Re-working Indigenous Customary Rights? The Case of Introduced Species

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Indigenous peoples' management and use of introduced species raises questions concerning the application of aboriginal rights or rights arising pursuant to the Treaty of Waitangi to non-traditional environmental resources. In New Zealand, trout fishing and kiore rat eradication programmes have become controversial because of governmental efforts to restrict Maori access to these species. This article explores the rights indigenous peoples may have to access and manage introduced species. It also canvasses possible institutional models to reconcile indigenous peoples' claims with other broader social, economic and environmental concerns. The development of iwi management plans under the Resource Management Act 1991 is identified as one possible model. Reforms to the Conservation Act 1987 may also be appropriate.

I. INTRODUCTION

The search by indigenous peoples for new sources of subsistence to compensate for the loss of their traditional lands and environment raises important questions about the application of customary rights to non-traditional resources. The adaptations of indigenous peoples to the disruptions of European colonialism have engendered further forms of discrimination. Their attempt today to use imported technologies to harvest wildlife has sometimes led governments to impose new restrictions on cultural harvests to prevent anticipated resource depletion. Exer-

* Some affiliations with Taitokerau iwi. My acknowledgments to Dr Margaret Mutu (Maori Studies, The University of Auckland), Dr Mere Roberts (Science Dept, The University of Auckland), Lyndsay Blue (Geography Dept, The University of Auckland), Dr Henrik Moller (Zoology Dept, University of Otago) and Te Runanga O Ngati Whatua (especially Hally Toia), and Nerissa Van Stipriaan.

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cise of customary rights, it is said, cannot be "customary" if it is effected by modern methods. Similarly, exploitation of non-indigenous species has spawned disputes about the application of customary rights to flora and fauna that are not regarded by government as part of the traditional patrimony of the concerned peoples.

In New Zealand, recently, trout fishing and kiore rat[1] eradication programmes have become controversial because of governmental efforts to restrict Maori access to these resources. What rights do or should indigenous peoples have to introduced species, especially when native species have been eliminated or severely depleted, in part, because of the policies of earlier government administrations? What legal models are available to reconcile indigenous peoples' claims with other economic and environmental concerns? How is use of introduced species to be integrated with emerging principles of sustainability, especially conservation of biological diversity and intragenerational equity?

This article examines the treatment of indigenous peoples' claims to introduced species in New Zealand, particularly in relation to trout fishing and the status of the kiore rat. The paper argues that these issues may be best resolved by broadening the terms of the problem from one of rights of *access* to the resources to rights of *management*. The notion of access to a resource without management responsibilities is anathema to notions of environmental stewardship (for example, "kaitiakitanga"[2]) in indigenous culture. Enduring solutions are unlikely to be found when the problem is framed solely in terms of "do Maori have recognisable customary *rights*" to rodents or fish? Rather, the focus must be broadened to the establishment of institutional processes that allow Maori to critically develop and articulate their environmental values in response to new circumstances or threats, and for these values to operate at the formative stage of government policy development. It is argued that this could be achieved through development of iwi management plans and their recognition in environmental decision-making processes under the Resource Management Act 1991 (RMA) or the Conservation Act 1987. The development of iwi management plans potentially offers a more *integrated* approach to indigenous peoples' environmental and economic concerns which can overcome the deficiencies with the essentially monocultural approach to policy-making under the Conservation Act 1987.

To improve our understanding of the connections between indigenous peoples' culture and use of biological resources requires the development of integrative and comprehensive approaches to resource management that overcome

1 The kiore (*Rattus exulans*) is a species of rat introduced to New Zealand in pre-European times. A further description of it is provided in Part II of this article.

2 The Resource Management Act 1991 (RMA), s 2, defines "kaitiakitanga" as "... the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".

former Inter-Commission Task Force on Indigenous Peoples. Its seminal study, "Indigenous Peoples and Sustainability", identified various characteristics of indigenous peoples' culture relevant to biodiversity conservation:[14]

1. They are the sole guardians of vast habitats critical to modern societies for regulating water cycles, maintaining the stability of the climate, and providing valuable plants, animals and genes. Since their homelands harbor such treasures of plants and animal species, then threats to indigenous peoples provoke loss of endangered species, habitats and ecosystems, as well as the culture and knowledge systems that sustain them.
2. In the case of many indigenous peoples, their ecological knowledge is an asset of incalculable value; a map of global biological diversity upon which all life depends. Encoded in indigenous languages and customs, and practices is a vast store of information about nature.
3. Indigenous peoples may provide models for the world's most populous societies. If humanity is to survive and prosper it will benefit from indigenous peoples' basic principles of conservation, environmental ethics and regard for future generations.
4. Many indigenous communities not only conserve, but foster genetic and ecological diversity, thereby enhancing biological resources for future generations.

Whilst such studies are useful in discerning broad trends and assisting the formulation of international standards for the treatment of indigenous peoples, they are of less value to governments and communities compelled to make decisions on specific resource use issues. The environmental practices of indigenous peoples vary considerably between communities and regions, and just as we need to move away from offensive stereotyped assessments of colonised populations, so today we must also eschew romantic generalisations of indigenous peoples that overlook areas of ambivalence. The IUCN's publication contains some useful case studies, but says little in relation to Maori.[15]

Maori have been portrayed as ideal conservationists.[16] Their conservation ethics have been described as based on a world-view in which humankind and nature are not perceived as separate entities but related parts of a unified whole.[17]

14 IUCN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions* (1997) (*"Indigenous Peoples and Sustainability"*) 35.

15 Crengle, D.L., "Perspectives on Maori Participation under the Resource Management", in *Indigenous Peoples and Sustainability*, supra note 14, at 339–352.

16 Firth, R., *Primitive Economics and the New Zealand Maori* (1929) 238.

17 See Marsden, M., *The Natural World and Natural Resources: Maori Value Systems and Aspects of Maoritanga* (1988); Patterson, J., "Maori Environmental Values" (1994) 16 *Environmental Ethics* 397; Hodges, W., *Maori Conservation Ethic: A Ngati Kahungunu Perspective* (1994).

This wholeness and interconnectedness is articulated through concepts such as tapu (sacredness) and kaitiakitanga (guardianship). However, Maori responsibility to the environment did not mean they were preservationists; rather, they actively utilised and developed nature for subsistence and cultural purposes.[18] Maori seek to exercise their environmental responsibilities through their own authority (mana motuhake). Thus, it has been advocated that, in accordance with the Treaty of Waitangi 1840, "clearly identifiable Maori resources should come under the authority of tribal government decision making".[19] The current Waitangi Tribunal claim for ownership of indigenous flora and fauna in New Zealand will provide a key opportunity for the government to assess the importance of indigenous traditional ecological knowledge and its differences from mechanistic, Western scientific epistemologies.[20]

The environmental credentials of Maori have been contested. Points of contention include their historical record, especially in relation to forest management,[21] and the hunting of moa and other birds,[22] and the suggestion that the traditional tribal nature of Maori society denied the possibility of universal conservation rules as these varied in relation to the group in question.[23] These claims converge on the idea that environmental conservation has not been an absolute goal of Maori, but has depended on the specific taonga in question and the available development options for that taonga. For example, environmental groups such as the Royal Forest and Bird Protection Society have clashed with Maori over the cutting of indigenous forests of habitat significance to avifauna.[24] Access to new technologies and population pressures among Maori are also popu-

18 Discussed in Williams, D.V., *Matauranga Maori and Taonga: The Nature and Extent of Treaty Rights held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Valued Objects, Valued Traditional Objects* (1997) (Report prepared for the Wai 262 Claim) 30.

19 Ministry for the Environment (Barnes, M., ed), *Resource Management Law Reform: A Treaty Based Model — The Principle of Active Protection* (1988) (Resource Management Law Reform Working Paper No 27) 5.

20 This is referred to as the "WAI 262 Indigenous Flora and Fauna Claim" or simply "WAI 262". See also "Indigenous Flora and Fauna" (1998) 14 *Te Manutukutuku* 3.

21 McGlone, M.S., "Polynesian Deforestation in New Zealand: A Preliminary Synthesis" (1983) 18 *Archaeology in Oceania* 11.

22 Brewster, B., *Te Moa: The Life and Death of New Zealand's Unique Bird* (1987) 26–36. The dramatic depletion of biodiversity that followed the first arrival of humankind on New Zealand, migrating from tropical environments, could have been caused by these peoples' perception of ecological abundance, thinking of nature as perpetually renewable, and dealing with their new environment in precisely the same way: Williams, supra note 18, at 81.

23 Gillespie, A., "Environmental Politics in New Zealand/Aotearoa: Clashes and Commonality Between Maoridom and Environmentalists", paper delivered at the *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*, 5–7 March 1998, The University of Auckland, at 7.

24 Royal Forest and Bird Protection Society of New Zealand, "Kanuka, Jobs and Pine Trees" (May 1993) 73 *Conservation News* 2.

lar criticisms. The fact that many Maori no longer exist in tribal structures or subsist directly on the land (invariably because of historical displacement from their traditional lands) has added to those claims that question the integrity and relevance of Maori environmental values.[25] This has also been acknowledged by Maori. For example, the Huakina Development Trust's Waikato Iwi Management Plan concedes that increasing rural–urban Maori migration has meant that some Waikato people "no longer know their tribal affiliations and despite the incredible renaissance in Maori culture and language that has occurred in recent years, knowledge of tikanga and te reo is still far from universal amongst our people".[26]

These possible reservations to the "sustainability" of indigenous culture should not, however, justify disqualifying the role of Maori in resource management decisions. Pakeha[27] development activities over the past 150 years have caused massive ecological damage, and yet this is not held to disqualify Pakeha society from seeking to improve environmental conditions today. What is important is the development of new cross-cultural approaches to resource management that synthesise the contributions of both European science and technology with the traditional knowledge and cultural world-view offered by indigenous peoples.[28]

III. CONSERVATION LAW AND THE MANAGEMENT OF KIORE

The principal nature conservation authority in New Zealand is the Department of Conservation. It administers a raft of statutes including the Reserves Act 1977, Wildlife Act 1953 and the Conservation Act 1987. The latter statute, in s 2, defines "conservation" as: "the preservation and protection of cultural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public and safeguarding the options of future generations". In the context of the Reserves Act 1977 and the Wildlife Act 1953, DoC has identified the kiore as an "exotic species" which it considers it is not obliged to protect.

25 Natural Resources Unit of Manatu Maori, *Maori Values and Environmental Management* (1991).

26 Huakina Development Trust, *Waikato Iwi Management Plan: Manuka* (1996) 90.

27 "Pakeha" denotes New Zealanders of European ancestry.

28 Moller, H., "Customary Use of Indigenous Wildlife — Towards a Bicultural Approach to Conserving New Zealand's Biodiversity", in McFadgen, B. & Simpson, P. (eds), *Biodiversity: Papers from a seminar series on biodiversity, hosted by Science and Research Division, Department of Conservation, Wellington, 14 June–26 July 1994* (1996) 89.

The Fifth Schedule of the Wildlife Act 1953 lists rats as "wildlife not protected". The Reserves Act 1977 provides for the eradication of non-protected species on Crown reserves; s 20(2)(b) stipulates that "except where the Minister otherwise determines the indigenous flora and fauna, ecological associations and natural environment shall as far as possible be preserved and exotic flora and fauna as far as possible be exterminated". Kiore can be lawfully retained on private and Maori-owned property, and introduced onto such land with the consent of DoC under s 56, Wildlife Act 1953, which provides for the authorisation of the capture or transfer of any species. However, exotic species on any land tenure may be targeted for eradication if the land is subject to a pest management plan effected under the Biosecurity Act 1993.

Since 1983, DoC has been eradicating kiore from offshore islands, beginning with Rurima Rocks. These eradications have complemented endangered species recovery plans for South Island saddleback, shore plover, tuatara and kakapo. According to DoC, the eradication of kiore from the 15 islands it manages would reduce the area occupied by kiore by about 4 percent only in the New Zealand region.[29] DoC's policy has been summarised as follows:[30]

> The Department's preference is for the total eradication of introduced rodents, including kiore, from islands administered by the Department, while *acknowledging* iwi and scientific interest in kiore. ... The Department perceives no real need to take active measures itself to protect kiore, and is able to facilitate other initiatives by interested parties, such as scientific research or transfer of kiore to modified islands. [Authors' emphasis.]

DoC's key management plan, "Approach to Island Management Where Kiore (*Rattus exulans*) Occurs", indicates what "acknowledgment" of iwi interests means. It states:[31]

> To consult with tangata whenua over management needs for the care or restoration of indigenous species or endemic ecosystems, including whether the management should occur in the absence of kiore, and to consult at an early stage with respect to the eradication of kiore from specific sites. Where potential conflicts are identified the Department will seek appropriate solutions that ensure that cultural perspectives and aspirations as well as the threats posed to indigenous species and ecosystems are addressed.
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> This will be achieved by:
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> - Liaising with tangata whenua community groups and other interested parties at appropriate local levels.

29 Department of Conservation, supra note 9, at 5.
30 Ibid 8.
31 Ibid 10.

- Consulting with iwi Maori through regional networks including the Department's Kaupapa Atawhai network and Conservation Boards.
- Maintaining effective dialogue throughout planning, research, implementation and evaluation phases of eradication projects, and subsequently as ecological restoration programmes proceed.
- Welcome initiatives from iwi, community groups and other interested parties to care for natural values of islands.
- Promoting the active involvement of tangata whenua in kiore research and eradication.

Some Maori groups have criticised DoC's management plan for its limited options — essentially kiore eradication or transfer. The Ngatiwai Trust Board has advocated a third option of customary "harvesting and sustained management of kiore" using traditional methods.[32] This option would not involve moving kiore. The Board believes that the resumption of a cultural harvest of kiore could help re-establish kaitiakitanga and rangatiratanga of the resource; reinforce customary knowledge of the species; restore wiata, whakatauki and karakia pertaining to kiore; and assist in resourcing iwi through the marketing of kiore as a specialised foodstuff, such as in Asian markets.[33] Iwi could provide a pool of untapped labour and skills to assist DoC with its kiore management programmes.

The attitude of DoC to pest management contrasts sharply with earlier government policies. Historically, Crown policy in New Zealand has welcomed the introduction of foreign animals, birds and fish for commercial production, game hunting and recreational purposes. This was achieved through the activities of the Acclimatisation Societies[34] as well as the numerous, inadvertent introductions by European settlers and tourists. For example, the preamble to the Protection of Certain Animals Acts of 1861 and 1865 stated: "Whereas it is expedient to provide for the protection of certain Animals and Birds within New Zealand and the increase arising therefrom and to encourage the importation into the Colony of certain Animals and Plants". These introductions have invariably had a devastating effect upon indigenous flora and fauna. Contemporaneously with the massive introduction of exotics and the concomitant destruction of natural landscapes by settlers, the colonial governments began to impose increasing restrictions upon Maori exercise of customary harvesting rights, such as through the Wild Birds Protection Act 1864. As the Crown gradually came to realise the value of protecting some areas of indigenous habitat from clearance and development, it was usually at the expense of the iwi denizens who were thus

32 Ngatiwai Trust Board, supra note 11, at 2.

33 Ibid 3.

34 The Acclimatisation Societies have since evolved into the Fish and Game Councils, and under the Conservation Amendment Act 1990 they assumed statutory responsibilities with a stronger conservation focus.

excluded from exercising their kaitiakitanga responsibilities. This was achieved through such laws as the New Zealand Settlements Act 1863, Scenery Preservation Act 1903, Public Works Act, Reserves and Domains Act 1953 and the National Parks Act 1952. This legislation reflected the "Yellowstone", preservationist model of nature conservation that entailed exclusion of indigenous inhabitants from conservation areas.

Today, the prospect that Maori be allowed to re-exercise customary rights to harvest wildlife has been raised in the 1994 discussion paper released by the New Zealand Conservation Authority.[35] Section 46 of the Reserves Act 1977 already allows the Minister to grant permission to Maori to take or kill birds from any scenic reserves, so long as it is in accordance with any restrictions imposed by the Wildlife Act 1953. Many environmental non-government groups have expressed concern that customary use of protected species would lead to disaster given Maori's historical record of species extinction. They believe that only Western science and modern ecological management could give security for species at risk, backed by strict government regulation. The Royal Forest and Bird Protection Society, for example, has condemned the proposed cultural harvest as it "virtually eliminates any public involvement in the nature of the protection afforded native wildlife and shows little regard for the intrinsic existence rights of native wildlife".[36] Yet Pakeha access to introduced species for game hunting and fishing is carefully protected and promoted. This is achieved through the powers of the Fish and Game Councils under the Conservation Act 1987, and the recognition, for example, in the RMA's guiding principles that the "protection of the habitat of trout and salmon" are matters decision-makers "shall have particular regard to" (s 7(h)).

IV. MAORI FISHING RIGHTS AND TROUT

Maori customary rights to fish indigenous species have been well recognised in legislation and judicial decisions. These rights may be sourced in aboriginal title or Article 2 of the Treaty of Waitangi.[37] In *Te Weehi v Regional Fisheries Officer*, customary rights were held to provide a defence to unlicensed fishing where the

35 New Zealand Conservation Authority, supra note 6. The New Zealand Conservation Authority is a 12-member, independent authority that advises the Minister for Conservation and DoC.

36 Royal Forest and Bird Protection Society, "Customary Take" (1995) 90 *Conservation News* 1.

37 There has been much discussion of the distinction between "Treaty rights" and "aboriginal rights", which is referred to later in this article. See generally McHugh, P.G., "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 *Victoria University of Wellington Law Review* 247; McHugh, P.G., "Aboriginal Title in New Zealand Courts" (1984) 2 *Canterbury Law Review* 235.

activity was undertaken for subsistence or cultural purposes in accordance with iwi protocol.[38] In *Ministry of Agriculture and Fisheries v Hakaria and Scott*[39] the taking of toheroa (a salt-water clam) for hospitality reasons was considered an exercise of customary Maori fishing rights.

Case law suggests that Maori fishing rights cannot be denied unless they are voluntarily extinguished or expressly abrogated by legislation.[40] The continued existence of customary rights, however, may not preclude government regulation of those rights for conservation purposes. This is illustrated in *R v Sparrow*[41] where the Supreme Court of Canada was prepared to countenance significant governmental regulation of indigenous rights which diminish such rights but do not extinguish them. In this case, an Indian caught salmon fishing with a drift-net in breach of fishing licence conditions claimed in defence that he was exercising his customary fishing right which could not be subject to licence conditions. The question for the Court was whether this right had been extinguished and, if not, what protection it received under s 35(1) of the Canadian Charter of Rights and Freedoms (1982) which gives constitutional protection to "existing", unextinguished aboriginal and treaty rights. The Supreme Court found that Sparrow's right to fish had not been extinguished merely because it had been closely regulated for many years, and the relevant legislation had no clear and plain intention to extinguish the indigenous fishing right. Such a view is reflected in the Waitangi Tribunal's findings in the *Muriwhenua* claim, that legislation of general applicability for the purpose of conservation is a valid exercise of kawanatanga (governorship) granted to the Crown, provided that priority is accorded to Treaty fishing interests over recreational and commercial interests.[42]

The recent decision in *Taranaki Fish and Game Council v McRitchie*[43] has clarified the potential application of Maori customary rights to introduced species. The case concerned fishing for trout, a species introduced by Europeans in the late 1800s, mainly for sports fishing purposes. The litigation has been the subject of considerable public interest because of its potentially wide ramifications, and the fact that it addresses a subject area infrequently considered by courts here or in other jurisdictions.[44]

Fishing for trout and other freshwater fish is governed by the Conservation Act 1987. The legislation seeks to accommodate Maori interests in two ways.

38 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

39 [1989] DCR 289.

40 McHugh, P., "Aboriginal Rights and Sovereignty: Commonwealth Developments" (1986) *New Zealand Law Journal* 57; *Te Runanga o Muriwhenua Inc v AG* [1990] 2 NZLR 641, 655.

41 (1990) 70 DLR (4th) 385, at 410.

42 Waitangi Tribunal, *Muriwhenua Fishing Report* Wai-22 (1988) ("*Muriphenua Report*") 227.

43 High Court, Wellington, AP No. 19/97, 14 May 1998, Neazor & Greig JJ.

44 Anonymous, "Trout Verdict Delights Anglers", *The New Zealand Herald*, 15 May 1998, section A, 3.

First, s 4 provides that the "Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Secondly, s 26ZH provides that nothing in Part VB of the Act (concerning freshwater fisheries) "shall affect any Maori fishing rights".[45] In the *McRitchie* case, a Maori of Ngati Hine was prosecuted for trout fishing without a fishing licence and using a lure forbidden by a local anglers' notice. Section 26ZI(1)(a) Conservation Act 1987 made it an offence for any person to take a "sport fish" (a term defined to include trout) from any freshwater during an open season without a licence. The respondent had regularly fished in the area for subsistence purposes for his family and local marae. He claimed to be exercising a traditional Maori fishing right according to iwi protocol. Among his defences, McRitchie argued that the fact trout was an introduced species was irrelevant, as rangatiratanga gave authority to fish whatever species was in the river.

The case was initially decided in favour of the respondent.[46] Judge Becroft stated:[47]

> If the taking (fishing) was for an indigenous fish, then the defence would clearly have succeeded on the unchallenged authority of *Te Weehi* and in the light of my factual findings that:
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> (a) That the defendant is Maori from hapu and iwi with authority over the relevant part of the river;
> (b) Local kawa/protocol was followed according to Maori custom;
> (c) That the fishing was for personal use consistent with principles of and conservation preservation.

The issue was whether it made any difference if the fish was not indigenous but introduced after the Treaty. The Judge rejected a "species" and "method" limitation on Maori fishing rights for a variety reasons, including: the rejection of such a limitation in North American cases;[48] the need to see the Treaty is a living document, and the fact that the right of Maori to harness new technology had been recognised in Waitangi Tribunal reports;[49] that following the Court of

45 Decided cases are ambiguous as to whether Maori fishing rights mentioned here derive from common law aboriginal title, or the Treaty of Waitangi, or both. The nature of aboriginal rights is elaborated in *Te Runganganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, 23.

46 *Taranaki Fish and Game Council v McRitchie*, District Court, CRN 5083006813–14, 27 February 1997, at 21. For a more detailed discussion of the original decision, see Parker, M., "Traditional Maori Fishing Rights" (1997) 3 *Butterworths Resource Management Bulletin* 29, and note in (February 1997 issue) *Maori Law Review* 3.

47 Ibid 21.

48 See, eg, *US v State of Washington* (1974) 384 F Supp 312, 401; *Simon v The Queen* 24 DLR 390, 402–403.

49 See, eg, *Muriwhenua Report*, supra note 42, 234ff; *Ngai Tahu Sea Fisheries Report* Wai-27 (1992) ("*Ngai Tahu Report*") 253–259.

Appeal view that Maori have an interest in the modern commercial quota system for fisheries, including new species, an extension to introduced species would thus be reasonable in relation to freshwater species;[50] and rights to introduced fish were reasonably within the contemplation of the signatories to the Treaty in 1840.

The Taranaki Fish and Game Council argued that trout were under a special regime as introduced fish, and successive legislation had explicitly excluded trout from the scope of the "Maori fisheries right". Judge Becroft rejected this argument on several grounds, including: that the legislation cited by the informant did not expressly limit the right; there was no evidence that Maori rights over fisheries sourced in aboriginal title had been extinguished with Maori consent; and that it would be absurd to require Maori to distinguish between "pre-Treaty" and "post-Treaty" fish.

An appeal by the Council to the High Court was upheld.[51] The appellant's main submission was that fishing for trout has always been the subject of statutory control which the Crown was entitled to exercise under Article 1 of the Treaty. It contended that the legislature has clearly sought that "sports fish" be managed separately, originally by the Acclimatisation Societies, and now the Fish and Game Councils, as a special public resource. The appellant also argued that Maori fishing rights to trout are inconsistent with the statutory scheme in which the Crown's conservation priorities take priority.[52] Neazor and Greig JJ concluded that "the acquisition of any Maori fishing right in respect of trout is precluded by legislation existing at the time of the introduction of the species and since".[53] They noted a continuous pattern of legislative control was evident in both primary Acts and subordinate regulations, including the Salmon and Trout Act 1867, Fisheries Act 1908, Fisheries Amendment Act 1948, Fisheries Act 1983 and the Conservation Law Reform Act 1990. The latter Act transferred the regulations regarding freshwater fisheries from the Fisheries Act 1983 to the Conservation Act 1987 (Part VB). Further, legislative controls on trout fishing had encompassed outright prohibitions or restrictions concerning times/seasons, rivers/streams, methods and capture of juveniles. Their Honours stated that "the legislative history is consistent only with the intention that there would be existing species of fish not subject to control and new species that would be so subject".[54]

50 *Te Runangau o Warekauri — Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

51 Anonymous, "Trout Verdict Delights Anglers", *The New Zealand Herald*, 15 May 1998, section A, 3.

52 *Taranaki Fish and Game Council v McRitchie*, High Court, Wellington, AP No. 19/97, 14 May 1998, 8 Neazor & Greig JJ.

53 Ibid 28.

54 Ibid 23.

The Court disposed of a defence concerning the interest of Maori in conserving fish because such a matter goes "to the content of the right in respect of the fish, if there is any right at all".[55] More importantly, the Court rejected reliance on the landmark Canadian case of *R v Sparrow*[56] concerning the justification for statutory infringements on native rights. McRitchie had argued that if rights are to be validly exercised, that must be done in accordance with tribal custom and authority, and subject to over-riding conservation measures. The High Court said this submission did not assist in determining whether the relevant customary right existed in the first place, and, secondly, because in New Zealand law regulations are not open to challenge on the ground of reasonableness.[57] Nevertheless, the judgment does not preclude Maori holding fishing rights to introduced species of fish. The Court observed that there is:[58]

> [N]o justification for treating Maori fishing rights reserved by Article II of the Treaty more narrowly than has been said by the Waitangi Tribunal to be the proper approach in respect of sea-fisheries; that what is protected by Article II are the available fish, the places where fish are caught and the methods and practice of fishing ... as a general proposition it would follow that a Maori fishing right in respect of a particular place would extend to all fish found in that place *whether indigenous or not* [authors' emphasis].

The High Court's decision is most unlikely to be the last word on Maori fishing rights in relation to introduced species. The respondents have already indicated their intentions to appeal this decision to the Court of Appeal.

More generally, increasing concerns about loss of indigenous wildlife and the concomitant impact of introduced species will invariably give rise to further litigation over the management and use of flora and fauna. An interesting question is whether Crown legislation has deprived Maori of harvesting rights to kiore. This is unlikely as the classification of the kiore as "unprotected wildlife" does not prevent Maori access to the species; however, if Maori do have customary rights to harvest kiore, would this oblige the Crown to avoid actions that threaten the resource and thereby the exercise of the customary rights?

Even if New Zealand courts are able to unambiguously recognise customary rights to a range of introduced species, including kiore, it would still leave unresolved the problem of securing opportunities for Maori to actually participate in policy and management decisions regarding such species. Rights of *access* to biodiversity, such as the right to fish trout or harvest kiore, do not necessarily amount to rights to participate in *management*. Without effective input into

55 Ibid 24.

56 (1990) 70 DLR (4th) 385.

57 *Taranaki Fish and Game Council v McRitchie*, High Court, Wellington, AP No. 19/97, 14 May 1998, 25 Neazor & Greig JJ.

58 Ibid 22.

management processes, rights of access may become meaningless if the given resource is allowed to deteriorate. This issue is addressed in the following section.

V. CONSERVATION MANAGEMENT AND LEGAL STANDARDS FOR THE INVOLVEMENT OF INDIGENOUS PEOPLES

Although the trout fishing controversy only touched on questions of management, this theme has been central to the kiore rat saga. DoC's plans to eradicate the kiore have resulted in an outcry from some Maori concerned about the lack of consultation and shared decision-making required in their view by the Treaty of Waitangi and s 4, Conservation Act 1987. Requirements to consult with Maori and observe the principles of the Treaty of Waitangi are found in many pieces of contemporary environmental legislation, particularly the RMA.[59]

Although the Maori chiefs signing the Treaty apparently believed that the document would formally acknowledge the concepts of mutual partnership and tribal self-regulation of resources,[60] the English and Maori language versions of the Treaty have led to discrepancies regarding the meanings of key words. This discrepancy has facilitated government control of key environmental resources.[61] In both the courts and government administration, neither versions of the Treaty of Waitangi have been applied literally and it has been acknowledged in terms of its purpose and spirit rather than specific content.[62] Recent judicial interpretation of the Treaty principles would appear to require government consultation in good

59 See, eg, Environment Act 1986, preamble; RMA, ss 6, 7, 8; Crown Minerals Act 1991, s 4; Fisheries Act 1996, Part X. See also Boast, R., "The Treaty of Waitangi — A Framework for Resource Management Law" (1989) 19 *Victoria University Law Review* 1. Acknowledgment of Maori concerns began to be addressed with the Town and Country Planning Act 1977 which stipulated in s 3(1)(g) that "... the relationship of the Maori people and their culture and traditions with their ancestral lands" was to be a matter of national importance.

60 Wharepouri, M., "The Phenomenon of Agreement: A Maori View" (1994) 7 *Auckland University Law Review* 603, 611; Milne, C. (ed), *Handbook of Environmental Law* (1993) 249. By Article 2 of the Treaty of Waitangi, the Crown confirmed and guaranteed to Maori "the full and exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties". The Maori version of the Treaty refers to the Crown protecting Maori unqualified exercise of *te tino rangatiratanga* over their lands, villages and resources. Rangatiratanga has been defined by the Treaty of Waitangi to mean a form of self-government: *Ngai Tahu Report*, supra note 49, at 231.

61 See Orange, C., *The Treaty of Waitangi* (1987).

62 See, eg, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662–663 Cooke P (CA).

faith with Maori, and to act reasonably.[63] It could also require more proactive forms of partnership and cooperation with Maori in resource management. The meaning of the Treaty principles is being further elaborated by the Waitangi Tribunal, established by the Treaty of Waitangi Tribunal Act 1975 to hear grievances and make non-binding recommendations to the Crown concerning alleged breaches of the Treaty.[64] The status of the kiore as an exotic or a "naturalised" species may be influenced by the current Wai 262 claim before the Tribunal concerning recognition of Maori rights in all "indigenous flora and fauna and the genetic resource contained therein". The claim has yet to be decided.

In addition to the guarantees of the Treaty of Waitangi, English common law has long recognised the rights of indigenous peoples of colonised lands to the continued possession and use of their land and its resources.[65] The doctrine of "aboriginal title" has been affirmed by Canadian[66] and Australian courts,[67] and in early New Zealand cases,[68] and it constitutes a burden on the Crown's underlying title. Grinlinton suggests that it is now generally accepted "that the concept of customary native title endures in New Zealand in respect of customary title and rights to land and resources not yet extinguished by legislation".[69] Aboriginal title does not equate to a claim in common law to a fee simple title over traditional lands, but rather is closer to usufructuary rights.[70] Aboriginal title is generally considered to be distinct from the principles of the Treaty, although there is undoubtedly considerable overlap in the rights conferred by each. Possibly one of the most significant differences is that aboriginal title rights tend to be confined to non-exclusive subsistence rights, whereas Treaty-based rights are not so limited and could extend to a right of commercial development.[71] Another

63 See, eg, Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (1989) Principle 4; *Te Runanga o Wharekauri Rekoku Inc v Attorney-General* [1993] 2 NZLR 301, 304 Cooke P (CA).

64 *Ngai Tahu Report*, supra note 49, at 251.

65 Henderson, J.Y., "The Doctrine of Aboriginal Rights in Western Legal Tradition", in Boldt, M. & Long, J.A. (eds), *The Quest for Justice, Aboriginal Peoples and Aboriginal Rights* (1985) 185.

66 *Calder v The Queen* [1973] 8 DLR (3d) 59.

67 *Mabo v Queensland* (No. 2) [1992] 175 CLR 1.

68 See Hackshaw, F., "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi", in Kawharu, I.H. (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989).

69 Grinlinton, D., "The Sources and Institutions of Environmental Law" in D.A.R. Williams (ed), *Environmental and Resource Management Law in New Zealand* (1997) 39, 41.

70 McHugh, P.G., "Aboriginal Title in New Zealand Courts" (1984) 2 *Canterbury Law Review* 235, 258–259.

71 See *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 692; *Muriwhenua Report*, supra note 42, 234–235. In the later report, the Tribunal stated (at 235) that the "right to commercial development of resources did not depend upon proof of a pre-Treaty commercial expertise".

salient difference is that although aboriginal title continues until extinguished by legislation, the Treaty generally requires statutory recognition to be enforceable.[72]

Besides these domestic standards, international law is a source of emerging obligations and standards for the treatment of indigenous peoples. New Zealand environmental legislation in some instances makes specific reference to potential international law requirements, such as s 140(2)(e), RMA. There are few international instruments that deal specifically with indigenous peoples' issues. The main example (but New Zealand is not a contracting party) is the Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989).[73] The relationship and the role of indigenous peoples in sustainable management has been recognised in various transnational policy documents, including the 1987 *Brundtland Report*;[74] Principle 22 of the 1992 *Rio Declaration on Environment and Development*; and Chapter 26 of *Agenda 21* adopted for the United Nations Conference on Environment and Development in Rio de Janeiro in 1992.[75] One of the salient themes of these documents is the principle of intragenerational equity; sustainability is premised, in part, upon equitably accommodating the cultural and developmental needs of all peoples, including indigenous communities.

International law also demonstrates a tendency to accommodate indigenous peoples' traditional rights to utilise wildlife. The International Convention for the Regulation of Whaling (1946) now provides for whaling (albeit by traditional means) for aboriginal subsistence use. Of wider significance is the Convention of Biological Diversity (1992), to which New Zealand is a party. It provides in Article 8(j) that each state shall "as far as possible and as appropriate ... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". One could argue, however, that protection of kiore is not "relevant" for the conservation of biological diversity. This view would find support in Article 8(h) of the Convention

72 See Boast, R., "Treaty Rights or Aboriginal Rights" (1990) *New Zealand Law Journal* 32. In the absence of explicit statutory obligations to this effect, nevertheless the courts have suggested that there is a general duty not to act in contravention of the principles of the Treaty: *Maori Council v Attorney-General* [1987] 1 NZLR 641, 656 Cooke P (CA); *Huakina Development Trust v Waikato Authority* [1987] 2 NZLR 188, 223 Chilwell J.

73 See Barsh, R.L., "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 *Oklahoma Law Review* 30–31.

74 World Commission on Environment and Development, *Our Common Future* (1987) 115–116.

75 Robinson, N.A. (ed), *Agenda 21: Earth's Action Plan* (1993). See further: Stamatopoulou, E., "Indigenous Peoples and the United Nations Human Rights as a Developing Dynamic" (1994) 16 *Human Rights Quarterly* 58; Shutkin, W.A., "International Human Rights Law and The Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia Journal of International Law* 479.

which refers to the obligation to prevent the introduction or eradicate those alien species that threaten ecosystems, habitats or species.

Evolving international standards for the treatment of indigenous peoples are converging on the concept of self-determination.[76] This is reflected in the United Nation's 1993 *Draft Declaration for the Rights of Indigenous People*.[77] The *Draft Declaration* refers to: the right to the protection of vital medicinal plants, animals and minerals (Art 24); the right to full ownership, control and protection of their cultural and indigenous property (Art 29); and the right to determine and develop priorities for their resources (Art 28). Whatever the fate of this initiative currently before the United Nations Economic and Social Council, the elaboration of comprehensive environmental rights at a national level need not wait until full elaboration and sanctification internationally. This is especially so given the reluctance of New Zealand courts to recognise international standards unless they are clearly embodied in national law. For example, in the case of *Kaiamanawa Wild Horse Preservation Society Inc v Attorney-General*[78] Judge Sheppard dismissed the relevance of the Convention on Biological Diversity to the administration of the RMA:[79]

> I accept that an international instrument might assist a Court in interpreting an ambiguous statutory provision. ... [However] it is not appropriate to ascribe to Parliament an intention to use words with meanings to be taken from an international instrument that was still in preparation at the time the Act was passed.

Regardless of evolving international legal standards for indigenous peoples, it is clear that, at a minimum, DoC needs to acknowledge the taonga status of the kiore and consult with relevant Maori before commencing kiore eradication projects. However, the tino rangatiratanga rights of iwi referred to in the Treaty of Waitangi may be insufficiently catered for through consultation procedures or even minority representation on Conservation Boards operating under the auspices of DoC (s 6P, Conservation Act 1987). Once the procedures of "having regard to" iwi concerns have been ostensibly satisfied, the relevant authority may arrive at whatever decision seems appropriate to the majority of its members. According to Williams:[80]

76 See Bosselmann, K., "The Right to Self-Determination and International Environmental Law: An Integrative Approach" (1997) 1 *NZJEL* 1.

77 Suagge, D.B. & Stearns, C.T., "Indigenous Self-Government, Environmental Protection and the Consent of the Governed: A Tribal Environmental Review Process" (1994) 5 *Colorado Journal of International Environmental Law and Policy* 59, 63.

78 [1997] NZRMA 356, noted (1997) 2 *Butterworths Resource Management Bulletin* 37 (Grinlinton).

79 Ibid 370–371.

80 Williams, supra note 18, at 70.

> There are differences in the administration of conservation areas ... yet throughout the conservation estate the Crown retains the entire right to control and manage all areas, consulting various parties as it sees fit and excluding Maori along with all members of the public as and when it sees fit.

The need to go beyond mere consultation is apparent from *Ngai Tahu Maori Trust Board v Director-General of Conservation.*[81] Ngai Tahu challenged the issue of whale-watching permits to a non-indigenous tourist enterprise which would compete with their own whale-watching tours. The permit decision was governed by the Marine Mammals Protection Act 1978 and s 4, Conservation Act 1987. Injunctive relief was sought on the basis that Ngai Tahu were entitled by the Treaty to exclusive rights for whale-watching tours and thus the right to veto the issue of this permit.[82] The Court of Appeal held that, in allocating the permits, the Director-General of the Department of Conservation was required to give a "reasonable degree of preference" to Maori operators to give effect to the principles of the Treaty. Cooke P stated:[83]

> Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed. ... it is difficult to find ... any indication of the value to Ngai Tahu of the right to be consulted. Some psychological benefit may be hinted at, but there is an absence and even a repudiation of any suggestion that Ngai Tahu's representations could materially affect the decision ...
>
> Such issues are not to be approached narrowly ... the Crown is not right in trying to limit [the Treaty] principles to consultation. Since the lands case, *New Zealand Maori Council v Attorney General* ... it has been established that the principles require active protection of Maori interests. To restrict this to consultation would be hollow ... a reasonable Treaty partner would not restrict consideration of Ngai Tahu's interests to mere matters of procedure.

By suggesting that the Crown's responsibilities extend to active protection of iwi interests, the Court's decision points to the need for more proactive institutional mechanisms for cooperation with the Treaty partner. The value of a more participatory approach to resource management in relation to kiore or trout fishing would be enhanced if it is complemented by a recognition that indigenous peoples' entitlements include commercial uses of resources. If customary rights are narrowly construed in terms of subsistence and locality requirements, then the scope for indigenous self-determination and more effective partnerships with government on contemporary and complex management issues would be clearly diminished.

81 [1995] 3 NZLR 553.

82 The case is fully noted in (1995) 1 *Butterworths Resource Management Bulletin* 172 (Grinlinton).

83 [1995] 3 NZLR 553, 558, 560, 561.

Of relevance here are the claims for a "right to development" which could allow for the re-working of customary rights to cover new sources of social and economic development. In *Taranaki Fish and Game Council v McRitchie*, the District Court considered whether the respondent's right to fish for trout could be conceptualised as a "development right" under the fisheries clause of Article II, Treaty of Waitangi. In the original decision reference was made to the Waitangi Tribunal's findings in the *Muriwhenua Report*. The Tribunal discussed use of new technology and markets for harvested produce. It stated:[84]

> **New Technology and the Right to Development**
>
> (a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.
>
> (b) Access to new technology and markets was part of the quid pro quo of settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing their own technology was highly developed ... there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.
>
> (c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.
>
> It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

The Waitangi Tribunal went on to comment that the right to use new technologies is linked to "the right to development", recognised in domestic[85] and international law. The right to development has been widely acknowledged in a range of human rights and environmental law instruments.[86] The Waitangi Tribunal argued that Maori custom and tradition applies more to beliefs than methods, so that it would not be traditional fishing when Maori depleted a resource. It commented: "There is nothing in tradition to constrain the use of new gear save that directed to resource maintenance."[87] Significantly, the Tribunal suggested that the "right to development" could extend to "commercial development rights to Maori".[88] The reasoning of the *Muriwhenua Report* was followed in the Waitangi Tribunal's *Ngai Tahu Sea Fisheries Resource Report* where it stated that Maori

84 *Muriwhenua Report*, supra note 42, at 234ff.

85 See the Canadian case *Simon v The Queen* (1985) 24 DLR (4th) 390, 402.

86 See, eg, United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (1992) Principle 3; United Nations General Assembly, *Declaration on the Right to Development* (1986).

87 *Muriwhenua Report*, supra note 42, at 234ff.

88 Ibid.

have a right of development to a reasonable share of the deep water fisheries notwithstanding that they may not have fully utilised them prior to 1840.[89]

New Zealand courts have acknowledged a right to development. In *Ngai Tahu Maori Trust Board v Director-General of Conservation*, Cooke P concluded:[90]

> [I]t is obvious that commercial whale-watching is a very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the Treaty. We were referred to no case in any jurisdiction dealing with a claim to exclusive commercial whale-watching rights. A right of development of indigenous rights is indeed becoming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests.

In the High Court decision in *Taranaki Fish and Game Council v McRitchie*, Neazor and Greig JJ ruled, in relation to the claim for Maori trout fishing on the basis of a right to development, that the case law "cannot support the [submission] when the issue is not related to a resource existing, whether or not known or relied on at the time of the Treaty, but to a new resource both introduced and controlled by the law after the Treaty".[91] In stating this they referred to *Te Runanganui o Te Ika Whenua Inc Soc v AG* where Cooke P said (as to whether hydroelectric dams on rivers and the generation of power were within the Treaty):[92]

> [H]owever liberally Maori customary title and Treaty rights may be construed, one cannot think that [such rights] were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity.

On this approach, the question becomes, what would have been within the reasonable contemplation of the parties at the signing of the Treaty in 1840? Such a perspective may be inconsistent with some of the standards for indigenous self-determination being drafted in international law and policy.

The most recent initiatives of DoC confirm that the administration of the Conservation Act 1987 falls short of properly addressing Maori resource use concerns. To give greater effect to its Treaty responsibilities, in February 1997 DoC published the "Kaupapa Atawhai Strategy". The Strategy's basic "mission"

89 *Ngai Tahu Report*, supra note 49, 253–259.

90 [1995] 3 NZLR 553, 559–560.

91 *Taranaki Fish and Game Council*, High Court, Wellington, AP No. 19/97, 14 May 1998, 26 Neazor & Greig JJ.

92 [1994] 2 NZLR 20, 24.

is to: "foster an iwi contribution to conservation management by: adopting customary management practices where these are applicable; supporting iwi development of a Maori customary approach to conservation; [and] integrating iwi initiatives into the programmes of the department".[93] The Strategy envisages new forms of "partnership" or "cooperation" in conservation planning and management. On the subject of pest management, the Strategy acknowledges Maori concern about some pest eradication methodologies, but concedes that there is "no option" to such tactics in the absence of alternative methods and the urgency of the problem. DoC's new biodiversity action plan, being developed to fulfil obligations under the Convention on Biological Diversity (1992), is expected to provide opportunities to "revive appropriate Maori cultural practices".[94] This will be subject to "recognising that many species are severely threatened and cannot sustain depletion".[95] The following section canvasses some ways to provide for more substantive and proactive forms of partnership in resource management.

VI. MODELS FOR RESOURCE CO-MANAGEMENT

Emerging concepts of sustainable development and cultural self-determination emphasise the importance of integrated treatment of environmental and development issues.[96] There is a move in national and international legal systems to re-work customary rights, either aboriginal or Treaty-based, to take account of new technologies, markets and sources of subsistence, on the basis of an evolving "right to development". This right forms part of the conceptual apparatus of "self-determination" doctrines. The legal challenge is to develop institutional arrangements that can allow for the articulation of the right to development in a way that is reconciled with underlying ecological imperatives and the interests of other parties in resource allocation. In a New Zealand context, one possible path is to recognise the role of iwi resource management plans in environmental decision-making. This could be achieved through the existing provisions of the RMA or by amendments to the Conservation Act 1987.

93 Department of Conservation, *Kaupapa Atawhai Strategy* (1997).
94 Ibid 13.
95 Ibid 19.
96 Bosselmann, supra note 76

1. Initiatives in Australia and Canada

Useful models of aboriginal–government co-management have been developed in Australia and Canada in relation to national parks and use of biodiversity.[97] Co-management promises equal responsibility for the management of resources. Craig describes it as:[98]

> ... the sharing of control of an area by two or more groups. It aims to provide conservation of the park and to maintain its value to the traditional owners. There is an attempt to recognise the interests of two cultures within the constraints imposed by the goal of ecosystem preservation. The model institutionalises cooperation in both long term planning for the park and the day to day implementation of a process which includes the mediation of disputes and the regulation of tourism.

Co-management may extend to other situations besides parks. Over the past two decades, indigenous peoples in northern Canada have negotiated regional land claims agreements that provide for co-management of wildlife, conservation areas and other environmental resources contested by multiple interests.[99] These agreements are exceptionally comprehensive, and have been extensively analysed elsewhere.[100] They generally include, for indigenous participants, clear rights to advise government authorities or share in the making of decisions regarding wildlife harvesting and management of renewable resources. Under the Inuvialuit Final Agreement (1984), for instance, the Inuvialuit are accorded exclusive or preferential harvesting rights to game, except for certain migratory species, and representation on an Inuvialuit Game Council and Wildlife Management Advisory Councils, which counsel the relevant Minister. The Nunavut Final Agreement (1993) provides for the Inuit and government to negotiate co-management agreements for the various national parks within the Nunavut region (Article 8). These co-management institutions are considered to provide a way of "meld[ing] together [the indigenous participants'] experientially based and very detailed knowledge of the natural environment with the experimentally based and theoretically driven knowledge of scientists and regulators".[101]

97 Wickcliff, K., *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand* (1994). See also Sultan, R., Craig, D. & Ross, H., "Aboriginal Joint Management of Australian National Parks: Uluru-Kata Tjuta" in *Indigenous Peoples and Sustainability*, supra note 14, 326–338.

98 Craig, D., *Environmental Law and Aboriginal Rights; Legal Framework for Aboriginal Joint Management of Australian National Parks* (1991) 28.

99 Major agreements include: James Bay and Northern Quebec Agreement (1975); Inuvialuit Final Agreement (1984); Nunavut Final Agreement (1993).

100 Richardson, B.J., Craig D. & Boer, B., *Regional Agreements for Indigenous Lands and Cultures in Canada* (1995).

101 Merrit, J. & Fenge, T., "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration" (1990) 15 *Queen's Law Journal* 255, 271.

In Australia, establishment of co-management regimes preceded the recognition of native title in the *Mabo* case[102] and the passage of the Native Title Act 1993 (Cth). Two highly praised examples of co-management concern Kakadu and Uluru national parks in the Northern Territory. The federal National Parks and Wildlife Conservation Act 1975 (Cth) provides that where a national park is on Aboriginal title land, the responsible Minister and the relevant Aboriginal land council must convene a board of management, the majority of which shall be indigenous and nominated by the traditional owners.[103] Joint management agreements are then negotiated between the indigenous party and the Australian Nature Conservation Agency (ANCA). With Uluru National Park, for example, the land is held under inalienable freehold title by the Uluru-Kata Land Trust which represents local Aboriginal tribes.[104] The area is leased to ANCA as a national park for a ninety-nine-year term. The park is managed by a board with government, tourist and conservation interests, but with a majority Aboriginal representation. The traditional owners receive a modest rental, Aborigines are employed as park rangers and run ecotourist operations in the park. Arbitration is used to settle any disputes between ANCA and the board of management in the implementation of the agreement. In all cases of conflict, the agreement provides that priority is to be accorded to indigenous interests.

The co-management model is a break with the "museum-piece" national parks by providing a mechanism for reconciling native land rights and nature conservation objectives. Although national parks are sometimes not openly welcomed by indigenous peoples, they can be an important buffer against the pressures and uncertainties of non-indigenous economic developments.

There are other informal and less institutionally complex models for indigenous participation in resource management. An example is the agreement negotiated between Queensland's Kowanyama community and state government authorities for the management of the Mitchell River delta, comprising Aboriginal land and adjacent pastoral leasehold areas.[105] The Kowanyama have set up a Land and Natural Resources Management Office, which operates under the joint direction of the Kowanyama Community Council and the Council of Elders. They have developed a regional planning strategy providing for water catchment management and sustainable use of fish stocks, and the Office addresses tourism management, fisheries surveillance, weed control and community education projects. The important question is whether such models, if considered appropriate, could be applied in a New Zealand context.

102 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA).

103 Section 14C(5).

104 Uluru-Kata-Tjuta Board of Management and Australian National Parks and Wildlife Service, *Uluru (Ayers Rock-Mount Olga) National Park: Plan of Management* (1991).

105 Young, E., et al., *Caring for Country: Aborigines and Land Management* (1991) 168–170.

2. Iwi Management Plans

In New Zealand, one of the most potentially useful, yet underutilised, mechanisms for empowering Maori involvement in resource decisions are the RMA references to iwi management plans (IMPs). In recent years a number of iwi authorities, which are constituted under the Maori Trust Boards Act 1955, have prepared resource management plans.[106] These IMPs provide for the identification and clarification of Maori values and concerns, and the setting of objectives and strategies for using and protecting cultural and environmental resources. The making of an IMP itself can be an empowering process for the concerned people through their improved understanding of the issues and acquisition of new skills.

The RMA does not itself stipulate the content of or the method to create IMPs. This is left to the concerned iwi. The RMA, however, provides that when preparing or changing a district plan or regional plan/policy, the concerned council "shall have regard to any relevant planning documents recognised by an iwi authority affected" by the plan or policy (ss 61(2)(a)(ii), 66(2)(c)(ii); 74(2)(b)(ii)). The actual weight that might be given to an IMP in council decision-making varies in practice, and some studies of council–iwi relations suggest a lack of effective co-operation and consultation, especially among district councils.[107] Nevertheless, according to Nuttal and Ritchie, "if fully recognised and provided for by local authorities, [IMPs] are potentially one of the most practical means by which proactive partnership can be achieved under the provisions of the RMA".[108]

A potentially even more forceful way to more empower iwi interests is through the s 33, RMA, procedure which allows councils to transfer powers, functions or duties under the Act to another public authority, such as an iwi authority. Transfers of power must comply with certain criteria, including that the authority to which the transfer is made has appropriate technical capacity or expertise (s 33(4)). This is an important issue because to date the preparation of IMPs has sometimes suffered from the lack of financial and technical resources available

106 See, eg, Gavern, P., et al., *Ngai Tahu Resource Management Strategy for the Southland Region* (1997); Huakina Development Trust, *Waikato Iwi Management Plan: Manuka,* (1996); Swann S.J., et al., *Ngati Paoa Resource Management Plan* (1996). Some IMPs make reference to pest control, for instance, the Waikato Iwi Management Plan states (at 69) that "Huakina expects to be notified of major pest eradication programmes within Waikato iwi rohe in order to participate, comment, object or provide input".

107 Nuttal, P. & Ritchie, J., *Maaori Participation in the Resource Management Act: An analysis of provision made for Maaori participation in regional policy documents and district plans produced under the Resource Management Act 1991: iwi planning documents* (1995); Maynard, K., *He Tohu Whakmarama: A report on interactions between local government and Maori organisations in the Resource Management Act processes* (1998).

108 Nuttal & Ritchie, supra note 107, at 104.

to their iwi proponents.[109] Greater "seeding" assistance may need to be provided by regional councils or central government, such as through the Ministry for the Environment's Sustainable Management Fund. There is little evidence yet of councils' willingness to use the s 33 process for the benefit of iwi.

The formulation and recognition of IMPs provides a useful model for an integrated approach to addressing indigenous environmental and development concerns based on consultation and partnership between indigenous peoples and external agencies. They enable the requirements of s 6(e), RMA, to be implemented: it provides that all persons exercising powers and functions under the Act "shall recognise and provide for ... relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, wahi tapu and other taonga". The IMPs can incorporate Maori policy on management of introduced species, and other wildlife, and allow for biodiversity management issues to be integrated with other cultural and economic concerns in the one planning document. The inter-relationships between Maori cultural harvests and their social and economic welfare can be made clearer through IMPs.

Perhaps the most fundamental barrier to using the RMA to address management of introduced species and other wildlife is not deficiencies in the preparation and recognition of IMPs, but that the RMA does not generally relate to biodiversity management. This is apparent from the Environment Court's decision in *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*.[110] In May 1996 the Minister for Conservation approved a plan under the Wildlife Act 1953 to cull the introduced wild horses because of their impact on fragile native flora. The applicant in this case argued that the wild horses are part of the natural environment, as a distinct and unique breed, and therefore the proposed culling would amount to a breach of the duty in s 17, RMA, to avoid adverse effects on the environment. Judge Sheppard dismissed the complaint on the basis that it fell outside the scope of the RMA. This is because, in spite of the broad words of s 17, its context meant that there was an implied restriction upon its scope so that it applied only to activities controlled elsewhere in the Act. Although the purpose of the proposed culling would mitigate adverse effects on the environment, Judge Sheppard considered that such an activity would not per se amount to a "use" of land under s 9, RMA, nor an activity regulated by any other provision of the Act.[111]

The *Kaimanawa* decision suggests that the RMA would need to be amended in order to accommodate direct management of biodiversity. This could be dif-

109 To assist iwi prepare IMPs, some authorities have prepared a resource kit: see, eg, Te Kotahitanga O Te Taitokerau Resource Management Committee and Northland Regional Council, *Towards Developing Hapu/Iwi Management Planning Resource Kit* (1998).

110 [1997] NZRMA 356.

111 Ibid 369 per Judge Sheppard.

ficult to achieve because of the potentially very wide ramifications such an amendment would have on existing nature conservation legislation. This is particularly so in relation to reserves and other areas, covering nearly 30 percent of the country, vested in DoC. Perhaps a more efficient method would be to reform the Conservation Act 1987 to provide for recognition of IMPs in DoC decision-making processes and to allow for joint management and transfer of decision-making arrangements in relation to certain parks and reserves, and certain resources. The Conservation Act 1987 is influenced by a different philosophy to the RMA; whereas "kaitiakitanga" and "sustainable management" of resources underpins the RMA, preservationism is the dominant philosophy of the Conservation Act 1987 and its ancillary legislation. The preservationist orientation of the wildlife legislation is also at odds with the sustainable use approach of recent legislation for marine fisheries (ss 8–10 Fisheries Act 1996).

Putting aside the potential of redrafting the purpose and principles of the Conservation Act 1987, some more straightforward changes could be made to the rules governing the membership and responsibilities of the Fish and Game Councils to ensure adequate representation of iwi interests. Whilst Maori representation is to some extent catered for in other bodies established under the Act, namely the New Zealand Conservation Authority (s 6D) and the Conservation Boards (s 6P), there is no explicit mention of Maori representation on the Fish and Game Councils. The administrative establishment of a Kaupapa Atawahi Division in DoC is a positive initiative, but it needs to be backed by adequate financial and technical resources if it is to substantively enhance iwi involvement in policy-making and the understanding of iwi perspectives by non-indigenous DoC staff.[112]

Another area for reform concerns the development of co-management agreements for parks or reserves of significance to iwi. This could be achieved by transferring the land to appropriate iwi claimants, or retaining Crown ownership, but transferring a significant management role to iwi. The latter option can be achieved through existing mechanisms under the Reserves Act 1977, which provide for the appointment of local authorities to control and manage reserves (s 28) and the making of management plans by such authorities (s 41). These options are referred to in the Crown Proposals for the Settlement of Treaty of Waitangi Claims (1995), but it recommends that:[113]

112 For a fuller discussion of the Division, see Manuera, E., Te Heu Heu, T., & Prime, K., "The Conservation Estate, the Tangata Whenua" in Craig, G.C. & Hale, P.T. (eds), *Aboriginal Involvement in Parks and Protected Areas* (1992) 327.

113 Office of Treaty Settlements, Department of Justice, *Crown Proposals for the Settlement of Treaty of Waitangi Claims* (1995) 17.

> The vesting of ownership (with or without encumbrances) should be considered only for small discrete parcels of land of very special significance to Maori ... and where the alienation of the land from the Crown would not have adverse effects on the overall management of the conservation estate or place important conservation values at risk.

These strong caveats suggest that the development of Australian or Canadian style models of co-management in New Zealand is remote at present. There is a paucity of formal co-management arrangements between DoC and iwi. One exception is the Motutau reserve in Tai Tokerau where Maori have assumed responsibility for managing a small forest reserve. Other limited examples include co-management in relation to two national parks (Whanganui River and Egmont-Taranaki) and Maori titi bird harvesting on the Rakiura Titi Islands in southern New Zealand.[114] Creating new opportunities for Maori sharing of resource management must be complemented by provision, if necessary, of technical and infrastructural support. According to Taipepa et al, "transferring management to Maori before they are equipped ... could be a major imposition, just as excluding them from a substantive role is discriminatory and a lost opportunity".[115] Co-management arrangements would also usually retain Western scientific methods to assist, for example, in planning and designing ecologically sustainable harvests of rare or vulnerable species.[116] A more detailed discussion of possible institutional frameworks and processes for co-management in New Zealand is beyond the scope of this article, but it is an issue that patently warrants further research and testing.[117] Cross-cultural management arrangements, based on negotiation, not consultation, should be pursued because most existing statutory mechanisms for Maori involvement are at the discretion of the relevant government authority or else only provide for consideration of Maori views or values. Mechanisms like IMPs could allow Maori authorities to control their own involvement in decision-making and management of resources.

114 Taiepa, T., Lyver, P., Horsley P., David, J., Bragg, M. & Moller, H., "Co-Management of New Zealand's Conservation Estate by Maori and Pakeha" (1997) 24(3) *Environmental Conservation* 236.

115 Ibid 247.

116 Moller, supra note 28, at 101. Moller suggests, in relation to native birds, that "restoration of habitats and specific populations will be a necessary prelude to sustainable harvests in most cases, [and] it is inevitable that a period of prior research and management will be necessary before the safety of any proposed harvest can be scientifically assessed".

117 See generally Borrini-Feyerabend, G., *Collaborative Management of Protected Natural Areas: Tailoring the Approach to Context* (1996); Fisher, R.J., *Collaborative Management of Forests for Conservation and Development, Issues in Forest Conservation* (1995).

VII. CONCLUSION

Declining biological diversity in New Zealand and other countries is paralleled by the erosion of cultural diversity — previously through colonial conquest and today through more subtle forms of cultural assimilation generated by globalisation and the spread of multinational capitalism. The approximately 350 million indigenous peoples worldwide[118] are regarded as holding a significant proportion of humankind's cultural diversity. It appears incongruous to argue for conservation of biological diversity whilst being indifferent to the loss of such cultural diversity. By maintaining cultural diversity, especially indigenous peoples' relationships with their environment, we *a priori* increase the possibility of preserving biological diversity. To improve our understanding of the connections between biological and cultural diversity requires the development of integrative and comprehensive approaches to resource management. This article has explored this issue in relation to the management and use of introduced species.

The continuing preoccupation, locally and internationally, with customary rights to indigenous biodiversity, should now be broadened to encompass the more prevalent, introduced variety. This article has argued that debates about customary rights to use wildlife resources should consider ways to enhance indigenous peoples' involvement in the more fundamental management processes. Obviously, recognition of customary rights can facilitate claims to participate in management structures. Maori participation in management, either separately or in association with government authorities, is one method of giving effect to the Treaty obligations to protect rangatiratanga which falls short of a transfer of ownership.

Emerging legal standards, in New Zealand and internationally, for the treatment of indigenous peoples emphasise a right to development as one of the bases for their self-determination. The right to development could encompass control over the use of introduced species, including commercial development of the resource. The kiore rat and trout fishing controversies provide an opportunity for interested parties in New Zealand to examine the role of some of the under-utilised statutory provisions for empowering Maori involvement in resource management, particularly through iwi management plans.

The development of cross-cultural management structures in New Zealand should be framed by international and Treaty obligations, be based on both scientific and traditional cultural knowledge, and serve to empower indigenous peoples' assumption of environmental responsibilities. Experiences overseas give some optimism that new forms of partnership can develop in this country.

118 For discussion of definitions and characteristics of indigenous peoples, see Hitchcock, R.K., "International Human Rights, the Environment and Indigenous Peoples" (1994) 5 *Colorado Journal of International Environmental Law and Policy* 2.