient basis for power sharing arrangements. While there are some sections that appear to provide for both parties to adequately power share as modern Treaty partners, these are ineffective and therefore iwi must look outside the RMA.

Sections 33 and 36BB-36E of the RMA have the potential to enable iwi to participate fully in environmental power sharing, but so far have fallen short of this goal.

In order to evaluate how Ngāi Tahu and Ngāi Tūhoe have engaged in resource management power sharing arrangements, and how these have changed the face of co-governance in New Zealand, it is also crucial to understand tikanga Māori. The tikanga that surrounds environmental management will be brought to the table by iwi when they engage in power sharing schemes such as co-governance arrangements. Of particular importance are the tikanga around mauri and kaitiakitanga. The law has attempted to engage with the terminology of tikanga, to a limited extent.

The recognition of the legal personality of a tribe or a natural entity is required to create a Treaty Partner with which the Crown can engage in a co-governance arrangement with. As the face of co-governance changes, the Crown may well give more power to iwi to enforce their form of environmental management within their rohe, and so give greater effect to tikanga Māori. This thesis will show how Ngāi Tahu and Ngāi Tūhoe have used such schemes that sit on a spectrum of power sharing to build their regional influence.

6 Ngāi Tahu and Resource Management Power Sharing Schemes

Ngāi Tahu have utilised a variety of resource management power sharing arrangements to build regional influence in Canterbury, since the time of the Ngāi Tahu Treaty settlement in 1996. Their participation in these arrangements has enabled the iwi to build authority across Canterbury and promote the welfare of its members. This chapter will show how, since the signing of their Treaty Settlement in 1996, Ngāi Tahu have continued to build their capacity to gain a 'seat at the table' in regional governance. Ngāi Tahu have used their Treaty settlement legislation and subsequent power sharing schemes to build up a patchwork of functional co-governance capacity, but have yet to fully reach co-governance in Canterbury. I will outline how the Crown has used a variety of power sharing arrangements that fit along the power sharing spectrum discussed in Chapter 5 to gradually give the tribe back some decision making authority in their rohe, but that Ngāi Tahu has yet to reclaim proper regional governance decision making power from the Crown.

Ngāi Tahu are the principal iwi for the majority of the South Island and are mana whenua in Canterbury. The Ngāi Tahu rohe is shown on the diagram below:[152]

[152] Igover, "Ngai Tahu Rohe" <http://commons.wikimedia.org/wiki/File:Ngai_Tahu_Takiwa.jpg>.

Figure 4: Ngāi Tahu Rohe

In the 2013 Census, 54, 819 respondents identified as being of Ngāi Tahu descent.[153] The tribe trace their lineage back to Paikea, who came to New Zealand from Hawaiki on the back of a whale.[154] Paikea had a descendant called Tahupōtiki, and it is from him that Ngāi Tahu take their name. The tribe were originally based on the East Coast of the North Island, but migrated to the South Island, where they conquered the tribes residing there, intermarrying

[153] Statistics NZ "Iwi Data" (2013) <http://www.stats.govt.nz/Census/2013-census/data-tables.aspx>.

[154] Te Maire Tau "Ngai Tahu" (2014) <http://www.TeAra.govt.nz/en/ngai-tahu >.

with Ngāti Mamoe and Waitaha to form the iwi as they are known today.[155] Ngāi Tahu signed the Treaty of Waitangi with the Crown at Akaroa, Ruapuke and Ōtākou in 1840.[156]

This chapter will show how Ngāi Tahu have slowly built co-governance capacity since the 1990s, utilising a variety of schemes to do so. It first outlines the basis for Te Kerēme, the Ngāi Tahu Treaty of Waitangi Claim, exploring some of the key provisions that have allowed Ngāi Tahu to engage in its later power sharing structures. It will show how the Claim led to the Ngāi Tahu Claims Settlement Act 1998, which provided key provisions to enable the iwi to participate and engage in resource management power sharing schemes, although to a lesser degree than full co-governance. The legislation also set out the commercial redress portion of the Settlement, which was also crucial in leading Ngāi Tahu to the position of influence they are in today. These two elements of the Settlement acted as building blocks which the tribe have used to increase their co-management and co-governance capacity. These provisions have led to three large power sharing arrangements in Canterbury, which in turn have allowed Ngāi Tahu to deeper develop their regional authority.

The chapter will explore three specific power-sharing arrangements in Canterbury that Ngāi Tahu have been involved in since settlement. I consider that none of these schemes reach full co-governance and instead sit along the

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[155] At 2.

[156] At 2.

spectrum of power sharing arrangements discussed in Chapter 5, but nonetheless I consider that each arrangement has allowed the iwi to build upon its functional governance capacity in the region. The arrangements in question are the Lake Ellesmere/Te Waihora Co-governance scheme, the Canterbury Water Management Strategy and the tribal involvement in the Christchurch Rebuild.

With the reconstitution of Environment Canterbury (ECAN) and the planned transition of Canterbury Earthquake Recovery Authority (CERA) powers in 2016 to local authorities, there will shortly be a vacuum in regional governance. The framework for regional governance in the near future is not known. Ngāi Tahu wish to be a part of whatever configuration future regional governance takes in order to continue advancing their interests. A permanent seat at regional council level has the potential to allow the tribe genuine regional governance authority.

6.1 Te Kerēme

Te Kerēme is the Ngāi Tahu name for their Treaty Settlement Claim, which provided the basis for the Ngāi Tahu Claims Settlement Act 1998. Te Kerēme is the foundation of Ngāi Tahu's ability to engage in co-governance. The Claim took many years of hearings and negotiations with the Crown. Sir Tipene O'Regan has reflected on the impact of Te Kerēme:[157]

[157] Nicola Carrell "Innovation in Reconciliation - the Ngai Tahu Claims Settlement Act 1998" 1999 3 New Zealand Journal of Environmental Law at 180.

> As I look into the eyes of my mokopuna I reflect that the Ngāi Tahu claim is now seven generations old. In many ways it has become our grievance, a culture of grievance. In that sense Te Kerēme is a taniwha, a monster that has consumed our tribal lives through the years as generation after generation has struggled for justice.

O'Regan aptly summarises the importance with which the iwi regarded Te Kerēme. The Claim was intergenerational and a significant influence on contemporary Ngāi Tahu identity. The iwi themselves describe Te Kerēme as "a long time coming".[158] The first petition by the tribe to the Courts over the legality of sales of Ngāi Tahu land occurred in 1868.[159] The Smith-Nairn Royal Commissioner Judge McKay reported in 1887 that "only a substantial endowment of land secured to Ngāi Tahu ownership would go some of the way to right so many years of neglect".[160] The findings of the Commission were never acted on due to a change of government, and "its report virtually sank without a trace".[161] I consider that this reflects the settler government's attitude towards their Treaty responsibilities of this time period.

Various commissions were to follow. All of these highlighted the poverty that had been forced on the tribe as a result of the land sales of the 19th Century. The 1921 Native Lands Commission led by Robert Noble recommended £354 000 as compensation in relation to Kemp's 1848 purchase ($28.8 million

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[158] TRONT "Claim History" (2013) <http://ngaitahu.iwi.nz/ngai-tahu/the-settlement/claim-history/>.

[159] At 1.

[160] At 1.

[161] Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wellington, 1991) at 173.

adjusted for inflation today).[162] The tribe rejected this amount, saying it was inadequate.[163] Despite this rejection, the 1944 Labour government enacted legislation without consultation with Ngāi Tahu to pay the Ngāi Tahu Māori Trust Board a sum of £300 000 at £10 000 a year for 30 years.[164] The 1944 Act was not designated as full and final, allowing the iwi to file a claim at a later date.[165]

Te Kerēme was filed by Rakiihia Tau on 28 August 1986, and was followed by seven amending claims over the next two years.[166] The claim revolves around what Ngāi Tahu views as the "Nine Tall Trees". Eight of these represent different areas of land purchased from the iwi, and the ninth 'Tree' deals with Mahinga Kai.[167] This thesis does not seek to explain each of the detailed claims, and those searching for further information should read the 1991 Waitangi Tribunal report on the matter.

Following the 1991 Tribunal report, the Crown and Ngāi Tahu began the negotiations for a settlement, but these collapsed in 1994.[168] Negotiations resumed in 1996 after the intervention of then Prime Minster, Jim Bolger.[169] In

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[162] Tau, above n 154.

[163] Ministry for Culture and Heritage "The Ngai Tahu Claim" (2014) <http://www.nzhistory.net.nz/politics/treaty/the-treaty-in-practice/ngai-tahu>.

[164] At 1.

[165] At 1.

[166] Tribunal, above n 161 at 3.

[167] At 5.

[168] Carrell, above n 157 at 179.

[169] TRONT, above n 158.

the meantime, the Waitangi Tribunal had released its 1995 Ancillary Claims report.[170] The resumption of the negotiations saw swift progress towards settlement, and in September 1997, the Crown and Ngāi Tahu concluded their negotiations and presented the proposed settlement to iwi members for ratification. Ngāi Tahu rangatira encouraged the acceptance of the settlement; consequently 94% of iwi members who voted approved the settlement.[171] The Deed of Settlement was signed at Kaikoūra on 21 November 1997, and finally, the Ngāi Tahu Claims Settlement Act passed into law on 29 September 1998.[172]

It can be seen that the long process of Te Kerēme is reflective of the complex nature of the claim. The Ngāi Tahu Claim was one of the very first to be dealt with by the Crown under the claims settlement process initiated in the 1990s. The Crown was tentatively feeling out the parameters of the 'rules' of settlement. The compromises that were made with regards to natural resource management reflect the explorative nature of Treaty Settlements at this time. I consider that the Treaty Settlement process remains one that is somewhat experimental – returning governance and management control to a people without returning their sovereignty is not a simple task. If the Ngāi Tahu Settlement were being negotiated today, the iwi may well have gained more power with regards to resource management decision making, if precedents such as those found in Te Urewera and the Whanganui River are to be

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[170] Waitangi Tribunal *The Ngai Tahu Ancillary Claims Report 1995* (Wellington, 1995).

[171] Carrell, above n 180.

[172] Ngāi Tahu Claims Settlement Act 1998.

followed. Ngāi Tahu led the way in Treaty Settlements, and as such, compromises had to be made.

6.2 Legal Personality for Ngāi Tahu

Recognition of Ngāi Tahu's legal personality was important as it was one of the fundamental steps that the iwi engaged in that has allowed them to enter effective resource management power sharing arrangements, and this concept has contributed to the rise of Ngāi Tahu in Canterbury regional politics. I contend that a power sharing arrangement where legal personality has been recognised is a more equal and valid arrangement than one where this concept is absent. The practical consequence of recognising legal personality is that any power sharing arrangement that is developed is formulated between two equal partners, rather than the entity that is the Crown, and an assortment of individuals that legally have no collective power.

Prior to the establishment of legal personality of the tribe through legislation, the Crown had denied the existence of Ngāi Tahu, saying instead that they were just a collection of individuals.[173] There are issues with recognising legal personality, as it is interlinked with the politically difficult concept of tino rangatiratanga. Tino rangatiratanga can be defined as the inherent sovereignty and self-determination of an iwi, and the mana that flows from that sovereignty. The recognition of Ngāi Tahu's legal personality has formed a crucial part of their journey to gain regional authority. Without this legal personality, the tribe would not be able to assert their mana. Additionally, the

[173] Interview with Sir Tipene O'Regan, Ngāi Tahu Elder (Rachael Harris, 30 September 2014).

Crown and the iwi would never be on an equal footing following the Treaty Settlement.

In simplified terms, the effect of removing legal personality from an entity is very damaging to the mana and power of that entity. If two parties are in a contract, and Party A simply states "you, Party B, do not exist", then Party A can remove themselves from their responsibilities of that contract. Nullifying the legal personality of the tribe was another tool utilised by the colonial government to remove itself from its Treaty obligations. I consider that this was a method for the Crown of declaring moral bankruptcy, a way of giving themselves a 'clean slate' with which to deal with iwi.

The quest for legal personality began with the establishment of the Ngāi Tahu Māori Trust Board in 1928, in order to help identify the beneficiaries of compensation that had been proposed by the 1921 Commission. The Board was reconstituted by legislation in 1946, enabling funds to be administered from the 1944 Settlement.[174] In 1955, the Ngai Tahu Trust Board Act 1946 was replaced by the Maori Trust Boards Act 1955. However, while the newly recognised NTMTB was recognised as a legal entity that had been mandated partially from statute, in the 1980s members decided it was an insufficient body to represent Ngāi Tahu interests in the settlement by iwi members.[175] The NTMTB was restricted in its actions by the paternalistic actions of the Government; for example, NTMTB was required to seek approval from the

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[174] Tau, above n 154.

[175] Waitangi Tribunal *The Ngai Tahu Claim: Supplementary Report on Ngai Tahu Legal Personality* (Wellington, 1991).

Minister of Māori Affairs before spending more than $400.[176] Another structure was therefore required to deliver genuine tino rangatiratanga to the tribe.

Legal personality for Ngāi Tahu began to seem more of a possibility when the former Labour Government passed the Runanga Iwi Act 1990. This modern interpretation of the Rūnanga system was modelled on its historical origins, and would have allowed groups such as hapū and urban Māori Authorities to apply for "iwi authority status" under the jurisdiction of the Māori Land Court.[177] The Act was designed to provide for "iwi empowerment", and as Rennie explains:[178]

> Ultimately, the Rūnanga Iwi Act would have provided mechanisms and processes for Māori to define what an iwi authority was and the RMA (Resource Management Act) would have the mechanisms to transfer functions, powers, and duties to such iwi authorities to empower them to directly exercise their kaitiaki responsibilities

However, the Act had a short life and it was repealed when the Bolger-led National Government was elected in 1990.[179] The repeal of the Rūnanga Iwi Act meant that Ngāi Tahu had to seek other avenue for their legal personality for the purposes of Te Kerēme and the settlement.

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[176] J. Sissons "Tall Trees Need Deep Roots - Biculturalism, Bureaucrocay And Tribal Democracy In Aotearoa New Zealand" 1995 9(1) Cultural Studies at 177.

[177] Rennie, above n 81 at ST3.01.

[178] At ST3.01.

[179] Sissons, above n 176.

In order to seek legal personality, Ngai Tahu decided to seek recognition of the tribal council, by 1991 renamed Te Rūnanga o Ngai Tahu, as the representative of the tribe's collective interest and the vehicle for its legal personality. A supplementary report to the *Ngai Tahu Report 1991* was presented to the Minister of Māori Affairs on 1 February 1991 regarding legal personality. The report recommended that:[180]

> As a matter of urgency and importance, the Minister of Māori Affairs introduce legislation constituting the Ngāi Tahu Iwi Authority to conduct and conclude negotiations with the Crown on the Ngāi Tahu claim resolution. The tribunal supports the claimant proposal as put to it and endorses the view that any incorporated structure should logically be also empowered to provide for the future implementation of Ngāi Tahu goals and aspirations. … [The Tribunal] recommends to the Crown that legislation be effected so as to appoint and constitute the Ngāi Tahu Iwi Authority as the appropriate legal personality to act on behalf of the iwi.

Following the Waitangi Tribunal report, negotiations began regarding the introduction of legislation that would enable the re-establishment of a legal personality for the iwi. The first iteration of the Bill was titled the Ngai Tahu Rangatiratanga Recognition Bill. This title clearly displays the link between legal personality and tino rangatiratanga. Crown Law officials were anxious about the recognition of Ngāi Tahu's rangatiratanga.[181] The discomfort of the Crown around the terminology eventually won over, as by the third and fourth

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[180] Waitangi Tribunal, above n 175 at 4.

[181] Martin Fisher, *Balancing rangatiratanga and kawanatanga: Waikato-Tainui and Ngai Tahu's Treaty Settlement Negotiations with the Crown* (Victoria University of Wellington, 2015).

draft of the legal personality Bill there was not a single reference to rangatiratanga contained in the recitals or in the Bill.[182] This discomfort with returning tino rangatiratanga to iwi has been present throughout the Crown's Treaty Settlement process, and I consider that co-governance is one method that the Crown has created in order to form a compromise over governance without returning tino rangatiratanga.

While the legislation in the form of Te Runanga O Ngai Tahu Bill was introduced into Parliament in July 1993, it was not given its final reading in Parliament until 17 April 1996 due to inter-tribal politics that were at play. The Royal Assent was given to the Te Runanga O Ngai Tahu Act 1996 on 24 April 1996, and this dissolved the Ngāi Tahu Māori Trust Board and replaced it with the entity now known as Te Rūnanga o Ngāi Tahu, or TRONT. TRONT is the body that represents the legal personality of the tribe, and it is answerable to the Rūnanga of Ngāi Tahu and their people.

However, I would contend that the legal personality established by the TRONT Act is not the same as the inherent legal personality that the iwi had before the Crown removed it by the New Zealand Settlements Act 1863. The legal personality that was possessed by the tribe at that point was derived from their whakapapa and tino rangatiratanga under tikanga Māori. The legal personality that is now possessed by the tribe has been granted by an Act of Parliament, and is derived from the sovereignty of the Crown. It is therefore a lesser form of recognition, and does not manifest full tino rangatiratanga.

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[182] Fisher, above n 181.

TRONT is also established by s 6 of the Act as a body corporate. Giving legal personality to a corporation is well established law, but there are questions to be asked as to whether a body corporate is the best vehicle to act on behalf of a tribal group that previously held its legal personality out of its own whakapapa.

The TRONT Act, although set up to deliver legal personality to the tribe, does not include the words 'legal personality' or 'tino rangatiratanga' anywhere in it. I believe that this reflects the discomfort felt by the Crown in recognising any sovereignty of Māori. The fact that no other iwi except Waikato-Tainui has managed to gain legal personality in this way is noteworthy. Other iwi including Ngā Puhi and Ngāti Ruahine have advanced the notion of having their legal personality recognised, but they have seen "flat out refusal" from the Government.[183] This clearly shows the contentious nature of recognising the legal personality of the tribe.

I consider that the recognition of Ngāi Tahu's legal personality has facilitated the creation of robust power sharing schemes that recognise the mana that the tribe has regained. Regaining legal personality for Ngāi Tahu has allowed the tribe to participate in resource management power sharing schemes as an equal Treaty Partner, more so than if they did not have this status. For a fully equal resource management power sharing scheme to exist in any future capacity – a scheme that truly reflects the mana and rangatiratanga of the iwi who are the Treaty partner in such an arrangement – the legal personality of the tribe or the

[183] O'Regan above n 173

area being governed should be recognised. In this way, the Crown is accountable to an entity that is a genuine governance partner.

6.3 The Settlement – Environmental Management Provisions

Ngāi Tahu power sharing capacity has been built from the ground up. The foundation for this capacity is the Ngāi Tahu Treaty Settlement legislation. The Ngāi Tahu Claims Settlement Act 1998 received the Crown's assent on 1 October 1998. The landmark settlement dealt with the claims that had been lodged under the 'Nine Tall Trees' of Ngāi Tahu. The Settlement included the commercial redress component, the vesting of certain properties in Te Rūnanga o Ngāi Tahu, and the Mahinga Kai claim. The Ngāi Tahu Treaty Settlement provided the basis for the tribe to build its commercial influence and to engage in the resource management power sharing arrangements in Canterbury that the tribe are using to increase regional authority.

Several different provisions were included in the Ngāi Tahu Settlement Act which have allowed the iwi to build the tribe's resource management power sharing capacity. These included specific sections designed to provide for dual management of designated natural resources within the Ngāi Tahu rohe, and general provisions that allowed Ngāi Tahu to work alongside the Department of Conservation (DOC). These provisions have allowed Ngāi Tahu to build up a series of different partnerships with the Crown.

Arguably, the most important of the 'Nine Tall Trees' of Ngāi Tahu that formed the basis for Te Kerēme was the claim for Mahinga Kai. 'Mahi' means 'work' and 'kai' means 'food', so this term can be literally translated as 'to work the food'. Mahinga Kai is the traditional form of food and resource

gathering for Ngāi Tahu, and can be seen as both an economic and cultural activity. The 1991 Ngāi Tahu report defines Mahinga Kai as: [184]

> The tribal resources in and on the land, in the forests and in the rivers, lakes and sea and in the sky. It includes kai ika, kai moana, kai awa, kai manu, kai roto, and kai rakau. Ngāi Tahu see their Mahinga Kai in a holistic way.

The claimants alleged that Ngāi Tahu, in breach of Article Two of the Treaty, had been dispossessed of their Mahinga Kai by the Crown, through such actions as refusing the iwi access to their traditional hunting, fishing and food gathering grounds. Part 12 of the Ngāi Tahu Claims Settlement Act provided for cultural redress to make amends for the Crown's failure to recognise Mahinga Kai. It features provisions that refer to the statutory advisor role of TRONT, the existence of Tōpuni, place names, taonga species, and DOC protocols. The Mahinga Kai section provides the general power-sharing provisions that Ngāi Tahu have used to build their co-governance capabilities.

One set of the Part 12 provisions that have allowed for tribal input into resource management decision making are the sections of the Act that deal with Tōpuni. Tōpuni are areas of land administered under the National Parks Act, the Conservation Act, or the Reserves Act 1977 which have Ngāi Tahu values.[185] While Tōpuni status does not override any other status, it does allow for an overlay of Ngāi Tahu values. As such, DOC will be required to recognise these values, and must undertake specific actions in line with these

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[184] Waitangi Tribunal, above n 161.

[185] Ngāi Tahu Claims Settlement Act 1998 at s 237.

principles. One example of this engagement in practice is the education of climbers of significant mountains that they should not stand on the top of its peak due to the tapu nature of the mountain.

The Tōpuni provisions provide for fourteen areas of public land that are symbols of Ngāi Tahu mana and rangatiratanga, including Castle Hill, Mt Earnslaw and Mt Aspiring.[186] Section 241 provides that the New Zealand Conservation Authority must have particular regard to Ngāi Tahu values when considering any management aspect to do with Tōpuni. This is one set of general provisions that allows for the iwi to build resource management power sharing capacity. I contend that these provisions do not meet full co-governance, as they are effective at an operational and output-focused level and do not involve shared goal-setting and navigational direction by Ngāi Tahu and the Crown for the areas in question. They do, however, sit on the resource management power sharing spectrum, and are an example of how the Crown uses this as a compromise to return some power to iwi while retaining overall control. This distinction reflects the difficulty in defining these terms discussed in Chapter 5.

The Claims Settlement Act provides for arrangements relating to specific sites over the South Island.[187] Several of these are Canterbury based. One such site is Aoraki/Mount Cook, New Zealand's highest mountain. The Settlement

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[186]TRONT "Mana Recognition" (1996) <http://ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/cultural-redress/ownership-and-control/mana-recognition/>.

[187] The provisions relating to the Titi Islands are an example of a co-management system between Ngāi Tahu and the Crown outside of Canterbury.

allowed for the name change from Mount Cook to Aoraki/Mount Cook, in recognition of the significance of the mountain's place in Ngāi Tahu creation traditions. Part 3 of the Settlement Act vests Aoraki/Mount Cook in TRONT. In return, s 16(1) provides that TRONT must gift back the mountain. This temporary re-vesting has yet to take place. TRONT themselves state that the re-gift concept is a deliberate move to assert their legal personality, observing "the very act of gifting the mountain to the people of New Zealand confirms that the person making the gift has the mana, or power, to do so".[188] TRONT also references the power sharing nature of these arrangements, noting that the return of Aoraki is a continuing symbol of their commitment to the co-management of areas of high historic, cultural and conservation value.[189]

Another specific provision in the Ngāi Tahu Settlement Act that has been a building block for co-governance in Canterbury was the vesting of the bed of Te Waihora/Lake Ellesmere in TRONT. Te Waihora was one of three lakes that had its bed vested in TRONT as a result of the Settlement. Also returned were Muriwai (Coopers Lagoon) and Lake Mahināpua. Under mainstream law, a lake can be split into various property rights, including: its bed; its water column; the subsoil and minerals below the bed; the plants and animal species in the water column; the banks of the land around the lake; and the airspace immediately above it. All of these are considered individual property rights. This is in direct contrast to tikanga Māori, which views a lake as one entity that is not available to be owned by any one individual; rather it is a taonga

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[188] TRONT "The Settlement - Aoraki " (1996) <http://ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/aoraki/>

[189] At 1.

that a collective group are responsible for as kaitiaki, as discussed in Chapter 5. The iwi claimed for the return of the whole lake, an issue that the Waitangi Tribunal noted was "deeply intertwined with Ngāi Tahu's Mahinga Kai".[190] However, just the fee simple estate of the bed of the lake was returned to Ngāi Tahu.[191] This formed the basis for a co-governance arrangement between the iwi and local government, and it can be seen that this deal reflects the nature of compromise that permeates the Treaty Settlement process.

These provisions of the Claims Settlement Act represent Ngāi Tahu's starting point for the changing face of co-governance in the Canterbury region. The tribe shifted from a position of no formal influence to one with broad powers across the South Island. The site-specific provisions of Aoraki and Te Waihora provide the foundation for influence in Canterbury resource management. Aoraki has become more symbolic over the past 16 years since settlement; however, Te Waihora has become the focus of an important power-sharing scheme that provides a genuine attempt at co-governance. I posit that this is because of the lesser economic potential for Aoraki; Te Waihora has valuable eel, flounder and mullet fisheries. The Settlement Act can be seen to be the genesis for Ngāi Tahu's increasing role in power sharing arrangements in Canterbury.

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[190] Waitangi Tribunal, above n 161 at 467.

[191] Ngāi Tahu Claims Settlement Act 1998 at s 168(2).

6.4 The Settlement – Commercial Provisions

The Ngāi Tahu Claim Settlement Act also includes provisions of significant commercial importance that have allowed the tribe to build their commercial capacity and have contributed to the tribe's development of significant regional influence. The large Ngāi Tahu property base in Christchurch has given them influence as property owners within the city. The Act has provided Ngāi Tahu with the capacity to build a large business portfolio, including holdings in property, tourism, agriculture and housing. The below diagram shows the business organisational structure of TRONT:[192]

[192] TRONT "Te Runanga o Ngai Tahu" <http://ngaitahu.iwi.nz/te-runanga-o-ngai-tahu/>

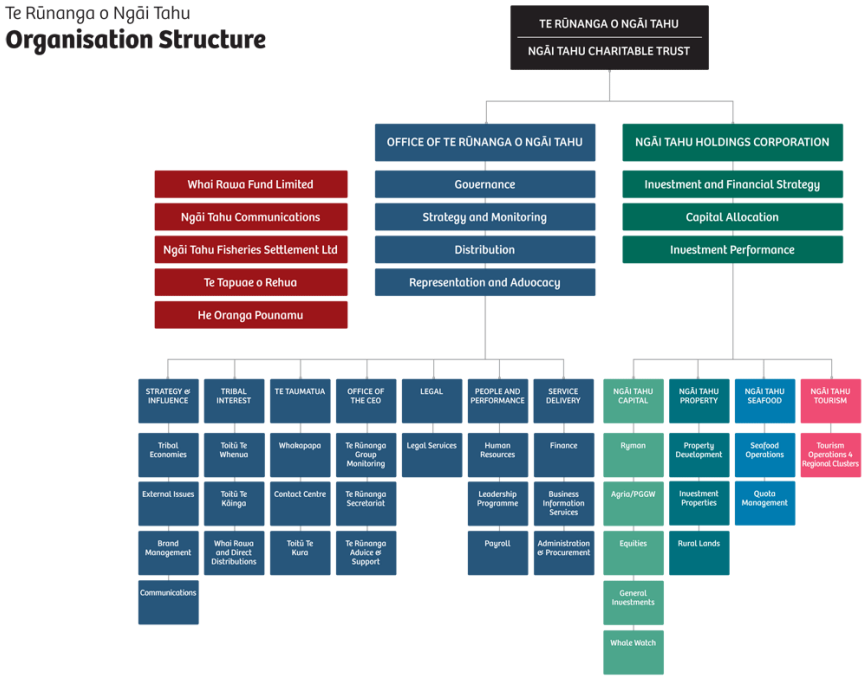

Figure 5: TRONT organisation structure

These entities have been built up from the financial compensation given to TRONT by way of the Settlement Act. The economic redress provisions in the Act provided Ngāi Tahu with $170 million.[193] The commercial 'bolt-ons', principally the Right of First Refusal and Deferred Selection Process, increased the value of the $170 million. These bolt-ons also included a relativity provision. This provision means that the Crown must 'top-up' the financial compensation paid to Ngāi Tahu once the Crown reaches its $1 billion 'fiscal envelope', although the Crown only has to pay this when

[193] TRONT "Economic Security" <http://ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/economic-security/>.

specifically asked by Ngāi Tahu. Ngāi Tahu describes this relativity provision as "a mechanism to help mitigate our losses and future proof us against the uncertainty of an evolving Treaty Settlement Process".[194] With the signing of the Ngāi Tūhoe settlement, this provision was triggered, with Ngāi Tahu receiving a pay-out of roughly $56 million.[195] This safeguard has ensured that the Crown remains accountable for its Treaty breaches, and it makes certain that the value of Ngāi Tahu's settlement remains as the Crown promised in 1996.

The Deferred Selection Process allowed TRONT to buy certain listed Crown assets within twelve months of the enactment of the legislation. Carrell explains that the purpose of the mechanism was to provide Ngāi Tahu with the opportunity to acquire "a range of assets in different economic sectors and locations, thus giving it a sound basis for social and economic development".[196] Parts 4-8 of the Act provide the legal processes through which the transfers of such property must be made. These provisions enabled Ngāi Tahu to purchase the fee simple to a large property base, including forestry land, high country stations and central Christchurch land including the Courts precinct. Some of these properties were then leased to or managed by the Crown exactly as they had been prior to the settlement.[197]

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[194] At 1.

[195] Tracy Watkins "Tribes to receive top-ups" *Fairfax NZ* (2012).

[196] Carrell, above n 157 at 182.

[197] At 182.

I consider that this interest in property has contributed to Ngāi Tahu's strong claim to engage in power sharing schemes in resource management. This is because, as a significant property owner, TRONT is a natural partner; the body has a vested interest in the governance and management of these areas. This has been particularly pertinent to the Te Waihora/Lake Ellesmere co-governance scheme, and the Central City Rebuild co-management arrangement. Ngāi Tahu is fond of saying that they are not going anywhere, showing their continued commitment to the governance and management of the land within their rohe.

Another settlement provision that has allowed TRONT to construct an influential commercial base is the section which allows for a Right of First Refusal (RFR) to purchase surplus Crown land. Part 9 sets out the provisions for RFR, with s 49 prohibiting a Crown body from disposing or attempting to dispose of relevant land except in accordance with the Act. Sir Tipene O'Regan, speaking of RFR, has noted that "in a lovely ironic twist… it's the right of pre-emption that the Crown imposed on us at the time of the Treaty! We could only sell to the Crown. Well, if the Crown wants to sell, it can only sell to us".[198] This 'twist' reflects the Treaty relationship of land sales; I submit that the acquisition and return of land and the governance of that land has always been the focus of the Crown/Iwi relationship.

RFR has allowed Ngāi Tahu to rebuild its land stocks. Rights of First Refusal were also important for the negotiation of the Canterbury Earthquake

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[198] O'Regan, above n 148 at 21.

Recovery Act. It has been hinted that one of the reasons Ngāi Tahu were given partnership status in the Act was to remove Rights of First Refusal responsibilities that the Canterbury Earthquake Recovery Authority may have otherwise been forced to comply with.[199] While this is speculation, it is a likely consequence of the RFR due to the significance of these provisions. The deferred selection process and RFR components of the Ngāi Tahu Settlement have given the tribe the capacity to build a large property base within their rohe.

The commercial elements of the Settlement also gave Ngāi Tahu the financial means to build resource management power sharing ability. The tribe has used these commercial components to turn their $170 million into an asset pool of around $1 billion. Ngāi Tahu Property has around 30 percent of the Christchurch subdivision market and is a large landlord in the region.[200] This, in turn, has translated into influence at a regional level. Ngāi Tahu Property CEO Tony Sewell is of the firm view that regional influence has come from "commercial clout", noting that tribal business relationships extend into all manner of areas of commerce in Canterbury.[201] The statutory environmental provisions in the Settlement Act, coupled with the genuine day-to-day influence that Ngāi Tahu has built through its commercial success, have provided the tribe with a solid base from which to engage in power sharing schemes across Canterbury. I conclude that the patchwork nature of the

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[199] Tau, above n 31

[200] Sewell, above n 37.

[201] Sewell above n 37.

construction of these schemes reflects that fact that such arrangements require the lobbying by iwi of the Crown to relinquish power. They sit on a spectrum of power sharing, and the Crown can use these arrangements as it sees fit to return decision making power. This does not occur in a uniform manner.

6.5 Te Waihora/Lake Ellesmere Co-governance Arrangement

One of the most significant resource management power sharing arrangements between the Crown and Ngāi Tahu in Canterbury is the Te Waihora/Lake Ellesmere governance arrangement. This co-governance scheme emerged from the Ngāi Tahu Claims Settlement Act, and has developed from years of Ngāi Tahu advocacy. It sits alongside the Canterbury Water Management Strategy, and has been instrumental in allowing TRONT to gain more regional influence. Te Waihora is of huge cultural and economic significance to Ngāi Tahu, and was a core part of Treaty negotiations. Although the arrangement introduces the tikanga principles discussed in Chapter 5 into Canterbury water management, this arrangement has yet to achieve its full co-governance potential and I believe that the scheme can currently be more accurately described as co-management. This shows how the boundaries between the two concepts are blurred, as discussed in Chapter 5. I consider that this reflects the fact that the Crown is utilising the term ‘co-governance’ as a useful political compromise that can be moulded into devolving as much or as little power as the Crown chooses to relinquish.

Te Waihora is a brackish lake close to Christchurch, with a catchment of Canterbury Plains waterways including the Rakaia and Selwyn Rivers. The lake is unique in that it can be closed and opened, and has been done so

historically by both Māori and settlers. A 2010 National Institute of Water and Atmospheric Research (NIWA) study reported that Te Waihora was one of the most polluted lakes in New Zealand, in terms of nutrient content and algal growth.[202] It is mostly shallow, with a maximum depth of 2.1 metres, and has suffered from algal blooms since the 1968 Wahine Storm, when aquatic macrophytes in the lake were all destroyed.[203] The high pollution levels have been attributed to the rapid intensification of farming in the catchment of the lake. Memon and Kirk explain that "the lake has been treated as a sink for waste, with the major causes of degradation being farm run-off, sewerage and the manipulation of the lake outlets to foster more arable farmland".[204] Farmers have grazed stock right up to the lake's edge, and the loss of lakeside vegetation and lake edge erosion have also been highlighted as contributing factors to the poor state of the lake.[205] These issues have contributed to the need for a significant clean up endeavour.

The tragedy of the lake's pollution is compounded because of the cultural significance of Te Waihora to Ngāi Tahu. The iwi use the lake as a source of Mahinga Kai, and it was known as 'Te Kete Ika a Rakaihautu' or 'The Food Basket of Rakaihautu'.[206] It was a source of fish and bird stocks, including a

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[202] P. Verburg and others *Lake water quality in New Zealand 2010: Status and trends* (NIWA, 2010).

[203] Murray Williams "Status and management of Black Swans *Cygnus Atratus*, Latham at Lake Ellesmere since the 'Wahine Storm', April 1968" 1979 2 New Zealand Journal of Ecology.

[204] P. A. Memon and N. Kirk "Role of indigenous Māori people in collaborative water governance in Aotearoa/New Zealand" 2012 55(7) Journal of Environmental Planning and Management.

[205] Waihora Ellesmere Trust *Te Waihora/Lake Ellesmere - feedback summary on potential scenarios* (2009).

[206] TRONT and ECAN *Te Waihora Co-governance Agreement between Te Waihora Management Board and Te Rūnanga o Ngāi Tahu and Canterbury Regional Council* (2012).

valuable eel fishery.[207] The lake supports thirty three native fish species and five exotic species, although eel, flounder and mullet are the primary catch.[208] Traditionally, Ngāi Tahu managed the opening and closing of the outlet of the lake to help fish stocks to flourish.[209] Several hapū claim Mahinga Kai rights to the lake and Ngāi Tahu whānui consider themselves kaitiaki of the lake.

Te Waihora was never intended to form part of Ngāi Tahu land sales. The Waitangi Tribunal reported:[210]

> It is clear that Ngāi Tahu did not intend to part with this treasured fishery. We are satisfied they fully intended to retain unimpeded access to both Waihora and the spit. This they made abundantly clear to (Crown agent Walter) Mantell. He deliberately chose to disregard their rights. In doing so he failed to comply with the terms of the purchase which preserved to Ngāi Tahu their Mahinga Kai, and acted in breach of the Treaty. Serious detriment to Ngāi Tahu has continued down to the present day.

For Ngāi Tahu, the loss of the lake through Crown actions was a tragedy and this became a focal point of the Mahinga Kai 'tall tree' of Te Kerēme. The tribe sought the return of the whole lake. Tikanga does not split a natural resource into various individual property rights as western law does, reflecting the kaitiakitanga approach to ownership taken by Māori described in Chapter 5. However, this claim for the whole lake was only partially successful. The Crown returned only the fee simple of the bed of the lake, and s 171 of the Act

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[207] Memon and Kirk, above n 204 at 945.

[208] TRONT and ECAN, above n 206 at 6.

[209] Memon and Kirk, above n 204 at 945.

[210] Waitangi Tribunal, above n 161 at 466.

is firm that this return did not confer any rights with regards to the waters, aquatic life of the lake, or any structures attached to the bed. This directly conflicts with the tikanga principle that the lake is one entity.

Prior to the 1998 legislation for the return of the bed of Te Waihora, Ngāi Tahu advocated for increased responsibility in governance and management of the lake. In 1993, an entity called the Te Waihora Management Board was set up under the mandate of the Papatipu Rūnanga Taumutu and involving six other rūnanga with interests in the lake. ECAN explains that "the Board's composition is in recognition of whakapapa, kaitiaki roles and the flax-roots local knowledge of the Te Waihora environment held by the Board members and their respective Papatipu Rūnanga".[211] The Management Board is today the Ngāi Tahu advisory voice in the local politics that surround Te Waihora.

In addition to the Ngāi Tahu-mandated Te Waihora Management Board, in 2003 the broader community was included in the form of the Waihora Ellesmere Trust (WET). None of the Trustees of WET are Ngāi Tahu; instead the board is composed of non-mana whenua who have an interest in the restoration and future of the lake. These include local landowners, scientists, and environmental practitioners. WET was established to implement a Community Strategy, derived from the Canterbury Regional Council's Regional Policy Statement and its subsequent work plans.[212] It was

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[211] ECAN "Ngāi Tahu and Environment Canterbury confirm commitment to restoration of Te Waihora/ Lake Ellesmere" (2011) <http://ecan.govt.nz/news-and-notices/news/pages/ngai-tahu-and-ecan-confirm-restoration-te-waihora.aspx>.

[212] Lake Ellesmere Issues Group *A community strategy for the future management of Lake Ellesmere/Te Waihora and its tributaries* (2004).

specifically provided that the Community Strategy was not to conflict with Ngāi Tahu Freshwater Management Policy and plans centred on Ngāi Tahutanga including the Te Waihora Eel Management Plan.

In 2005 another significant piece of Te Waihora policy was introduced. This was in the form of a Joint Management Plan between Ngāi Tahu and the Crown, called Mahere Tukutahi o Te Waihora. This plan was provided for outside of the RMA, and was the first statutory joint land management plan between the Crown and any iwi in New Zealand to do so. From here, negotiations began to extend this JMA into a full co-governance arrangement. In 2011, the Te Waihora Management Board, representing Te Rūnanga o Ngāi Tahu, signed a relationship agreement with ECAN, signalling "a shared commitment to the restoration and rejuvenation of the mauri and ecosystem health of Te Waihora/Lake Ellesmere".[213] At the same time, an interim co-governance arrangement was signed, indicating that both parties intended to establish a longer term co-governance scheme.

Running alongside the relationship agreements that were being signed at this time was an announcement from the then Minister for Conservation, Dr Nick Smith, that the government intended to funnel $11.6 million into a clean-up project for Te Waihora.[214] The project was named Whakaora Te Waihora, and this $11.6 million figure was sourced from the Central Government, ECAN, Fonterra, Ngāi Tahu, Selwyn District Council, Waihora Ellesmere Trust and

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[213] Whakaora Te Waihora "Co-governance" <http://tewaihora.org/cogovernance/>.

[214] Nick Smith "$11.6 million clean up plan for NZ's most polluted lake" (2011) <beehive.govt.nz/release116-million-clean-plan-nz's-most-polluted-lake>.

Lincoln University. The project was announced as a multi-year endeavour that would be led by TRONT and ECAN and was based on their relationship agreement.[215] It can be seen that the involvement of multiple parties in the clean-up of the lake reflects the tikanga concept of manaakitanga discussed in Chapter 5. Ngāi Tahu are actively engaging with other parties who are regular visitors to the lake in order to effectively manage this plan.

The focus of the arrangement is on reducing farming nutrient runoff.[216] Smith noted that it would be "New Zealand's most difficult lake cleanup", and highlighted the importance of education and support for the effort.[217] Ngāi Tahu Kaiwhakahaere, Sir Mark Solomon, echoed these comments and remarked on the collaborative nature of the clean-up effort, "today's a good step because it's not just about us – it's about us, ECAN, Fonterra now, the Government – it's about, hopefully, the community getting on board".[218] I consider that Solomon's comments reflect the essence of co-governance arrangements and manaakitanga – bringing different stakeholders into the mix to produce a better result for the resource in question.

In late 2012 two important arrangements were signed between the Crown and Ngāi Tahu. On 23 November 2012, the formal Te Waihora Co-governance Agreement between Te Waihora Management Board and Te Rūnanga o Ngāi Tahu as the representatives of the tribe, and Canterbury Regional Council

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[215] Goodall, above n 53.

[216] David Williams "$12m clean up for NZ's most polluted lake" *The Press* (Christchurch, 26/08 2011).

[217] At 1.

[218] At 1.

(ECAN) as the representative of the Crown, was signed. On 7 December 2012, Tuia, the Relationship Agreement between Ngā Papatipu Rūnanga and Environment Canterbury was signed. The eighteen Papatipu Rūnanga of Ngāi Tahu represent the hapū level of the tribe. Tuia is important to both the Te Waihora co-governance scheme and broader tribal resource management power sharing arrangements as it provides the basis for how these arrangements should be conducted. Tuia recognises stewardship and kaitiakitanga, mutual respect and good faith and unity. Tuia acknowledges the mana whenua of each Papatipu Rūnanga, acknowledging that they hold customary authority within their rūnanga. This essentially means that other hapū cannot influence resource management power sharing arrangements that are outside of their rohe.[219] Tuia provides the background relationship agreement to the formal Te Waihora co-governance arrangement (TWCGA).

The TWCGA is the first co-governance arrangement in New Zealand to be entered into by the Crown separate to a Treaty settlement. It is a policy that has been formed outside of the RMA. This reflects the fact that the RMA is an ineffective vehicle for facilitating effective power sharing arrangements as discussed in Chapter 5. The arrangement is between TRONT, the Te Waihora Management Board, which is a TRONT-funded entity given the mandate to deal with Te Waihora issues, and ECAN.

The document that sets out the TWCGA includes: the functions, powers and duties of the parties; a catchment vision to provide direction to the joint

[219] TRONT and ECAN *Tuia: Relationship Agreement between Ngā Papatipu Rūnanga and Environment Canterbury* (2012).

exercise of those functions, powers and duties; operational process protocols; co-governance responsibilities; structural machinery for the co-governance entity; joint decision-making capabilities; reservations and conditions; and administration of the arrangement. The specific co-governance clause provides that:[220]

> The Parties agree to:
>
> Approve any relevant management and/or operational plans, work programmes and budgets developed for the implementation of the Whakaora Te Waihora accelerated restoration programme.
>
> Provide leadership to the organisations and the community in relation to the Whakaora Te Waihora accelerated restoration programme.

I contend that this definition sits at a much more operational level than a true co-governance arrangement would. While the board approves the management and operational plans, and 'provides leadership', it does not provide for any long term goal-setting, any decision making about what the serious issues facing the board are, or any other similar 'governance-level' decisions. This is an example of where the label 'co-governance' is used to describe an arrangement that the Crown are not fully engaged in at a governance level, reflecting the fact that this is a politically useful term used as the Crown sees fit.

The Te Waihora Co-governance Board comprises of fifteen members, all seven Commissioners from ECAN and all eight members of Te Waihora

[220] At 8.

Management Board (TWMB).[221] The co-governance board is to be chaired jointly by both ECAN and TWMB. Decisions of the co-governance group are made on a consensus basis.[222] This consensus is not a consensus between all the individual members of the group, but rather a consensus between a majority of the Commissioners and a majority of the TWMB. The current co-governance board is co-chaired by Dame Margaret Bazley (Chief Commissioner) and Sir Mark Solomon (TRONT Kaiwhakahaere). Despite the lack of governance level decision making that this power sharing scheme entails, I believe the fact that both Ngāi Tahu and ECAN have sent their "Chiefs" to chair the organisation shows the strong co-operative commitment to the governance arrangement of both parties.

The somewhat limited impact of the co-governance scheme for Te Waihora is echoed by responses from stakeholders from both sides of the co-governance scheme that the author interviewed. These stakeholders identified that the current state of the scheme is at more of a co-management level. ECAN Commissioner, Peter Skelton, stated simply that "what we have been talking about is close to co-governance but it's not quite there. It's a co-operation, a collaboration".[223] Te Waihora Management Board member Anake Goodall was blunter about the efficacy of the co-governance arrangement, making the observation "I think the thing is pretty shallow, or has been operating in a shallow way. … So it's sort of a glorified Te Waihora Management Board

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[221] At 10.3

[222] At 10.5-10.6.

[223] Interview with Peter Skelton, ECAN Commissioner, (Rachael Harris, 11 March 2014).

that's been managing flax bush plantings and really operational stuff".[224] Goodall was critical of the human resourcing of the board, noting that the teams provided to work on the clean-up effort are often working split roles and are distracted by other professional obligations. He made the point that "there's no urgency, no power, no particular sharp edge. … I think what we are doing is scratching at the glass ceiling of what co-governance might look like".[225] Goodall's comment exposes a reality of co-governance – all forms of power sharing arrangement are not created equal.

In addition to the fact that this arrangement does not meet full co-governance, the literature has identified that power sharing arrangements for Te Waihora have not returned full tino rangatiratanga to Ngāi Tahu. About six months before the signing of the formal co-governance arrangement, Memon and Kirk produced a paper analysing collaborative governance in the area. They noted that the property right of the return of the lakebed: [226]

> Has enabled Ngāi Tahu to exercise rangatiratanga in limited capacities (such as rent on commercial eel fishers and rehabilitating customary fisheries), it does not provide new capabilities for management of the lake's water … effective Māori agency in the lake and wider catchment continues to be burdened by the historical forces of institutional inertia.

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[224] Goodall, above n 53.

[225] At 3.

[226] Memon and Kirk, above n 204 at 954-955.

Memon and Kirk conclude that true Ngāi Tahu rangatiratanga over the lake is limited, despite their participation in lake management.[227] Despite the fact that a co-governance arrangement is now in place, I would argue that power sharing regimes never fully return tino rangatiratanga, as by its nature it is not a concept that can be shared between iwi and Crown. A tribe either has tino rangatiratanga, or the Crown has sovereignty, and there is little overlap between the two.

While this power-sharing arrangement is a co-governance scheme in name, it is questionable as to whether it actually achieves co-governance. I consider that a more appropriate name for this scheme would be 'co-management', as the decisions that are being made by the board are much more to do with day-to-day management that the philosophical, long-term goals that co-governance arrangements typically address. I therefore posit that this current iteration of the co-governance arrangement is simply one building block for future Ngāi Tahu regional influence. This arrangement has not reached true co-governance, however it can be seen that it has built up functional power sharing capacity, and will enable the tribe to participate in other resource management power sharing schemes in the future.

6.6 The Canterbury Water Management Strategy

Another power sharing arrangement that Ngāi Tahu are involved in is the Canterbury Water Management Strategy (CWMS). The Te Waihora/Lake Ellesmere Co-governance Arrangement and the CWMS can be seen to

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[227] At 955.

represent two strands of a rope, winding together to create a stronger strand of regional influence for Ngāi Tahu in the area of water governance. The CWMS sits alongside the TWCGA, complementing it, and mirroring, to a lesser degree, the power sharing aspect of water governance. Ngāi Tahu have used the CWMS as another building block to gain influence. The CWMS is not a bilateral Iwi/Crown co-governance arrangement; it is a multi-party governance scheme of which TRONT is a key stakeholder.

Ngāi Tahu's influence on water usage in Canterbury is important to the tribe as water is of great economic importance in the region. According to a 2014 study, Canterbury allocates 58% of New Zealand's water, generates 24% of the nation's power through hydroelectric schemes, and has 70% of the country's irrigated land.[228] Canterbury has braided rivers, lakes, and lowland streams and wetlands, and is relatively dry, with a high water table in some areas.[229] The current 'first-in first-served' system of water allocation in New Zealand does not allow for water to be distributed according to the most worthy application, or for any monetary compensation, or along any grounds of iwi-based prioritisation. Instead, water is allocated to those who apply under the RMA and are the first to file their applications. This allocation system has been tested by land-use changes and the intensification of farming practices.[230] The rise of dairy farming as a major money earner in the New Zealand

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[228] B. R. Jenkins and others "Application of sustainability appraisal to the canterbury water management strategy" 2014 21(1) Australasian Journal of Environmental Management at 88.

[229] At 89.

[230] Sylvia Nissen "Who's in and who's out? Inclusion and exclusion in Canterbury's freshwater governance" 2014 70(1) New Zealand Geographer at 35.

economy has seen many former sheep and beef farms convert to dairy, and such conversions see a large increase in irrigation and water usage. Canterbury has the largest number of cows per hectare of land in New Zealand.[231] This rise in dairying has also seen another water-based issue – increased levels of nutrient contamination and run-off in water levels. This combination of greater demand for water resources and the decrease of an adequately clean water has led to the so-called "water woes" of Canterbury.[232]

In an attempt to solve the water problems of Canterbury, the Canterbury Water Management Strategy was adopted in 2009 after seven years of development.[233] The Strategy takes a collaborative, community-based approach to water management.[234] The CMWS is broad, and its direction and implementation were supported by stakeholder groups including Ngāi Tahu. Jenkins and others explain how this arrangement was formed with a community focus:[235]

> The CWMS aims to provide a long-term direction for water management in the region, combining current and contemplated projects and activities, and integrated infrastructure, environmental flows, water quality, land use, water allocation, ecosystem protection and restoration, together with demand management.

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[231] At 35.

[232] ECAN "Water Issues" (2009) <http://ecan.govt.nz/advice/your-water/water-issues/pages/default.aspx>.

[233] Jenkins and others, above n 228 at 89.

[234] ECAN "Canterbury Water Management Strategy" (2009) <http://www.cwms.org.nz/>.

[235] Jenkins and others, above n 228 at 89.

The CWMS is set up as a method of bringing local community leaders together at a governance level to balance the economic issues of water distribution with the environmental protection issues that are facing the region. It is a form of co-governance, but it is a multi-lateral form of co-governance rather than a strictly bilateral Crown-Iwi co-governance scheme.

Soon after the adoption of the CWMS, regional governance in Canterbury became complicated. In 2010, the central Government removed the elected Environment Canterbury regional councillors from their roles for their failure to consent water allocations in due time, and for "dysfunction at a councillor level".[236] The alleged 'defective' nature of the councillors was contested by some, including the councillors themselves. However, instead of fourteen democratically elected councillors, the Government installed seven commissioners, headed by Dame Margaret Bazley, to correct the defective allocation system. Their term was extended in 2012 to end in 2016.

At a practical level, the CWMS splits Canterbury into ten zone committees. Each of these zone committees is comprised of local community leaders, including one ECAN Commissioner, and at least one Ngāi Tahu representative. This Ngāi Tahu representative ensures that the iwi have a form of influence in this community-based multi party governance arrangement. The influence of Ngāi Tahu on Canterbury water governance is reflected in both the text of the CWMS and the practical outcomes from the work of some of the zone committees. In the text of the CWMS, there is an emphasis on

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[236] Chris Hutching "Q & A: The Environment Canterbury Saga" *National Business Review* (17/5 2010)

involving Ngāi Tahu in decision making and governance. The Kaitiakitanga section outlines goals and tikanga principles for water management in the region with direct reference to Ngāi Tahu, and Ngāi Tahutanga. There are six key points that sum up the entirety of the chapter. These are:[237]

- Water is a taonga that provides for and sustains all life. It is integral to cultural and personal identity and wairua for whānau, hapū and iwi.

- Water is central to the Ngāi Tahu resource management philosophy 'Ki Uta Ki Tai' – from the mountains to the sea. For Ngāi Tahu this requires an holistic view of the world and integration and co-operation between agencies, legislation and management frameworks.

- Kaitiakitanga is about the active protection, use of and responsibility for natural and physical resources by tangata whenua – it requires both an active role in decision-making and achievement of environmental outcomes.

- Priorities for Ngāi Tahu include protecting wāhi tapu, wāhi taonga, and Mahinga kai, preventing further decline in quality and quantity of drinking water, increasing understanding of and provision for customary values and uses in particular zones, and involvement of Papatipu Rūnanga in CWMS work.

- Ngāi Tahu is particularly concerned with the impacts of land use intensification on water quality & quantity. Adverse effects of degraded waterways impacts on the health and wellbeing of waterways and ability to access life sustaining resources of the waterways.

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[237] ECAN, above n 122

- Ongoing discussions between Ngāi Tahu, the Crown and Canterbury local government will lead to increased clarity around the arrangements and commitments needed to give effect to the Treaty, aboriginal and customary rights

The formalisation of Mahinga Kai and Ngāi Tahutanga in this policy is an example of how Ngāi Tahu are integrating the tikanga values discussed in Chapter 5 into the mainstream.

6.7 Freshwater governance – policy v practice

While it is notable that Ngāi Tahu values are incorporated into freshwater governance policy, the question must be asked, how much of a practical influence is the tribe having on regional water governance? Of particular note here is the Selwyn/Waihora zone committee. This zone committee is unique in that it has more than one Ngāi Tahu representative. There are six Ngāi Tahu representatives from the hapū that associate with the lake, and the ECAN Commissioner on this zone committee is Donald Couch, who is also Ngāi Tahu. Six Ngāi Tahu representatives on a committee of twelve "raised a few eyebrows" in the farming community, but ECAN Commissioner David Caygill explains that it was not deliberate to install so many Ngāi Tahu representatives on this committee.[238] Rather there was a desire to involve all the affected rūnanga in the zone committee, rather than say to Ngāi Tahu "we know that six rūnanga are all interested in the lake – but pick two".[239] This

[238] Interview with David Caygill, ECAN Commissioner (Rachael Harris, 11 March 2014).

[239] At 3.

approach is indicative of substantial Ngāi Tahu influence over water governance in the Selwyn/Te Waihora area.

The zone committee and the Te Waihora Co-governance Arrangement are separate bodies, but the zone committee will have some effect on the Co-governance scheme as it will have some control over resource management law for that area. By having influence in both these governance groups, Ngāi Tahu is able to 'cover their bases'. Having a heavy Ngāi Tahu influence in this zone committee has had a positive effect on the resource management policy for the area. Recommendations for a comprehensive set of changes to land management in the Selwyn Catchment have included suggestions that are reflective of tikanga Māori. Specifically, the zone committee has recommended rules designed to address the mauri of Te Waihora.[240] I consider this shows that participation in the zone committees under the auspices of the CWMS is enabling Ngāi Tahu are using to widen their influence at a regional level.

Another zone committee that is engaging with tikanga Māori is the Ashburton zone committee, which covers the Rakaia and Rangitata River. There are two Ngāi Tahu representatives on this committee. The zone committee had to consider whether some bodies of water could be considered 'streams', and others 'drains' in the Hinds catchment, with the practical consequence that drains would be ignored in their engagement.[241] An Arowhenua representative

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[240] Caygill, above n 110.

[241] At 4; The Hinds River is part of the Ashburton area, and traditionally drains to the sea through an area that is swampy, rather than a defined river channel.

explained that Ngāi Tahu did not make such a distinction as "water is water and wherever it is it has mauri".[242] The zone committee adopted the Ngāi Tahu approach of not differing between streams and drains, and did this directly as a result of the input from the Arowhenua representative. I consider that this occurred as a practical consequence of the interaction of tikanga protocol into mainstream policy. This is, in effect, what a working power sharing arrangement should look like – tikanga and western science working hand in hand to protect the resource as kaitiaki.

Ngāi Tahu are able to use their involvement on the CWMS zone committees to advance their regional influence and ensure that their values are contributing to discussions under this scheme. The tribe is engaging in water governance at a regional level, and is using this as one way to promote the interests of their people. It is not mere consultation – the tribe are engaging in the real decision making that is happening as part of the CWMS. However, this is not a co-governance scheme or a co-management scheme. Rather it is a multi-party governance arrangement of which Ngāi Tahu are a major stakeholder. Nonetheless, I consider that this scheme is an effective partnership for delivering Ngāi Tahu regional influence, particularly as water is such an important resource in Canterbury. This kind of arrangement proves that the Crown and Iwi can work together as partners in a range of different power sharing schemes, even those that are beyond the traditional co-management or co-governance schemes discussed in Chapter 5.

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[242] At 4; Arowhenua are a hapū of Ngāi Tahu.

6.8 Ngāi Tahu and the Canterbury Rebuild

6.8.1 The Background to the Ngāi Tahu role in the rebuild

One innovative tool that Ngāi Tahu is using to build regional influence is through the central city rebuild of Christchurch. Ngāi Tahu hold a unique position in the rebuild, as legislation has granted TRONT partner status with the central and local governments. This arrangement is a little different from previous resource management power sharing schemes, as it involves the rebuild of an entire central city, rather than the restoration of a more 'natural' environment, such as a river or a lake. While this arrangement resembles more closely a co-management scheme than a co-governance scheme, it is undoubtedly influential and will allow the tribe to make a significant contribution to the changing face of Christchurch.

On 4 September 2010, at 4.35 AM NZST, a magnitude 7.1 earthquake occurred on a previously unknown fault line in Darfield, Canterbury.[243] This quake caused both significant damage in the Christchurch city area and the surrounding region, and created a 29.5 kilometre long surface rupture, now named the Greendale fault.[244] Subsequent to the Darfield earthquake, extensive aftershock activity was documented, and more than 4300 aftershocks with local magnitudes of up to magnitude 5.4 were recorded by the Geonet seismograph network between 4 September 2010 and 22 February

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[243] S. Bannister and K. Gledhill "Evolution of the 2010-2012 Canterbury earthquake sequence" 2012 55(3) New Zealand Journal Of Geology And Geophysics.

[244] At 296.

2011.[245] Five and a half months after the Darfield earthquake, a magnitude 6.3 quake struck on 22 February 2011 at 12.51 PM NZDT.[246] The ground shaking was severe; with an epicentre around six kilometres southeast of the city centre of Christchurch, the whole city felt considerable ground movement. The effects of the February quake were devastating – 185 people were killed, at least NZD $11 billion worth of building damage occurred, and there was widespread soil liquefaction across the entire city, predominately affecting the central business district and eastern suburbs of Christchurch.[247]

Within ten days of the 4 September quake, the Canterbury Earthquake Response and Recovery Act 2010 (CERR Act) was enacted by Parliament under urgency. The Act was designed to aid with the response and rebuild of the affected areas of Christchurch.[248] Broad powers given to the Crown by the Act drew criticism from academics for their breadth and power.[249] While the legislation was of importance at the time of enactment, the CERR Act was soon repealed by the Canterbury Earthquake Recovery Act 2011.

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[245] At 305.

[246] At 307.

[247] At 309.

[248] Kenneth Palmer "Canterbury Earthquake Recovery Act 2011 - a legislative opportunity?" 2011 9(52) Butterworths Resource Management Bulletin.

[249] Charlotte Brown, Mark Milke and Erica Seville "Legislative Implications of Managing Disaster Waste in New Zealand" 2010 14(2010) New Zealand Journal of Environmental Law.

Following the February quake, the Canterbury Earthquake Recovery Act 2011 was enacted, again under urgency, and came into force on 19 April 2011. In the first reading, the Minister for Canterbury Earthquake Recovery stated:[250]

> The purpose of the Bill is to provide appropriate measures to ensure that greater Christchurch and its communities respond to, and recover from, the impacts of the earthquakes; to enable community participation in the planning, the recovery, and the rebuilding of affected communities without impeding a focused, timely and expedited recovery; to facilitate and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of infrastructure and other property; and to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities.

The CER Act created a cross-party forum of parliamentary members from the greater Christchurch area to provide information and advice to the Minister, and, crucially, established the Canterbury Earthquake Recovery Authority (CERA), in the state sector.[251]

The CER Act creates a role for Te Rūnanga o Ngāi Tahu as a partner in the recovery process. I consider that this is not a full-scale co-governance arrangement as the tribe are not influencing the governance-level decisions of the rebuild, but it is a different form of resource management power sharing arrangement than those that Ngāi Tahu have been engaged in previously. This is because it allows the iwi to be engaged in co-management decisions regarding complex arrangements including new buildings, river management,

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[250] Canterbury Earthquake Recovery Bill - First Reading, (12 April 2011) 671 NZPD 17898.

[251] Canterbury Earthquake Recovery Act ss 6-7.

and parks redevelopment. I contend that this is a more multifaceted kind of co-management than the two arrangements explained above, and sits closer along the spectrum to co-governance as discussed in Chapter 5.

Section 11(4) of the CER Act requires the Minister to develop the Recovery Strategy in consultation with the Christchurch City Council, Environment Canterbury, Selwyn District Council, Waimakariri District Council, and, crucially, Ngāi Tahu, as well as 'any other persons or organisations that the Minister considers appropriate'. Section 17(2) requires that CERA, Environment Canterbury, and Ngāi Tahu must have the opportunity to provide input into the development of the Recovery Plan for the Christchurch Central Business District. Section 20(1) provides that a copy of any draft Recovery Plan for the CBD must be available to CERA, Environment Canterbury, and Ngāi Tahu. I consider it noteworthy that while Ngāi Tahu were allowed to comment on the Recovery Strategy and provided consultation, they were not involved in the early stages of this Strategy, and therefore did not participate in making any governance level decisions. On these facts, I believe that the Crown did not want Ngāi Tahu to be of equal partnership status at this stage in the decision making process for the Rebuild, and it was instead content to keep the tribe at a management level.

Section 59 of the CER Act governs the application of the Ngāi Tahu Claims Settlement Act. It states that:

> (1) Nothing in this Act affects the operation of the Ngāi Tahu Claims Settlement Act 1998

(2) To avoid doubt, if the chief executive wishes to exercise his or her power under this Act to dispose of land to which that Act applies, he or she must do so in accordance with the Ngāi Tahu Claims Settlement Act 1998

The practical application of this section is to confirm the grant of the first right of refusal concerning land disposal. This has been an influential regarding the acquisition of land during the rebuild. In the first reading of the Canterbury Earthquake Recovery Bill, then Member of Parliament for Te Tai Tonga, Rahui Katene highlighted the importance of this section, stating:[252]

> This is so important not just because it demonstrates that the Government has agreed that the existing first right of refusal is sacrosanct and should be protected, but also because it demonstrates the care taken in respect of formalising the Treaty relationship with mana whenua… Ngāi Tahu expresses their particular appreciation of the way this legislation embodies the commitment of Ngāi Tahu to be a partner with central and local government in developing a recovery strategy.

There are no specific provisions in the Act recognising the principles of the Treaty of Waitangi; however, this statutory co-management partnership that is created between central government and Ngāi Tahu by the Canterbury Earthquake Recovery Act is unique. The arrangement has been reported by media as a trail-blazing arrangement.[253] Even Ngāi Tahu Kaiwhakahaere Sir Mark Solomon admits to being shocked that TRONT was legislated into the recovery.[254] Sir Mark acknowledged the Treaty settlement that provided for

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[252] Hansard, above n 250.

[253] John McCrone "Ngai Tahu's reach" *The Press* (Christchurch, New Zealand, 2013).

[254] Te Karaka "Future Vision" (2013) <http://ngaitahu.iwi.nz/our_stories/future-vision/>.

Ngāi Tahu partnership roles provided the basis for Ngāi Tahu influence, but is in no doubt that the earthquakes sped up Ngāi Tahu's rise to prominence in city affairs.[255] While this is indeed a unique arrangement, I posit that the Ngāi Tahu are a natural partner in the Central City Rebuild, due to their proven capacity in power sharing arrangements and their large property stocks within the rebuild area. Ngāi Tahu's involvement in the rebuild builds on arrangements such as those under the Canterbury Water Management Strategy.[256] The tribe has displayed their ability to work efficiently with the Crown in prior resource management power sharing arrangements, and has built up the capacity required for such arrangements. Additionally, it has been hinted that Ngāi Tahu was placed in their position in the rebuild so they were unable to compete with buying land.[257] Regardless of whether this rumour is true or not, it is undeniable that the iwi has built up influential property holdings in the Central City through their purchasing of property through RFR and the deferred selection process, and have authoritative sway as large landowners in the area.[258] This role has allowed Ngāi Tahu to significantly increase their wider regional authority.

6.8.2 Actual effect of the CER Act for Ngāi Tahu

Following the legislation of a co-management role for Ngāi Tahu in the Christchurch rebuild, the tribe has attempted to use this leverage to increase its

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[255] At 4.

[256] McCrone, above n 253.

[257] Tau, above n 31.

[258] Sewell, above n 37.

influence in the region. However, this has not been straightforward for the iwi, and some have observed that this partnership is not being used to its full potential. I consider that these frustrations reflect the complex and often non-defined nature of co-governance.

The Central City Recovery Plan (CCRP) includes plans for eighteen anchor projects within the boundaries of the 'Four Avenues' of Christchurch's Central Business District. The CCRP is the statutory document that is the blueprint for the rebuild of Christchurch's central city. These anchor projects are overseen by the Central City Development Unit (CCDU), an arm of CERA. As per the statutory partnership created by the CER Act, each anchor project is led by CERA, Christchurch City Council (CCC), TRONT, or a combination of CERA and CCC.[259] Even if an anchor project is not led by one of these three entities, each partner is allowed input into that project if they choose to do so. TRONT has created a specific voice for funnelling input.

Te Rūnanga o Ngāi Tahu was named the statutory partner in this arrangement by this legislation. However, the hapū Ngāi Tūāhuriri are the mana whenua for Christchurch, and this is acknowledged by the CCRP.[260] The hapū are based in Tuahiwi, Kaiapoi. In order to provide an effective consultation arm to maximise the Ngāi Tahu role in the rebuild, a steering committee was established under the mandate of Ngāi Tūāhuriri called Nga Matapopore Trust.

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[259] A list of the 18 projects and which entity is leading what can be found at http://ccdu.govt.nz/sites/default/files/christchurch-central-anchor-projects-and-precincts-map-a4-2014-06-17.pdf.

[260] CCDU *Christchurch City Recovery Plan* (2012) at 11.

This trust was developed early on in the rebuild process after mana whenua began to fear that they would be left out of the rebuild.[261] Matapopore are a group of mana whenua with different skills who are providing a unified Ngāi Tahu voice and bringing tikanga principles, like those discussed in Chapter 5, into the rebuild.

Initial engagement between Ngāi Tahu and the rebuild did not start on a positive footing. The traditional tension between iwi and non-iwi came to the fore with the first anchor project to get off the ground – the Te Papa Ōtākaro/Avon River precinct project. The issues that occurred with the bid for this project display the complexities of power sharing arrangements, and how iwi can sometimes be side-lined in such schemes, especially when outside commercial interests who are not a Treaty Partner are involved. As part of the CCRP, the importance of the Avon/Ōtākaro River to Ngāi Tahu was emphasised. Ōtākaro is at the top of this list of places of significance to Ngāi Tahu.[262] The section of the CCRP that deals with the Avon River Precinct, and the way that it must be developed, specifically mentions, "Ngāi Tahu through Te Ngāi Tūāhuriri Rūnanga will advise and guide CERA and Christchurch City Council to ensure their values are appropriately integrated into the new project".[263] The Plan acknowledges both the mana of Ngāi Tūāhuriri as kaitiaki of the river, and the importance of Mahinga Kai values to Ngāi Tahu,

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[261] Tau, above n 31.

[262] At 12

[263] CCDU, above n 260 at 55

particularly with regards to the river.[264] The CCRP is clear that the river is of great significance to Ngāi Tūāhuriri and that the hapū are to be consulted throughout the process of this anchor project. I would consider that the CCRP sufficiently recognises the Treaty obligations of the Crown to mana whenua in the rebuild. However, this situation was complicated when a commercial enterprise not in the role of Treaty Partner, was introduced into this process.

The bid to complete the Avon River project was won by engineering consultancy OPUS and BDP Consortium in a contestable process.[265] Despite the clear CCRP guidance to involve Ngāi Tūāhuriri in the Te Papa Ōtākaro anchor project, OPUS and BDP Consortium failed to do so. Ngāi Tahu reports on the OPUS/BDP concept design are scathing of the lack of Ngāi Tahu values. A review of the concept design by Tau highlighted that the OPUS/BDP design failed to adequately portray the important concept of Mahinga Kai as a key principle; failed to demonstrate any insight or understanding of Ngāi Tūāhuriri requirements; did not show a Ngāi Tahu or even a Canterbury/New Zealand aesthetic; contained cultural constructs that misrepresent Ngāi Tahu whakapapa; and wrongly identified sites of significance to Ngāi Tahu/Ngāi Tūāhuriri.[266] Rakihia Tau Jr states that an independent review of the draft concept design by CCDU identified that "embedded cultural engagement with Te Rūnanga o Ngāi Tūāhuriri has to date been inadequate and is inconsistent

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[264] At 11-12

[265] Rakihia Tau *Avon River Precinct - Te Papa Ōtākaro* (Te Awheawhe Rū Whenua, 16/05 2013)

[266] Te Maire Tau *Review of the Concept Report: Te Papa o Otakaro, Avon River Precinct, the North and East Frames and Avon River Flood Mitigation, Te Manawa, The Pulse of the City* (Ngai Tahu Research Centre, Canterbury, 2013).

with requirements set out in the Recovery Plan".[267] OPUS/BDP failed entirely to follow proper process to engage with mana whenua and in doing so, produced a concept design that was inconsistent with the guidelines of the CCRP as well as insulting one of the three rebuild partners.

It appears that OPUS/BDP consortium failed to consult properly with mana whenua because they lacked an understanding of the correct tikanga. OPUS/BDP, instead of consulting with mana whenua Ngāi Tūāhuriri, decided to consult with other Māori, assuming, somewhat naively, that other Māori could speak on behalf of Ngāi Tūāhuriri. These other consultants included the OPUS Māori consultancy in the North Island, and members of Ngāi Tahu who did not have the mandate to consult.[268] Under tikanga, this is impolite and incorrect, and their actions have been described as 'culturally thick'.[269] The mistakes made by OPUS/BDP are a good example of some of the issues facing participants in resource management power sharing schemes. I believe that this shows a clear contrast between the general willingness of the Crown to engage with Iwi as a Treaty Partner, and private business interests who see engagement with mana whenua as a 'box-ticking' exercise. Although the Crown has been guilty of 'box-ticking consultation' in the past, it would appear that in this case it has been more responsive to Treaty obligations than private industry.

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[267] Tau, above n 5.

[268] Tau, above n 31.

[269] Te Maire Tau *Review of Te Papa Otakaro Avon River Precinct, the North and East Frame* (Ngāi Tahu Research Centre, University of Canterbury, 6/05 2013).

Despite the failure of OPUS/BDP to act with cultural integrity, CCDU and CERA staff acted in good faith towards this concept design.[270] Following the mistakes made by OPUS, CCDU and Nga Matapopore undertook discussions to ensure that such an issue would not occur again. A Heads of Agreement was negotiated and signed between CCDU and Ngāi Tūāhuriri that set out the requirements of anchor project engagement by Nga Matapopore.[271] The objectives for the Heads of Agreement are given as:[272]

- To provide for effective and meaningful integration of Ngāi Tahu values, histories, narratives and aspirations into all anchor projects, as agreed by the Parties;

- To provide for transparent, accountable and high quality provision of advice from Ngāi Tūāhuriri to CCDU on the integration of Ngāi Tahutanga into the anchor projects;

- To achieve clear and effective communication between the Parties; and

- To support an enduring relationship between the Parties that aligns with the redevelopment programme of the city.

This arrangement was signed on 27 April 2014 and now dictates the way that Ngāi Tahu engages in the resource management power sharing arrangement that is facilitating the Central City Rebuild. I consider that this arrangement outlines a role that sits at more of a consultation or management role, rather than elevating Nga Matapopore to sit at a governance level.

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[270] At 1.

[271] Ngāi Tūāhuriri "Ngāi Tūāhuriri Engagement on Christchurch Rebuild Anchor Projects Agreement" 2014.

[272] At 2.

Through the voice of Nga Matapopore, a Ngāi Tahu aesthetic is currently being woven into several anchor projects, and eventually a more Ngāi Tahu cultural feel will be present in the whole of the central city. Despite initial teething problems, there is now more significant Ngāi Tahu involvement in the Avon/Ōtākaro River Precinct. There is provision for Mahinga Kai; in the form of rain gardens, in-stream improvements to promote the return of indigenous fish species, and the planting of indigenous shrubs, and 'noble trees' such as tōtara and mataī.[273] Ngāi Tahu narratives are being introduced along the river banks, and traditional games are being incorporated into playground equipment design. Along the river there is an Art Trail composed of thirty works that tells the stories of the River. Two of these works are Ngāi Tūāhuriri stories that are receiving government funding, including one called 'Nine Tall Trees', portraying Te Kerēme.[274] Weaving patterns are also to be integrated into paving. The history of Victoria Square as a trading point for Māori and European settlers will be prominent.[275] I believe that this shows that whilst the Avon/Ōtākaro River project started under a cloud of controversy, Ngāi Tahu and the Crown have managed to negotiate their way through this, enabling the Ngāi Tahu voice to be integrated into this project.

Another anchor project that will be reflective of a heavy Ngāi Tahu influence in the Christchurch Rebuild is the Bus Interchange. This project will have a strong incorporation of Ngāi Tūāhuriri travel narratives throughout it, so

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[273] CCDU *CCDU Led Anchor Project Update: Presentation to Matapopore* (2014).

[274] At slide 5.

[275] Georgina Stylianou "Victoria Square revamp to cost $7m" *The Press* (Christchurch, 24/10 2014).

commuters can understand some of the journeys that mana whenua took throughout their rohe. The intention is to have Ngāi Tahu artworks in the Bus Interchange, and for there to be signage in Te Reo Māori throughout as well. Through these details, the Ngāi Tahu presence and influence in Canterbury will be obvious to the everyday Cantabrian on their daily commute.

Other anchor projects that are yet to fully get underway will also have a Ngāi Tahu influence. One such project is the Ngāi Tahu-led cultural centre, Te Puna Ahurea. The CCDU website promotes this cultural centre as: [276]

> A world class centre for celebrating Ngāi Tahu and Māori culture, and acknowledging Christchurch's place within the Pacific. Te Puna Ahurea Cultural Centre will be a unique, vibrant visitor destination that supports central city recovery through increased cultural, retail and hospitality activity.

This building will not be a mārae, but it will be used for pōwhiri and for Māori performing arts. The site for this cultural centre is likely to be on iwi-owned land on Durham St, but so far there has been little development and the iwi "will not rush" the project.[277] Te Puna Ahurea will be a strong representation of Ngāi Tahu in the city, and the iwi will no doubt use this as a focal point of their influence in Canterbury.

A second anchor project which will have an exciting, strong Ngāi Tahu focus is the Justice and Emergency Services Precinct, where Matapopore have

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[276] CCDU "Te Puna Ahurea Cultural Centre" (2012) <https://ccdu.govt.nz/projects-and-precincts/te-puna-ahurea-cultural-centre>.

[277] Georgina Stylianou "No timeframe for Ngai Tahu cultural centre" *The Press* (Christchurch, 11/04 2014).

provided consultation with regards to the Māori Land Court, Environment Court and Youth Court design. Matapopore consultation on this project has suggested that the layout for the Māori Land Court should reflect a mārae environment, and that whānau rooms be included so people can study whakapapa records without disturbance.[278] Ngāi Tahu art will feature in this precinct, and the intention is to make the Courts a less intimidating space for Māori. The Cultural Centre and Justice Precinct are two key anchor projects that will have an obvious and significant Ngāi Tahu aesthetic and influence in the rebuilt Christchurch. I consider that having such a strong Ngāi Tahu presence in the city is a visual reminder of the Treaty partnership. Although this will have been achieved through a co-management regime rather than a co-governance scheme, I do think that this arrangement is a worthwhile engagement for the tribe, despite the lack of governance direction that the tribe has been able to give.

Ngāi Tahu are involved in various other aspects of the Christchurch rebuild aside from the anchor projects. As a major partner in the central city rebuild, their voice has been sought on a number of projects. In the eastern suburbs, community gardens used to build Mahinga Kai capacity are being developed,[279] Ngāi Tahu recently expressed support for a 'living cathedral' proposal to replace the damaged Christchurch Cathedral,[280] and additionally, Ngāi Tahu deferred their Right of First Refusal on surplus Crown land to

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[278] Email from Aroha Reriti-Crofts (Chair, Nga Matapopore) to Rachael Harris (20/05 2014).

[279] Radio New Zealand "Group gathers red zone renewal ideas" *Online Ed.* (10/07 2014).

[280] Georgina Stylianou "Iwi considers living cathedral" *The Press* (Christchurch, 13/09 2014).

enable a land swap to provide space for a redevelopment of Christchurch Hospital.[281] I contend that the increased involvement of the tribe in such projects, and the fact that they are being involved at all, shows the way that Ngāi Tahu are now a significant player in Canterbury, having utilised the tools available to them to construct power and authority in the region.

Despite the influential nature of the Ngāi Tahu role in the rebuild, some within the tribe have expressed the view that the partnership is not being utilised to its full potential. Sir Tipene O'Regan has compared the three pronged partnership to 'The Father, the Son, and the Holy Ghost', asking wryly "and who's the Holy Ghost?".[282] He is concerned that Ngāi Tahu involvement in the Rebuild loses sight of what is actually important for the iwi.[283] O'Regan's comments are echoed in somewhat stronger language by Tony Sewell, who called the rebuild partnership "bloody nonsense".[284] Sewell thinks that the governance is "flawed" and has highlighted the unequal relationship between the parties. These anecdotes would appear to show that while on face value Ngāi Tahu engagement is at an equal level to the Crown in the rebuild, in reality their voice is side-lined on some issues, and the iwi have not always utilised the opportunities that are available to assert their authority.[285] The arrangement

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[281] Canterbury District Health Board "Canterbury DHB and Christchurch City Council Canterbury DHB & Council Land Swap Receives Stamp of Approval" (Media Release, 3 April 2014) < http://christchurch.scoop.co.nz/?p=19108>.

[282] O'Regan, above n 173.

[283] At 4

[284] Sewell, above n 37.

[285] Initial engagement in the Justice Precinct started off very slowly, and Nga Matapopore were unable to regain traction on this issue.

lacks the efficacy that members of the iwi might have expected it to have. I believe that this exposes how iwi expectations are often not met in resource management power sharing schemes, as the Crown will use these arrangements to meet its own political goals and will retain ultimate control over the matter.

Iwi, as has often happened throughout our colonial history, get the raw end of the deal in power sharing regimes. A more efficacious arrangement would be one that resembles more closely co-governance, rather than co-management. Currently, Nga Matapopore engagement is predominately operational and involves tasks such as securing artists and designing native planting schemes. I consider that if TRONT had been involved at the governance level of the rebuild, for example in a dedicated role in the Crown Blueprint design team, or at a higher level, perhaps in an advisory role to the Minister, tribal engagement in the rebuild may have more successful.

Others outside of the iwi have claimed that there is a conflict of interest, as Ngāi Tahu Property is one of the biggest stakeholders in commercial property development in the city.[286] Some have claimed that Ngāi Tahu "have a privileged role in the rebuild", a claim which Sir Mark Solomon refutes.[287] Solomon has responded to these accusations by highlighting the difference in the sections of Ngāi Tahu, "this role, which emerged from our role as Treaty Partner, is undertaken by our tribal leadership and this role is partitioned from

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[286] Ngai Tahu "Leadership - Recovery and Rebuild" (2013) <http://ngaitahu.iwi.nz/leadership-recovery-and-rebuild/>.

[287] At 1.

our commercial structure". [288] These criticisms levelled at the Ngāi Tahu role in the Central City Rebuild can thus be seen to be invalid.

The Ngāi Tahu role in the Christchurch rebuild is complicated but hugely influential. The iwi used the influence that they have gained from other resource management power sharing schemes to show that they had capacity to be involved in such a co-management scheme, and were therefore included in the arrangement. The OPUS issue shows the complexity of such involvement, and has highlighted the cultural issues that such power sharing schemes can create. Ngāi Tahu involvement in the Central City Rebuild will see a future Christchurch that reflects the shared history of the region – rather than the 'Englishness' that it was known for pre-quake. The role of Nga Matapopore reflects the kaitiakitanga role that Ngāi Tūāhuriri hold in Canterbury. The Ngāi Tahu role in the rebuild is an acknowledgement of a living, breathing Treaty partnership, and I consider that despite the limitations of the arrangement, the tribe have used this to some extent to advocate for their regional authority.

6.9 Ngāi Tahu and Canterbury in the Future

Canterbury is facing a unique set of circumstances with the reformation of the regional council and the transition of CERA powers back to local authorities. The term for the government-appointed ECAN commissioners finishes in 2016. The method of appointing commissioners to replace the democratically elected representatives has received mixed reviews. While the Green Party

[288] At 1.

made "restoring local democracy to Christchurch" an election priority,[289] Ngāi Tahu Property CEO Tony Sewell proposes the slightly anti-democratic approach of installing commissioners for every regional council.[290] At the time of writing, the new form of regional governance for Canterbury has not been finalised. It is not known whether ECAN will return to a democratically elected council, or will be formed by representatives that are half appointed and half elected like a Health Board, or whether another structure will be implemented.

While there are many questions regarding the form of the new regional council, what is clear is that there will be an initial vacuum at the regional governance level.[291] This may be an opportunity for Ngāi Tahu, as they wish to gain a more concrete seat at the top table in regional governance. Their co-management and co-governance schemes show that they have the capacity to make worthwhile and productive contributions to regional governance. Future Ngāi Tahu involvement might include permanent representation at the regional council level. This kind of governance power would be a very effective way for the tribe to advance the influence of the iwi and it members.

Māori representation on regional councils is not a new concept. In a 1998 report on establishing a Māori constituency for Environment Bay of Plenty, Judge Peter Trapski considered more than 300 submissions on this topic, the

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[289] Green Party Aotearoa *Greener Christchurch: Green Party Election Policy* (2014).

[290] Sewell, above n 37.

[291] Nissen, above n 230.

majority of which were in support.[292] Judge Trapski considered such representation to be "constitutionally sound, paralleling and reflecting the delivery of democracy in the government of New Zealand".[293] He also noting that such an action had the potential to "heal the wounds of separatism; it would emphasise the concepts of partnership and proportional representation. It would get to the Council table people who were truly representative of the population at large".[294] As a result of this report, under the Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001, three Māori seats were established on the Council. Two Māori wards were also introduced by Environment Waikato in the 2013 election, although Hamilton City declined to follow suit.[295]

None of the Māori local authority seats are designated to any one hapū or iwi, and the candidates are voted in by the Māori electoral role. Introducing Māori wards into the Canterbury Regional Council would not necessarily fulfil the Crown's responsibilities as a Treaty Partner to mana whenua, as there is no certainty that any elected member would speak with the Ngāi Tahu kaupapa. If Ngāi Tahu's role in Canterbury was to be genuinely reflected at a regional council level, I consider that it would be appropriate to appoint a designated councillor from Papatipu Rūnanga who would then be able to speak with the

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[292] Peter Trapski, *The Proposal to Establish a Māori Constituency for Environment Bay of Plenty (Bay of Plenty Regional Council* (Tauranga, 6 August 1998).

[293] At 2.

[294] At 9.

[295] James Ihaka "Regional council votes in seats but city against" (New Zealand Herald, online ed., 28 October 2011) < http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10762152>

mandate of the Rūnanga behind them. This would deliver meaningful governance power at a top level in the region.

One system that would be ineffective to reproduce is in Auckland. The City of Sails became a Super City in November 2010. The National Government rejected the suggestion by the Royal Commission on Auckland Governance that three elected Māori seats be established on the new council. Instead, a nine member advisory board was established comprising seven mana whenua nominated representatives and two ngā mataa waka representatives.[296] This role is not strictly advisory, as there are two representatives of this Board with voting rights on eleven of the eighteen Council Committees.[297] However, other non-councillor members of committees also held voting rights.

Ngāti Whātua joined this board reluctantly, releasing a statement:[298]

> We are very clear that this lightweight board does not replace direct consultation with Ngāti Whātua that is a Treaty obligation for the Auckland Council under the Local Government Act and the Resource Management Act.
>
> We are joining this Maori Advisory Board on the basis that it is there to advise only and contact between the Advisory Board and the Council cannot be construed as consultation with Ngāti Whātua proper.

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[296] Local Government (Auckland Transitional Powers) Act 2010.

[297] Rawiri Taonui. 'Ngā māngai – Māori representation - Local body representation', Te Ara - the Encyclopedia of New Zealand http://www.teara.govt.nz/en/nga-mangai-maori-representation/page-5.

[298] Ngati Whatua "Ngati Whatua Reluctantly Joins Auckland City's Maori Advisory Board" (2010) < http://www.ngatiwhatua.iwi.nz/news/2010/march/ngati-whatua-reluctantly-joins-auckland-city-maori-advisory-board>.

The Iwi continue to fight for Māori seats on the Council. I therefore conclude that this is a failed method of delivering tino rangatiratanga to mana whenua, and this model should not be replicated in Canterbury if Ngāi Tahu wish to participate as an equal Treaty Partner in the resource management decision making process.

Another factor contributing to this power vacuum is the transition of CERA powers back to local authorities in Canterbury. The CER Act expires in April 2016, and as such, decision-making power will be handed back to the region. Former Prime Minister Jenny Shipley has been chosen to head a committee of Canterbury power brokers, including Ngāi Tahu Kaiwhakahaere Sir Mark Solomon, to decide how this transition will take place.[299] The gradual scaling back of CERA powers could potentially see Ngāi Tahu receiving responsibility for some of the functions that were previously held by the Recovery Authority. This could be another method which Ngāi Tahu could use to gain regional influence. However, as the committee only began sitting in January 2015, not much is known about how this transfer will work.

A Ngāi Tahu role at the regional governance level is supported by ECAN commissioners interviewed by the author. Rex Williams would see a representative on the group who provides a Ngāi Tahu voice, he notes "we must not think of them as a lobby group, but as representing a different approach to thinking about stuff and get their views on a whole range of

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[299] Georgina Stylianou and Charlie Gates "Jenny Shipley to lead transition from Cera" (*The Press, Christchurch NZ,* 23 December 2014) online at < http://www.stuff.co.nz/national/64406938/Jenny-Shipley-to-lead-transition-from-Cera>

issues".[300] Peter Skelton echoed these comments, and commented that ECAN Commissioners have been "pushing very hard" for a Ngāi Tahu voice on whatever governance authority is created.[301] These comments suggest that in future regional governance, it is likely that Ngāi Tahu will have a designated role.

6.10 Conclusion

Ngāi Tahu's co-governance journey is a story of patchwork functionality adding up to significant regional governance power with room for further growth. Ngāi Tahu has engaged in a manner of power sharing arrangements that have been provided for outside of the RMA in Canterbury. None of these arrangements can be described as full co-governance, but they have allowed the tribe to build the functionality required for future regional governance power. The capacity of the tribe to be engaged in co-management and co-governance schemes has been created by several different 'building blocks'.

One of these building blocks was the Te Rūnanga o Ngāi Tahu Act, which gave the tribe back their legal personality. This paved the way for the Ngāi Tahu Claims Settlement Act, which provided the foundations for the tribe to be involved in such power sharing schemes. The Settlement Act provided both specific provisions that have allowed the development of power and information sharing arrangements, and more general sections that the iwi have utilised to build their commercial influence in the region. Crucial provisions

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[300] Williams, above n 29.

[301] Skelton, above n 223.

included those relating to Aoraki/Mount Cook, Tōpuni, and the commercial redress components. The Settlement provided the basis for Ngāi Tahu to engage in specific arrangements in the Canterbury region.

Ngāi Tahu have engaged in three key power sharing arrangements in Canterbury. The tribe are involved in a 'co-governance' scheme for Te Waihora/Lake Ellesmere. This was the first co-governance scheme to be actioned outside of a Treaty Settlement, but it has yet to fully reach its potential. There is no doubt, however, that this scheme has boosted Ngāi Tahu influence in the area. The Te Waihora Co-governance scheme sits alongside another collaborative governance scheme, the Canterbury Water Management Strategy. The CWMS is not a bilateral co-governance scheme, but is a community governance scheme in which Ngāi Tahu are one of the many community stakeholders. Ngāi Tahu have used their position in this scheme to change aspects of water policy to better reflect tikanga Māori.

The success of Ngāi Tahu's contribution to these two prior governance schemes acted as building blocks for the widest reaching co-management scheme that Ngāi Tahu has been involved in yet. Ngāi Tahu's role in the Christchurch Central City Rebuild has not been without controversy, nor has it been a simple task. As the rebuild itself is vastly complex, so is the role of the tribe and tikanga in the space of a 'new' Christchurch. The OPUS issue is a key example of what can happen in such a space when tikanga is not correctly understood or is ignored. What is certain is that the introduction of a Ngāi Tahu aesthetic into the rebuild will imprint a future Christchurch for years to come. The introduction of Ngāi Tahu into an 'everyday' Christchurch will help to de-alienate the tribe in a city that is very aware of racial differences.

Other cities such as Auckland and Hamilton have a more visible Māori presence, but Christchurch has always been a more 'Anglified' city. The Ngāi Tahu will result in "genuine meaningful changes" in the way that Christchurch looks in the future.[302] The increased Ngāi Tahu influence in the Canterbury region has been brought about not by one Act of Parliament, but rather over the course of a generation's worth of work done by tribal stakeholders who have taken their Settlement Act and used it to build power sharing capacity from this. Ngāi Tahu have used resource management power sharing arrangements as a means of increasing regional influence in Canterbury.

Ngāi Tahu have yet to achieve full co-governance in Canterbury. However, this may change with the new form of regional governance that will be created with the reconstitution of Environment Canterbury and the transition of CERA powers in 2016. These changes will see a vacuum in regional governance, and raise many queries as to what future governance might look like. Ngāi Tahu wish to have some form of permanent governance influence in Canterbury. I believe that their successful engagement in current power sharing arrangements might see this happen.

One clear conclusion that I draw from this Ngāi Tahu case study in Canterbury is that the term 'co-governance' can mean many things to many people, as earlier discussed in Chapter 5. The Crown can use this term as a political tool to appear, on face value, that they are meeting their Treaty obligations. However, iwi can often be effectively shut out of the real decision making in

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[302] McCrone, above n 253 at 5

these schemes, and it can be difficult for them to assert their tino rangatiratanga. Although ‘co-governance’ in Canterbury appears to be an effective compromise of alleviating Treaty grievances, Ngāi Tahu will need to continue lobbying to break through the glass ceiling to claim genuine Iwi-led decision making power.

7 Ngāi Tūhoe and resource management power sharing schemes

Ngāi Tūhoe are engaging in a new form of power sharing arrangement in resource management, changing the face of co-governance entirely. This chapter will outline how Ngāi Tūhoe have gained major regional governance power in Te Urewera through their Treaty Settlement, with a new co-governance style arrangement. I will show how legal personality has been adapted to form a compromise that does not fully return Te Urewera to the Tūhoe people, but does hand over a level of control unprecedented since the signing of the Treaty of Waitangi. This is a consequence of the Crown using resource management power sharing arrangements as a political tool that the Crown retains ultimate control over. I will show that this new arrangement goes beyond the previously defined boundaries of co-governance, and that this in turn reflects the issues of defining these arrangements discussed in Chapter 5. I will subsequently outline that Tūhoe are using this new form of co-governance to advance the influence of the tribe and the welfare of their iwi members.

Ngāi Tūhoe (Tūhoe) are the mana whenua of the Te Urewera region. Often titled with the romanticism ‘People of the Mist’, a reference to the heavy fogs that often settle over the Urewera Ranges, Tūhoe are one of the most remote people in New Zealand. Te Urewera was one of the last parts of New Zealand to be mapped by colonial settlers, and it is prized for its wilderness areas and original flora and fauna. Tūhoe trace their descent to their ancestor, Tūhoe-

Pōtiki, and are the sixth-largest iwi in New Zealand, with nearly 35,000 people identifying as Tūhoe in the 2013 census.[303] The majority of Tūhoe do not live inside the Tūhoe rohe-pōtae (tribal boundary) as many have left home to seek work outside of the Urewera area. The iwi has arguably one of the most fractured and difficult historical relationships of any iwi with the Crown; the 174 year period since the signing of the Treaty of Waitangi has seen warfare, famine, land thefts and illegal police raids all within the Tūhoe rohe-pōtae.

The Tūhoe people are represented by the governance entity, Tūhoe Te Uru Taumatua (TTUT). TTUT has seven trustees who represent around 30 hapū and 40 mārae within the four Tūhoe regions of Ruatoki, Te Waimana, Waikaremoana and Ruatāhuna. Tūhoe do not split their financial wing and their development wing like Ngāi Tahu. Rather, the board oversees five key offices: the Office of the CEO, the Office of Anamata (futures), the Office of Ōnukurana Tūhoe (natural resources), the Office of Tūhoe Development (iwi development), and the Office of Whairawa (assets). The map below shows the Tūhoe rohe:[304]

[303] Statistics NZ, above n 153.

[304] Ngāi Tūhoe "Our History"< www.ngaituhoe.iwi.nz/our-history>.

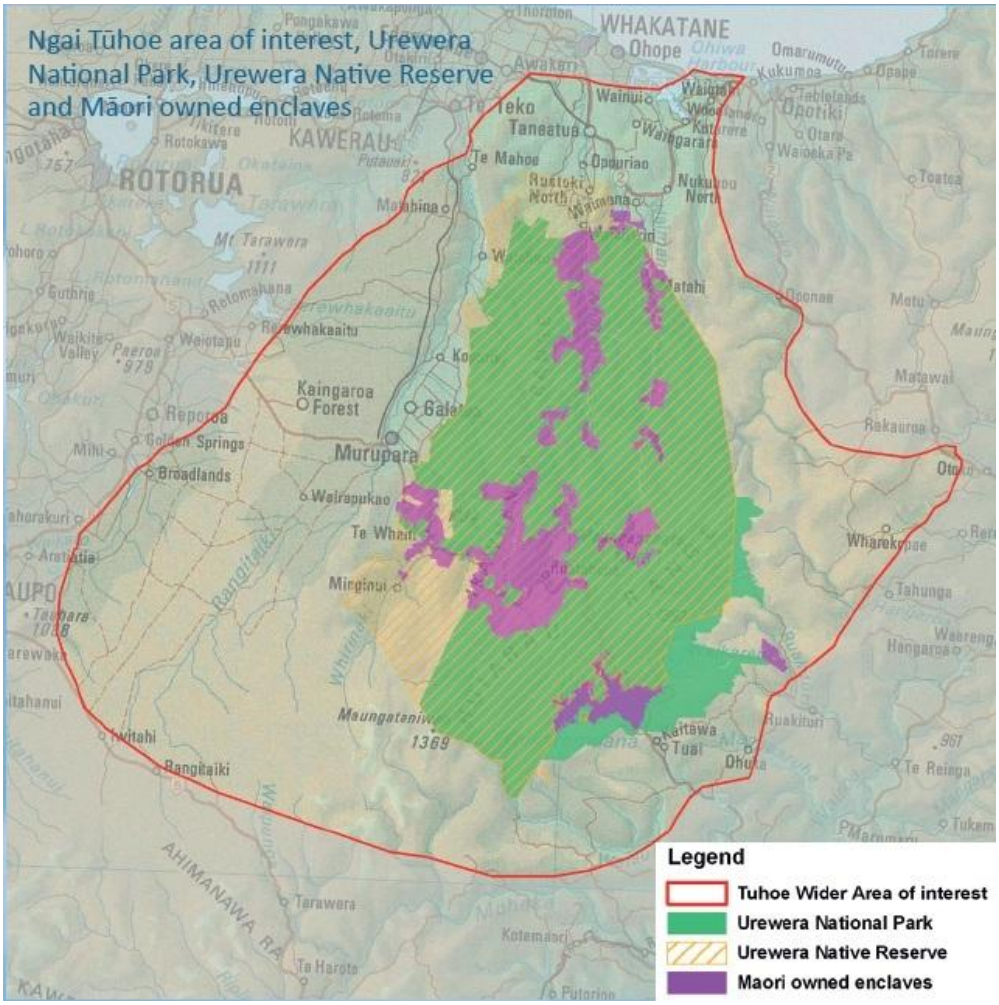

Figure 6: Ngāi Tūhoe area of interest.

In June 2013, after many years of fraught relations with the Crown, Tūhoe signed an historic Treaty of Waitangi settlement. As well as addressing the long list of historic grievances perpetrated by the Crown against Tūhoe and apologising for these, this settlement offered the iwi substantial commercial redress and set up the framework for a new method of governance of the Te

Urewera area. For the first time in New Zealand's history a national park has been given its own legal personality, much as a corporation is considered its own legal person. I believe that this is a ground-breaking and innovative form of management that will drastically affect the way Te Urewera will now be governed. I make this conclusion as this new arrangement for Te Urewera is substantively similar to co-governance, but takes this concept beyond previous schemes and creates a new form of governance.

This chapter will first outline some of the crucial historical events in the Tūhoe-Crown relationship in order to show how this relationship has always been influenced by land governance. Important events include the creation of Te Whitu Tekau, the Urewera District Native Reserve Act 1896, consolidation of Tūhoe lands, and the creation of Te Urewera National Park. I will show that the difficult Crown/Tūhoe relationship has directly led to the compromise that is legal personality for Te Urewera. I will then explain the governance and legal personality components of the Tūhoe Treaty Settlement, and how these combine to form the overall power sharing scheme in Te Urewera. The next section of this chapter will show the structures that are in place between Tūhoe and government agencies, how these fit into the governance of Te Urewera, and the vision that Tūhoe have for the future in Te Urewera. I contend that whereas Ngāi Tahu have some authority in various factors of regional governance, Tūhoe now have significant influence over the governance of their whole region, and that this may well become the future for of co-governance.

7.1 Tūhoe and the Crown – Co-governance history

Tūhoe and the Crown have shared a tumultuous history since the signing of the Treaty of Waitangi. I believe that this difficult relationship has been directly responsible for the compromise created in the Tūhoe Treaty Settlement that is legal personality for Te Urewera and the governance regime that springs from this. Throughout post-Treaty history, Tūhoe have promoted the interests of their people through asserting their self-determination. This section will analyse how the Tūhoe/Crown relationship evolved in a post-settlement era, how Tūhoe 'mana motuhake' or self-determination was continually affirmed by the tribe, and how this has led to the current co-governance style relationship that the iwi share with the Crown. I believe that Tūhoe are using this contemporary co-governance-style regime as a tool to assert their self-determination and self-governance of Te Urewera, effectively taking the compromise that the Crown has been willing to offer and moulding it to fit the Tūhoe agenda.

Early settler influence in Te Urewera, as opposed to the South Island and Ngāi Tahu, was relatively limited, due to the isolation of the area. Tūhoe predominately became followers of the prophet Te Kooti, rather than the Christianity that other Iwi embraced.[305] Tūhoe were not present at the signing of the Treaty of Waitangi on 6 February 1840, nor would they ever sign the Treaty. While Crown representatives did take the Treaty to Whakātane in June 1840, they did not take it into Te Urewera, and Tūhoe were unlikely to have

[305] Judith Binney, Gillian Chaplin and Craig Wallace *Mihaia: the prophet Rua Kenana and his community at Maungapōhatu* (Bridget Williams Books, Wellington, N.Z, 2011).

seen the Treaty or have had the opportunity to consider it.[306] The lack of a formal signed Treaty agreement between Tūhoe and the Crown contributed to the difficult relationship between the two parties.

Despite their isolation, Tūhoe did engage in the politics of colonial New Zealand, and from an early stage were in opposition to the Crown, a theme which was to continue for generations. Their political stand led to confiscation of their lands, and this in turn fuelled their fire for self-determination and control over their rohe. At an 1857 hui, Tūhoe pledged their allegiance to the Kingitanga, despite having some reservations about the movement.[307] Elsdon Best suggests the tribe did so to protect their land interests, a theme which recurs throughout the Tūhoe narrative.[308] In 1864 Tūhoe were first involved in fighting in the Waikato, engaging in battles at Rangiaohia, Haerini and Orakau.[309] This involvement had consequences. The New Zealand Settlements Act 1863 was a scheme implemented to punish Māori who were seen to be in rebellion against the Crown. The preamble reveals the racist attitudes of the time with reference to "the evil disposed persons of the Native race". Section 2 of the Act provided for land confiscations when the Governor in Council determined that 'any Native tribe or section of a Tribe or any considerable number thereof' had been in rebellion since 1 January 1863.

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306 Anita Miles *Te Urewera* (Waitangi Tribunal, Wellington, N.Z., 1999) at 43.

307 At 74-75.

308 Elsdon Best *Tuhoe* (4th ed, Reed, Auckland, 1996) at 323 at 566.

309 At 566.

The Settlements Act was swiftly utilised to compensate large tracts of Tūhoe lands as a punishment for their involvement in the Waikato Wars, and for their alleged involvement in the murder of a missionary.[310] This land included the most fertile land suitable for agriculture, and the confiscations are understood to have been unfair.[311] Best notes that in 1871, following confiscation and raids by colonial forces, Tūhoe resolved to have nothing to do with Europeans. They set up a carved post on the confiscation boundary at Ruatoki – hai arai i te pākehā me āna mahi – to keep off the white man and his works.[312] Later colonial Compensation Courts established to evaluate the confiscation process failed to adequately compensate the tribe for their unfairly taken lands. The confiscation boundary is still there today, and is an active reminder of the difficult relationship between Tūhoe and the Crown with regards to Tūhoe lands. I believe that confiscation can be seen to be one of the root influences on Tūhoe's continual assertion of self-governance of Te Urewera.

Following the confiscation of Tūhoe's best land, the relationship between Te Urewera iwi and the government grew frostier, and Tūhoe continued to seek their own self-determination in their rohe. When the prophet and rebel Te Kooti took shelter in Te Urewera to escape Crown forces, the Crown responded by engaging in scorched earth tactics to flush him out.[313] Four raids

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[310] The murder of the Rev Volkner was pinned on Tūhoe, but it is likely they had little involvement in the crime. See Best at 581.

[311] Best, above n 308 at 665.

[312] At 665.

[313] Judith Binney *Redemption songs: a life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, N.Z, 1995) at 155.

were instigated by the Crown to catch Te Kooti, however all four raids failed. The troops did succeed in wiping out kāinga (food stores), crops, livestock, dwellings, and shelter, leaving many Tūhoe to starve and die from disease and suffer from lack of shelter.[314] A peace was eventually negotiated in exchange for Tūhoe giving up Te Kooti to the Crown.[315] The march of Crown forces against Tūhoe people has remained an historical bone of contention, and has contributed to their ongoing desire to regain self-governance over Te Urewera.

Tūhoe are a tribe that has continually grappled with the Crown for governance and control of their own lands. The first effort to establish collective land governance in Te Urewera occurred in 1872-1878, with the creation of Te Whitu Tekau, or Union of Seventy. Seventy chiefs formed an alliance to present a united front against the colonial government's pursuit of their land. The government was not shy in its attempts to 'open-up' Te Urewera; land sales were engaged in all around the Te Urewera area in order to isolate the people as much as possible. I believe that establishing Te Whitu Tekau was a significant landmark in the history of post-colonial Te Urewera governance as it was the first attempt at pan- Tūhoe collaborative governance, rather than the traditional hapū-governed model.[316] The Crown avoided any formal recognition of the group, although initially respected the opposition of the

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[314] Judith Binney *Encircled lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, N.Z, 2009) at 212-213.

[315] Miles, above n 306 at 177; Te Kooti was never actually captured by the Crown, despite eventual Tūhoe co-operation.

[316] Binney, above n 314 at 216.

group to any road building within Te Urewera boundaries.[317] However, while Te Whitu Tekau attempted to provide a consolidated Tūhoe voice, not all rules laid down by the group were unanimously supported by all hapū.[318] The underlying issue was "a tense dynamic between the interests of the tribe, as advocated by Te Whitu Tekau and the authority that hapū or chiefs had traditionally exercised over their own land and people".[319] I consider that in essence, Te Whitu Tekau represented a nascent governance board. However, the group was affected by its lack of mandate, and eventually Te Whitu Tekau became redundant in the politics of Urewera land. Nonetheless, I contend that Te Whitu Tekau is a good example of the continual Tūhoe assertion of self-governance over their land.

Another significant example of early co-governance emerged in 1896 in the Urewera District Native Reserve Act 1896 (UDNRA). I believe that this arrangement is the most significant early example of Tūhoe using resource management power sharing techniques to promote the interests of their people. It is the earliest recorded co-governance style arrangement in New Zealand. UDNRA was important in solidifying the relationship between Tūhoe and the Crown and its constitutional importance has been recognised to such a degree that there has been a suggestion that the Crown-Tūhoe relationship should, in

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[317] New Zealand Government *Tūhoe me Te Uru Taumatua - Deed of Settlement of Historical Claims* (4 June 2013) at 54-55.

[318] Miles, above n 306 at 176.

[319] At 176.

fact, be grounded in this agreement rather than in the Treaty of Waitangi.[320] Despite this suggestion arguably having some merit, a Treaty of Waitangi Settlement has been signed between the tribe and the Crown on the basis of the Treaty.

The UDNRA emerged as a result of ongoing discussion between Tūhoe and the government regarding land purchases and the 'opening-up' of Te Urewera lands for settler purchase. Tūhoe were extremely reluctant to sell land and wished to continue self-governance of their land, but the government began to assert more and more pressure on the iwi to sell. In 1894, Premier Richard Seddon and the member for Eastern Māori, James Carroll, visited Te Urewera.[321] The result of these meetings was the 1895 Te Urewera compact, comprising of six core ideals:[322]

- Te Urewera would be established as an inalienable reserve to provide permanent protection for its people, their lands, forests, birds, taonga, and their customs and way of life
- The Native Land Court would be excluded from the reserve and an alternative process developed to create Crown-derived land titles
- Land titles would be awarded at a hapū level, in a form that facilitated hapū and tribal control

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[320] Hannah Blumhardt "Multi-textualism, 'treaty hegemony' and the Waitangi Tribunal: making sense of 19th century Crown-Maori negotiations in Te Urewera" 2012 43(2) Victoria University of Wellington Law Review.

[321] Miles, above n 306 at 176.

[322] New Zealand Government, above n 317 at 60.

- The peoples of Te Urewera acknowledged the Queen and the Government and would obey the law

- The government would protect the people and promote their welfare in all matters, and provide a package of social and economic assistance; and

- Development should occur in the reserve, in a manner in keeping with the primary nature of the reserve (including roads, tourism, farming and gold mining).

This compact formed the basis of an early co-governance-style resource management power sharing arrangement, and was remarkably cooperative considering relations between both parties had never been particularly warm. During these negotiations, Seddon stated to the iwi of Te Urewera "you acknowledge that the Queen's mana is over all, and that you will honour and obey Her laws".[323] As Judith Binney notes, "Seddon's statement recognised that the request for internal autonomy was neither separatist nor disloyal. This was a significant legal advance". I contend that Seddon was willing to recognise an ideology that contemporary governments have struggled with.

The 1895 compact formed the basis for the 1896 UDNRA. The practical governance arrangements established by the UDNRA provided for the establishment of the Urewera Commission, a body of eight whose role was to establish land ownership.[324] Initially, five of these eight were 'natives'; the

[323] Binney, above n 314 at 388.

[324] At 389.

other three were Percy Smith, Elsdon Best and Judge Butler.[325] The Commissioners were to determine on the basis of hapū boundaries the ownership of blocks, the ownership share of each family who had claim to that block, and the individual shares due to each member of that family. In addition, a General Committee was established to make decisions about local governance and alienation of land to the Crown.[326] The process to determine land titles was an extremely long and drawn out process, plagued by appeals. The Chair of the Commission was always European, and Tūhoe's role was often limited, meaning claimant communities were frequently ignored.[327] I consider that while, on face value, the arrangement appeared to be a cooperative and effective method of involving the Tūhoe community in land governance, in reality the UDNRA turned into another colonial tool for alienating land from tangata whenua. Consequently, the arrangement proved to be unworkable, largely due to the actions of the Crown, and in 1922, the UDNRA was extinguished.[328]

I contend that in order to evaluate the present-day co-governance arrangement it is important to remember these historical precedents and to observe how the Crown has used these types of schemes to further its own end. Tūhoe have long sought to define their own governance structures, and to determine the future of their own people. UDNRA is the most significant early example of

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[325] *New Zealand Herald* 'The Urewera Commission'(Volume XXXVI, Issue 11036, 13 April 1899) At 4, available online at <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=NZH18990413.2.24>

[326] New Zealand Government, above n 317 at 61.

[327] At 61.

[328] Urewera Lands Act 1921-22

this self-determination in action, although ultimately, for Tūhoe, the UDNRA represents failed promises.[329] Due to the earlier confiscation of lands, famine hit at the same time UDNRA Commission inquiries were occurring. The population of Tūhoe was reduced by one-quarter between 1896-1901 (child and infant mortality also increased during this time).[330] The people of Te Urewera were at their most vulnerable during the period in which UDNRA was active, and shortly afterwards, the iwi was invaded with the Rua Kenana raids of 1916.[331] This was a delicate time for the iwi, but their quest for self-determination was clear at this point.

Following the disestablishment of UDNRA, the Crown and Tūhoe continued to compete for control and governance of Te Urewera lands. The Urewera Consolidation Scheme of the 1920s saw Tūhoe lose the majority of their rohe. The Crown's consolidation scheme took place in 1922-1924, and by the end of consolidation, the Crown had awarded itself 482, 000 acres in a single title.[332] This left Tūhoe with only 14% of the original Urewera Reserve fragmented into over 150 titles, which was mostly land unsuitable for any form of settlement or economic development. The Crown then sought to sell its land, but found the rugged Urewera land unattractive to buyers and failed to make a single sale.

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[329] Rawinia Higgins to Rachael Harris Interview (18 February 2014).

[330] New Zealand Government, above n 317 at 62.

[331] For a full account of the raids, see Binney, Chaplin and Wallace, above n 305.

[332] New Zealand Government, above n 317 at 66.

The difficult nature of the Crown/Tūhoe relationship continued throughout the 20th Century when the Crown sought to gain Lake Waikaremoana and the surrounding block of land. This was not done without protest, the Deed of Settlement reports that "The Crown's acquisition of the Waikaremoana block was the most disputed aspect of the Urewera Consolidation Scheme".[333] The lake is of a high importance to Tūhoe and other iwi including Ngāti Ruapani, for reasons that are both cultural and economic. The Crown saw the lake as a potential hydro power resource, and sought to gain title through a series of mechanisms including court action. This process was drawn out, and the Crown never gained full title, instead, it was granted a long-term lease to the lakebed under Lake Waikaremoana Act 1971. By this point the Crown had already included Lake Waikaremoana in the Urewera National Park, without the consent of Tūhoe.[334]

Upon gaining the Waikaremoana lease, the Crown constructed roads, a National Park headquarters, a hotel and a motor camp on the lakebed, without the consent of the land's owners.[335] Sewerage flow polluted tapu waters, much to the distress of the iwi. While Tūhoe landowners have managed to hold the title to the lake, the Crown has actively pursued removing it from them, and has treated the owners with disrespect. I consider that this shows how the Crown/Tūhoe relationship remained difficult from the 19th to the 20th Century,

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[333] At 68.

[334] At 69.

[335] At 70.

and that this relationship helps explain the continual quest for Tūhoe to assert their self-determination and self-governance of Te Urewera.

The creation of the Urewera National Park is another example of poor treatment by the Crown of Tūhoe and their lands. When the Crown could not sell the land it had acquired under the consolidation scheme, it did not return the land to the original owners. Instead, it followed a pattern of control over the Urewera natural resources that it had established as early as the 1910s with logging restrictions in the area, and turned the land into a National Park.[336] This was done without consultation with Tūhoe, and legislation was enacted to establish the Park in 1954. The Park included all of the now-Crown owned consolidated lands, Lake Waikaremoana, and other lands. While the Park did not include the remaining Tūhoe lands, it surrounded them, and locked them in an enclave. The rules of the Park did not recognise the iwi's special relationship with the area, and restricted Tūhoe customary usage of Te Urewera.[337] It reduced what little economic benefit of tribal land that the iwi had left into nearly nothing. Tūhoe suffered from the detrimental effects of the establishment of the Park, and most people left their rohe to look for work.[338] The current unemployment rate in Te Urewera is more than four times greater than the rest of the country. I believe that this is a direct result of the acquisition of their land by the Crown and the restrictions placed on what was

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[336] At 71.

[337] At 71.

[338] At 72.

left. It is clear that Crown actions have severely affected Tūhoe's self-determination and governance of their lands.

Tūhoe's continual pursuit of Te Urewera governance rights has been in the spotlight in recent times with the controversial 2007 'Anti-Terror Raids' in Te Urewera. Police raided the Urewera town of Rūātoki and the nearby town of Whakatāne, arresting activist Tame Iti, on the accusation he had been running terrorist training camps "and was planning a guerrilla war to establish an independent state on traditional Tūhoe land".[339] Others were also arrested on terrorism-related charges. Charges under the Terrorism Suppression Act 2002 were thrown out by the Solicitor-General, and lengthy court action established that police evidence was obtained illegally.[340] The case against the alleged suspects was labelled a "house of cards".[341] Eventually, only four convictions were handed down, for firearms charges.[342] A large amount of distress was felt by Tūhoe and other members of the community, who felt they had been unfairly targeted and badly treated during the raids.[343] When legislation was passed enacting the Tūhoe Treaty Settlement in 2014, the Commissioner for Police, Mike Bush, apologised to the iwi for the raids.[344] He specifically

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339 Ministry for Culture and Heritage "'Anti-terror' raids in Urewera" (2014) <http://www.nzhistory.net.nz/page/so-called-anti-terror-raids-ureweras>.

340 *Morse v R* [2011] NZCA 114.

341 Ian Steward "Urewera Terror Raids A 'House of Cards'" *Stuff.co.nz* (07/09 2011).

342 Ministry for Culture and Heritage, above n 339.

343 See Danny Keenan *Terror in our midst?: searching for terror in Aotearoa New Zealand* (Huia, Wellington, N.Z, 2008); Valerie Morse *The day the raids came: stories of survival and resistance to the state terror raids* (Rebel Press, Wellington, N.Z, 2010).

344 James Ihaka "Police Commissioner makes Landmark Apology to Tuhoe" *New Zealand Herald* (Auckland, 13 August 2014).

apologised for the damage to the mana of the tribe. Whilst an official apology has been made, the Raids are an example of the tumultuous nature of the Crown-Tūhoe relationship regarding the governance of land.

During the late 2000s the negotiations for a Treaty Settlement between Tūhoe and the Crown took place. For Tūhoe, there were three crucial elements that had to form any Settlement: the return of the Park; mana motuhake, and a decent quantum of settlement.[345] The negotiations were stalled when Prime Minister John Key announced that vesting the title of the Park in Tūhoe would never happen.[346] The iwi thought this was a breach of good faith, and negotiations were delayed. This refusal to grant Tūhoe full ownership of Te Urewera led to the negotiation team thinking more laterally about how to grant Tūhoe their request while not fully returning the title to Te Urewera. I believe that the unique governance arrangement in Te Urewera has been created as a compromise to deal with the ownership of Te Urewera. I think that this directly reflects the conflicted nature of the Crown and Tūhoe's struggle for control in the area. This compromise suggests that the amount of authority that the Crown has been willing to cede in Treaty Settlements has shifted, and it is now significantly more than it was in the 1990s. I consider that this is also reflective of the isolated nature of Te Urewera and the fact the very few other parties have an interest in the area.

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[345]Rawinia Higgins "Tūhoe-Crown settlement – Te Wharehou o Tūhoe: The house that 'we' built" 2014 Oct Māori Law Review.

[346] Radio New Zealand "PM at Loggerheads with Tuhoe over Urewera Claim" (2010) <www.radionz.co.nz/news/national/32183/pm-at-loggerheads-with-tuhoe-over-urewera-claim>.

I believe that the fraught history of the Crown-Tūhoe relationship has provided the basis for the contemporary co-governance style arrangement in Te Urewera. Throughout the past 170 years, Tūhoe have continued to assert their mana motuhake, or self-determination. Their early attempts to protect their land were clear in the creation of Te Whitu Tekau, although that collective ultimately failed. An early co-governance arrangement was established by the Urewera District Native Reserve Act 1896. This appeared, on face value, to be a genuine attempt to allow the tribe to determine their own affairs with regards to their land. However, the UDNRA was quickly turned into a tool by the Crown to acquire more of the Urewera lands.

Tūhoe were side-lined in Te Urewera governance in the 20th Century. The Urewera Consolidation Scheme, the active pursuit of Lake Waikaremoana by the Crown, and the creation of the Urewera National Park all ignored mana whenua, and as a result, the iwi were detrimentally affected. The Crown has a poor record of treating Tūhoe well, right into the 21st Century. Tūhoe have remained passionate about self-governance and have retained a burning desire for mana motuhake.[347] I therefore conclude that the Tūhoe Treaty Settlement is ultimately a tool to achieve the goal of self-determination and governance of Te Urewera that the tribe has been working towards for many generations.

7.2 The Tūhoe Treaty Settlement

The Tūhoe Treaty Settlement sets out the framework for Tūhoe's new co-governance arrangement. On 4 June 2013, the Deed of Settlement of Historical

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[347] Higgins, above n 329.

Claims was signed between Tūhoe and the Crown. I consider that the Settlement is notable for several reasons, including the Crown-Tūhoe relationship and the difficult negotiation period, but of note, I contend that it creates a whole new system of co-governance for the Te Urewera region. I believe that this new form of resource management power sharing arrangement goes beyond current co-governance arrangements discussed in Chapters 5 and 6, and forms a new kind of co-governance that is unlike any current arrangement in New Zealand. It can be seen that this arrangement has emerged from the struggle between the Crown and Tūhoe for control over the Te Urewera region. This section will show how the Treaty Settlement gives the iwi back its self-determination rights and allows them unparalleled control over Te Urewera.

The Tūhoe Settlement and governance of Te Urewera have been legislated for in two separate acts, the Tūhoe Claims Settlement Act 2014 and Te Urewera Act 2014. These two Acts went through the parliamentary process as one Bill, and the Māori Affairs Select Committee reported back on the one Bill. This section addresses the Te Urewera Act and the creation of legal personality, as this legal fiction creates the basis for the governance arrangement.

7.2.1 Legal Personality for Te Urewera

A pillar of the Tūhoe Treaty settlement is the establishment of legal personality for Te Urewera. I contend that this arrangement was created to deal with the difficult ownership issue of Te Urewera and was a compromise for both sides, reflecting the fact that the Crown uses these types of arrangements as a political vessel to devolve as much or as little power to iwi as it wishes. The Settlement creates a form of 'non-ownership' for Te

Urewera, meaning it will own itself, rather than be owned by either Tūhoe or the Crown. It gives the area its own legal personality and removes the National Park status for Te Urewera, a first for New Zealand.[348] The creation of legal personality has required the establishment of a new governance entity, and this arrangement has allowed Tūhoe to regain control over their rohe. I believe that this whole arrangement is a compromise that reflects the undefined boundaries of resource management power sharing schemes as discussed in Chapter 5.

Legal personality for a non-human has been discussed in Chapter 5, where it was concluded that some configuration of legal person is required to form a partner in an effective co-governance scheme with the Crown. The incorporation of legal personality for a natural object into the Tūhoe Settlement came from a variety of sources, and can be traced back to the early writings of Sir John Salmond on legal fictions. Dr John Wood, Chief Crown Negotiator for both the Whanganui River and Tūhoe settlements,[349] has highlighted Salmond's work on legal fictions as the starting point for thinking about legal identity for Te Urewera[350]. The Crown negotiation team also looked at work conducted in the United States in the 20th Century on granting legal personality to natural objects.[351] The negotiation team then consulted

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[348] Jacinta Ruru "Tūhoe-Crown settlement – Te Urewera Act 2014" 2014 Oct Maori Law Review.

[349] Dr Wood is also the Chief Crown Negotiator for the Tongariro National Park and Ngāti Rangi Treaty settlement negotiations.

[350] Interview with Dr John Wood, Chief Crown Negotiator Tūhoe Settlement (Rachael Harris, 30 January 2014).

[351] It is likely this work was Christopher D. Stone *Should trees have standing?: law, morality, and the environment* (Oxford University Press, New York, 2010), however this has been neither confirmed or denied by the negotiation team.

various members of the legal community to ask if the concept could be applied to New Zealand law, receiving an affirmative response, with qualifiers that such action must be efficacious and in the interests of the whole country.[352] I consider that this reflects the fact that this co-governance arrangement was formed as an effective compromise. It was a way for the Crown to devolve some power back to Tūhoe without giving the tribe full ownership of Te Urewera, as a complete transfer of fee simple ownership of Te Urewera to Tūhoe was ruled out by the National-led Government for political reasons.[353]

Granting legal personality to Te Urewera is a unique bargain. Instead of a direct handover of the fee simple title to Tūhoe, the Crown placed Te Urewera "beyond ownership", similar to the precedent set by the Marine and Coastal Act 2011, expanded upon further in this chapter. The concept of legal personality for Te Urewera was work-shopped with bureaucrats, politicians and academic leaders; later, stakeholder groups including mountaineers, deerstalkers and fishermen were consulted in stakeholder summits held by Tūhoe. To the surprise of the Crown negotiation team, it was found that there was broad public stakeholder and political support of this concept.[354] New Zealand is the first nation in the world to give legal personality to a natural object, and this has been done for the purposes of indigenous reconciliation, rather than for environmental reasons. I consider that for co-governance to be

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[352] Wood, above n 350.

[353] Radio New Zealand, above n 346.

[354] At 3.

an effective and equal power sharing model that the formation of such a legal person is required.

In order to understand how this approach has been developed and how it might be applied in New Zealand, it is necessary to examine the legislation leading up to the Tūhoe settlement legislation, and then consider the applicability of the work of United States academic, Christopher Stone.[355]

7.2.2 Marine and Coastal Area (Takutai Moana) Act 2011

One of the stepping stones for the introduction of legal personality for Te Urewera and consequently the co-governance style regime that came with this arrangement was the Marine and Coastal (Takutai Moana) Act 2011 (Marine and Coastal Act). This Act provided the concept of 'non-ownership' on which the Te Urewera legal personality is built. The Marine and Coastal Act was introduced into New Zealand legislation to repeal the controversial Foreshore and Seabed Act 2004. The Foreshore and Seabed legislation was enacted by the Clark Labour Government as a response to the decision handed down by the Court of Appeal in *AG v Ngāti Apa* [2003] 3 NZLR 643. *Ngāti Apa* was heard to decide whether the Māori Land Court had jurisdiction to consider whether the foreshore and seabed of the Marlborough Sounds was Māori customary land. The ruling granted the right to pursue such an interest in the Māori Land Court, and did not declare it impossible that such an interest existed.

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[355] Christopher D. Stone "Should Trees Have Standing? - Toward Legal Rights For Natural Objects" 1972 45 Southern California Law Review.

The ownership of New Zealand's foreshore and seabed then became a political issue.[356] Parliament enacted the Foreshore and Seabed Act 2004 to vest the ownership of the foreshore and seabed in the Crown. After an urgent inquiry, the Waitangi Tribunal produced a report on the matter that was scathing of the government's actions.[357] The Tribunal stated that the Crown had breached Article Two of the Treaty of Waitangi twice over with the Act, and violated the Rule of Law by taking away the right of Māori to go to the High Court and Māori Land Court to seek their property rights.[358]The legislation also received international condemnation with the Committee on the Elimination of Racial Discrimination finding that the legislation contained discriminatory elements.[359]

The Marine and Coastal Act 2011 eventually repealed the Foreshore and Seabed Act. This Act introduced the concept of non-ownership that has formed the basis of the legal personality for Te Urewera. The 2011 Act was introduced by the National Government as a method of "balancing the interests of all New Zealanders in the marine and coastal area" and dealing with the ownership question of the foreshore and seabed.[360] Instead of vesting the title of the foreshore and seabed in either the Crown or Māori, s 11 of the Act instead placed it beyond ownership. This was opposed by some

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[356] NZPA "National was right in Foreshore debate says Brash"(Jan 30 2004).

[357] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (2004).

[358] At 221-223.

[359]Committee on the Elimination of Racial Discrimination, *New Zealand Foreshore and Seabed Act 2004* (Sixty-sixth session, 17 February - 11 March 2005).

[360] Office of Treaty Settlements Marine and Coastal Area - Takutai Moana www.justice.govt.nz/treaty-settlements/office-of-treaty-settlements/marine-and-coastal-area-takutai-moana.

commentators, including former Member of Parliament and practising lawyer Stephen Franks, who stated in his submission to the Select Committee that:[361]

> The political pretence of non-ownership will disfigure our law… It is a legal nonsense to declare something incapable of ownership. Ownership is a description, not a status. Parliament is capable of declaring that there shall be no fee simple title, or leasehold title or other legally defined status, but ownership is a term that describes in summary the nature of a property right – the result of a relationship determined by a bundle of rights and powers in relation to land (or other assets). Whether land is owned or not is determined by those rights, not a political declaration dressed up as law.

Despite Frank's concerns that non-ownership creates a legal nonsense, the Marine and Coastal Act passed, and was the first piece of legislation to introduce this concept into New Zealand law. The concept of non-ownership forms a significant part of the subseqeunt Tūhoe Treaty Settlement compromise that is legal personality of Te Urewera. The concept that a piece of land is beyond ownership was further developed by the Whanganui River and Tūhoe Settlements. The Marine and Coastal Act is important as the precedent that has allowed non-ownership of Te Urewera.

7.2.3 The Whanganui River

Going beyond non-ownership, the concept of giving a natural object legal identity first entered New Zealand statutory consciousness in the form of an agreement between Whanganui River Iwi and the Crown. This occurred

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[361] Stephen Franks "Submission on Marine and Coastal Area (Takutai Moana) Bill" (2010) <http://www.stephenfranks.co.nz/marine-coastal-area-bill-submission-no-2/>.

shortly before the Tūhoe settlement was enacted. This arrangement mirrors the new Tūhoe governance arrangement in some aspects, and shows how the concept of legal personality for natural objects has been applied in another area of New Zealand.

The Whanganui River is New Zealand's longest navigable river, and is considered a national treasure. It is particularly important for the Whanganui River iwi who see themselves as belonging to the river, rather than the river belonging to them, this is manifested in the whakataukī "*Ko au te Awa, ko te Awa ko au"*. Whanganui River Iwi have been battling with the Crown to have their interests recognised from as early as 1873.[362]A recently signed Deed of Settlement has signalled that legal status is to be granted to the Whanganui River in the form of the official title 'Te Awa Tupua'.

A 2011 Record of Understanding began the process of recognising legal personality for the river and this was followed by a 2012 preliminary agreement. A ratification document was sent out to Whanganui River iwi members for voting between 13 June and 11 July 2014, and the Deed of Settlement was signed on 5 August 2014.[363] The Deed of Settlement is split into two documents, Te Mana o Te Awa Tupua (which outlines the new Te Awa Tupua governance arrangements for the river), and Te Mana o Te Iwi o Whanganui. At the time of writing, the Settlement legislation has not passed

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[362] Katie Shuttleworth "Agreement entitles Whanganui River to legal identity" *NZ Herald* (Auckland, 30 August 2012).

[363] Whanganui River Māori Trust Board *Whanganui River Settlement: Ratification Booklet for Whangaui Iwi* (2014).

through the Parliamentary process yet, however, the signing of the Deed recognises the end of the negotiation period. As a result of this Treaty settlement, the Whanganui River is to be given its own legal identity, and is to be placed outside of the ownership of the Crown and iwi, in a non-ownership status much like that which was created by the Marine and Coastal Act. The bed of the river is vested in the entity known as Te Awa Tupua, meaning the river owns itself. The Crown has chosen to not return full ownership of the river to the iwi. Ownership of the river was a hotly contested issue in 2010/2011, before the Supreme Court decision to place ownership of the water beyond iwi in *Paki.*[364] Nonetheless, this arrangement has still placed the resource beyond Crown ownership. I consider that this suggests that it may become a more frequent method that the Crown utilises to address contested ownership issues.

Te Mana o Te Awa Tupua acknowledges the status of the river as:[365]

> Te Awa Tupua is an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.

Te Mana o Te Awa Tupua sets out at 2.2-2.3 that Te Awa Tupua is a legal person, with the rights, powers, duties and liabilities of a legal person. Of note, the document specifically recognises the interconnection between the iwi and hapū of the Whanganui River, and Te Awa Tupua.[366] I believe that this

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[364] *Paki v Attorney-General* [2012] NZSC 50.

[365] NZ Government *Ruruku Whakatupua - Te Mana o Te Awa Tupua* (2014).

[366] At 3.4.1

connection shows an increased mainstream legal recognition of the tikanga Māori concepts discussed in Chapter 5. I contend that such an inclusion suggests that future co-governance arrangements may also involve such recognition of the interconnection of iwi and their rohe.

The Whanganui River governance structure is different from the Te Urewera structure in that it includes two different levels of governance. The top level of co-governance for Te Awa Tupua will be a body called Te Pou Tupua, this will be a human face to act in the name of Te Awa Tupua.[367] This governance body must act in the interests of Te Awa Tupua, and is designated with functions that include the promotion and protection of the health and wellbeing of Te Awa Tupua. It is a role to be exercised jointly by one person nominated by Whanganui River iwi, and one person to be nominated by the Crown. I believe that this arrangement can be considered a form of co-governance, but does not take the form of a bilateral co-governance board.[368]

Sitting below Te Pou Tupua will be a second layer of governance. This structure will be called Te Kōpuka, and will comprise of a range of seventeen stakeholders including iwi, local and central government, commercial and recreational users and environmental groups.[369] This group will perform the strategy function of Te Awa Tupua, and is tasked with developing and approving strategy to advance the environmental, social, cultural and economic health and wellbeing of Te Awa Tupua. I contend that as the

[367] At 3.1.

[368] At 3.7.

[369] At 5.1.

membership of the group will include representatives from stakeholders including Genesis Energy and Fish and Game, it is not a true iwi-Crown co-governance scheme. I believe that rather it is something more akin to a multi party governance arrangement. Such a scheme has parallels to the Canterbury Water Management Strategy discussed in Chapter 6, which is also a multi-party governance arrangement. I think that the unique nature of this arrangement reflects the fact that the Crown uses co-governance as a useful political tool to devolve as much or as little political authority as it sees fit.

The past few years have seen significant political turmoil over the ownership of freshwater resources in New Zealand. Whanganui River iwi have been closely involved in this debate. I believe it is noteworthy, then, that the preliminary agreement specifically provides that the recognition of Te Awa Tupua as a legal entity does not, in itself, create any legal ownership in the Whanganui River or its waters.[370] I consider that this reflects the traditional political tension between the Crown and Iwi over the ownership and control of resources, a tension that in essence a co-governance arrangement is supposed to overcome. I also note that this co-governance style compromise may possibly create more challenges than a straight handover of control; with an entity as vast as the Whanganui River there will no doubt be challenges, such as where the balance of power actually lies, and how the different Whanganui Iwi work together in practice.

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[370] New Zealand Government, above n 365 at 9.

The Whanganui River arrangement provides an example similar to the new Tūhoe governance scheme that has been introduced. The Whanganui arrangement does not provide iwi with as much governance control as Tūhoe have over Te Urewera, due to the second tier of community collaborative governance that exists in the Whanganui scheme. I conclude that the existence of two such schemes in a short amount of time suggests that legal personality for natural areas may well be a crucial part of future co-governance arrangements.

7.2.4 Christopher Stone's 'Should Trees Have Standing'

In order to understand how legal personality for a natural object is practicable in New Zealand, and how the governance regime that is introduced by such a legal personality may work in Te Urewera, it is useful to examine the work of Christopher Stone, the leading theorist in this area. In 1972 Stone introduced a revolutionary idea into environmental legal theory. His essay 'Should Trees Have Standing?' mooted the concept that legal personality should be given to natural objects as a method of environmental protection.

Stone's theory, introduced to a United States (US) legal system that places tortious liability on such a commercial pedestal, suggests that giving natural objects legal status, and thus the right to sue in a civil suit, would provide a form of environmental protection. Whereas an ordinary citizen cannot sue on behalf of a natural object for damage inflicted by polluters, businesses and governments, a specially appointed guardian could. In short, Mother Nature herself could be the plaintiff in a suit for damages.

This theory arose by way of a case heard before the Supreme Court of the United States under the name of *Sierra Club v Morton*.[371] In the 1971 case the Sierra Club, an environmental lobby group, brought court action on behalf of the Mineral King Valley wilderness area in California's Sierra Nevada Mountains. Walt Disney Enterprises, Inc had been granted a permit to develop this area into a $35 million leisure and recreational complex, and the Sierra Club brought a suit for an injunction, maintaining that "the project would adversely affect the area's aesthetic and ecological balance".[372] An earlier Appeal Court judgment had reasoned that the Sierra Club did not have standing, as they were not an aggrieved party, and Stone responded to this by way of a question: why not let the Sierra Club be characterised as the lawyer or guardian for the Mineral King Valley area and get on with the merits of the case?[373]

The first iteration of Stone's paper was published before the case was heard by the Supreme Court. Despite the Supreme Court majority judgment against the Sierra Club, Douglas J, in his dissent, warmly endorsed 'Should Trees Have Standing?'. He noted, "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation".[374] This dictum supported the concept of legal personality for natural objects. Praise for the

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[371] *Sierra Club v Morton* 405 U.S 727 (1972).

[372] Stone, above n 351 at xiii.

[373] At xiii.

[374] *Sierra Club v Morton*, above n 371 at [741]-[742].

idea reached the US Senate floor, 'Should Trees Have Standing?' was reprinted in the 'Congressional Record' and it received approval from lawmakers, journalists, and jurists.[375] From here, the concept of giving natural objects legal personality entered the consciousness of the US legal system.

While initially the idea of giving natural objects legal personality may seem radical and unworkable, legal personality has been applied to other such entities. Corporations have long been granted personality, and lawyers can act on behalf of a corporation's interests, despite such a concept being "jarring for early jurists".[376] Similarly, trusts, ships, nation-states and foetuses have all been accorded legal status within the court system. Why then, should extending legal personality to environmental objects or areas not be similarly feasible?

Stone gives three core reasons as to why giving natural objects legal personality would be an effective method of protection of these resources. First, the third party (such as the Sierra Club, or in a New Zealand scenario, perhaps an iwi organisation) would act as a guardian to speak on behalf of the natural entity rather than in the interests of that third party.[377] Secondly, the focus would be on the actual effect of the damage on the natural area, rather than any loss suffered by a third party. Finally, the remedies would focus on directly restoring the natural entity to its original, undamaged state rather than

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[375] Garrett Hardin "Evoking A New Ethic To Protect Natural Amenities" 1975 25(5) Bioscience.

[376] Stone, above n 351 at 5.

[377] At 19.

a focus on a third party's estimated economic loss.[378] As a hypothetical example of how Stone's theory may be applied in a New Zealand context, take this scenario:

> Farmer A pollutes the Rangitata River with an illegal discharge of dairy effluent. The damage to the river is estimated at $1,000,000. Farmer B is affected by the discharge by $200,000 due to a loss of stock. Currently, the only entity that can sue is Farmer B, who, if he wins the suit, will pocket the $200,000 and use it to offset his losses, rather than use it to restore the Rangitata to its original condition. The Rangitata remains damaged to the tune of $1,000,000. If Stone's theory was applied, a third party such as Ngāi Tahu, or Fish and Game, could sue on behalf of the Rangitata. If they were successful, the $1,000,000 awarded as remedy could be used for riparian repair and fish restocking, and the river could be returned to its original condition.[379]

Despite an initially positive response, Stone's theory has in fact had limited application in the US. The US court system has seen a variety of cases attempting to apply the theory, on behalf of a wide range of plaintiffs, but with limited success. One such group of cases has named endangered species as plaintiffs, although never as the sole plaintiff.[380] However, in these cases, the species' legal standing on its merits has not been considered by the court and "exclusive reliance on animal plaintiffs has proved unrewarding".[381] Another group of cases has named natural objects such as rivers as co-plaintiffs, but as natural areas cannot cover the costs of litigation, non-human plaintiffs have

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[378] At 15, 31.

[379] Stone, above n 351 gives a similar example, but in an American context, at pages 5-7.

[380] At 160.

[381] At 165.

been rare in the US system. Therefore, despite its promise, 'Should Trees Have Standing?' has had minor impact on the global stage. I conclude that one of the lessons that can be learnt from the failure of Stone's theory to take hold is that funding for a Stone-esque guardian is necessary. However, this failing will not exist in the Te Urewera setting, as the quantum from the Tūhoe settlement will be used to fund the governance board that acts as a guardian.

In New Zealand, Stone's theory was considered and endorsed by James Morris and Jacinta Ruru in their 2010 paper 'Giving Voice to Rivers: Legal Personality As A Vehicle For Recognising Indigenous Peoples' Relationships to Water?'.[382] The paper argues that the application of Stone's theory to New Zealand's river network "would create an exciting link between the Māori legal system and the state legal system". Morris and Ruru claim that giving a river its own standing would recognise the mana and mauri of the river, and would align the dominant western legal system with tikanga Māori. I am in agreement with Morris and Ruru, and contend that the introduction of legal personality for natural areas into New Zealand's law is therefore a positive recognition of the kinds of tikanga concepts discussed in Chapter 5.

I consider it is particularly important in this context to discuss the concept of Kaitiakitanga as discussed in Chapter 5. A Stone-esque guardian acting on behalf of a natural object could do so in the role of kaitiaki. Morris and Ruru argue that applying Stone's theory to New Zealand's rivers would acknowledge the ancestral role that Māori see natural objects as taking, as well

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[382] Morris and Ruru, above n 102.

as recognising the holistic nature of a river.[383] This could potentially see a "move away from the western legal notion of fragmenting a river on the basis of its bed, flowing water, and banks".[384] Morris and Ruru conclude that Stone's theory of granting legal status to natural objects has the potential to be beneficial in the context of Treaty negotiations. I believe it is possible that Morris and Ruru planted the seed for this concept to take root.

Christopher Stone's theory of granting legal personality to natural areas and objects helps to explain how such a concept can be applied in New Zealand. His idea of a guardian to act on behalf of a natural area fits well with the tikanga concept of kaitiakitanga. It is not clear whether his theory was specifically applied by negotiators in the Te Urewera context, but his theory helps one to understand how legal personality of a natural area for Te Urewera might operate. I contend that legal personality for Te Urewera recognises the inherent mana of the area, and has allowed Tūhoe to gain crucial governance power in the rohe.

7.2.5 Te Urewera

The continual desire for Tūhoe self-determination and the consistent demands of the tribe that Te Urewera be returned to them has seen the creation of Te Urewera as a legal identity. I believe that this is a compromise signalling how far the Crown was prepared to relinquish authority in the area, reflecting the fact that the Crown utilises resource management power sharing arrangements

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[383] At 58.

[384] At 58.

to suit its own political purposes. Consequently, this has led to a new form of governance regime which goes beyond co-governance and creates a new form of governance different from those discussed in Chapter 5. With a full return of the former National Park off the table, the Crown required some other form of negotiation compromise. This came in the form of granting Te Urewera legal personality and putting it 'beyond ownership'. Following on from the Marine and Coastal Act's creation of 'non-ownership' and the granting of legal personality to the Whanganui River, the Tūhoe Treaty Settlement legislation has granted legal personality to Te Urewera and implemented Stone's theory of legal personality for a natural object.

The relevant section of the Te Urewera Act 2014 is:

> **Section 11 – Te Urewera declared to be legal entity**
>
> (1) Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person.
>
> (2) However,—
>
> (a) the rights, powers, and duties of Te Urewera must be exercised and performed on behalf of, and in the name of, Te Urewera—
>
> (i) by Te Urewera Board; and
>
> (ii) in the manner provided for in this Act; and
>
> (b) the liabilities are the responsibility of Te Urewera Board, except as provided for in section 96.

This section is followed by s 12, which vests all Crown-owned land, including conservation land, reserve land and land that was formerly National Park land,

in the entity that is now known as Te Urewera. Section 13 declares such land to be inalienable, and s 111 declares that land cannot be removed from Te Urewera except by an Act of Parliament. Land, including private land, can be added to Te Urewera under ss 104-106.

The Explanatory Note to the Te Urewera-Tūhoe Bill 2013 gives some guidance as to the interpretation of s 11, stating:

> The purpose and principles of Parts 5 to 7 provide that Te Urewera will be preserved for its cultural, historic, and natural values, as well as for the use and enjoyment of the public. … The Bill recognises the mana and intrinsic values of Te Urewera by putting it beyond human ownership. It establishes a legal identity for Te Urewera, and vests the current national park land in that legal identity. Te Urewera will effectively own itself, in perpetuity. Legal identity is the vehicle by which the law of New Zealand recognises the existence of a separate and distinct entity which can be the subject of defined rights for legal purposes (as in the company model).

As Te Urewera is a natural area without a human voice, a governance board has been set up to act on its behalf. This governance group will be one way that Tūhoe can show their influence in Te Urewera. Section 16 of the Te Urewera Act establishes the Board to act on behalf of Te Urewera. The purposes of the Te Urewera Board are set out by s 17: to act on behalf of, and in the name of Te Urewera; and to provide governance for Te Urewera in accordance with the Act. The functions of the Board, as given by s 18, include the strategy goals expected of a co-governance board such as preparing and approving a management plan, making bylaws for Te Urewera and promoting and advocating for the interests of Te Urewera.

I believe it is an important reflection of tikanga that the Board cannot disregard the interests of Tūhoe when governing Te Urewera. Section 18 gives the Board the ability to consider and give expression to Tūhoetanga and Tūhoe management concepts including rāhui, tapu and noa, mana and mauri, and tohu. These tikanga principles are discussed in Chapter 5. Section 20 provides that the Board must consider and provide appropriately for the relationship of iwi and hapū and their culture and traditions with Te Urewera when making decisions, and this should reflect Tūhoetanga and Treaty responsibilities of the Crown. I consider the fact that the Board cannot disregard the interests of Tūhoe reflects the tikanga principle that iwi and the environment are interlinked in a metaphysical sense as discussed in Chapter 5.

This new governance arrangement sets up a much more substantial guardianship body than is provided for in the Whanganui River arrangement. However, it echoes the Whanganui River scheme in that ownership of Te Urewera is placed beyond both the Crown and Tūhoe. I believe that this is a means of returning some control to iwi while denying tribes full legal ownership of the resource in question. This form of governance arrangement echoes co-governance, but goes further than any other co-governance scheme has done in returning authority and control to an iwi. I contend that this reflects the way that the Crown uses resource management power sharing schemes to devolve power as it sees fit. Nonetheless, I believe that the Tūhoe governance arrangement signals the changing face of co-governance in New Zealand, and that its existence suggests that more arrangements like it may be created in the future.

The membership of the Urewera Board is determined by s 21. Initially, the Board is to be comprised of eight members, four of whom are appointed by the trustees of Tūhoe Te Uru Taumatua, with the other four to be appointed jointly by the Minister of Conservation and the Minister for Treaty of Waitangi Negotiations. After three years, this will change to three Crown representatives and six Tūhoe representatives, seeing a Tūhoe majority on the Board.[385] The first iteration of the Board has been announced and is comprised of members of the non-Maori community with links to governance or the environment, and representatives from TTUT.[386] Of note, two Crown appointees are ex-Ambassadors, perhaps reflecting the diplomatic nature of such a role and the way that these appointees will serve two cultures.

I consider that this concept of a Governance Board acting as a guardian fits alongside both Christopher Stone's theory in 'Should Trees Have Standing?', and tikanga. Stone suggested giving natural objects a guardian to act on their behalf in order to apply the rights and responsibilities of legal personality. Tikanga already provides for this kind of role in the form of a kaitiaki. The establishment of a guardian group for Te Urewera also serves to act as a kaitiaki. The Tūhoe settlement provides for the standard form of co-governance but in a non-standard method. Like existing co-governance arrangements discussed in Chapters 5 and 6, this agreement places both iwi and government representatives in decision making roles on a Board

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[385] Part 1, Te Urewera Act 2014.

[386] Department of Conservation "Board appointed for new era for Te Urewera" (Media Release, 24 July 2014) </www.doc.govt.nz/about-doc/news/media-releases/2014/board-appointed-for-new-era-for-te-urewera/>.

established to govern a natural resource. However, I contend that because of the legal personality granted to Te Urewera and the establishment of a Board to act on its behalf, this arrangement acts as very close to the concept of kaitiakitanga, allowing Tūhoe to promote the interests of their people in a way that is consistent with tikanga Maori.

By granting legal personality to Te Urewera and establishing a governance board that will eventually be Tūhoe-dominated to administer the legislation for this, I believe that the Crown has created a new form of governance arrangement that goes beyond the boundaries of co-governance, reflecting the fluid nature of these arrangements as discussed in Chapter 5. Previous co-governance arrangements have much more equal representation. Wood states:[387]

> One of the unique things about the Tūhoe settlement is that we start with co-governance, or something that looks very like it, and it nearly approaches it. But in fact, it doesn't end up in a balanced arrangement at all. We've been quite open and specific about that within a relatively short time. The balance of appointments in the governing body shifts in favour of Tūhoe; that's normally not what we mean by co-governance.

In considering this statement, I believe the Tūhoe settlement develops the concept of co-governance in New Zealand so that iwi have more influence. Not only will Tūhoe have numerical dominance on the Te Urewera Board, but Tūhoetanga will be influencing decisions about the region. Additionally, I believe that the mana motuhake aspect of the settlement, in conjunction with

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[387] Wood, above n 350.

this governance scheme will also give the tribe more authority than previous co-governance arrangements. Moreover, I posit that the new arrangement can perhaps not accurately be called 'co-governance', as it goes beyond any co-governance arrangement seen before and creates a whole new level of resource management power sharing scheme.

7.2.6 Prospects of the Te Urewera Governance Board

There are several unique aspects of the Tūhoe Treaty Settlement. The nature of the Urewera region and the Tūhoe people is likely to affect the way that Te Urewera will be governed in the future. This section will first outline the way that Tūhoe intend to utilise their settlement and the governance arrangements included to promote the interests of their people. I will then discuss one policy that has the potential to restrict the way that Tūhoe use this arrangement to promote the interests of their people.

7.2.6.1 Mana Motuhake

One of the aspects that will influence the new governance arrangements in Te Urewera is the acknowledgement in the Tūhoe Deed of Settlement of Tūhoe's mana motuhake.[388] Mana motuhake was one of the three 'bottom lines' in the Tūhoe settlement negotiations.[389] The negotiators were not seeking to gain independence, instead they were pushing for formal recognition of their mana motuhake. Mana motuhake is an expression utilised by Tūhoe to describe the

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[388] Deed of Settlement, above n 317.

[389] Rawinia Higgins, above n 329.

relationship they want with the government. This is a relationship in which Tūhoe strives to reduce tribal reliance on the government.

While mana motuhake means different things for different people, it is inherent to the Tūhoe way of being. For Tūhoe, Te Urewera and Mana Motuhake continue to be an innate part of who they are.[390] Tāmati Kruger, Tūhoe Chief Treaty Negotiator, explained that "Mana motuhake is better described as interdependence, not separatism, not isolation. Tūhoe are a global people… we like to think we have dual citizenship".[391] Mana motuhake is a crucial part of Tūhoetanga – at every Tūhoe festival (held biannually), the idea is sung and spoken about and rehashed "over and over again".[392]

While there was some initial murmur in the media about public access to Te Urewera, and the ability of Tūhoe to create a 'state within a state', this dialogue appears to have ceased.[393] I think this is likely because the term mana motuhake has been successfully explained by Tūhoe as not being independence in a sovereign sense, but rather inter-dependence and self-reliance.[394] Mana motuhake is a key principle for Tūhoe, and will affect the way they govern Te Urewera.

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[390] Higgins, above n 345.

[391] Interview with Tamati Kruger, Tūhoe Chief Negotiator (Guyon Esipner and Duncan Garner, 3rd Degree, 19 May 2013).

[392] Higgins, above n 329.

[393] Bryce Edwards "A Tuhoe Mini State?" *National Business Review* (Online Ed., 12 September 2012).

[394] Wood, above n 350.

Guided by mana motuhake, Tūhoe intend to take the commercial redress portion of the settlement, in company with the Te Urewera governance role given, and use it to develop the autonomy of Tūhoe people and Te Urewera. They intend to remove all Tūhoe reliance on the government – this includes social services as well as infrastructure.[395] In official language, mana motuhake was defined in the 2013 Ngāi Tūhoe Service Management Plan (SMP) signed between the Crown and Tūhoe. The SMP defines the relationship between Crown service providers and Tūhoe, and will allow the tribe more autonomy within the social service sphere. The SMP defines Mana Motuhake as:[396]

> Progressively enhancing Tūhoe's autonomy in decision-making matched by its growth in infrastructure, capability and leadership in social service provision. This is balanced by the Crown's governance role under Te Tiriti O Waitangi. Through the Treaty Settlement practical steps will be taken for Tūhoe to manage their affairs within their core area of interest with the maximum autonomy possible in the circumstances

The SMP signed between the Crown and Tūhoe sets out the relationship between Crown Service Providers (CSPs) and the iwi. Developed in conjunction with Tūhoe, it aims to improve social outcomes for Tūhoe. Although the SMP is not legally binding, it cements the relationship between

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[395] Kruger, above n 391.

[396] Ministry of Business and Innovation *Ngāi Tūhoe Service Management Plan* (2013).

the tribe and CSPs. The goals of the SMP are reflective of mana motuhake. They are given as:[397]

- The aspiration of Tūhoe to manage their own affairs to the maximum autonomy possible in the circumstances;

- That over the first five year phase of this SMP and all agreed subsequent phases, the housing, health, education, training, employment, and family unit safety of Tūhoe will substantially increase according to the standard measures in place from time to time to validate such matters or such specific standards as the parties may agree;

- That all parties recognise the importance of iwi, hapū and whānau in assisting in the achievement of these goals and undertake and agree to work with them and any appropriate facilitating and supporting programmes.

- The parties specifically acknowledge that at any time Tūhoe may seek to join Whānau Ora or any programme replacing or supplementing it;

- That all parties to this SMP recognise that they represent to Tūhoe a united voice of the Crown and will where possible and necessary work in partnership both among themselves and with Tūhoe, to achieve the aspirations and goals of Tūhoe.

I believe that these goals, particularly the recognition that Tūhoe will be managing their own affairs, show that the Crown is taking Tūhoe's mana motuhake seriously. Tūhoe wish to reclaim all their children from Child,

[397] Ministry of Business and Innovation, above n 396 at 6.

Youth and Family care, and remove benefit dependency within the iwi.[398] The iwi also intends to develop enough electricity to remove itself off the grid and eventually take responsibility for funding road building in Te Urewera.[399] The timeframe for these significant goals is only 40 years. I posit that the iwi will need a continuing positive relationship with the Crown to achieve these goals.

Since the Deed of Settlement was released, the tribe has already established a travelling General Practitioner (GP) and dental service; previously, these were incapable of being provided by a Crown agency due to the stretched budgets of District Health Boards.[400] A new clinic has been built in Taneatua that will provide access to a GP four times a week, whereas previously residents inside Te Urewera had to travel outside of the rohe to access essential health services.[401] They have invested $2 million of their settlement into this health scheme.[402] Other efforts to look after the interests of their people include establishing an archive centre in the new tribal building and installing one thousand smoke alarms in Tūhoe homes.[403] While Tūhoe is actively engaging in activities to assert their mana motuhake and establishing some bold goals, they will continue to work with the Crown under the guidance of the SMP. I believe that this arrangement reflects a working and dynamic Treaty

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[398] Kruger, above n 391.

[399] Kruger, above n 391.

[400] Reynald Castaneda "Tuhoe to open four clinics without PHO" *New Zealand Doctors Newspaper* (Online Edition, 2014).

[401] At 1.

[402] Mere McLean "Tūhoe invests $2 mil into health services" *Māori TV* (17 February 2014).

[403] Radio New Zealand News "Tuhoe to establish archive centre" *Radio New Zealand* (13 Feb 2014); Radio New Zealand News "Tuhoe to install 1000 smoke alarms" *Radio New Zealand* (15 May 2014).

Partnership that goes beyond natural resource management. Moreover, I posit that Tūhoe's arguably more socialist spending of their Treaty settlement can be directly contrasted to the capital-building approach taken by Ngāi Tahu. The Tūhoe form of resource management power sharing scheme includes elements of the social services sector, as well as in the environmental sector, whereas I think that Ngāi Tahu have taken a more business and resource-focused approach in their co-governance efforts.

As a symbol of Tūhoe mana motuhake, the iwi has built a new tribal headquarters in Taneatua.[404] Called Te Uru Taumatua after the taumatua trees which sustain life and its environment, the new building was built for $15 million and represents the relationship that Tūhoe have with the environment.[405] The building is a "living building", and is constructed to be sustainable and regenerative; the roof is covered in solar panels and any extra power generated will be sold back into the grid.[406] The people of Tūhoe were involved in building the project, some 5000 earth bricks were made by Tūhoe to line the walls.[407] Kruger describes Te Uru Taumatua as "a symbol of wanting to leave behind the hurt, the anger of the last 170 years".[408] Te Uru Taumatua is a great source of pride to the iwi. I believe the building is a

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[404] Jerome Partington "How buildings can restore nature" *New Zealand Herald* (Auckland, 2013).

[405] At 1.

[406] Jason Renes "Sustainability the cornersrone for new Tuhoe headquarters" *The Waikato Independent* (13 March 2014).

[407] Partington, above n 404.

[408] Renes, above n 406.

physical symbol of Tūhoe mana motuhake, and indicative that the tribe truly wish to reinvest their settlement money in order to benefit iwi members.

I contend that Tūhoe mana motuhake will affect the governance arrangements in Te Urewera as the iwi, mana motuhake, and the interests of Te Urewera are all so deeply entwined by culture, legislation and policy. They are three strands of a Tūhoe identity rope. Consequently, I posit that governance decisions regarding road construction and resource management decisions will reflect the need for the tribe to progressively increase their autonomy. When the Governance Board produces management plans for Te Urewera, these will be influenced by mana motuhake. Here there will be an entanglement of indigenous economic and social development and environmental protection. I believe that Tūhoe are using this resource management power sharing regime to actively promote the social and cultural health of their people, and are extending co-governance beyond 'just' resource management to all areas of Tūhoe life. This reflects the interwoven nature of iwi with their environment, discussed in Chapter 5.

7.2.6.2 Biosphere Reserves

One policy factor that may potentially affect the governance arrangements of Te Urewera in the future is the potential for the area to be turned in a United Nations Educational, Scientific and Cultural Organisation (UNESCO) biosphere reserve. During the negotiations for the settlement it was announced that both the Crown and Tūhoe were seeking recognition of Te Urewera as

such.[409] UNESCO is the cultural branch of the United Nations. If this status was finalised, it would be a first for New Zealand, although the idea has been broached before as a possible management tool for Waiheke Island.[410] Biosphere reserves have been in existence since 1968, with some 580 sites in 114 countries across the world.[411] They are used to balance conservation interests with the interests of the local population – humankind working with nature.

Biosphere reserves are 'special places for people and nature' designed to promote a conservation function, to foster economic and human development that is sustainable, and to provide logistic support for research and monitoring for such functions.[412] They provide a method of participatory conservation management, and generally allow for some sustainable development within the reserves, while still promoting the protection of the unique area of the reserve. Establishing a biosphere reserve in Te Urewera would potentially protect the world-class natural characteristics of the area while still allowing Tūhoe to build their economic development. As part of the process to facilitate the creation of a UNESCO biosphere reserve, Min. Finlayson has travelled to

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[409] Te Rangimārie Williams "Crown offer to settle the historical claims of Ngāi Tūhoe" 2012 October Māori Law Review.

[410] Diane Worthy "Island could be a UNESCO Reserve" *Waiheke Marketplace, Online Ed* (Auckland, 30 June 2010).

[411] A. Cristina De La Vega-Leinert, Marcelo Antunes Nolasco and Susanne Stoll-Kleemann "UNESCO biosphere reserves in an urbanized world" 2012 54(1) Environment at 26.

[412] Peter Dogse "Toward urban biosphere reserves" 2004 1023(1) Annals of the New York Academy of Sciences.

France to conduct talks with the relevant authorities.[413] At the time of writing, no further announcements have been made on this proposed new status.

I believe that if a Biosphere Reserve is instituted for Te Urewera, this will likely alter the future path taken by the governors of Te Urewera. It is probable that instituting a Biosphere Reserve into Te Urewera was a negotiation point put forward by the Crown, rather than Tūhoe, and there may be some reluctance from the tribe in embracing this reserve status. This is understandable, considering Tūhoe have just been returned the effective control of their land; they will be reluctant to restrict themselves with externally imposed rules and regulations. I contend that if such a status is acquired for Te Urewera, Tūhoe will have to ensure that they balance the requirements of the reserve with the welfare of tribal members. Rules and regulations required of the Biosphere may potentially impact on Tūhoe mana motuhake, and impact on the ability for Tūhoe to utilise this power sharing arrangement to promote the interests of their people.

7.3 Response to the New Te Urewera Governance Arrangements

The Tūhoe Treaty Settlement and new governance arrangements for Te Urewera are an exciting and novel form of indigenous reconciliation, environmental management and Crown-Iwi governance arrangement. These arrangements have significant potential to offer a brighter economic and cultural future to Tūhoe, and will allow the iwi to advance the influence and

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[413] Radio New Zealand News "UNESCO Status Sought for Te Urewera" *Online Ed* (14 October 2013).

welfare of its members. The new structure also shows a changing approach to co-governance arrangements towards a new system where iwi have more influence. This reflects the fluid and dynamic nature of the boundaries of co-governance as discussed in Chapter 5. As can be expected, such a unique scheme has attracted comment.

The Parliamentary reception of this modern settlement has been mostly positive. During the First Reading of the Bill, Labour MP, Shane Jones, highlighted his surprise at Minister Chris Finlayson's success in bringing the settlement forward as a model of governance, kaitiakitanga, and embedding Māori in the spirit of the new law.[414] Surprise at Finlayson's success in introducing this new concept to law was also expressed by Police Minister the Hon. Anne Tolley, who commented that she had earlier expressed the opinion on returning Te Urewera to Tūhoe as impossible.[415] These remarks reflect the compromising nature of the legal personality deal; this arrangement was created as a direct response to the difficulties of handing back the full ownership of the Te Urewera which has been contested for generations. It is a novel arrangement, and has stretched the concept of 'ownership' to satisfy both the requirements of Tūhoe to feel like they have been returned their rohe, and the Crown's need to maintain overall control over the area. The comments of the parliamentarians signal the novelty of this arrangement.

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[414] Te Urewera-Tūhoe Bill – First Reading at 14131.

[415] At 14132.

Stakeholder groups such as Forest and Bird and Fish and Game have recognised that there is potential within this agreement for Te Urewera to be governed more effectively.[416] It has been recognised that DOC resources are spread thin, and that the increased contribution of human and financial resources by Tūhoe will help to protect and successfully manage the unique natural features of Te Urewera.[417] Then Minister of Māori Affairs the Hon Dr Pita Sharples, described the Bill as "an enabler of a stronger Tūhoe economy. It is a lifeline that will help reinstate and redevelop Tūhoe independence and cultural permanency".[418] I believe that these comments reflect the ambitious nature of the mana motuhake provisions of the settlement.

However, some negativity has come from some Parliamentary sources, including Mana Party leader Hone Harawira, who expressed the opinion that the scheme was unworkable.[419] New Zealand First voted against the legislation when it went through Parliament, as it felt that the Waitangi Tribunal had not adequately addressed the counter claims to Waikaremoana land made by hapū, Ngāti Ruapani.[420] Tūhoe will no doubt hope that positivity overwhelms this negativity, as it is important that the scheme does not mirror the failed Urewera District Native Reserve Act 1896. I contend that the Crown's relationship with Tūhoe in this new form of co-governance must be co-operative for the scheme to work. Ultimately, as the law is not entrenched, if

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[416] John Wood, above n 350.

[417] Wood, above n 350.

[418] Te Urewera-Tūhoe Bill - Second Reading at 17643.

[419] Waatea News "Te Urewera land plan scepticism" *Waatea News, Online Ed.* (2013).

[420] New Zealand First Press Release "Te Urewera Tuhoe Bill - Parliament has duty to put matters right'.

this scheme does not work for the Crown, it can introduce legislation to rewrite the governance arrangements. The tribe must therefore avoid separatist rhetoric and instead focus on fostering their relationship as 'interdependent' of the Crown, rather than 'independent' of the Crown.

The response from Tūhoe has also been mostly positive. In a submission to the Select Committee, Tāmati Kruger, in his role as Chair of Te Uru Taumatua, was fully supportive of the legislation.[421] His submission states that the new legal personality for Te Urewera strengthens and maintains the connection between Tūhoe and Te Urewera. He states that it preserves as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage. He also argues that the legislation provides for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all. I believe that these statements show that Tūhoe is willing to work within the boundaries of this settlement to achieve its goals, despite not being given full ownership of Te Urewera.

Already, since the passing of the legislation, the entity that is Te Urewera has shown the Board intends to be a force of influence in the area. The new governance structure for Te Urewera is not just a ceremonial body, it has very real power and its actions show that Tūhoe do intend to use this structure to effectively govern Te Urewera. Within four weeks of the law passing, the Board "has developed annual priorities, formed the board, and begun work on

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[421] Tāmati Kruger *Submission to the Māori Affairs Select Committee* (1 December 2013).

developing infrastructure with Tūhoe and the Department of Conservation to progress operational programmes".[422] With the change of status of Te Urewera, DOC-issued hunting permits became invalid, hunters were asked to leave Te Urewera, and new permits were not being issued while the system was reviewed.[423] Waatea News reports that there will be a change made by the Board with regards to the hunting permit system:[424]

> "Tāmati Kruger says licensing hunters is not a revenue-gathering exercise. … "There is no arrangement of reciprocity of information that we would like to see, for example hunters to help us out by observing things around flora and fauna, about tracks, about huts, the hunters dogs in the area. We would like to have a relationship with these people, rather than just be a point that issues out a paper permit ", he says.

Kruger's comments reflect the importance of tikanga, as discussed in Chapter 5. Here we can see the Te Urewera board change the way that activities have worked in the past in Te Urewera to benefit the region and reflect tikanga principles such as kaitiakitanga and manaakitanga. I believe that this shows that this governance structure is a very real tool for Tūhoe to manage their rohe effectively and advance the influence of the Iwi, and ensure that tikanga values are used in the governance of Te Urewera.

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[422] Mike Jones "Focused on enhancing visitor experience " *Gisborne Herald* (23 October 2014).

[423] Gisborne Herald "Halt on hunting at lake" *Gisborne Herald* (18 October 2014).

[424] Waatea News "Tūhoe change hunting roles" *Waatea News Online ed.* (2014).

7.4 Conclusion

This chapter has shown how Tūhoe have gained regional influence through a new governance arrangement for Te Urewera, and how they are promoting the interests of their people through this. I first outlined the troubled history of the Crown-Tūhoe relationship, showing that governance and ownership of Tūhoe land has always been a large factor of influence on this relationship. I have shown that throughout the history of this relationship, Tūhoe's drive for their mana motuhake has been clear. The Tūhoe Settlement reflects this desire.

This chapter then set out the legal personality provisions of the new Tūhoe Treaty Settlement, extending the definitions given in Chapter 5. I explained how this concept arose, and what legal personality and 'non-ownership' mean in the context of Te Urewera. I believe that this arrangement is a compromise that has stretched the concept of ownership – while it is not ownership in name it does give Tūhoe significant authority and control over the area. I posit that this compromise reflects the fact that the Crown changes the terms of co-governance to give as much or as little power as it wishes to devolve, reflecting the fluid nature of these arrangements as discussed in Chapter 5. However, ultimately the critical power still vests in the Crown as it can revoke this devolution with future legislation. I have also explained the governance regulations that have been put in place by the legislation, and has discussed how the governors cannot ignore the requirements of mana whenua when governing Te Urewera, as Tūhoe and Te Urewera are deeply interlinked.

The chapter has sought to explain the concept of mana motuhake. I have shown how Tūhoe is using the governance influence gained by their Treaty

settlement, in conjunction with the financial quantum, to develop the autonomy and self-reliance of their people. I discussed how such influence might be affected by a biosphere reserve if one of these was established in the area. This chapter ends with a summary of the response from Parliament, as the Crown's attitude to this arrangement is important to ensure this arrangement continues smoothly and does not go the way of the UDNRA. I then explained how the Board has already begun to secure influence in the region.

The governance arrangements for the new entity that is Te Urewera are clearly being used for Tūhoe to promote the interests of their people. I consider that the arrangement will allow Tūhoe majority control of their rohe, and will allow them to make resource management decisions that will develop the industries within the area that benefit Tūhoe people. The tribe is using their governance power in conjunction with the financial quantum given in the Settlement to make a better future for Tūhoe people based on Tūhoe tikanga values. Tūhoe leadership is determined that the benefits that flow from the settlement will benefit every hapū, whānau, and every mārae.[425] As Kennedy Warne notes "the economic reality must alter so that families can afford not to leave, instead of having no realistic option to stay".[426] I conclude that this is the ultimate Tūhoe goal – self-governance and a strong economy so their people can return to the area and prosper.

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[425] K. P. Warne and Peter Quinn *Tūhoe: portrait of a nation* (Penguin Books, Auckland, 2013) at 160.

[426] At 160.

8 Conclusions

This thesis has outlined how the concept of co-governance has been used by two iwi to advance their regional influence. I began with a literature review in Chapter 5 in order to define exactly what co-governance is. One of the significant conclusions from this literature review was that the concept of co-governance means different things to different people. I believe that the Crown ultimately uses co-governance as an easily mouldable tool to devolve as little or as much power as it wishes to the other party engaged in the arrangement. Chapter 5 continued with a discussion of how the Resource Management Act 1991 attempts to engage the Crown and Iwi in low level power sharing schemes. An evaluation of ss 33 and 36 concluded that the RMA is an inefficient vehicle for instituting proper co-governance.

This literature review chapter then expanded upon the concept of tikanga, and the tikanga concepts that would likely be utilised in a co-governance scheme. I placed particular focus on the concept of Kaitiakitanga, and explained how this has been utilised in legislation, case law, policy and in practice. I concluded that it is necessary to understand the ethic and responsibilities of Kaitiakitanga as this will be a significant influence on the perspective of iwi co-governance board members. The final section of Chapter 5 outlines the concept of legal personality. I believe that a legal personality of some form must be in existence in order to form a true Treaty Partnership with the Crown and effect a genuine and effective co-governance arrangement.

In Chapter 6 of my thesis, I explored the case study of Ngāi Tahu in Canterbury. I first outlined the crucial elements of the Ngāi Tahu Claim and

the resulting Ngāi Tahu Claims Settlement Act that have allowed the iwi to build up functional co-governance capacity. An integral part of this was the effort of the tribe to regain their legal personality, which in turn has enabled them to be a full Treaty Partner in co-governance arrangements. I concluded that the Settlement Act did not provide any power sharing schemes that resembled co-governance as any provisions sat at more of a co-management level. However the Act did provide the building blocks that Ngāi Tahu have used to develop other, more effective, power sharing schemes.

Chapter 6 then outlined the three contemporary resource management power sharing arrangements that Ngāi Tahu are currently engaged in: at Lake Ellesmere/Te Waihora; in the Canterbury Water Management Strategy; and in the Central City Christchurch Rebuild. I believe that none of these Ngāi Tahu arrangements reach full co-governance capacity, although each of them sits at a different place along the co-governance spectrum discussed in Chapter 5. However, I posit that with the reconstitution of Canterbury Regional Council and the devolution of powers from CERA, Ngāi Tahu are in a strategic position to gain high level regional governance power. While this may not be co-governance, it will still offer the tribe highly influential authority in Canterbury. I think that the variety of power sharing arrangements that Ngāi Tahu have been involved in reflect my earlier conclusion that the Crown moulds these schemes to suit its own purposes and as it sees fit.

In Chapter 7, I discussed the new Treaty Settlement arrangements for Ngāi Tūhoe that have thrust the tribe into a new governance role. I believe this role goes beyond traditional co-governance and into a new form of governance. I first highlighted the ‘legal personality’ elements of this Settlement that create

Te Urewera as a new entity that is beyond ownership. This is clearly a compromise designed to offer a viable alternative to Tūhoe after the outright ownership of Te Urewera was taken off the negotiation table. However, this legal personality element does provide an identifiable Treaty Partner for the Crown to engage with, and this is a factor that I believe is essential for formulating an effective co-governance scheme.

In Chapter 7 I also outlined the legislation that has developed the concept of legal personality and the ability to put land 'beyond ownership'. I also applied the theories of Christopher Stone to a New Zealand context. Further, I outlined the concept of mana motuhake, what this means, and how the mana motuhake of Tūhoe could be impacted by a Biosphere Reserve. I also outlined the Parliamentary response to the new arrangements. After considering these elements, I posit the conclusion that this is another example of the Crown utilising the concept of a resource management power sharing scheme in a manner that allows it to achieve a political compromise. I contend that the Tūhoe arrangement goes beyond the boundaries of co-governance and creates a new form of governance, especially as the arrangement involves social service elements, not just natural resource policies. In conclusion, this arrangement is another example of the way that the Crown uses these types of schemes to devolve as much or as little power as it wishes, while ultimately not returning full sovereignty or outright ownership and therefore retaining residual control.

This chapter will explore some conclusions about each tribe's co-governance arrangements and the influence of legal personality, what the practical negatives of co-governance arrangements are, and where the future of resource

management power sharing arrangements might be as a result of the efforts of both iwi.

8.1 A Seat at The Table vs. The Whole Table

Ngāi Tahu and Tūhoe are two unique iwi in two very different regions. Both of these iwi have engaged in various forms of resource management power sharing arrangements with the Crown throughout their histories, and now each iwi is engaged in co-management and co-governance style arrangements that are allowing them to promote the interests of their people. These different co-governance arrangements show the changing face of Iwi/Crown resource management power sharing arrangements. I believe that while Ngāi Tahu have been engaged in such activities for a generation, they have yet to reach the level of influence that Tūhoe have been given in their 2014 Treaty Settlement.

Co-governance and co-management are two forms of partnership agreements that sit on the spectrum of resource management power sharing arrangements, as discussed in Chapter 5. The two terms are used in various contexts by assorted groups of people, and it is difficult to provide a precise definition of the differences between the two types of arrangement, as I have discussed throughout this thesis. What is clear, however, is that co-governance operates at a higher level of power sharing. Co-governance schemes require each partner to be committed to a future vision, to develop strategy to meet this vision, and to debate the inherent issues surrounding each project. Partners in a co-governance scheme should be at an equal level of information sharing and participation. Co-governance schemes are closer to a Treaty Partnership than co-management. Co-management, while still an effective method of

introducing a tangata whenua voice in resource management, operates at a lower level of authority than co-governance. Co-management deals with the operational side of the issue at hand; examples include decision-making about native planting and artwork. Tangata whenua in a co-management scheme will be allowed some input into the day-to-day running of the scheme, but will not be involved in the overall directional policy. Co-governance allows iwi to weave tikanga principles throughout power sharing arrangements much more efficiently than co-management, and thus I consider that co-governance puts iwi in more of a position of influence.

Ngāi Tahu and Tūhoe are two tribes who have utilised schemes that sit at different places along the resource management power sharing spectrum. Both iwi differ in many ways. Ngāi Tahu, in general, have a more European lineage, influenced by the genetics of the sealers and whalers who intermarried with the tribe in the early settler history of New Zealand, and then later by the flocks of settlers who came to Canterbury to farm. Ngāi Tahu signed the Treaty of Waitangi, and have long maintained that they hold a Treaty relationship with the Crown. Canterbury is a region of key economic importance to New Zealand, producing large quantities of agricultural products for both domestic consumption and for export. In the year ending March 2013, Canterbury contributed 13.2% of New Zealand's Gross Domestic Product (GDP). In the same year, Canterbury's GDP increased by 6% - the overall nationwide increase was 2%.[427] Canterbury includes the city of

[427] Statistics New Zealand "Regional Gross Domestic Product: Year ended March 2013" (2013) <http://www.stats.govt.nz/browse_for_stats/economic_indicators/NationalAccounts/RegionalGDP_HOTPYeMar13/Commentary.aspx#can>.

Christchurch and other large towns such as Ashburton and Timaru. At the 2013 census, 12.7% of New Zealand's population was recorded as living in Canterbury.[428] 7.7% of the Canterbury population identifies as Māori, in comparison to the 15% of the National Māori population.

Ngāi Tahu were one of the first tribes to settle with the Crown at a time where the parameters of the Treaty process were still being solidified. In their Treaty Settlement, the tribe were given the foundational building blocks which have allowed them to develop regional influence. I believe that without the pioneering efforts of Ngāi Tahu in the early days of Treaty Settlements, it is unlikely that iwi including Ngāi Tūhoe would have been able to gain the ground that they have with their respective Settlements. I reach this conclusion as Ngāi Tahu were able to break the ground for how much in the way of non-cash assets and power sharing authority the Crown was prepared to give away during Settlement negotiations, in comparison to the cash-only Waikato-Tainui Settlement that had been signed previously.

Ngāi Tahu have three core contemporary power sharing arrangements in Canterbury. None of these arrangements reach full co-governance, as all three deal with issues that are to do with operational management rather than the directional and policy based questions that a co-governance scheme deals with. As such, Ngāi Tahu have been able to intertwine less tikanga Māori principles through these arrangements in comparison to Tūhoe in Te Urewera. Nonetheless, the Ngāi Tahu involvement in the Canterbury Water

[428] Statistics New Zealand "Quick Stats: Canterbury Region" (2014) <http://stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-a-place.aspx?request_value=14703&tabname=>.

Management Strategy has allowed the tribe to have significant sway over one of the most economically important natural resources in the region. Ngāi Tahu participation in the CWMS has proven their capacity to engage in multi-party governance schemes. I consider that while this arrangement is not a traditional two-party co-governance scheme, it is an undoubtedly an important piece of the Ngāi Tahu strategy to gain more regional influence.

The closest arrangement to full co-governance that Ngāi Tahu is involved in is the scheme that TRONT and ECAN are partners in at Te Waihora/Lake Ellesmere. This agreement is expressed to be a co-governance scheme and involves the top level 'chiefs' of each party. However, while this arrangement is called a 'co-governance' scheme, I believe it does not reach the requirements of true co-governance. This arrangement sits at a level of co-management as it is focused on day-to-day management issues such as the planting of flax bushes, riparian repair, and clean up concerns. Co-governance level directional and strategy issues are not as fully addressed as they should be in an effective co-governance scheme. Nonetheless, I consider that the influence of the tribe in this area is undeniable, and this scheme is undoubtedly one method that they are utilising to build governance capacity at a regional level.

The most recent resource management power sharing arrangement that Ngāi Tahu are involved in is in the Christchurch Rebuild. Ngāi Tahu, through their representatives Nga Matapopore, have an imitable opportunity to stamp a Ngāi Tahu aesthetic on the post-rebuild Christchurch. I consider that this influence has been attained as a result of Ngāi Tahu's commercial presence in Christchurch, and their proven capacity in such power-sharing arrangements.

However, while influential, I posit that this arrangement does not reach the level of co-governance. This is because CCDU developed the Central City Blueprint with some Ngāi Tahu consultation but did not involve the tribe at a full partner level at this stage in the formulation of the overall strategy for the rebuild. As such, Ngāi Tahu were excluded from the directional governance decisions, and were brought in at a lower level to consult on management issues. Although lacking input on the higher level decision making, the weight of Ngāi Tahu's regional authority will be much more visible as a result of their input into the Central City Rebuild. I believe that it can therefore be seen that for Ngāi Tahu, co-management functionality has been built up stage-by-stage in a piecemeal approach, with the tribe taking as much authority as the Crown has been prepared to offer. This is reflective of the early stage of the Ngāi Tahu Treaty Settlement, and the nature of the Canterbury region.

Since the arrival of settlers into the region, Ngāi Tahu have had less and less regional influence as mana whenua became a smaller and smaller proportion of the population of Canterbury. From their Treaty Settlement in the 1990s this trend has reversed and the tribe have built up contemporary influence through their co-management schemes and commercial weight. Canterbury is still a very Pākehā-dominated region, and pre-quake Christchurch was renowned for its 'Anglification'. Against this background and the importance of Canterbury to New Zealand's economy, I believe that it is perhaps understandable that Ngāi Tahu have had to build up their influence piece by piece. They would never be given full regional co-governance in Canterbury. Instead, they have taken what they have been given and used it to build their influence and promote the interests of their people in a patchwork fashion.

In 2016, a new regional governance structure will be put in place for Canterbury. It is the wish of Ngāi Tahu that they have some form of formal, solidified role on this new authority.[429] There is precedent for this; Māori seats at a Regional Council level already exist in the Bay of Plenty and in the Waikato. It is not yet known what the new Canterbury authority will look like. It may be fully elected, or might be composed of half appointed, half elected councillors.[430] A super-city style unitary authority has been mooted for the whole region.[431] Whatever the structure of the future regional governance body in Canterbury, Ngāi Tahu want a permanent role on this body. I consider that one such role could be one or two concrete seats on the council that are reserved for a Ngāi Tahu member. This would mirror the Bay of Plenty (BOP) example; however the three BOP Māori wards are not designated to any one iwi, due to fact that the BOP regional council has 27 iwi within its boundaries.

If Ngāi Tahu were to gain a permanent and formal role in Canterbury regional governance, I believe that this would be a result of the patchwork of power sharing capacity that they have built, and wider New Zealand acceptance for these schemes as the discussion around Treaty obligations becomes more mainstream. Such an arrangement is highly unlikely to be a 50/50 Crown/Ngāi Tahu co-governance council. This is reflective of the racial makeup of the Canterbury region. However, while such an arrangement will not be co-governance, I consider that it will give Ngāi Tahu a higher degree of authority

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[429] Tau, above n 31.

[430] Skelton, above n 223.

[431] John McCrone "A super city for Canterbury?" *The Press* (Christchurch 7 September 2014).

and influence than they have had previously. This seat at the table will have been gained partly as a result of Ngāi Tahu's engagement in co-management arrangements that have allowed them to develop governance power-sharing capacity.

I consider that Canterbury and Te Urewera could not be two more different regions. Statistical census information is not available for Te Urewera, but is available for the Bay of Plenty (BOP) region, into which Te Urewera falls. As at the 2013 census, 6.3% of New Zealand's population lived in the BOP, and 25.7% of the BOP population identifies as Māori.[432] The BOP region contributed to 5.3% of New Zealand's GDP for the year ending March 2013.[433] Te Urewera, as a smaller section of the region, will naturally have contributed less to the nation's GDP.

Due to the isolationist tactics and the geography described in Chapter 7 of this thesis, Te Urewera has remained a predominately Māori area. Unlike Canterbury's flat plains, the region is mountainous, wild and unsuitable for agriculture. The main economic activities in the area are tourism (which has traditionally been limited due to the poor access roads into the area and the distance from main centres) and some hunting and fishing related activities. The high unemployment figures of Tūhoe reflect the economic reality of Te Urewera.

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[432] Statistics New Zealand "Quick Stats: Bay of Plenty" (2014) <http://stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-a-place.aspx?request_value=13853&tabname=>.

[433] Statistics New Zealand, above n 427.

Tūhoe, as a people, have advocated for their own governance of their rohe for generations. The iwi's goal to reclaim their mana motuhake has been a crucial part of their tribal identity. The Tūhoe Deed of Settlement has returned their mana motuhake of their rohe, and this is of significance, as it is the first Treaty Settlement in New Zealand to do so. The new governance structure will give Tūhoe majority control over the governance of the Te Urewera region. I consider that the arrangement goes well beyond co-governance, and into a new form of governance that the country has never seen prior to this settlement. I therefore posit that whereas Ngāi Tahu have spent twenty years crafting a seat to sit at the regional governance table, Tūhoe have been given the whole table.

The creation of legal personality for Te Urewera has required the establishment of a guardian-like governance board, which will have control over the area. This is not an elected regional or district council, where councillors are voted in by the public. Rather, these governors will be appointed. I believe that this is potentially undemocratic in the mainstream definition, and could be a cause for concern.

Te Urewera as a region will continue to sit within the boundaries of the regional councils that it did previously, such as the BOP Regional Council, however the Te Urewera Board will have effective control over the Tūhoe rohe. In future, the Tūhoe representatives on the Governance Board will be appointed by the four Tūhoe tribal authorities, or rohe committees, Ruatāhuna, Rūātoki, Te Waimana and Waikaremoana.[434] These tribal authorities represent

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[434] Te Uru Taumatua "Te Urewera Governance " (204) <http://www.ngaituhoe.iwi.nz/te-urewera-governance-and-management>.

65 hapū.[435] The 'tribals' each contribute members to Te Uru Taumatua, the Tūhoe overarching governance structure. This reflects the traditional hapū and whānau-based governance of the tribe. The new Te Urewera governance structure will therefore not replicate a western system of democratically elected regional governors, but rather a tikanga Māori-based system of hapū-nominated governors.

I consider that this unique agreement is reflective of the inimitable nature of Te Urewera. The area is mostly Māori, and it is a deprived region which contributes comparably little to New Zealand's wider economic growth than the agricultural powerhouse that is Canterbury. I believe that the new governance arrangements for Te Urewera are a gamble for the Government, but giving control of regional governance to mana whenua in Te Urewera is a much safer bet than in other regions of the nation. After all, the bulk of the people that Tūhoe will have governance power over will be Tūhoe themselves, and there are few other influential stakeholders in the region.

Ngāi Tahu and Tūhoe have both utilised arrangements that are on face value designed for environmental protection and regulation, in order to further their own tribal agendas. This shows the intertwined relationship that both iwi have with the land and natural resources, as discussed in Chapter 5. It also reflects the historical dispossession suffered by each tribe with respect to their land and their subsequent desire to control their own natural resources. While Ngāi

[435] Te Uru Taumatua "Who are the Tribals?" (2014) <http://www.ngaituhoe.iwi.nz/tribes>.

Tahu have yet to attain full co-governance, Tūhoe have gained a form of power-sharing arrangement that goes well beyond co-governance.

Another point of comparison for these two iwi is that initially, I consider that Tūhoe have taken a much more socially-conscious approach with their settlement funds. Their mana motuhake-driven strategy will see funds directed into social endeavours to better the everyday lives of their people. Their ultimate goal is to have complete interdependence within the rohe, and they are using their settlement funds to achieve this. Tūhoe have combined all of their endeavours, including their stakes in fisheries and the Central North Island Forests, into one entity, Te Uru Taumatua, in order to achieve this goal. In comparison, a large focus of Ngāi Tahu's strategy has always been to acquire property and build their commercial influence. TRONT has split its endeavours into various commercial arms and has taken a more capitalist long term strategy. This commercial influence has contributed to the increase of influence in the Canterbury region.

Although only two years into their arrangements with the Crown, I believe that Tūhoe have been much more visibly active in promoting the interests of their people with their power sharing arrangement than Ngāi Tahu. While Tūhoe's approach is admirable, if they are to achieve the large scale goals that they have for full self-reliance they may wish to take a leaf out of Ngāi Tahu's book and work on growing their Treaty quantum so they do not whittle this away. Ngāi Tahu and Tūhoe are two iwi who have taken diverse paths. I consider that the efforts of both iwi prove that co-governance and co-management arrangements are used as method for the Crown to devolve as much or as little

power as it wishes to do so, and I believe that the concept will remain one that is easily mouldable to suit the agenda of the Crown.

8.2 Legal Personality

The concept of legal personality has been a crucial focus for both Ngāi Tahu and Tūhoe in attaining their respective resource management power sharing arrangements. Ngāi Tahu regained their own tribal legal personality, and Tūhoe were given a governance arrangement that acts as a guardian for the new legal personality that is Te Urewera. Tūhoe have not regained their own tribal legal personality as Ngāi Tahu has. Nonetheless, Tūhoetanga sees Te Urewera and Tūhoe as an indivisible unit, and therefore the bestowment of legal personality onto Te Urewera is a significant recognition of the tribe's own mana and identity. I conclude, therefore, that each conferral of legal personality has been a pivotal part of building successful resource management power sharing capacity for the iwi in question.

The recognition of legal personality is the acknowledgment of the tikanga concept of mana, in a mainstream legal system. I believe that the legal personality of an entity mirrors the inherent rangatiratanga that the entity has. I consider that the government's acknowledgement of the existence of the tribe that is Ngāi Tahu, and the personality of the natural area that is Te Urewera, therefore reflects that these entities exist in their own right and have their own mana. Under tikanga principles as discussed in Chapter 5, recognising mana is highly important. For Māori, the recognition of legal personality therefore carries substantial weight.

I posit that a successful co-governance style arrangement sees Iwi and the Crown at an equal level, participating in a resource management power sharing arrangement. If the Crown acknowledges the mana of an iwi through the recognition of legal personality, then both parties to that co-governance arrangement are at the same level of importance in the arrangement. Two of the biggest iwi in the country, Ngāi Tahu and Waikato-Tainui, have had their legal personality recognised. Whanganui River Iwi see the Whanganui River as an inseparable part of the iwi, just as Tūhoe see Te Urewera as an indivisible part of their tribal identity. I believe that the recognition of the legal personality of these two natural areas therefore recognises the mana of these tribes in a different way.

I consider that a power sharing arrangement where legal personality has been recognised is a more equal and valid arrangement than one where this concept is absent. Thus, for a future co-governance-style arrangement to truly be equal and successful, legal personality, either to the tribe in question or the area being governed, should be applied. I believe that this kind of arrangement appears to truly recognise the mana of the tribe, and sets the Crown and the iwi at a more equal. Legal personality is not found in other power sharing arrangements in New Zealand, but it is present in the biggest and most ambitious of these schemes, therefore I believe that it is a pivotal element for a successful Treaty-based partnership in future arrangements.

8.3 Pitfalls of co-governance

As part of the research for this thesis, I conducted socio-legal semi-structured interviews with stakeholders from both iwi and local authorities. From these

interviews it became clear that co-governance arrangements were not always a perfect means for delivering results for both iwi and authorities. The following concerns were raised in multiple interviews. I contend that reducing these pitfalls would make future co-governance style arrangements more effective.

8.3.1 Capacity

During the interviews I conducted, it was acknowledged by both iwi and local authorities that capacity is a big issue for tribes. Whereas local government bodies can employ a team of planners, architects, environmental consultants, and lawyers, often tribes have two or three people who are filling multiple roles.[436] Rex Williams states "Ngāi Tahu don't seem to have the whole range of support staff. Their efforts aren't as good as they could be because they don't have the resources to match the councils".[437] I think that this is a fair observation to make, as councils are funded by the tax payer, and iwi are self-funded.

In order to build capacity for effective engagement in collaborative governance, iwi will need to invest in their people. Anake Goodall states:[438]

> We've got to be asking the hard questions like, what are we doing to identify and train a pipeline of human talent? The tools, co-governance and co-management, are really important, but it will only ever be anything over time if we can sustain it and it comes back to the human talent. … There's a real burden, I think, in

[436]Interview with Stephen Lamb, Manager Natural Resources Policy, Bay of Plenty Regional Council, (Rachael Harris, 17 February 2014).

[437] Williams, above n 29.

[438] Goodall, above n 53.

> these tribal groups, to help educate young people and train young people so they can step up and discharge their treaty responsibility. It's all very well to tell the government, oh you owe us this, but we have an equal responsibility. I think tangata whenua are the tuākana in the Treaty relationship because we were here first, so how does the tuākana discharge its responsibilities? It's a bloody big investment.

Taking into account Goodall's remarks, the question must be asked as to how to remedy the situation. I believe that there are no better representatives for tribal interests than members of the iwi concerned. Rawinia Higgins has also highlighted the need to get the right people on the ground.[439] This is an intergenerational responsibility, and as Goodall observes, it is reflective of the nature of the Treaty relationship. I consider, therefore, that an effective co-governance scheme must have a pipeline of iwi talent who can take charge of their iwi responsibility to effectively discharge their obligation. Human resources must be a crucial part of any successful future co-governance scheme. I posit that iwi looking to build co-governance capacity must be careful to build their iwi human resource pool at the same time as building the legislative framework for co-governance. If the formal framework for a co-governance style arrangement exists but the iwi cannot produce the people required to do the job, I believe that such an arrangement will be ineffective.

8.3.2 Cost

One of the complaints that have arisen from tribal members is the cost of being involved in co-management and co-governance schemes. Prior to the

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[439] Higgins, above n 329.

introduction of such a scheme, these roles were predominately undertaken by local and regional governance bodies, and were therefore funded by taxpayer money. When a resource management power sharing regime is established, the Crown officials that sit on such a board remain on taxpayer funded salaries; however, tangata whenua representatives are not funded by the taxpayer. O'Regan observes that "Māori participation might involve taxi chits, but on the whole the community expects that that will be provided by the Māori side".[440] Māori participation will therefore be funded by the tribal entities that have been established to manage Treaty funds.

For some, it seems counter-intuitive to spend tribal money on a job that was being funded by the Crown previously. Treaty settlement funds were hard-won for iwi, and there is a desire to manage them in the most efficient way possible. Using them to pay for a co-governance or co-management arrangement may be seen to be a drain on resources. Therefore, an effective future co-governance scheme should see the iwi representatives funded by the Crown also, in order to ensure equality for both sides. This would perhaps be politically unpopular, but would be one method to ensure a productive co-governance arrangement that each party can contribute to in a meaningful way. However, I consider that the counter-argument to this is that Crown funding could potentially undermine the partnership aspect of co-governance, as Iwi representatives may in some ways be beholden to the Crown if they are being funded by it. I suspect, therefore, that this will remain a contended issue for some time to come.

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[440] O'Regan, above n 173.

8.3.3 Aligning perspectives and politics

Māori and the Crown bring different perspectives to governance, and these perspectives can be hard to align. One concept is determining the measure of 'good governance'. What is 'Good governance' can be hard to define, and Pākehā and Māori will take different views. Skelton, who has long term governance experience in a variety of roles, believes you can't define the term at all, preferring instead to give a description. He notes that governance:[441]

> Includes tolerance, understanding, being knowledgeable about the matters that you are being put in place to govern, and being fair about the way you administer your governance role. … Being tolerant of other people's views and trying to work out a solution to problems is probably the single biggest attribute that good governors should have and develop.

Skelton's colleague, Caygill takes a more theoretical angle than Skelton. Caygill sees good governance from a philosophical viewpoint, stating that

> Good governance involves identifying and focusing on the relevant objectives: why are we here. … To think about the purposes of the organisation, whether those are being fulfilled, whether resources are being marshalled to those ends.

These two Commissioners both take different approaches to their roles in ensuring best governance despite undertaking much the same role. I believe that this reflects the complex nature of such arrangements.

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[441] Skelton, above n 223.

For O'Regan, 'good governance' is much simpler, and just means "Māori control of Māori things". Co-governance in New Zealand brings both Māori and Pākehā to the table to decide crucial governance decisions. I consider that both ethnicities will be rooted in a different cultural context, and as such, what is considered 'good governance' will vary. This could cause problems at the boardroom table as iwi and Crown stakeholders grapple with what the true issues are.

Another challenging issue is the impact of intra-tribal politics. Several ECAN Commissioners that the author spoke to highlighted the difficulties that they face when they are not presented with a united Ngāi Tahu front. Williams has noted that the Commissioners find the divisions between the Ngāi Tahu rūnanga to be frustrating at times.[442] I consider that one way of delivering an effective future co-governance scheme would be to maintain a united front when dealing with council officials.

8.4 Co-governance in the future

The 2014 Waitangi Tribunal report on the Treaty of Waitangi and the Declaration of Independence produced a result which was considered to be groundbreaking.[443] The report stated that iwi had never intended to give up sovereignty in New Zealand, in contrast to the traditional understanding of Treaty jurisprudence. This report suggested that a shift of power in New

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[442] Williams, above n 29.

[443] Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Delcaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington, 2014).

Zealand government and governance needed to occur to rectify current arrangements to reflect the 50/50 nature of the Treaty partnership.[444]

I contend that co-governance arrangements may therefore become more commonplace following the report, as the government looks for politically palatable ways to respond to the report without upsetting the status quo. So far, the government's response to the report has been neutral, with Treaty of Waitangi Negotiations Minister Chris Finlayson stating "The tribunal doesn't reach any conclusion regarding the sovereignty the Crown exercises in New Zealand. Nor does it address the other events considered part of the Crown's acquisition of sovereignty or how the treaty relationship should operate today".[445] I consider this to be a non-committal response that the government is using to dodge responsibility.

No action has yet been taken by the government in response to the report. However, as co-governance arrangements are already in existence and have been accepted as a functional way of engaging Maori as Treaty partners in resource management, I believe that they may be put forward by the government as a method to deliver the Treaty relationship that the Waitangi Tribunal report in question demands. This thesis has shown that the Crown uses co-governance and co-management arrangements as a mouldable vessel into which it can pour as much or as little authority as it likes. Thus I consider

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[444] Bryce Edwards "Get ready for more biculturalism in politics" *New Zealand Herald* (Online edition, 21 November 2014) < www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11362274>.

[445] Katie Kenny "Maori did not give up sovereignty: Waitangi Tribunal" (Stuff.co.nz, 14 November 2014) < http://www.stuff.co.nz/national/politics/63196127/Maori-did-not-give-up-sovereignty-Waitangi-Tribunal>.

that co-governance schemes may be used as a future compromise to settle the issues raised by the report, rather than more radical options such as 50/50 Maori/Crown government proposed by the Tribunal.

In November 2014, the Mayor of New Plymouth received criticism for suggesting that Māori dominated councils could be implemented.[446] Designated Māori seats are already in place at a regional governance level in the BOP and Waikato. Nelson City Council has also decided to create a Māori ward, a move that has received support from the Human Rights Commission.[447] In the long term future I believe this may well become more commonplace. I consider that regional governance bodies need to engage with Māori in a more meaningful way, and this could be one method of ensuring Treaty partnership obligations are met.

The Tūhoe Treaty Settlement gives a significant level of governance power to the iwi, and I consider that this has the effect of changing the face of co-governance. The governance arrangements put in place by the settlement legislation allow Tūhoe effective control over their region and their self-determination in a way that has not primarily existed. Other iwi are already looking to the Tūhoe settlement as the 'gold standard', and those who have already signed deals with the government are now looking to the "full and final" nature of their settlement and considering their options as to whether

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[446] Taryn Utiger, "Mayor calls for half Māori Councils" *Taranaki Daily News* (Online ed, 24 Novemeber 2014) <www.stuff.co.nz/national/politics/63475174/Mayor-calls-for-half-Maori-councils>.

[447] Human Rights Commission Newsletter "Nelson and Waikato agree to establish Māori seats on council" (November 2011) < http://www.hrc.co.nz/newsletters/whitiwhiti-korero/english/2011/11/nelson-and-waikato-agree-to-establish-maori-seats-on-council/>.

they, too, can apply the 'legal personality' concept to their lands. Despite the "full and final" nature of Settlement, the Crown is prepared to adjust the terms of their relationship with Iwi in order to meet certain objectives. An example of this can be found in Northland, where Te Roroa are to be given further yet-to-be-determined rights in order to facilitate National Park status for Waipoua Forest, despite settling in 2008.[448] A new form of governance has been created for Tūhoe, and while it goes further than co-governance has ever gone before I believe there is potential for co-governance to be developed further.

Although Wood has rejected the applicability of legal personality to anything that is not a major area of national significance, I believe that the nature of this arrangement means that other iwi will want to follow in the path of Tūhoe.[449] I posit that future co-governance arrangements may well reflect the 'legal personality' concept that deals with the politically thorny issue of ownership in such a way that diplomatically puts the ownership of the entity in question beyond the ownership of any party. I thus conclude that should the Whanganui River and the Te Urewera legal personality arrangements prove to be effective, it is likely that this will become an acceptable and commonplace factor in future co-governance arrangements.

I consider that the Ngāi Tahu path to co-governance also has the potential to change the face of co-governance. While the iwi has yet to fully engage in co-

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[448] Department of Conservation, "Kauri National Park Proposal Investigation: Report to NZCA" <www.doc.govt.nz/Documents/getting-involved/consultations/current-consultations/northland/kauri-national-park/kauri-national-park-proposal-investigation-report-to-nzca-june-2012.pdf>.

[449] Wood, above n 350.

governance, the co-management and multi-governance arrangements that they have developed have gained the iwi a significant amount of regional influence. I believe that of particular note is the way that the iwi are changing how Christchurch will look in the future through their rebuild co-management arrangements. Iwi in future natural disaster areas may well become natural partners for local and central government bodies in the area in question if it can be proved that such engagement is constructive and positive for a Treaty of Waitangi partnership. I think that if Ngāi Tahu can show that their engagement in the rebuild is productive, they may well be engaged in other areas of their rohe in similar large-scale urban redevelopment projects in the future.

Of great potential to Ngāi Tahu is the new regional governance structure that will be created as a result of ECAN changing form. I consider that if Ngāi Tahu can gain a seat at the regional governance table they can continue to build their influence. One potential structure could be one or more permanent Ngāi Tahu representatives on the council who answers to the Papatipu Rūnanga. Although s 33 of the RMA has yet to be utilised, with the shift in attitudes towards giving iwi more governance authority within their rohe, and the upcoming vacuum in Canterbury governance, now could be the time to see a s 33 transfer of powers to Rūnanga. I believe that if a s 33 delegation of powers was given to Papatipu Rūnanga to exercise RMA functions over traditional areas of their rohe, a degree of mana motuhake would be returned to the Papatipu Rūnanga. In turn, these Rūnanga could then answer to the permanent Ngāi Tahu delegate on the regional council, giving both Rūnanga a voice to the Council, and the Council a conduit to Rūnanga. If this was to be

proved productive and functional, I posit that it could potentially be a method of producing Crown/Iwi partnerships across the country.

What is clear from how both these iwi are engaging in co-governance and co-management arrangements is that the general trend across the country is to engage Iwi more in regional governance. This is reflective of the nature of Treaty Partnerships. The 2014 Waitangi Tribunal report will no doubt see an increase in the implementation of such partnerships. In the future, iwi-dominated governance boards such as in Te Urewera, or permanent iwi representatives on regional councils, could become the norm.

With all of the previously discussed factors taken into consideration, one thing must not be ignored – the agenda and the actions of the Crown. I believe that it is unarguable that both Ngāi Tahu and Tūhoe have made significant progress in their resource management power sharing regimes. The agreement between the Crown and Tūhoe shows the power of long term negotiation and creative thinking with regards to resource management and Treaty settlements. However, I consider that the Crown continues to hold the ultimate say in these relationships. As an example of this power dynamic, when Key stated that a transfer of the ownership of Te Urewera was no longer on the table, this was a non-negotiable point. Power sharing arrangements provide the Crown with a useful political tool to devolve as much or as little governance power as it wishes. The Crown gives away assets and concedes strong alternative governance and management arrangements only when it suits, and when there is little in the way of political risk. This is evident in Te Urewera where there is a slim resource base and a large Tūhoe population, and therefore little competition to such a governance structure. While the face of co-governance

will continue to change, I conclude it will ultimately be determined by the agenda of whichever political party is in government at the time.

There can be no clinical definitive form of successful co-governance arrangement that can be applied to every iwi or hapū across the country, as discussed in Chapter 5 and evident through the examples I have provided in this thesis. Each iwi is different in terms of makeup, rohe, and tikanga. Additionally, what is considered 'successful' for iwi will differ to the markers of 'success' held by the Crown. However I believe that the examples that have been put forward by Ngāi Tahu and Tūhoe will no doubt continue to influence the resource management power sharing arrangements that iwi form with the Crown across the country. I conclude, therefore, that a 21st Century Aotearoa should see more co-governance and majority-Iwi governance entities at a regional level that bring tikanga Maori into a resource management power sharing context. A successful, forward-thinking co-governance arrangement will reflect the true partnership nature of the Treaty of Waitangi.

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10 Appendix One: List of Interview Subjects

- Kataraina Belshaw, Strategic Engagement Manager, Bay of Plenty Regional Council[450]
- David Caygill, Environment Canterbury Commissioner
- Donald Couch, Ngāi Tahu, Environment Canterbury Commissioner
- Anake Goodall, Ngāi Tahu negotiator, member of Te Waihora Co-governance group
- Nigel Harris, Ngāi Tūāhuriri member[451]
- Dr Rawinia Higgins, Ngāi Tūhoe, Head of Māori Studies, Victoria University of Wellington
- Stephen Lamb, Manager Natural Resources Policy
- Patrick McGarvey, Ngāi Tuhoe, Te Uru Taumatua Board Member452
- Sir Tipene O'Regan, Ngāi Tahu negotiator and Upoku
- Tony Sewell, the CEO of Ngāi Tahu Property
- Professor Peter Skelton,
- Dr Te Maire Tau, Ngāi Tūāhuriri member, and head of the Ngāi Tahu Research Centre

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[450] Kataraina Belshaw and Stephen Lamb were interviewed together. This interview was lost due to equipment malfunction but some of the spirit of their interview is referenced.

[451] This interview was not recorded or transcribed at the request of the participant.

[452] This interview was lost due to equipment malfunction.

- Rex Williams, Environment Canterbury Commissioner

- Dr John Wood, Chief Crown Negotiator, Tūhoe and Whanganui River Settlements