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# Of Kuia's Garden:
## Hydroelectricity, Iwi, and Framing the War for Whanganui River Power

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"Kuia" is the Maori term for grandmother and is used as an appellation of endearment by the tribal entities along the Whanganui River. On an ethereal level, the term is translated to ancestress, which reflects the way a River, as a dynamic system, creates spaces for a plethora of communities to thrive. As a queen tends her garden, the River governs her basin through ebb and flow. As an acknowledged legal entity, I thank her for providing me with the stories and a unique case to study.

To Ngāti Rangi Trust and Whanganui River Board Trust, thank you for providing me with the documents and guidance to compile this work. Special thanks to Che Wilson, Gerrard Albert, Rose White-Tahuparae, and Hannah Rainforth for the wealth of knowledge you all have shared and familiarizing me with the Whanganui River.

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**Abstract**

Rivers are iconic landscapes of flux, unity, and conflict. Often they are places where cohesive relationships are created and fortified through the trade of goods as well as "discursive frames" or knowledge systems. On the other hand, such sites are also painted by the struggle for power and protest. This timeless paradox embodies the international concern for water wars, which Doremus et al. (2003) coined as "culture wars". Along the ancestral Whanganui River, hostility between stakeholders arises from the dominance of one discursive community over the other. Ngāti Rangi and Genesis Energy fought for ten years under the Resource Management Act of 1991 (RMA) yet, were able to negotiate an out of court settlement in 2010. So what triggered this engagement and what frames were most apparent on the legal landscape? This thesis explores the nature of water governance against the changing background of discursive frames and to examine the interface between philosophy, practice, and policy in terms of litigation, especially as exemplified by tribal entity Ngāti Rangi and state-owned hydroelectric company Genesis Energy. In an effort to examine influential frames during the trial, I applied a frame analysis. I analyzed how the RMA defined "sustainable management" as well as their three primary principles: matters of national importance, decision preferences, and the Treaty of Waitangi. Then, I examined each stakeholder's legal submission to the Environment Court and their annual reports to inform each stakeholder's philosophy and practice. I was able to conclude which frames were most dominant in the trial by analyzing the judicial verdict and the settlement agreement based on the terms above. Negotiations between formal law and cultural norms serve as a crucible for change in water governance frameworks, though in practice they are mutually exclusive. Despite imbalances in water resource practices, litigation avails a pathway towards the reconciliation of discursive clash and hegemonic improprieties.

As the River transcends territories and privatized properties, this image captures the way different discursive communities are required to engage on a cultural, social, economic, political, and legal level. Here indeed is the Whanganui River in New Zealand.

# INTRODUCTION

*"Ko au te awa, ko te awa ko au. I am the River and the River is me."*

--Tahuparae

Her nostalgic ballads have enchanted the land of the long white cloud and all its creation from time immemorial. Rising on the north-west flank of Mt. Tongariro on the northern island of New Zealand, with great care, she weaves her way to the Tasman Sea at Whanganui City, while simultaneously creating and recreating fruitful landscapes for all to dwell in. Kuia[1], as she is referred to by local tribal entity Te Atihaunui a Paparangi[2], share in a sacred, genealogical, and symbiotic relationship with her indigenous stewards. As a phenomenal force of this biosphere, 'she', is commonly referred to as the ancestral Whanganui River[3]. Another primary stakeholder, Genesis Energy, shares in the splendor of the River's bounty by exerting its authority with that of an ironclad fist. As a nation-state owned power-corporation, its grand hydroelectric power scheme, harnesses and refines the River's greatest hydraulic potential to produce a socially optimal good for all. The deep polarity between these interest groups has sparked New Zealand's most extensive set of legal proceedings throughout the 20th – 21st century before the Native Land Court, Environment Court, Maori Appellate Court, and Court of Appeal. To the wider community, she merely speaks in riffles and runs—but to the 'River people', as Te Atihaunui a Paparangi are nationally acknowledged, she need only whisper her needs through everyday ebb and flow. Now, after nearly 200 years of litigation, the rest of the world is finally ready to listen as New Zealand's

[1] Female elder

[2] Te Atihaunui a Pāpārangi include, but are not limited to Tamaupoko, Hinengakau and Tupoho, Ngāti Hauā, Ngāti Rangi and Tamahaki. The tribal area extends into the regions or districts of the following local authorities. This implies that the tribe has asserted a level of authority in each of these local authorities and should be consulted on Resource Management Act matters if they impact on those areas.

[3] Henceforth I will refer Whanganui River with an 'R' instead of an 'r' to acknowledge her as a legal entity with 'standing' in her own right.

largest navigable river has acquired something no other river in the country—and possibly the world—yet has: a legal platform to speak.

On August 30, 2012, the *New Zealand Herald* announced a structural agreement between the Crown[4] and Te Atihaunui a Paparangi that would recognize the River as an integrated legal entity with affairs and rights.[5] *Te Awa Tupua,* the River's lawful title, is afforded two guardians, one appointed by the tribal confederation and the other by the Crown. Minister for Treaty of Waitangi Negotiations Christopher Finlayson deemed the signing a historical event saying, "Whanganui River iwi have sought to protect the river and have their interest acknowledged by the Crown through the legal system since 1873. They pursued this objective in one of New Zealand's longest running court cases."[6] With this in mind, the Tu-tohu Whakatupua agreement[7] was seen as a victorious milestone that emerged from a waterscape fraught with cultural politics, negotiations, and combat.

The Whanganui River incident speaks to current discussions between legal scholars regarding whether or not rivers and other resources should be considered as existing right holders. In most common law systems, especially those who govern substantial river basins, such resources lack 'standing'. Standing is a term used to classify the ability for a party to bring a lawsuit against another party based on their

[4] The Crown is a corporation that, in the Commonwealth realms and any of its provincial or state sub-divisions, represents the legal embodiment of executive, legislative, or judicial governance. The concept spread via British colonization and is now rooted in the legal lexicon of the other 15 independent realms.
[5] Kate Shuttleworth, "Agreement entitles Whanganui River to legal identity," *New Zealand Herald,* August 30. Accessed December 20, 2012.
http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586
[6] Shuttleworth, "Agreement entitles Whanganui River to legal identity."
[7] The agreement that refers to Whanganui River as a legal entity and to be protected by appointed guardians. It states that Whanganui tribal values will hold primary precedence in a final settlement where both Crown and tribe will appoint a guardian each that will work closely to advocate the River's best interest.

stake in the outcome.[8] Though uncommon, from the 1970s onward, the world saw the resurgence of the successive conference of rights to a natural entity.[9] In a renowned legal essay *Should Trees Have Standing?* Christopher D. Stone discusses the ethical implications of the *unthinkable* while earnestly proposing that natural resources have inherent rights and that we should afford "legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment".[10] Furthermore, to protect these parties, we must appoint guardians to safeguard these 'natural entities' similar to the way a child's rights are protected by legal guardians or the way corporations are managed by legal counsel.[11] Such legal-operation aspects are exercised in *Earthjustice v. Hawaiian Commercial & Sugar Company/Wailuku Water Company,* where non-profit organization Earthjustice advocates for the instream values and Kanaka Maoli[12] practitioner rights that are acceded to in the State Water Code.[13] Another example is the Law of the Rights of Mother Earth, a Bolivian law passed in December 2010 to revolutionize resource management frameworks and urban planning by acknowledging the land's intrinsic value.[14] Finally, in New Zealand, or traditionally known as Aotearoa[15], Parliament instituted a new environmental planning paradigm for the nation entitled the Resource Management Act of 1991 (RMA).[16] As a part of the process, the RMA requires that certain uses of natural resources require authorization

[8] West Group, *West's Encyclopedia of American Law* (Minneapolis/St. Paul: West Publishing Company, 1998).
[9] Kenneth Gould and Tammy Lewis, *Twenty Lessons in Environmental Sociology* (New York: Oxford University Press, 2009), 211.
[10] Christopher Stone and Garrett James Hardin, *Should Trees Have Standing*: *Toward Legal Rights for Natural Objects* (Los Altos/California: William Kaufman INC, 1997), 16-17.
[11] Stone and Hardin, *Should Trees Have Standing, 26.*
[12] Native Hawaiian
[13] Ph.D Kapua'ala Sproat, "Wai Through Kanawai: Water for Hawaii's Streams and Justice for Hawaiian Communities," *Marquette Law Review* (2011): 129.
[14] Vidal, "Bolivia enshrines natural world's rights with equal status for Mother Earth."
[15] I will now refer to New Zealand as Aotearoa as a part of the effort to decolonize my methodologies in writing this thesis.
[16] Ministry for the Environment, *Implications of the Sustainable Development Programme of Action,* by Bob Frame and Maurice Marquardt, LC0607/015, (Wellington, NZ: Landcare Research, 2006), 5.

by a "resource consent" through the approval of an Assessment of Environmental Effects—similar to the U.S. Environmental Impact Assessment. Though the latter environmental contracts serve as a beacon of light for multi-use models and "sustainable" planning, Stone cautions against the "seamless web": the resistance and repercussions to affording a "thing" "rights".[17] With this in mind, the water governance frameworks that acknowledge the intrinsic value and standing of dynamic systems such as river basins will be met with ignorance and hostility.

Stone's "seamless web" is spun across Whanganui's waterscape as two chief discursive communities defend their values and interests along the River. In 2002, Ngati Rangi Trust, Whanganui River Maori Trust Board and Tamahaki Incorporated Society brought charges against Genesis Energy by disputing the renewal of resource consents for the Tongariro Power Scheme (TPS) in the Environment Court under the RMA.[18] Consequently, the friction between indigenous and neoliberal frames were at odds as one entity sought to safeguard their notions of sustenance, while the other defended their perception of property rights.[19] In the end, both interest groups set aside their differences and negotiated a settlement agreement that abated neoliberal notions of privatization and commoditization to include Maori subsistence and spiritual value. Previous hydroelectric practices founded in liberal individualism approaches have been modified to suit the criteria for regional collectivism. Negotiations between formal law and cultural norms serve as a crucible for change in water governance frameworks, though in practice they are mutually exclusive. Despite imbalances in water resource

[17] Stone and Hardin, *Should Trees Have Standing*, 9.
[18] Ānеta Hinemihi Rāwiri, *Mouri tuī, mouri ora : water for wisdom and life : Ngāti Rangi, the Tongariro Power Scheme and the Resource Management Act 1991 : reconciling indigenous spiritual wellbeing, corporate profit, and the national interest* (Whanganui: Te Atawhai o Te Ao, 2009), 4.
[19] Rāwiri, *Mouri Tuī, mouri ora*,12.

practices, litigation avails a pathway towards the reconciliation of discursive clash and hegemonic improprieties.

Within the context of litigation proceedings, this research explores the role of discursive frames in legal discourse throughout water governance as a means to catalyze each discursive community's ideal waterscape. In examining water war actors from this perspective, one is able to see how an environmental issue is characterized and the way it shapes the broader conversation regarding the issue. Here the Whanganui River case illustrates competing worldviews, specifically between corporations and tribal entities. These worldviews are expressed in different practices and policies. Furthermore, I analyze the ten-year *Ngati Rangi v. Genesis Energy* trial to see how these frames are expressed in philosophy, practice, and policy.

This thesis will investigate the litigation proceedings using the following roadmap: In the first section, I will provide a geographical, ecological, cultural, and legal background of my research site Whanganui, New Zealand. Following this, I will present my primary research questions, the social practice theory that guides my discursive study, and present the qualitative methodology I used in this study. Next, I will describe the RMA's definition of "sustainable management" in article 5 and the document's primary principles as stated in 6, 7, and 8 as they pertain to the trial. Following the policy, I identify each stakeholder's (i.e. Genesis Energy and Ngāti Rangi) discursive theme regarding water governance in the River Basin based on each their philosophy (legal submissions) and water use practice (annual reports). I will then align my findings with that of the Court Opinions to discern the results from the trial. In the discussion section, I will report on what frames I saw most emergent in the proceedings and discuss their meanings. Finally, I will convey the way this litigation process shaped the conditions for the settlement agreement between the two warring

parties. To understand the depth and significance of the *Ngati Rangi v. Genesis Energy* case, the following section sets the stage in regards to the battle for River power in the Whanganui River basin.

# I. MAPPING THE MILLEU

*"In the beginning was the story. Or rather: many stories, of many places, in many voices, pointing toward many ends."*

--William Cronon, *A Place for Stories*

## WHANGANUI RIVER BASIN

*Iwi Oral Tradition*

To situate, I begin with a particular korero[20] of the five ancestral mountains that has been accepted by Whanganui iwi as an essential account to their historical understanding and sense of place in the River basin.

> "Long ago, Maui Tikitiki and his brothers went fishing and hauled up Te Haha Te Whenua, the fish of Maui, the North Island. So mighty was this fish that Maui returned immediately to Hawaiki for help, leaving his awed brothers to safeguard it. In their fear they approached Ranginui, who told them: 'the mana of Te Ika a Maui can be subdued only by a greater mana. I give you Matua Te Mana –Ruapehu, this volcano, rising skywards in the centre of the new land, brought much-needed tranquility. But there was a problem for Ruapehu – loneliness—and it was Ranginui who noticed. Ranginui laid two teardrops at Ruapehu's feet, one of which was to become the Whanganui River; the other becomes a story for other tribes to tell. But Ruapehu's sorrow deepened. He pleaded with Ranginui for companionship and in time Ranginui sent him four friends: Tongariro, guardian of the two teardrops, and Taranaki, custodian of the tapu for the clan of mountains. There was also Ngauruhoe, the servant of these mountain masters, and finally, Pihanga, the maiden mountain. Pihanga was spoken for as Tongariro's bride and the future mother of the continuing line for the mountain enclave. However, Taranaki tempted Pihanga. Eventually, heeding the advice of his brother, Ruapehu, Taranaki wisely but sadly left the enclave. It was the only way he could ensure his tapu remained intact. Taranaki took the pathway that many mortals would later follow, down the course of the Whanganui River. At a western point in the river he struck out towards the coast, settling by the ocean as the guardian of the setting sun. Here he remains, within view of the line of mountains of the central uplands from whom he stands in exile. And the Whanganui River continues to flow from Tongariro and down to the sea."[21]

*Geography and Ecological Significance*

[20] Oral tradition
[21] David Young, *Woven by Water: histories from the Whanganui River* (Wellington: Huia Publishers, 1998), 1.

With a length of 180 miles, the Whanganui River is the country's largest navigable river. Majority of the land on each side of the upper portion of the River are a part of the Whanganui National Park, though the river itself is not part of the park.[22] As seen in Figure 1, the river climbs the northern slopes of Mount Tongariro, one of the three active volcanoes of the central plateau, and close to Lake Rotoaira.[23] The River flows to the northwest before turning southwest at Taumarunui. From here it runs through the rough, bush-clad hill country of the King Country before turning southeast and flowing past the small settlements of Pipiriki and Jerusalem, before reaching the coast at Whanganui.[24] The Whanganui River basin contains a variety of flora species, much of which can be characterized as a Broadleaf and Podocarp forest, while understory species include Crown Fern, Blechnum discolor, and a variety of other ferns and shrubs.[25] With a mixture of alpine rivers, forest groves, rich alluvial soils, swamps, lowland gorges, rolling grasslands, and shifting sand dunes, the River basin is an ecological space of national interest.[26] This claim is reinforced as a seventh of its area is protected under Aotearoa's conservation estate.

There have been numerous environmental problems that characterize the basin. In 1894, Tongariro National Park was established, the oldest park in Aotearoa. With 494 $mi^2$ of area, it is the largest in the region and houses the ancestral volcanoes Ruapehu,

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[22] Horizons Regional Council, *Upper Whanganui River Management Scheme Audit*,11-107. (Manawatu-Wanganui, NZ: Horizons, 2011), 2.

[23] Laurence Cussen, "Notes on the Physiography and Geology of the King Country," in *Transactions of the Royal Society of New Zealand, Volume 2* ed. by Sir James Hector (Wellington: Lyon & Blair Printers, 1887), 316.

[24] Horizons Regional Council, *Whanganui River – Lower Reaches Channel Management*, 11-223. (Manawatu-Wanganui, NZ: Horizons, 2011), 1.

[25] Department of Conservation, *Vegetation monitoring in Whanganui National Park,* by Amy Hawcroft and Sean Husheer, 315, (Wellington, NZ: Publishing Team DOC, 2009), 6.

[26] United Kingdom's State Prosecution Services, *Whanganui Iwi and The Crown: Record of Understanding in relation to Whanganui River Settlement*, (Wellington, NZ: Signed October 2011), http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverROU.pdf

Tongariro, and Ngauruhoe, which are designated world heritage sites. The Whanganui National Park was established in 1986 as a part of a reserve area initiative and is approximately 461 $mi^2$. The original idea for national parks was to base them on recreation and tourism.[27] Ungulates such as deer and goats were released into parks as sport for hunters. Non-native plants such as African feathergrass and nodding thistle were introduced for aesthetics however they are invading pastureland in this heavily agricultural-dependent region. The national park ethic quickly changed from recreation to conservation and from the 1960s, tribes were granted stronger authority in the decision making process regarding the national parks.

*Cultural Landscape*

The Whanganui River Basin is characterized by a diverse cultural landscape, as it has always been an integral transmission for the central North Island.[28] Prior to European colonization, the basin was occupied by major tribal entities Ngāti Tūpoho, Ngāti Tūmango and Ngā Paerangi, hapū (sub-tribes) of Te Āti Haunui-a-Pāpārangi The tribes share a genealogical connection with the River, was their main highway, prime habitat for eel fisheries, and a site for traditional healing.[29] Soon, with the arrival of European settlers, the area surrounding the River's mouth became a major trading post.[30] The major River development was pioneered by Alexander Hatrick, who started the first regular steam-boat service in 1892. From then on, during the early the 20th century the river basin was considered the country's most popular tourist area, attracting thousands of tourists per year. With the completion of the North Island Main

[27] Nancy Swarbrick. 'National parks', Te Ara - the Encyclopedia of New Zealand, updated 30-Jan-13 URL: http://www.TeAra.govt.nz/en/national-parks
[28] David Young, *Woven by Water: histories from the Whanganui River* (Wellington: Huia Publishers, 1998), 34.
[29] Diana Beaglehole. 'Whanganui places - Whanganui River', Te Ara - the Encyclopedia of New Zealand, updated 13-Jul-12 URL: http://www.TeAra.govt.nz/en/whanganui-places/page-5
[30] Beaglehole, "Whanganui places," 5.

Trunk railway, the need for the steamboat route to the north greatly diminished, and the main economic activity of the river area became forestry. The flow of the river has been altered with the diversion of water from the headwaters into Lake Taupo. This may have been a contributing factor to the demise of the raft race and the fact river boats can no longer make the entire trip to Taumarunui during the dryer months. For the same reason, the river has been one of the most fiercely contested regions of the country in claims before the Waitangi Tribunal for the return of tribal lands. In fact the Whanganui River claim is heralded as the longest-running legal case in New Zealand history[5] with petitions and court action in the 1930s, Waitangi Tribunal hearings in the 1990s, especially in protest of the Tongariro Power Scheme.


**Figure 1: The Whanganui River Basin.**[31]

[31] David Young. 'Whanganui tribes - Ancestors', Te Ara - the Encyclopedia of New Zealand, updated 15-Nov-12

*Tongariro Power Scheme*

The Tongariro Power Scheme is located on the central volcanic plateau south of Lake Taupo, generates approximately 1,350,000 MWh of electricity annually, and contributes 4 percent of New Zealand's electricity generation.[32] The scheme and its structures extend from the southern flanks of Mount Ruapehu in the south, to the southern point of Lake Taupo in the north, and along either side of the mountain range formed by Ruapehu, Ngauruhoe and Tongariro. The scheme taps a catchment area of more than 1615 miles.[33]

Water extraction by the Tongariro Power Scheme began in the 1970s despite tribal opposition. By the 1980s, the diversion of the headwaters on both the western and eastern flanks of Mt. Ruapehu resulted in protracted minimum flow proceedings before the Planning Tribunal. In 1994, the Whanganui people were granted urgency to present the Whanganui River Claim to the Waitangi Tribunal in response to the onset of a new planning law framework under the RMA. The diversions are a crucial concern for the tribal entities as the power scheme impedes on their fishing practices, healing rituals, transport, and spiritual connection with the River.

URL: http://www.TeAra.govt.nz/en/map/2174/map-of-the-whanganui-river
[32] [32] Rāwiri, *Mouri Tū, mouri ora*,3.
[33] Ibid, 4.

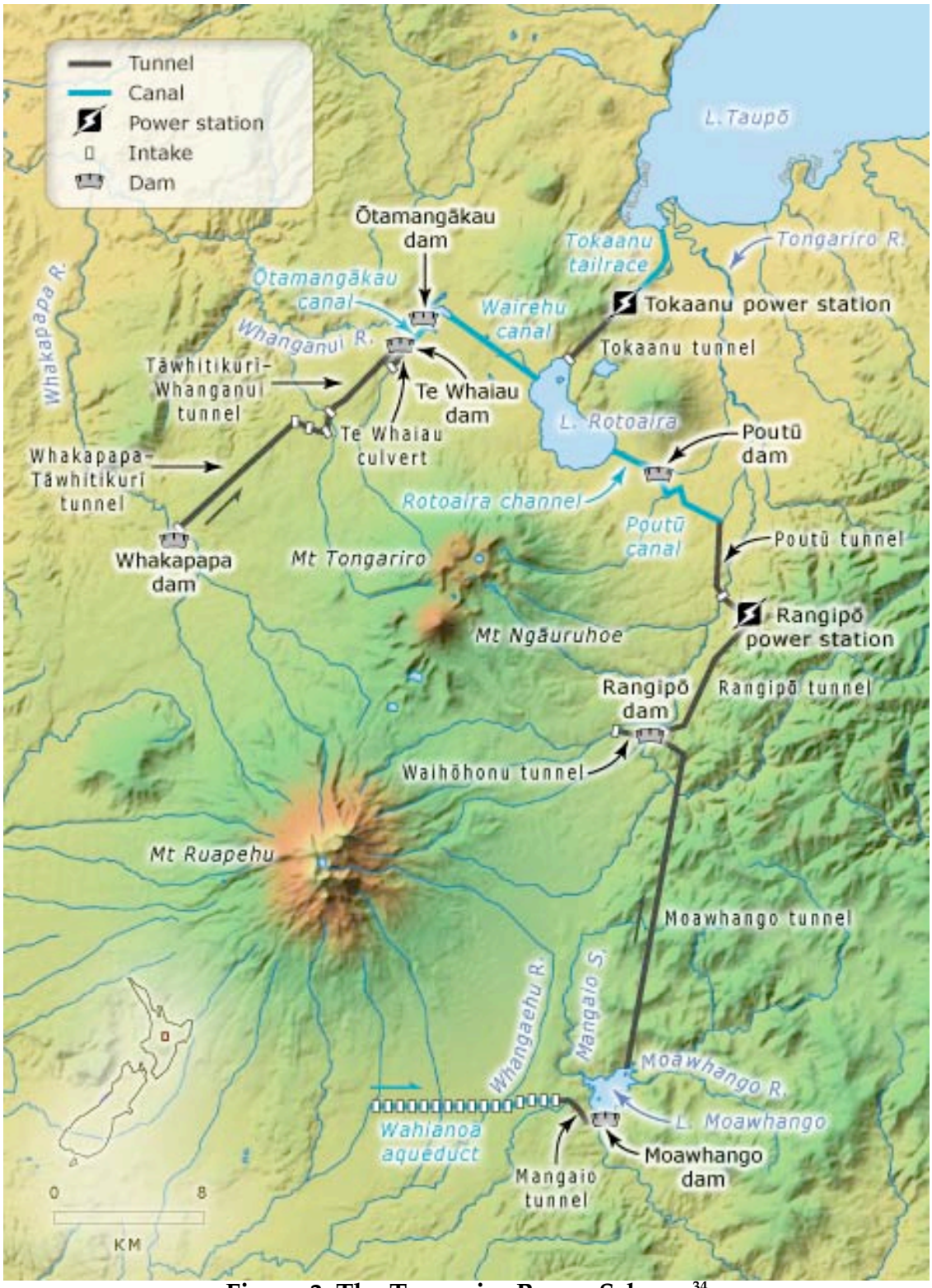


**Figure 2: The Tongariro Power Scheme**[34]

[34] Jock Phillips. 'Bridges and tunnels - Road and utility tunnels', Te Ara - the Encyclopedia of New Zealand, updated 15-Nov-12

*Legal Landscape*

The Whanganui River Basin is an example of a landscape governed by legal pluralism. Legal pluralism is a space where multiple legal systems occur in a regional area. These types of systems are indicative of colonialism, where the laws of a former colonial authority are simultaneously functioning alongside traditional legal systems.[35] This is reflected in the Treaty of Waitangi, which is the country's founding document. The Treaty of Waitangi is a central theme in New Zealand's resource management legislation. The Māori have become discouraged with the implementation of these provisions and are applying pressure through the courts to have their expectations met. The Ministry is trying to develop practical ideas to help Māori and the government reach their goal of improving New Zealand's resource management regime. To meet its obligations, the Ministry is active in guaranteeing the principles of the Treaty of Waitangi in the management of New Zealand's natural and physical resources. Kāhui Taiao is spearheading this project and provides advice on a range of environmental issues concerning the Māori.

The most significant way in which the Horizons Regional Council (the regional government) regulates the use and development of natural resources is through the Resource Management Act (RMA). Aotearoa's central government made a conscious decision to avidly promote the sustainable management of natural and physical resources. In 1987, deputy Prime Minister Geoffrey Palmer was re-elected as the Minister for the Environment and enacted a comprehensive reform project for New Zealand's environmental and planning laws entitled the Resource Management Law

URL: http://www.TeAra.govt.nz/en/map/23658/tongariro-power-scheme
[35] Wanda McCaslin, *Justice as Healing: Indigenous Ways* (Minnesota: Living Justice Press, 2005), 322.

Reform.[36] His multi-faceted goals for reform distinctly gave rise to the Treaty of Waitangi, cost-effective use of resources, the World Conservation Strategy, intergenerational equity, and intrinsic values of ecosystems. By December 1989, Palmer proposed the Resource Management Bill to the Parliament of New Zealand, however the Selection Committee was incomplete as Palmer lost the election in the following year[37]. Fortunately, the new National Minister for the Environment, Simon Upton, moved forward with the law reform process leading to the enactment of the Resource Management Act in 1991 (RMA). Under the RMA, particular land-use and natural resource extractions require clearance by resource consents.[38] The resource consent application process is analogous to that of an Environmental Impact Assessment and must theoretically note all potential impacts on the environment.

The two major acts that ensured the power balances between the government and tribal entities in upholding the Treaty of Waitangi are the Environment Act of 1986 and the Resource Management Act of 1991. The Environment Act required that the Ministry for the Environment to ensure that the management of natural and physical resources be full and balanced according to the principles of the Treaty of Waitangi. The Resource Management Act of 1991 set out Māori and Treaty obligations that needs to be taken into account by all those who exercise power under the Act. The Ministry is also responsible for the administration of this Act. Some other natural and physical resource management legislation that include Treaty and Maori provisions are: the Hazardous Substance and New Organisms Act of 1996, the Fisheries Act of 1996, the Conservation Act of 1987 and the Historic Places Act of 1996.

[36] Geoffrey Palmer, *Environment: The International Challenge: Essays* (Wellington: Victoria University Press, 1995), 152-153.
[37] Palmer, *Environment*, 155.
[38] Palmer, *Environment*, 161.

Property rights arise in both law and traditional uses. However, to truly understand the legal framework for water rights in Aotearoa, it is imperative to begin with a state definition of what constitutes a water consent. In legal terms regional councils are empowered under the RMA to grant water permits, which allow the holder to take, use, dam or divert water based on availability. Consents are not required for water in some circumstances, for example: domestic use, stock water, and fire fighting; however, they cannot be granted for stream use. Consents may be cancelled by the Regional Council if not exercised for a continuous period of five years or more and these rights are only recognized for a period of 35 years. These rights do not run with in parallel land, but are personal to the consent holder. While these consents are transferable in some cases, and can be acted on by other persons with the permission of the consent holder, it still does not constitute ownership of the water.

Water rights have not been explored in depth according to traditional and customary discourses. However, looking at custom and tradition is an important factor in defining the property rights for water. The concept of customary use is enshrined in the language of existing use rights, although these are usually nullified in respect of water takes by the RMA. The status of existing users is established partly by custom, since it is an aspect that is taken into account by the courts in deciding on the appropriateness of any reduction of a property right. While many of the property rights established in water are not expressly covered by the statutory framework, custom is likely to tend to favor the rights of existing users over new users both in the courts and at the council planning and consent issuing level. Property rights established through these means are not necessarily as strong nor as well defined as are embodied in statute. Therefore, water rights are not a simple extension of the common law

approach to managing water, but is more loosely defined and more likely to change based on society's understanding of what is appropriate in managing a resource. The Ministry of Agriculture and Forestry believe that the rights of the Maori to use water as a physical resource guaranteed under the Treaty of Waitangi and roughly equates to the common law doctrine of aboriginal title. The doctrine of aboriginal title recognizes the right to use water, although it is not clear in the water context whether this extends to the right to use water in ways in which it was not historically or traditionally used. The right of use of water, recognized under the general doctrine is similar to the general common law position and Maori cultural philosophy in that it advocates a right to "use" rather than "own".

*Ngati Rangi v. Genesis Energy*

In 2001, the Manawatu-Wanganui Regional Council granted Genesis Power resource consent to continue to divert water from the Whanganui, Whangaehu, and Moawhango rivers for another 35 years. Genesis Power is a Crown-owned corporation that operates the Tongariro Power Scheme. The tribes of the Ngāti Rangi, Whanganui Iwi and Tamahaki appealed this decision to the Environment Court as their cultural traditions have been "inhibited by a reduced flow of water, reduced water levels, degraded water quality and a change to the ecological system that affects the food chain in the water." The Iwi's core belief was that the Tongariro Power Scheme diversions should be ceased to allow their ancestral rivers to flow their natural path unbroken from the Mountains to the Sea. It was argued that at the very least the consent to divert waters should be reconsidered within a time frame much less than 35 years. The Iwi wanted Genesis Energy to think of new technologies with increased efficiencies, so that

the water diverted will be reduced or closed given that Iwi have consistently opposed Genesis Energy for over 40 years.

In its 2004 decision, the Environment Court accepted that power generation is of national economic and social benefit. However it also found that under the RMA, sustainable management requires a balancing of economic, social, environmental and cultural considerations. Accordingly, it reduced the consent term to 10 years to give the parties time to work together and try to come to an agreed resolution. Genesis Power filed objections against this decision with the High Court. In 2006 the High Court found the Environment Court's grounds for decision to be unduly weighted in favor of Iwi and sent the 10-year term back to the Environment Court to reconsider. The Iwi appealed the High Court's decision, however, the Court of Appeal has since then endorsed the High Court's judgment. The next section dives into my frame analysis of the trial and the way each stakeholder's frame of water governance is aided or hindered by the RMA.

## II. EXPLORING THE TEN-YEAR BATTLE

*"War does not determine who is right – only who is left."*

Bertrand Russell

### RESEARCH QUESTIONS

The principal research questions that this thesis attends to are descriptive and evaluative: During the ten-year litigation proceeding in the Environment Court between Ngati Rangi v. Genesis Energy, what discursive frames influenced judicial verdicts and what events triggered the two stakeholders to sign a settlement agreement? The next question asks how has the RMA been utilized to revolutionize frameworks for future water resource management and perceptions of water governance in Whanganui? Through these questions, I am keen on the interplay between philosophy, practice, and policy as they play out on the legal landscape.

### SOCIAL PRACTICE THEORY: FRAMING WATER GOVERNANCE

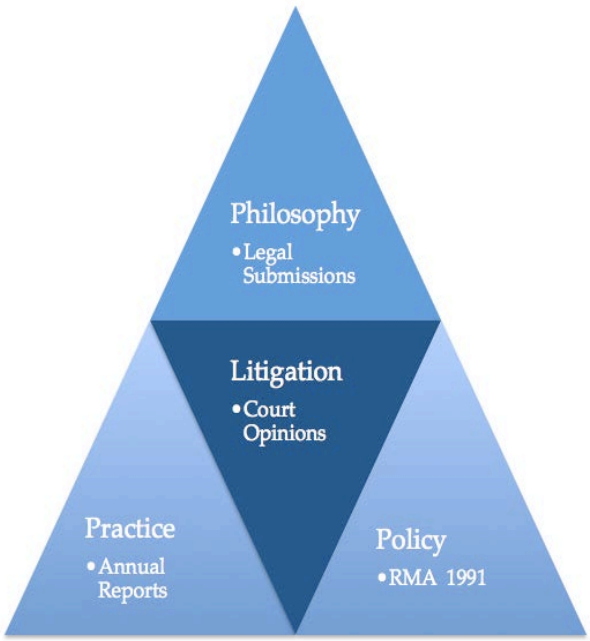


**Figure 3: The interplay between philosophy, practice, and policy as they converge in a trial setting.**

Identifying discursive frames sheds light on the way different communities produce and consume meaning. This also tracks the way these communities attach meanings to their cultural practices and the way they are institutionalized through law. Robert Entman's rendition of social practice theory states that "practices and discourses that people engage in and embody, and a focus

on the actual ways people produce these practices and discourses within socio-cultural constraints which themselves are subject to reproduction and change through such human activities".[39] Moreover, what occurs through each stakeholder's engagement in practice is influenced by experience and discourse. Framing describes the process in which human beings group messages in order to bring about a particular interpretation in the receiver.[40] Figure 3 demonstrates the way philosophy, practice, and policy converge in a trial setting. I organized my frame analysis based on this scope by assigning each of the legal documents to their designated sections. This is done so that the reader is able to conceptualize the dynamics influencing the framing process of water governance.

## METHODOLGY

I investigated the questions mentioned above through the analysis of legal submissions made by Ngati Rangi and Genesis Energy in the Environment Court back in 2004, annual reports submitted by both parties (2004 – 2010), Court Opinions that describe reasoning for each holding, and articles that concern 'sustainable management' of water resources RMA. I used this discourse method to analyze these legal documents and reports. This frame analysis investigates the way an 'issue' is characterized and compromised as well as the impact it has on the broader discussion of the problem. I employed PhD Mat Hope's University of Bristol post-graduate model for the framing process (Figure 1) as means to contextualize the inherent hierarchy within the framing process as each layer of meaning arose.

[39] Robert Entman, "Framing: Toward Clarification of a Fractured Paradigm," *Journal of Communication* 43 (1993): 52.
[40] Entman, "Framing," 54.

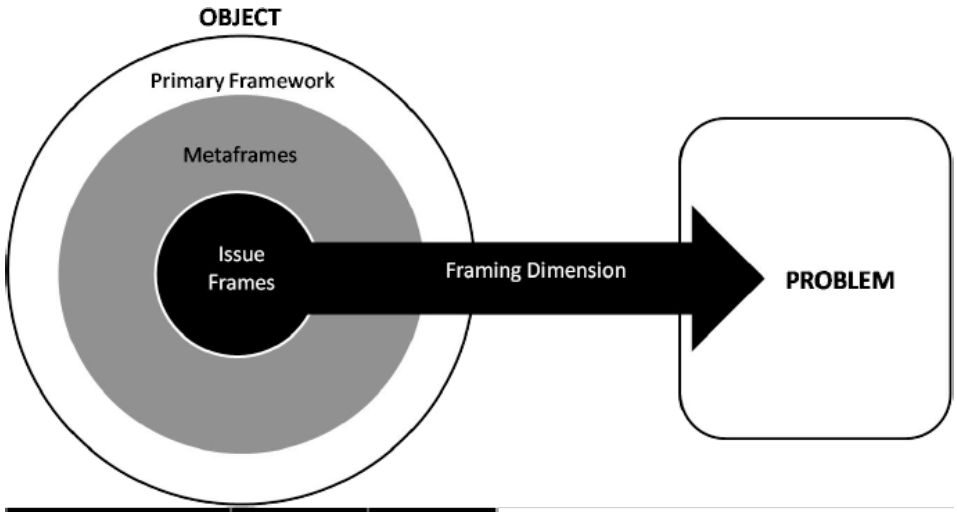


**Figure 4 Mat Hope's Framing Process: The primary frameworks, metaframes, and issue frames embedded in these legal texts are layers of meaning that contribute to the perceptions of an 'object'. The 'object' translated into the 'problem' by way of a 'framing dimension'.[41]**

*Cross-Examining Water Conflict in Terms of Discursive Frames*

There are four components to Mat Hope's model. First, primary frameworks recount a discursive community's basic level of understanding that situate their experiences with their surroundings in terms of 'nature' and the 'social'. Next, metaframes are generalized levels of theory that "may function as normative aspects of issue frames". Normative meanings converge to create an overarching metaframe.[42] Various framings can contribute to a singular metaframe. As with all frames, understanding clarifies the use of other frames.[43] Issue frames are at the heart of the framing process and yield a coherent narrative in which problem specific predictions correspond to problem specific verdicts.[44] Here, information is processed and contributes to the construction of the issue frame as a unit. Once the frames are setup, it projects itself onto an 'object' and

[41] Mat Hope, "Frame Analysis as a Discourse Method: Framing Climate Change Politics" (paper delivered to the Post-Graduate Conference on Discourse Analysis, University of Bristol, March 2010)
[42] Brigitte Nerlich and David Clarke, "Semantic fields and frames: Historical Explorations of the interface between language, action, and cognition," *Journal of Pragmatics* 32 (1999) 127.
[43] Nerlich and Clarke, "Semantic fields and frames," 129-130.
[44] Dombos, Tamás. "Critical Frame Analysis: A Comparative Methodology for the QUING Project." (2009).

transforms into the problem. The framing dimension is academically understood as a mechanism by which discursive communities define then complicate their problem in order to fulfill their political aims.

First, I analyzed the way the RMA defined "sustainable management" in article five. Then, I extracted key primary terms addressing water and Māori from the Act's principle objectives from articles six, seven, and eight (Refer to Appendix I). Section six is a compiled list of "matters of national importance"[45] that shall be "recognized and provided for". Section seven includes other matters that "shall have particular regard to" and section eight regarding the Treaty of Waitangi. The following themes were extracted from section six and seven:

Section 6:

- outstanding natural features and landscapes:
- significant indigenous habitats and vegetation
- public access to water bodies

Section 7:

- stewardship:
- efficient use and development of natural and physical resources:
- efficiency of the end use of energy
- amenity values
- intrinsic values of ecosystems

Using the terms "sustainable management", terms from section six and seven, along with the term "Treaty of Waitangi", passages were analyzed from legal submissions

[45] 1U.S. Department of Education, National Center for Education Statistics, The Road Less Traveled? Students Who Enroll in Multiple Institutions, by Katharin Peter, Emily Forrest Cataldi, and C. Dennis Carrell, NCES 2005-157 (Washington, D.C.: United States Government Printing Office, 2005), 12.

and annual reports to trace themes that govern the way each stakeholder expresses their philosophy and practices. With the extracted reoccurring frames, I examine the Court Opinion in terms of the RMA purposes and principles, as litigation is a space for creating legal meaning and reformulating cultural norms. By tracing trial activity related to water governance, a better understanding of their politics of water can emerge. Once the politics of water governance is better understood in context, then solutions – or the process by which to design solutions – can be better formulated, debated, and applied. By applying the model to these legal documents, insight can be gained into the effects of framing water litigation.

The methodology that I used may lack scientific rigidity and empirical relevance; however, I attempted to compensate for these shortcomings in three ways. First, I theoretically ground my study in primary qualitative evidence as well as secondary sources that give the documents contextual evidence. Secondly, the study tries to be as transparent as possible. With an increase of transparency, readers can trace the logic of the analysis and dispute it if need be. Lastly, this thesis seeks to examine a unique case as it studies the way that discursive clash can be remedied through open communication and an examination of the issues at an international level.

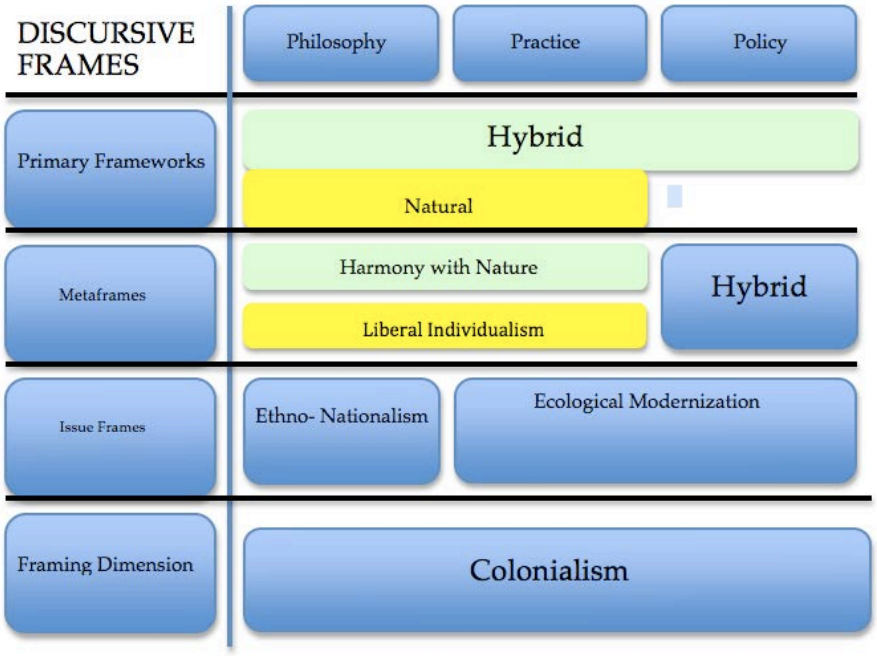


**Figure 5: Framing Water Governance**

The table above traces the different frames that are prevalent in the trial setting. The green represents Ngāti Rangi, the yellow is indicative of Genesis Energy, and the blue is a mixture of both parties. We look at the chart in terms of the way philosophy, practice, and policy is framed at each discursive level: primary frameworks, metaframes, issue frames, and framing dimensions.

The primary framework row shows a 'hybrid' and 'natural' form. Ngāti Rangi yield a hybrid primary framework as their legal submissions and annual reports constantly refer to their genealogical connection (social) and subsistence practices (natural) when stating the importance of the River. The hybrid form extends over to policy as indication that RMA articles six, seven, and eight are interconnected to tribal philosophy and practice. Genesis Energy's primary framework merely states a 'natural'

frame as they merely refer to the River as a 'source of water' for the power scheme. In terms of policy, their practices and courses of action are not reflected in articles six, seven, and eight of the RMA.

At the metaframe level both parties still differ. Ngāti Rangi's philosophy and practices reflect Gamoson[46] and Eder's 'harmony with nature' based on the tribe's use of the terms "stewardship", "intrinsic value", "significant indigenous habitats and vegetation", as well as the Treaty of Waitangi in their submissions. On the other hand, Genesis Energy's resonates 'liberal individualism', or rationally acting individuals, which are endowed with freedom rights. This is show in the way they frame their interactions with the River in terms of "amenity values", "efficiency of the end use of energy", and "efficient use and development of natural and physical resources". At this level, the RMA demonstrates a combination of the two themes based on the policy's definition of "sustainable management".

Following the Metaframes, the issue frames show that both stakeholders capture the same core narrative when framing water governance. Their philosophies reflect Greenfeld's "ethno-nationalism", or the way different cultural groups are embedded under a nation-state.' Both stakeholder's express a "national urgency" for "sustainable management". This type of urgency is reflected in their practices through the term "ecological modernization" as each party emphasizes the need for "efficient use and development of natural and physical resources" through technological advancements and progress in their annual reports. With the legislative history regarding Aotearoa's

[46] William Gamson, "The Social Psychology of Collective Action," *Fronteirs in Social Movement Theory* (1992): 56.

environmental reform, the RMA emphasizes "ecological modernization" for efficiency.

The framing process shows that colonialism is the political lens that both stakeholder's utilize when looking at water governance. Much of this has been extracted from the country's legislative and colonial history between European settlers and Māori.

## III. HEALING BATTLE WOUNDS

*"Scars are but evidence of life. Evidence of choices to be learned from, evidence of wounds, wounds inflicted of mistakes, wounds we choose to allow the healing of. We likewise choose to see them, that we may not make the same mistakes again."*

Marcia Lynn McClure

### DISCUSSION

Fundamentally, philosophy is a theory or attitude held by an individual or collective that acts as a guiding principle for behavior. It functions as a means to clarify aims, helps to put things in context, and serves as an epistemological and historical frame for courses of action in any organized body. The nature of these goals is intimately connected to practical policy and often makes a difference to what happens in practice. It became apparent that Genesis Energy employed strictly a 'social' primary framework, whereas Ngati Rangi used both 'natural' and 'social'. For example, Ngati Rangi submitted the following opening statement:

> The fundamental importance of the Whanganui River (Te Awa Tupua) and its tributaries to the Whanganui Iwi and their existence as a people cannot be overstated. As the evidence to be presented on behalf of the Whanganui Iwi confirms, the Whanganui River and its tributaries (which include the Mangatapopo, Okupata, Taurewa, Tawhitikuri, Te Whaiau and Otamangakau Streams and the Whakapapa River which are diverted by the TPD) is of central significance to the culture, traditions, beliefs and values of the Whanganui Iwi.[47]

[47] *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting).

While Genesis Energy opens with:

> The TPD generates electricity using the energy of the rivers and streams that flow from the mountains of the Central Volcanic Plateau. Water is sourced from a catchment area of more than 2,600 km2 using a series of lakes, canals and tunnels to bring water to two hydroelectric power stations - Rangipo and Tokaanu - which is then discharged into Lake Taupo.

Water governance within the context of Ngāti Rangi is not understandable unless there is the constant application of both the social and natural frameworks intertwined. If the 'social' aspect of water were removed, reflected in the words, "culture, tradition, beliefs and values" then what would remain would essentially be 'water' (which is not 'water governance'). Where as in the Genesis passage, In the passages, 'the social' and 'the natural' primary frameworks were not being operationalized simultaneously but were contingent on one another; water governance could not be understood in any terms other than a 'hybrid' primary framework.

The most obvious lesson from the ten-year water war between Ngati Rangi and Genesis Energy in the Whanganui River Basin is that the water governance is inequitable. There in fact is enough water in the basin to satisfy both demands. Increases in extraction or return to meet contrasting demands are not imminent. The sobering questions, then, are what compromises will these discursive communities have to make, what are the terms, and how this settlement will be executed. Several factors have made it difficult to address those questions. Unless these walls can be dismantled,

old wounds will reopen.

Over the course of the proceedings, the Environment Court witnessed neoliberal conquest and the workings of indigenous nationhood. To recognize Indigenous nations as distinct peoples within a nation-state is widely considered to be separatist and divisive. Yet, denying ancestral heritage and cultural lifestyles are not inclusive forms of practice. Nation states that acknowledge legal pluralism and multiculturalism are than one that denies it. The source of the problem are not sourced in the discursive differences however, it is the lack of respect for these cross-cultural differences that drive such clash.

Significantly, majority of the hearings were centered on notions of cultural identity. It is difficult to negotiate legal and political claims in these disputes. Competing discursive communities tend to denounce one another, and, as a result of each community's distinct views of the problem, it is frequently difficult for them even to communicate with one another. Monetary compensation is mere stitching compared to the requirements for mending these broken relationships. Though all is not lost.

## Ngāti Rangi – Genesis Agreement

The out of court settlement agreement is the product of discursive clash along the Whanganui River (Appendix II). A negotiation team comprised of Ngāti Rangi Trust members, consultants, and counsel met fourteen times with Genesis Energy to identify solutions funded by Genesis, "in good faith with no obligation placed on Ngāti Rangi".[48] The legal council advised the Ngāti Rangi that an arrangement, rather than an

[48] Ngāti Rangi Trust, Ngāti Rangi Trust Annual Report 2010 – 2011, August 2011, 15-16.

appeal to the Supreme Court, would be in their best interests. Upon this advice, the Ngāti Rangi Trust contracted Tina Porou Consultants to lead them through a process that would identify options for such an arrangement to address the TPS issue and the impacts of the Eastern Diversion on Ngāti Rangi. Tina Porou and her consults had to summarize past documentation throughout the duration of the process, provide an overview of the information and seek feedback and further ideas regarding potential options. In May and June of 2012, all impacts that had been articulated by the Maori were identified and options were identified to help soften the pain for the Maori people of the TPS Eastern Diversion. The Hui-ā-iwi agreed for the Ngāti Rangi Trust to enter into negotiations with Genesis Energy to seek an arrangement out of court that would change the dynamics of the relationship and seek the return of water into the catchments. The return of water was the only bottom line for these negotiations because of the fact that the Wāhianoa Aqueduct was the only section in the entire TPS that had no flow of water at all.

## CONCLUSION

*"At the end of all our exploring will be to arrive where we started and know the place for the first time."*

--T.S. Eliot

While the RMA does provide a platform for Maori to air their concerns, these concerns constitute just one of several factors that the decision-makers and the courts have to consider. The fact that Maori often lose in the courts is not because the courts lack the awareness of the importance of the RMA protections to Maori. The overall impression of water management in this country is still one of mono-cultural decision-making and governance. While decision-makers must have some level of regard to

Maori values, often these values are trumped by other development prospects. For the most part, as an overall generalized statement, are iwi and hapu being rendered to merely consultation roles? If this is the direction we are heading towards, then this is not simply unsatisfactory but potentially in breach of the Treaty of Waitangi guarantees and contrary to the common law doctrine of native title.

Though these orators tell a starkly different story, each contributes to the macro-narrative of this dynamic system: an integrated tale of the human experience—how it was, how it is, and how it could be along the River.

Though the battle has been settled, the war for river power in Whanganui is far from over. As Che Wilson says, "Tribal entities will change, governments will change, power companies will change, but the River remains".[49] Here, we have seen the way law & policy exists to support indigenous rights, however practical implementation of competing philosophies, practice, and policy, mean that indigenous rights remain subjected to other priorities. However there is hope as we have seen here in the case of Whanganui, where collective customary forms of knowledge, practice, and a sense of reciprocal environmental rights thrive alongside corporate interests and profit.

[49] Che Wilson, interview by Lu'ukia Nakanelua, Ngāti Rangi Trust, March 27, 2012.

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## APPENDIX I

## Resource Management Act 1991 (RMA)

### Section 5: Purpose

(1)The purpose of this Act is to promote the sustainable management of natural and physical resources. (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a)sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b)safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c)avoiding, remedying, or mitigating any adverse effects of activities on the environment.

### Section 6: Matters of national importance

*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 recognize and provide for the following matters of national importance:*

*(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:*

*(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*

*(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*

*(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*

*(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.*

*(f) The protection of historic heritage from inappropriate subdivision, use, and development.*

*(g) The protection of recognized customary activities.*

**Section 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 8: Treaty of Waitangi**

*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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

# APPENDIX II

Based on the guidance given through the series of hui and the support given at the Hui-ā-Tau we agreed to the following

**Our Formal Objection is noted**

It is formally noted in our agreement between Ngāti Rangi and Genesis Energy that Ngāti Rangi objects to the establishment and continued diversion of water from the Whangaehu and Moawhango catchments of the Eastern Diversion.

**Establishment of Formal Relationship**

The relationship ensures that we are involved in research and working together regarding a range of arrangements for the Eastern Diversion.
That we establish a 'connecting flow' on at least two and potentially four named awa by 2013
This was negotiated to seek an act of good faith from Genesis to connect our four named awa from source to sea. This is currently being worked on.

**That we receive an agreed flow on the four-named river by 2017**
An agreed flow will be identified and understood through a joint Ngāti Rangi and Genesis research program and subsequently provided for the four named awa (Tokiāhuru, Wāhianoa, Mākahikatoa and Tomowai) on the Wāhianoa Aqueduct. All research will be conducted using both mātauranga Māori and western science.

**Research Funding Package**
This funding will assist with the research strategy mentioned above.

**Mitigation Package**
With the negotiation of the return of flows to the four named awa and the formal recognition of our objection, a mitigation package was negotiated to support the Ngāti Rangi Natural Resources Unit, environmental projects, wānanga and marae initiatives.

**Full term of the consent with 5 yearly reviews agreed by both parties**
A full term of 35 years (26 years remaining at time of signing) has been negotiated based on the understanding that reviews regarding the arrangements between Ngāti Rangi and Genesis and the on-going effects of the TPS will be conducted every 5 years. The reviews will be based on jointly agreed principles and conditions.
This relationship agreement was signed in December 2010 and the formal ceremony