MAORI ISSUES PROMINENT IN MANGAKAHIA RIVER IRRIGATION DECISION

By Michael Savage, Barrister

The recent decision of the Planning Tribunal (*Mangakahia Maori Komiti & Others v. The Northland Regional Council - Decision No. A107/95)* is notable for the range and complexity of issues canvassed, and particularly for the prominence of Maori issues.

It represents a practical application of the provisions of Part II of the Resource Management Act 1991 where substantive Maori issues are prominent; and in particular uses the term of a consent in weighing biocentric and anthropocentric interests.

The case concerned applications by 14 dairy farmers to take water from the Mangakahia River for the irrigation of nearly 1,200 hectares of pasture. The Northland Regional Council granted consent. The applicants appealed certain of the conditions imposed, relating to the volume of water allocated, minimum flow regime for the river and the term of consent. In relation to the term, the Regional Council (with 2 exceptions) granted terms of just over four and half years. The applicants, however, sought a 10 year term of consent to provide what they considered to be an acceptable level of security in light of the very substantial capital investment in the project.

The Mangakahia Maori Komiti, effectively representing the various Marae located in the Mangakahia Valley, also appealed seeking that consent be refused altogether. The hearing before the Tribunal occupied a total of 11 days, including 2 complete days on the Marae, where much of the case was presented in Maori with the aid of an interpreter.

Tonkin and Taylor assisted the applicants and presented detailed hydrological and scientific evidence relating to the physical state of the river and its environment. The applicants also presented substantial evidence in relation to the economic, social and environmental benefits claimed for the irrigation scheme.

Technical and scientific evidence in opposition to the applicant's case was presented on behalf of the Regional Council, Maori Komiti and the Department of Conservation, addressing principally the potential effects of catchment afforestation on water availability, water temperature effects during low flow periods and whether existing data in relation to the river necessitated a cautionary approach to the applications. While that evidence was of relevance in the overall outcome, the Tribunal, in broad terms, accepted the evidence presented by the applicants commenting that:

> "The applicants/second appellants have come to the Tribunal at this stage seeking consent in circumstances where a comprehensive case has been presented, plainly revealing the exertion of much expert effort in its preparation."

This is reflected in the Tribunal's acceptance of the low flow regime and water volumes sought by the applicants and consequent amendments made to the conditions of consent imposed by the Regional Council.

While the applicants' technical evidence was substantially accepted, the Tribunal still needed to address the viewpoint of the Tangata Whenua from a cultural and spiritual viewpoint, issues which the Tribunal referred to as "prominent in the present case".

Witnesses called by the Maori Komiti stated that they took the river to be a source of well-being - not only in terms of the physical, but as an important element in their spiritual well-being. They expressed their strong concerns that implementation of the irrigation proposal would not only adversely affect the river in physical terms, but that it would run counter to their profound spiritual and cultural attachment to the river and undermine its mana and status as a taonga of great significance to the Marae communities of the area.

As the Tribunal observed,

> ".....viewed realistically, the irrigation committee (applicants) and the Komiti were (and remained before us) directly opposed in their stances - the one seeking consent to extract water from the river pursuant to an irrigation scheme along lines recommended by the irrigation committee's consultants - the other seeking that no such scheme proceed on cultural, spiritual and other related grounds."

Or to put that in the context of the Act:

> "In seeking to promote the Act's purpose, it quickly became apparent that the 'deliberate openness' of legislation, as commented on by Greig J in the Port Marlborough case [1994] NZRMA70 at 86, may require the decision-maker to arrive at a judgment in circumstances where competing, indeed conflicting, values exist. On the one hand, it is said that to uphold the (applicants') case, or even the more restrictive basis of the consent represented by the Council's decision, would involve a failure to provide for the well-being of the Tangata Whenua, particularly from a cultural standpoint, bearing in mind section 6(e), 7(a) and 8. On the other hand, it is said that consent on the basis sought by the second appellants would provide, not just for their well-being, but for that of the wider Northland community from an economic perspective; further, that abstractions from the river will be conservatively managed (against a background of comprehensive conditions, including a strict monitoring regime) so as to protect the river as a resource in a way, and at a rate, which will enable Maori values and concerns to be suitably recognised and provided for."

There was, then, a need to reconcile those competing claims against the background of Part II of the Act. The approach of the Tribunal to this

problem is perhaps best reflected in the following passage from the decision:

> "In reality, this case calls for a difficult judgment to be made in relation to the anthropocentric and bio centric aspects of consideration. Some cases (such as this) are of singular difficulty because section 5 leaves it to the decision-maker at the end of the day to make what is, in essence, a value judgment based on the weighing of considerations that may, in effect, be irreconcilable. Hence, one may argue for the application of a strategic approach to sustainability, with the application of section 5 being clarified via the 'rigour of thinking' to be applied by the planning process which the Act embraces".

On section 5 and addressing the assertion that paragraphs (a), (b) and (c) of section 5(2) are sometimes spoken of as 'bottom line' requirements, the Tribunal said that not too much reliance should be placed on such a catchphrase. It was preferable to approach the three paragraphs on the footing that each was to be afforded full significance and applied according to the circumstances of the particular case, so that promotion of the Act's purpose was effectively achieved.

In approaching section 6(e) ("The relationship of Maori and this culture and traditions with their ancestral lands, water, sites, Waahi Tapu and other taonga"); section 7(a) ("Kaitiakitanga") and section 8 (requiring that the principles of the Treaty be taken into account), the Tribunal considered that those provisions were to be read "in context against the background of Part II as a whole and how it is framed. Sections 6, 7 and 8 are intended to be invoked and applied in the promotion of the Act's purpose expressed in section 5, not in counterbalance to that end".

The Tribunal concluded that to refuse consent altogether would be unjustified, allowing for all that was said for the Komiti. On the other hand, it was the view of a majority of the members of the Tribunal, that to grant the applicants all that they sought would be an insufficient recognition of the special relationship of the Tangata Whenua with the river.

Having accepted the applicants' case in relation to the volume of water required for the irrigation scheme and appropriate low flow regime, the Tribunal turned to consider whether the 10 year term of consent sought by the applicants was also appropriate. On the one hand the applicants maintained that a 10 year term with appropriate review periods under section 128 of the Act was appropriate and would ensure that the nature and quality of the river would be properly maintained and safeguarded. One member of the Tribunal considered that the provisions of the Act pertaining the Tangata Whenua and their interests, cultural and otherwise, would be met with a 10 year term and conditions allowing a review at the 5 year point pursuant to section 128 of the Act. This conclusion was influenced in part by the provision for Maori representation on a community monitoring and liaison panel proposed by the applicants themselves.

However, no doubt reflecting the difficult judgment to be made between these competing interests, the Tribunal by a majority, decided that the periods of consents should be limited to 6 years, with provision for the possibility of a review of conditions after 3 years. Consent for this period was considered to give due recognition and provision for Maori interests in terms of section 6, 7 and 8 of the Act. A 'fresh look' at the proposal was then warranted, particularly in view of the river's central importance and status in the eyes of the tangata whenua.

CONCLUSION

The decision is perhaps one of the first that directly addresses the substantive Maori issues in Part II of the Act (as opposed to the procedural) in circumstances where a proposal has been found generally to be otherwise acceptable. While not referred to in this article, the decision also contains useful passages relating to consultation, broadly in line with cases such as *Ngatiwai Trust Board v Whangarei District Council, Rural Management Limited v Banks Peninsula District Council*, and *Whakarewarewa Village Charitable Trust v. Rotorua District Council.*