chapter 12:

Ngā Pakanga o Wāhi Tapu: Battles over sacred places

Robert Joseph

Kaiapoi pa site, near Christchurch, is considered wāhi tapu. John Crump

He whenua, he wāhine, e ngaro ai te tangata
Men will die for land and women[1]

Wāhi tapu are the sacred places of Māori in Aotearoa New Zealand. All cultures have sacred sites such as cemeteries, significant battlefields, and places of spiritual significance. Standout examples internationally include the 'Weeping Wall' in the Holy Land, Stonehenge in Britain, Maraeātea in the Pacific, and Intihuatana at Macchu Picchu in Peru. But unlike these sites, wāhi tapu are rarely a visible structure but rather a site or area within the landscape with values so significant that restrictions are warranted. In law, wāhi tapu are defined as a 'place of special significance according to tikanga Māori'[2] and 'a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense'.[3]

As the aphorism above emphasises, Māori historically were willing to die for land (and for women of course!), and wāhi tapu are the most sacred of places. Many battles have been fought over actual or proposed transgressions of their sacredness. In earlier years, blood was shed and men did die; today battles tend to occur in the Environment Court, but are just as passionate. Recent decades have seen conflicts where wāhi tapu were threatened by new highways, railroads, airports, prisons, residential and commercial developments, wind farms, power stations and waste dumps.

In this chapter, I discuss a number of the battles that have been fought over the development or preservation of wāhi tapu from first European contact up until the present time. I highlight the growing legal recognition of tikanga Māori in relation to these sacred landscapes, and conclude with a proposed pragmatic solution for all New Zealanders when negotiating developments over wāhi tapu. Having a background in law and tribal affiliations, I discuss these tensions from both legal and kaupapa Māori perspectives.

Tikanga Māori and wāhi tapu

The traditional Māori world-view and legal system was based on tikanga Māori. Tikanga embodies core values and principles that guide what is right, correct or appropriate. Māori were taught from a young age what was tika (right, correct) and this formed the basis of self-government including stewardship over land, waters and their resources. Māori tribal landscapes were and continue to be important

anchors for the tribe and the Māori law of tapu was a key way to protect places of significance within the landscape.

'Wāhi' refers to a place or locality.[4] 'Tapu' is a protective mechanism that can be applied to persons, places or things. Tapu acted as a means of social control:

> *The system of tapu was a series of prohibitions, and its influence was very far reaching ... To disregard those rules meant disaster to the individual; but the punishment meted out to the transgressor was not inflicted by his fellow-tribesman – it was imposed by the gods.*[5]

Such a system of prohibitions was intended to safeguard the tapu of each person in relation to the community, the Atua (Gods), and the landscape.[6]

The principles of tikanga Māori over wāhi tapu then, refer to the correct or proper courses of action to preserve, govern and manage these places in a culturally appropriate and sustainable way for past, present and future generations. Unfortunately, this has not always been achieved, and disagreements over the protection and control of the landscape generally and wāhi tapu specifically have been a source of many historic and contemporary battles.

Historic wāhi tapu battles

From first contact, tensions existed between Māori and the Pākehā[7] newcomers to New Zealand over wāhi tapu. One of the first recorded battles was 1772 when French explorers committed the hara (crime) of desecrating a temporary wāhi tapu at Manawaora Bay in the Bay of Islands. Some members of the local tribe had drowned, and tapu status had been temporarily applied to the Bay. Captain Marion du Fresne and his party had been fishing in this area despite warnings by Māori about the tapu. Local Māori subsequently attacked the French, executing du Fresne and twenty-six crew members for their desecration of this sacred area.[8]

The British were more circumspect about tapu, at least at first. In a letter to Rev. Joshua Mann dated 14 July 1817, Thomas Kendall offered some important advice to would-be settlers at the time:

> *In selecting a portion of land for a settlement, it would be advisable to take care that it be as clear as possible of what the natives call the wahhe tabboo [sic]. Wherever a person has breathed his last, or his bones have been laid for a time, there is always a piece of timber set up, if there is no tree growing to perpetuate his memory. The wahhe tabbo is not suffered to*

> *be molested, and is held sacred both by friends and strangers. Amongst the natives, the least disrespect paid to their sacred relics or religious ceremonies and customs is considered a sufficient ground for a war by enemies and for a public debate by friends.*[9]

The British initially attempted to accommodate tensions over different cultural understandings of what constituted appropriate behaviour. In 1840, official instructions were forwarded from the Colonial Office in London directing Governor Hobson to respect tikanga Māori.[10] In 1842, Lord Stanley even suggested that certain Māori institutions such as tapu be incorporated into the legal system.[11] Lord Stanley also directed that legislation be framed in some measure to meet Māori property practices including punishment for desecrating wāhi tapu.[12]

From the Treaty of Waitangi in 1840 until the turn of the nineteenth century, numerous battles occurred over wāhi tapu areas that were either largely ignored or trampled over. A classic example is the opening up and development of Mount Tongariro as a tourist attraction, which local Maori disapproved of:

> *The Maori are angry with Europeans going to Tongariro, the Europeans argue that they want to see the top of Tongariro. The Maori believe Europeans are desecrating the sacred things of the Maori. The Europeans believe that land is just land, and not sacred. The reason the Maori are angry is that that place is sacred and the Europeans are transgressing the things that are sacred to the Maori.*[13]

Angered by a similar desecration of burial grounds, the Rotorua Māori Council in 1903 wanted to develop:

> *... a strict protocol to protect Māori graveyards and sacred sites, in case they are abused and trampled on by Pākehā. The people are very angry with Pākehā for this thoughtless behaviour. Because of this, they have made known their thoughts about such careless behaviour (toward things sacred to the Māori). ... The law is inadequate to punish this type of crime. The outcry was that [it would be different] if it was thought that a Mäori had violated a Pākehā grave; a strong motion was carried at the meeting in Rotorua, requesting the Government to protect their dead.*[14]

Māori continued to express their concern to Government about the transgression of wāhi tapu, which the Government responded to by enacting section 11 of the Māori Councils Amendment Act 1903:

> *Every person who knowingly and wantonly without due and lawful authority trespasses on or desecrates or interferes in any manner with any Māori grave, cemetery or burial cave, or place of sepulchre is liable on conviction to a fine not exceeding twenty-five pounds (£25) or to both fine and imprisonment.*

However, this law applied only to burial places, not to other areas that might have other reasons for having tapu status. It was not until the end of the twentieth century that wāhi tapu began to be formally recognised in law as more than just burial grounds, a change that was linked to the increasing recognition of the Treaty of Waitangi from the mid 1980s. For example, wāhi tapu are now referred to in Ture Whenua Māori Act (Maori Land Act) 1993,[15] the Historic Places Act 1993,[16] the Biosecurity Act 1993,[17] Hazardous Substances and New Organisms Act 1996[18], Local Government Act 2002[19], and the Foreshore and Seabed Act 2004.[20] Importantly, wāhi tapu are also specifically referred to in the Resource Management Act 1991 (RMA), and it is under this law that most conflicts are mediated.

Contemporary wāhi tapu battles

Section 6(e) of the RMA provides that it is a 'matter of national importance' for decision-making authorities to 'recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'. This provision, together with the other two sections of the Māori 'trilogy', 7(a)[21] and 8[22] was enacted to enable an appropriate balancing exercise to occur between development proposals and the preservation of Māori customary interests. These sections are recognised by the Courts to be 'strong directions, to be borne in mind at every stage of the planning process.'[23] These provisions:

> *… place the Court directly at the interface between the concepts of British common law (which has its genesis in Roman law) and the concepts of Māori customary law which is founded on tikanga Māori. The Treaty promised the protection of Māori customs and cultural values. The guarantee of Rangatiratanga [sic] in Article 2 was a promise to protect the right of Māori to possess and control that which is theirs: 'in accordance with their customs and having regard to their own cultural preferences.*[24]

Since the enactment of the RMA there have been many cases in which values arising out of tikanga Māori have been challenged by resource-consent applicants and local authorities. The resulting judicial testing means there is a growing of Court decisions acknowledging the Māori spiritual and cultural worldview, including values and tikanga relating to wāhi tapu and the wider landscape. This has led in many cases to resource-management outcomes quite different from those that occurred prior to the enactment of the RMA, when Māori cultural and spiritual values could be safely ignored or sidelined.

From these decisions, it is clear that wāhi tapu are given greater consideration that the 'ancestral lands' or 'sites' that are also mentioned in section 6(e). In a case involving proposed sand mining,[25] the Environment Court was asked to consider the relationship of Māori and their culture and traditions with a site which was not wāhi tapu. The Court found that:

> *It would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Māori ownership to non-Crown interests, if the principles in s. 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Māori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.*[26]

Section 6(f) RMA requires the Court as a matter of national importance to also recognise and provide for 'the protection of historic heritage from inappropriate subdivision, use and development.' Historic heritage includes by definition 'sites of significance to Māori including wāhi tapu', archaeological sites, and the surroundings associated with these sites. Resource consent was refused for a TV transmitter[27] because the proposed site had considerable spiritual and cultural significance even though it was neither an archaeological site nor wāhi tapu. While wāhi tapu are the most sacred of sites, the RMA gives scope for consideration of other Māori cultural values in the landscape, which could potentially preclude development.

Nevertheless, wāhi tapu feature prominently in case law, and have been commonly at the centre of Māori concern about development proposals. Issues considered by the Court include legal definitions of what is a wāhi tapu, their size, why land might be tapu, the challenges of demarcating a wāhi tapu area, and whether wāhi tapu need to be formally listed in district plans.

Defining wāhi tapu

On a number of occasions, the Environment Court has had to consider what constitutes a wāhi tapu.[28] The Court appears to have adopted a three-stage inquiry for claims: The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for.[29]

Some alleged Māori studies experts have claimed that the term wāhi tapu applies only to sites with spiritual associations, which are quite limited in area. In a 2002 case, a Māori academic stated:

> *In traditional Māori society a waahi tapu was a specific place – usually very small – within the tribal rohe or boundary. They were, by definition, strictly set apart from daily life because the tapu or spiritual restriction contained within such places posed dangers to all. Nobody went there or used such places for any purposes. … The definition I have stated here lies behind the concept of waahi tapu and identifies them as places of high spiritual and religious danger. Because of the nature of their original use; old pa sites, fortifications, earthworks, cultivations and such like cannot be waahi tapu because they are associated with secular rather than religious activities.*[30]

In a separate case the same academic again asserted that 'wāhi tapu are very small specified places.'[31] A far broader definition of wāhi tapu was offered by the Kaumātua (Elder) Mr Rima Herbert, as:

> *… physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people. Waahi tapu as conceived by Māori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Māori earthworks and burial areas which are all of long-standing importance to the Māori people of our area.*[32]

It is also clear that wāhi tapu can cover more than a small area: The wāhi tapu argued in Takamore Trustees v Kapiti Coast District Council[33] was 25 acres, in

Minhinick v Watercare Services Ltd it was 29 hectares,[34] in Canterbury Regional Council v Waimakariri District Council it was 338 hectares,[35] and in Tawhai v Whakatane District Council and Te Rūnanga o Ngāti Awa it was 56 acres.[36]

The idea that wāhi tapu can cover a large area is accepted in a number of Court decisions, as is the idea that they can sometimes be associated with secular activities. The stone fields at Matukutua were 29 hectares in size. Many of the activities associated with the area were of a secular nature such as cultivations and kainga (homes).[37] The Ngāti Hape Pa site was found by the High Court to contain a pa as well as wāhi tapu 'areas'.[38] Another site, an unfortified pa with kumara (sweet potato) storage, was found by the Environment Court to be a wāhi tapu even though it was not associated with spiritual activities.[39] In both decisions, the Courts seemed to accept that within a general wāhi tapu area, there could be specific more localised wāhi tapu.[40]

In 2002, the Environment Court considered a proposal to develop a new town (Pegasus) near Kaiapoi pa, outside of Christchurch. Kaiapoi pa was a site of historical significance to Ngāi Tahu, but the proposed town did not directly impinge upon the actual pa site. Te Rūnanga o Ngāi Tahu and Te Rūnanga o Ngāi Tuahuriri were consulted and reached agreement on how the development would proceed. The Court accepted that the site was wāhi tapu and ancestral land for the purposes of section 6(e) of the RMA, but felt that the proposals put forward by the developer (incorporating the agreements) meant that the obligations to Māori were recognised and provided for.[41] There was some opposition from a small dissident group of local Māori, and the Court noted 'the difficulty faced by any developer when endeavouring to achieve consensus between the various elements of Māori social and historic structures.'[42]

Precise location and registration

Whether tapu areas should be precisely defined was an issue when the Kapiti Coast District Council and Transit New Zealand sought to develop a road which would run through a wāhi tapu area.[43] In this case, the wāhi tapu area had been previously registered with the Historic Places Trust and was listed in the District Plan. The High Court found that neither the inability of tangata whenua to specifically point to tapu places within the wider wāhi tapu area nor the absence of archaeological remains were barriers to wāhi tapu status.[44]

The failure to register areas as wāhi tapu in relevant district plans is also not

critical to the Court recognising that a site is a wāhi tapu. For example, TV3 proposed to install a television translator on a hill known as Horea on the west side of Whaingaroa (Raglan) Harbour.[45] Local Māori appealed on the grounds that the apparatus would offend the relationship of Māori with the place. The High Court held that TV3 approached the selection site purely from an economic development and coverage point of view. But Tainui saw Horea in metaphysical and cultural terms and if the development was to proceed, it would be culturally debilitating for Tainui, and the loss of the integrity and spirit of the place could not be justified by the claimed economic advancement.[46] The fact that Horea was not identified in the District Plan as a wāhi tapu did not mean its values should be ignored.[47]

Recent developments

In some cases, development has occurred despite claims of wāhi tapu status such as in Heta v Bay of Plenty Regional Council[48] and Beadle and Wihongi v Minister of Corrections and Northland Regional Council.[49] In contrast, a proposed wind farm was turned down at Te Waka on the Maungaharuru Ranges in Hawkes Bay because of the significance of the site to Māori.[50] The Court concluded that in this case, Māori values were more important than issues of climate change and the use of renewable sources of energy. Regarding the relationship of Māori with the land, the Court commented:

> *The area of Te Waka-Maungaharuru has all of the features mentioned in s. 6(e) – land, water, sites, waahi tapu and other taonga. It was impossible not to absorb some of the depth of emotion expressed in the evidence about the attachment of the people to this area. It not only defines one of the boundaries of their tribal rohe or districts. It also helps to define them as individuals and as tribal and family groups. The relationship they have with it, despite no longer owning it, must be, we think, just the kind of relationship … of Māori, their culture and traditions … that drafters of the section had in mind, and which the legislation requires to be recognised and provided for as being of national importance.*[51]

An unusual case occurred when a Māori with ancestral links to Whaingaroa (Raglan) proposed to build a house, but was vehemently opposed by a local non-Māori family on the grounds that part of the land was wāhi tapu.[52] The Environment Court had to consider disputed evidence about whether or not a taniwha (ancestral

monster) resided along the coastline beneath the land, making it wāhi tapu and therefore inappropriate for the development of a dwelling place. Judge Harland found that there were no urupā or archaeological findings on the site which was indicative that the site was not wāhi tapu. However, even if it was, a tapu lifting ceremony had been conducted by Kaumātua (Elders) prior to 1965 so that the land was not wāhi tapu anymore.[53] Consequently, the consent was granted and the whānau can now develop the coastal property.

Some conclusions

Cultures view the world differently, and valuing that difference is an important step towards understanding and acknowledging a Māori world view. Unfortunately, this has not always been the case and cultural misunderstanding and ethnocentrism have been the causes of much conflict throughout our history, from the bloody execution of the French sailors in 1772, to the contemporary legal battles today. Happily, the Courts are moving to alleviate potential and real conflict over wāhi tapu by giving weight to Māori interpretations of these sacred sites. As a result, wāhi tapu are accepted by the Courts as more than just burial grounds, in that there may be a variety of causes why tapu status may be given. Wāhi tapu do not necessarily stand separate from places used for everyday life, and may sometimes be associated with secular features and values. Wāhi tapu can be of significant size, and a wāhi tapu area can include other more discrete wāhi tapu sites. They can be present on both land and water. Importantly, wāhi tapu are not always sacrosanct – tapu status can be uplifted, and in some cases the relevant iwi organisation may come to an agreement as to the grounds under which wāhi tapu can be disturbed.

The Treaty of Waitangi promised the protection of Māori cultural values. Through the introduction of the concept of wāhi tapu into law, and the interpretations made by the Courts, there is now formal acknowledgement that non-European concepts of sacredness are important, and an acceptance of tikanga relating to wāhi tapu and other Māori concepts. These changes over the past two decades have meant that tikanga concepts such as wāhi tapu have now become widely accepted (even if sometimes begrudgingly).

However, local authorities and developers continue to face considerable difficulties over how to identify and protect wāhi tapu and the values associated with them. My proposed pragmatic solution for all New Zealanders is this. Tikanga is not static and unchanging. While the principles and values are deeply embedded

and enduring, they are always in practice interpreted, weighted and applied by iwi and hapū according to the context. There is ample scope for choice, flexibility and innovative responses to a development proposal. Indeed, a dynamic society will evolve over time as it encounters other societies and knowledge systems, alongside its ongoing maintenance of the customary traditional values:

Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production. [54]

Tikanga Māori embodies core values and principles that reflect doing what is right, correct or appropriate in a given circumstance. It is the cultural responsibility of past, present and future generations to protect the whenua (land) and to continue to protect wāhi tapu. It is not about preserving wāhi tapu for the sake of preservation, but pragmatically deciding on the most appropriate course of action. In some circumstances, it may be appropriate for a particular development to proceed. If so, the tapu can be lifted. There is scope for such a course of action both in terms of tikanga (tapu lifting) and also legal precedent – thus rendering the land open for appropriate development. In other circumstances, it may be appropriate to preserve the status quo. But Māori should be making these decisions, not others. More emphasis therefore should be given in planning documents and planning processes to accepting tikanga. It should be up to Māori to decide whether a site is wāhi tapu, and what might be an appropriate course of action following an approach to carry out a development that may affect its values.

I suggest that we are starting to see the emergence of a hybrid legal system that recognises both the English legal tradition and some elements of tikanga. The New Zealand legal system should continue to evolve in order to accommodate the best values and concepts from both Māori and Pākehā cultures. Māori should be open to the option of appropriate cultural change, as should Pākehā, so that we can together create a legal system with sufficient flexibility and robustness to meet the future needs of the citizens of Aotearoa New Zealand

Kāua e hokona te whenua, he mea oti tonu atu; nōku hoki te whenua; he manene hoki kōutōu, he noho noa ki ahau.
The land shall not be sold forever: for the land is mine; for ye are strangers and sojourners with me.
– Leviticus 25: 23.