THE TREATY OF WAITANGI

A FRAMEWORK FOR RESOURCE MANAGEMENT LAW

by

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I INTRODUCTION

The objective of this paper is to consider the principles and the provisions of the Treaty of Waitangi as a framework for New Zealand's resource management laws. The necessity for such an analysis to be undertaken has now become critical as a consequence of the Government's resource management law review project (RMLR), coordinated by the Ministry for the Environment. This large-scale exercise, a complete review of all of New Zealand's statutes impinging on resource management (town and country planning, water and soil conservation, geothermal energy, mining, pollution control)[1] - and which has overtaken and absorbed an earlier review of coastal management law embarked on by the Department of Conservation - must obviously take some cognisance of the Treaty of Waitangi, as the principal reports thus far produced in the course of the review acknowledge explicitly.[2] The most recent RMLR report advises that the Government has decided already that an "active stance" must be taken in regard to Maori interests in the resource management area, that "new legislation should provide for more active involvement of iwi in resource management", and that "legislation should provide for the protection of Maori cultural and spiritual values associated with the environment" - all of these flowing from the government's recognition that resource management law must now take account of the Treaty.[3]

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1 The Acts covered by the review are: the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, the Soil Conservation and Rivers Control Act 1941, the Mining Act 1971, the Coal Mines Act 1979, the Geothermal Energy Act 1953, the Petroleum Act 1937, the Quarries and Tunnels Act 1982, the Noise Control Act 1982 and the Clean Air Act 1972. Also included are the Environmental Protection and Enhancement Procedures, a non-statutory directive which establishes guidelines for environmental impact reporting.

2 The two principal productions to date are *Directions for Change: A Discussion Paper* (Ministry for the Environment, August 1988), and *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (Ministry for the Environment, December 1988) (subsequently referred to as *Discussion Paper and People, Environment, and Decision Making).* For references to the Treaty in the context of resource management law see *Discussion Paper, 14-16,* 27-28; *People, Environment and Decision Making,* 23-24, 32-34.

3 *People, Environment and Decision Making* (above, n 2), 5. It should also be noted that there is considerable Maori scepticism as to whether anything useful for Maoridom

As well as RMLR other important reviews of environmental and conservation legislation are proceeding, coordinated by the Department of Conservation. The Protected Areas Review is concerned with the legislation relating to national parks and reserves: an Issues Paper was released by the Minister of Conservation in July 1988.[4]

There is also the historic places review, focusing on the Historic Places Act 1980 and parts of the Town and Country Planning Act 1977. An Issues Paper[5] has recently been released by the Minister of Conservation, exploring the deficiencies of the existing statutes and inviting public submissions. As with the Protected Areas Review Issues Paper[6] considerable emphasis is placed on the obligations of the Crown which derive from the Treaty. Other reviews impinging on Treaty issues and resource management are the reviews of local and regional government, marine reserves, marine mammals protection and species protection. [7]

New legislation dealing with resource management, protected areas and historic places will, it can safely be assumed, make some reference to the Treaty. Whether the new legislation will fairly discharge the Crown's obligations remains to be seen. The task of determining what the Crown's Treaty-based obligations in this area might be has, in any event, not yet been addressed in detail by the Government; this would seem to be an essential prerequisite to reshaping resource management and conservation laws so that they conform to the Crown's Treaty-based obligations. It is on this question that this paper will focus. Does the Treaty allow for laws to be made for resource management at all? If so, are there limitations on what the Crown may do? What are the respective roles of the Treaty partners in the area of environmental management? How satisfactorily does the existing law conform to these requirements? These are the difficult conceptual and jurisprudential problems with which this paper will attempt to grapple.

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will emerge from the RMLR, especially in view of the Government's will be excluded from the review process. This scepticism appears to extend to the Ministry for the Environment's own Maori Secretariat: see "Maori 'Cynical of Resource Management Reform'", *The Evening Post*, Wellington 10 September 1988.

4 See *Protected Areas Legislation Review: Issues for Public Comment* (Department of Conservation, July 1988). Statutes included in this review are the Conservation Act 1987, aspects of the Harbours Act 1950, the Hauraki Gulf Maritime Park Act 1967, some provisions of the Land Act 1948 and the Local Government Act 1974, the National Parks Act 1980, the Queen Elizabeth the Second National Trust Act 1977, the Reserves Act 1977 and the Wildlife Act 1953.

5 *Historic Places Legislation Review: Issues for Public Comment* (Department of Conservation, December 1988).

6 See *Protected Areas Legislation Review* (above, n 4), 35 (noting the desirability of statutory procedures which would encourage marae-based participation in protected areas management), and 46-47 (proposing incentives to encourage reservation of Maori land).

7 See *Historic Places Legislation Review* (above, n 2), 33-35.

The first part of this paper will focus on the implications of the language of the Treaty for resource management and conservation law. This will be followed by an analysis of overseas developments where similar issues have arisen. Here, particular emphasis will be placed on the framework developed by courts in the United States deciding cases arising out of resource disputes between Indian tribes and state governments. The next section will be a consideration of the variety of statutory references to the Treaty of Waitangi in the existing New Zealand statutes. The central part of the paper will examine how adequately Treaty issues are taken into account in the various areas of existing resource management and conservation law (mining, geothermal energy, town and country planning, water and soil conservation, fisheries management, historic places and archaeological sites, and environmental impact reporting and assessment). The last part of the paper will be an examination of the methods by which consideration of the requirements of the Treaty in this area can be improved.

This paper will not examine whether the Treaty *should* be relevant to resource management and conservation law in late twentieth-century New Zealand. This will simply be taken for granted, although it is of course recognised that there is no real consensus on this issue amongst Pakeha New Zealanders, as recent controversy over fisheries issues makes clear.[8] The Government has already decided that Treaty issues will be central to the current legislative reviews, and a number of statutes already make specific reference to Treaty principles.[9] It is too late in the day now to contend that the Treaty has no relevance in this area.

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8 For example, the President of the Fishing Industry Association, Mr David Anderson, has stated that the fishing industry "strongly questioned the existence of Maori rights" ("Industry to Fight Fisheries Claims", *The Dominion* 19 March 1988, p 3). In April 1988 a group of about 80 commercial fishermen gathered outside Parliament Buildings to protest against a recent District Court decision which dismissed charges against a Maori fisherman on the grounds that he was exercising a traditional fishing right (see "Maori Fish Case Provokes Protest", *The Dominion* 23 April 1988, p 2). With the release of the Waitangi Tribunal's *Muriwhenua Report* in June 1988 the President of the Federation of Commercial Fishermen, Mr Bob Martin, threatened that unless the Government took steps to change the Fisheries Act 1983, particularly s 88 (2), which protects Maori fishing rights, the industry would retaliate by flouting the quota management system ("Fishers Threaten To Flout Quota Law", *The Dominion Sunday Times* 12 June 1988, p 2). The same report led to claims by Whangarei MP John Banks and Bay of Islands MP John Carter that the Report advocated legalised racism and that it would lead to bloodshed and violence - claims angrily rejected by Maori leaders: see "Fisheries Decision 'Legalised Apartheid': Maoris Reject Predictions of Race Conflict", *The Dominion* 14 June 1988, p 2. Such controversy is not in itself surprising, and is paralleled by similar controversies - also over traditional fishing claims - which have occurred in Oregon and Washington: see Richard A Finnigan, "Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study" (1975) 51 Washington Law Review 61, 92; John R. Schmidhauser, "The Struggle for Cultural Survival: The Fishing Rights of the Treaty Tribes of the Pacific Northwest" (1976) 52 Notre Dame Lawyer 30.

9 See eg Conservation Act 1984 s 4; Environment Act 1986, Long Title (iii); State-Owned Enterprises Act 1987 s 9.

II IMPLICATIONS OF THE TREATY OF WAITANGI FOR RESOURCE MANAGEMENT AND CONSERVATION LAW

A Kawanatanga: The Crown's Right to Govern

In Article I of the Treaty the chiefs assembled at Waitangi ceded to the Crown "all the rights and powers of Sovereignty" formerly exercised by the chiefs; in the Maori text this is rendered as kawanatanga, "governorship". (Pontius Pilate is the 'kawana' in the Maori text of the Bible.) Claudia Orange, in her authoritative study, *The Treaty of Waitangi,* comments as follows on the Maori text of Article I of the Treaty:[10]

> The emphasis given to an absolute and lasting yielding up seems to be conveyed clearly, but the choice of 'kawanatanga' for 'sovereignty' is not such a happy one. Williams had already used it to render 'sovereign authority' and 'civil government' in the preamble. The concept of sovereignty is sophisticated, involving the right to exercise a jurisdiction at international level as well as within national boundaries. The single word 'kawanatanga' covered significant differences of meaning, and was not likely to convey to Maori a precise definition of Sovereignty.

Orange also argues that the word "rangatiratanga", used in Article II, actually conveys a much clearer sense of "sovereignty" than does the word "kawanatanga". Kawanatanga "tended to imply authority in an abstract rather than a concrete sense".[11]

In the first of its major recommendations, the *Motunui* report,[12] the Waitangi Tribunal characterised the essential exchange of promises recorded in the Treaty as "an exchange of gifts .... The gift of the right to make laws, and the promise to do so as to accord the Maori interest an appropriate priority."[13] In the *Manukau* report[14] kawanatanga was defined as:[15]

> the authority to make laws for the good order and security of the country, but subject to an undertaking to protect particular Maori interests.

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10 Claudia Orange, *The Treaty of Waitangi* (Allen and Unwin,Wellington 1987) 40.

11 Ibid 41.

12 *Motunui Report,* Aila Taylor (Te Atiawa, re Motunui), Wai-6, March 1983 (*Motunui*).

13 *Motunui, 61.*

14 *Manukau Report,* Nganeko Minhinnick and others (Ngati Te Ata and Tainui, re Manukau), Wai-8, July 1985 *Manukau.*

15 *Manukau, 95.*

In the *Muriwhenua* report[16] the Tribunal took this analysis several stages further, specifically in the context of resource management law. This has obvious significance for present purposes.

In *Muriwhenua* the Tribunal's starting point was that the position which had prevailed until the present time - complete Crown control - was inappropriate and resented,[17] and (by implication) was not in accordance with kawanatanga. Kawanatanga was a limited, not an absolute right, qualified by rangatiratanga (just as rangatiratanga was restricted by the Crown's kawanatanga). Although the Crown had exceeded the authority given to it by the Treaty, it did not follow that the Crown had no general authority over the resource. One proper exercise of kawanatanga is to make laws of general applicability with the objective of conservation control. The Tribunal observed that it is "not contrary to the Treaty that the Crown has sought to provide laws directed to resource maintenance."[18] But the right to legislate thus is not unfettered, and its exercise will be contrary to the Treaty if inadequate account is taken of rangatiratanga. Thus in the *Muriwhenua* context it was inconsistent with the Treaty that fisheries laws were

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16 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* Interim Report (re Maori Fishing Rights) May 1988, Hon Matiu Rata and others (Ngati Kuri and others, re Muriwhenua lands and fisheries) *(Muriwhenua).*

17 At pp 27-28 of *Muriwhenua* the Tribunal, restating the questions and concerns of the applicant tribes, observes: "Fish laws and policies were therefore the subject of criticism. Who made these laws to apply to the North as if Maori had no laws of their own it was asked, and were the government's laws any better? What bureaucrat could claim access to a greater knowledge than theirs, when the record of bureaucratic advice is that it results in the destruction of the fish life? Why had Maori to go cap in hand to the bureaucrat for a licence to fish, to feed families or supply the home marae when for centuries, Maori had done these things well enough, without government control. Why were others permitted to fish the grounds of the Maori and why were the Maori restricted in doing that themselves? Why was no account taken of Maori conservation experience, and why had Maori to prove the wisdom of centuries to sceptical public servants whose experience was more questionable than theirs? Why were Maori excluded from full-time and part-time commercial fishing and why were others assisted into the industry but not them? What account was taken of their local economy and dependence on the resource? Why were no Maori engaged to enforce the regulations in the remote northern harbours? Had not the Maori honorary fishing officers been summarily dismissed? Who allowed the government to sell the fishing rights of their fisheries when they had a Treaty with the Crown that guaranteed those rights to them? Who said the bureaucrat could decide what Maori fishing interests were, and then, apparently, ignore them? Why was there no consultation on these things?"

18 *Muriwhenua,* 227.

made "without *adequate regard* to the Crown's treaty undertakings".[19] Observed the Tribunal:[20]

> The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order', and that *includes the right to make laws for conservation control.* Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.

In other words, there is a presumption that the Crown cannot make laws which override rangatiratanga, although this presumption can sometimes be displaced, as for instance when the need arises to make conservation laws. It follows, too, that all discussion and analysis of the implications of the Treaty must begin from its starting-point as a constitutional constraint, as a fetter on parliamentary sovereignty. New Zealanders have long been used to the concept of unfettered parliamentary sovereignty as a fundamental characteristic of their constitution. The argument that the Treaty - if it is to be taken seriously - must fetter Parliament's ability to legislate might therefore be rather difficult for many to accept. However, most countries are regulated by constitutional texts which constrain the legislature - as is the case in both Australia and the United States. It is also the case that recent dicta by Cooke P in the Court of Appeal suggest that in other areas the concept of complete parliamentary sovereignty is coming to be questioned-especially in the area of fundamental rights and freedoms.[21] Nor are the constraints envisaged by the Waitangi Tribunal absolute: they are rebuttable in certain contexts. The focal point of sovereignty remains the Crown-in-Parliament; but in relation to certain subject-matter (restraints on rangatiratanga) certain preconditions are necessary before such sovereignty can be exercised.

It must be emphasised that the Treaty of Waitangi does not yet have the status to act as a constitutional fetter. The observations of the Waitangi Tribunal in *Muriwhenua* arise out of the Tribunal's specific statutory mandate, which is to evaluate whether the actions of the Crown are in accordance with the principles of the Treaty. Nevertheless the Tribunal's analysis, and the dicta of the Court of Appeal alike, suggest that the principle of unfettered parliamentary sovereignty

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19 Ibid (emphasis added).

20 Ibid 232. The Tribunal appears to be referring to not merely to *political* , but to legal sovereignty: that is, for the Treaty to be given its full constitutional place there must be legal constraints on Parliament. For a stimulating discussion, specifically on the concepts of legal and political sovereignty, see P G McHugh 'Constitutional Theory and Maori Claims' in I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi,* (Oxford, Auckland, 1989) pp 25-63.

21 See *L* v *M* [1979] 2 NZLR 519, 527; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

may have had its day. We are moving instead towards a constitution based, rather, on 'rights' - Treaty rights and fundamental human rights.[22]

B Rangatiratanga and Environmental Management

Article II of the English-language text of the Treaty of Waitangi stipulates that:

> Her Majesty the Queen of England confirms and *guarantees* to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess ... .

The word "guarantees" has been given particular emphasis by both the Waitangi Tribunal and the Court of Appeal as denoting that the Crown's obligations are active, rather than passive.[23]

In the Maori text the Queen assures and agrees to the chiefs, the sub-tribes and all the Maori people of New Zealand "te tino rangatiratanga" (the full authority, or full chieftainship, or maybe complete sovereignty) 'o o ratou whenua o ratou kainga me o ratou taonga katoa" (over their lands, villages - sometimes translated as 'places where their fires burn' - and all things, tangible and intangible, of importance to them). Whatever precisely it means, "rangatiratanga" implies something rather more than a mere right of possession until alienation, and this different terminology in the two texts is of real importance in view of the possibility that in the event of a clash the Maori text must prevail.[24]

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22 See J L Caldwell, 'Judicial Sovereignty' [1984] NZLJ 35; P A Joseph and G R Walker, 'A Theory of Constitutional Change' (1987) 7 Oxford Journal of Legal Studies 155.

23 See eg *Manukau,* 94 (the Treaty "obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them"); similarly in *Te Reo Maori* (Huirangi Waikerepuru and others, re *Te Reo Maori,* Wai- I 1, April 1986) 29; *Orakei* (Joseph P Hawke and others, Ngati Whatua, re Orakei, Wai-9, November 1987) 135; *Muriwhenua* 194. In *Maori Council v. Attorney-General* [1987] 1 NZLR 641 Cooke P observed that 'the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.

24 See eg *Manukau,* 88. The starting point is the general rule of international law (as reflected in the provisions of the Treaty of Waitangi Act 1975) that where a treaty is in two or more languages, each text has equal authority. However, the Tribunal said that regard must also be had for certain other principles, notably the rule in *Jones* v *Meehan* (1899) 175 US 1. This states that treaties should be understood "in the sense which they would naturally be understood by the Indians", a rule which would seem to involve a preference for the text in the indigenous language (supposing one should exist: in fact nearly all treaties with American Indians were written only in English). The Tribunal referred also to the contra proferentem rule and to the fact that it was the Maori text which played the "predominant role" in "securing the signatures of the various chiefs". However the Tribunal has so far refrained from explicitly according

It is not proposed to review here in detail the various lengthy analyses of rangatiratanga to be found in the various reports of the Waitangi Tribunal. What is more to the point for present purposes is the Tribunal's view that the Crown's obligation to take positive steps to protect rangatiratanga involves both ownership and management. In terms of ownership, an iwi should own at least enough property and resources to ensure its continued viability. This was traversed in the *Waiheke* and *Orakei* decisions in particular.[25] But many claims transcend questions of resource ownership, extending to the restoration of tribal mana in the context of resource management. Indeed it is management rights, rights of tribal input into decisions affecting the environment and resources, which have so far claimed most of the attention of the Waitangi Tribunal. In a number of the principal reports to date ownership questions were not in issue at all.

In *Motunui* the Tribunal concluded that:[26]

> the protection envisaged by the Treaty involves recognising the rangatiratanga of the Maori people to both the use and the control of their fishing grounds in accordance with their own traditional culture and customs and any necessary modern extensions of them.

A right to 'use' and even to 'control' does not necessarily have to amount to ownership, although a transfer of ownership of certain fishing grounds to local hapu would be one way of achieving the objectives. However, the Tribunal had in mind, it appears, the establishment of reserves (still owned by the Crown) but

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priority to the Maori text. The Tribunal is under a statutory obligation to take *both* texts into account, and prefers to emphasise the wairua or spirit of the Treaty considered as a whole.

25 This aspect is dealt with most fully in *Waiheke* (Hariata Gordon and others, Ngati Paoa, re Waiheke Island, Wai-10, June 1987) at pp 77-78. Here Judge Durie concludes that the right of preemption in Article II involved a corresponding "duty to ensure that each tribe maintained a sufficient endowment for its foreseen needs". This, he argues, was clear Imperial policy, and is also implicit in the language used in the preamble to the Treaty, 'indicating a fiduciary trust" (*Waiheke,* 80). In *Orakei,* p 147, the Tribunal stated:
"In our view the two parts of Article II of the Treaty must be read together ... . If this is done, we find that Article II, read as a whole, imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood, or, as Chief Judge Durie puts it in the *Waiheke Report* (1987:77), that each tribe maintained a sufficient endowment for its foreseen needs.
This duty is in turn used as the basis for *settling* ownership claims - in *Orakei* the Tribunal thought that the appropriate method to calculate a settlement of the claim, once it had been made out, was "to re-establish in modern context an objective of the Treaty appropriate to the case - in this case, surely, the duty on the Crown *to ensure the retention of a proper tribal endowment*" (*Orakei,* 186).

26 *Motunui, 63.*

which would be managed in some way by local hapu - in the same way that reserves under the Reserves Act 1977 are often managed by management authorities.[27]

Tribal participation in reserve management - either in isolation or in association with other authorities - is one method of giving effect to the obligations to protect rangatiratanga which falls short of a transfer of ownership. Consultation of a more general kind was emphasised in *Manukau*. Here, the Tribunal rejected the argument that ownership of the Manukau Harbour be transferred to the claimant tribes. The real issue was not "who owns the Harbour but its use". Ownership and control (that is management) are properly severable".[28] Nor was the Tribunal willing to accept that total management of the Harbour be vested in the local tribes.[29] Rangatiratanga could be safeguarded by means of a Crown resumption of ownership, by an Action Plan to be proposed by the Commission for the Environment, and by the establishment of a body of Guardians of the Harbour, with at least half of this body being comprised of Kaitiaki o Manukau, appointed by the Minister of Maori Affairs from local Maori leaders, who would "be vested with mana, and their role would uphold the mana of the people."[30]

That management of such places as the Manukau, or geothermal areas, should take into account the status of local Maori tribes or hapu as kaitiaki is an objective many Pakeha can easily sympathise with. There are two questions, however: first, over what places should kaitiaki be appointed? Every estuary, river, geothermal area, scenic reserve? (The answer is probably to be determined on the basis of whether the particular locality has the status of a taonga.) Secondly, how much control should the kaitiaki have? 100%? 50%? Or should it vary depending on the status of the particular locality as a taonga - some places are more treasured than others. The complexities of management are also relevant: for instance in *Manukau* the Tribunal felt that the complexities of managing and cleaning up a large and polluted harbour was a task beyond the resources of local Maori people.[31] It is this writer's view that no clear statement of the appropriate powers of kaitiaki is possible at this stage: much will depend on the facts of each case. Much must also, obviously, turn on what the local tangata whenua themselves regard as appropriate.

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27 See ibid, 70-73.

28 See *Manukau*, 103.

29 Ibid, 104.

30 Ibid, 107. Progress in implementing Manukau was slow, in some aspects disappointingly slow - see *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988*, Parliamentary Commissioner for the Environment, Wellington 1988, 55-74.

31 See *Manukau*, 104.

An appropriate note on which to conclude this section are the views of Nganeko Minhinnick, of Ngati Te Ata of Tainui, the claimants in *Manukau,* on the role of kaitiaki:[32]

> Nganeko stated that the Maori people desire their status as kaitiaki to be fully recognised, and that this is not *the same as ownership*. She repeatedly emphasised that the Pakeha people needed to trust that the Maori people would act as effective guardians. They will not support the Lake Guardians model (only advisory) or only a percentage guardianship. They want tangata whenua's existing kaitiaki status to be acknowledged 100% as a starting point; in that way they can negotiate a 50:50 partnership from a position of mana. They believe it is against the spirit of the Treaty for the Crown to demand compromise of mana from the outset.

C *Rangatiratanga and Customary Law*

One of the most valuable features of the work of the Waitangi Tribunal has been its analysis of customary environmental and conservation law, especially in the context of fisheries management. In *Motunui* the Tribunal was concerned to make clear that the customary rules deserved serious consideration and respect: such rules represent "the collective wisdom of generations of people whose existence depended upon their perception and observation of nature".[33] Customary rules relating to the disposal of human waste were described in *Kaituna*[34] and *Mangonui*[35] - in the *Manukau*[36] and *Muriwhenua*[37] reports the fisheries conservation rules of Tainui and the Muriwhenua tribes were described in considerable detail.

Customary rules have been receiving prominence in recent contexts other than the Waitangi Tribunal. At a conference on marine disposal of waste water held in Wellington in May 1988 Ngati Raukawa elder Maui Pomare spoke of Maori attitudes to marine sewage disposal, reminding the conference that "it was an

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32 *Environmental Management and the Principles of the Treaty of Waitangi* (above, n 30), 72.

33 *Motunui,* 34.

34 *Kaituna* (Sir Charles Bennett and others, Te Arawa, re Kaituna River, Wai-4, November 1984), 12.

35 *Mangonui Sewerage Report* (Mangonui Sewerage, Ngati Kahu, Wai-17, August 1988), 38.

36 *Manukau,* 54-55.

37 *Muriwhenua,* 24-25.

affront and totally unacceptable to Maoridom to discharge raw human waste into the sea":[38]

> Maoris regarded the sea not only as a food resource but with an element of tapu (sacredness) and to discharge any untreated effluent into it violated the spirituality of their traditions and cultural values.

A somewhat similar body of customary rules relating to the conservation of geothermal resources also exists amongst Te Arawa and Ngati Tuwharetoa.[39]

The Waitangi Tribunal in *Muriwhenua* took the view that implicit in rangatiratanga was a right of self-regulation according to the norms of customary environmental management law. This is subject to the Crown's right to override customary rules in the interests of conservation, but this should only be done after attempts to regulate non-Treaty fishing have proved inadequate to facilitate the objectives of conservation control. (This is implicit in the 'rights'/'privileges' distinction, of which more later.) Generally the tribes are entitled to be left alone to regulate their share of the resource in accordance with their own rules - if that is their wish. Under the general heading of "Tribal rules" the Tribunal advanced a number of propositions, as follows:[40]

(i) Fisheries were tribally owned at 1840. Individual use rights were subject to and flowed from the tribal overright.

(ii) The Maori text guaranteed a tribal control of Maori matters. That *includes the right to regulate the access of tribal members to tribal resources.*

(iii) The tribal overright was customarily unstructured. Long held family rights were recognised. Rules were simply known. Individual use rights were based on kinship and marriage and not merely on boundaries.

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38 Vanessa Stephens "Sea Seen As Factor In Racial Harmony", *The Dominion* (Wellington), 27 May 1988, p 7.

39 On geothermal issues, and especially on the application of the kaitiaki concept in this context, see M. Davenport et al, *Geothermal Management Planning: An Overview,* Waikato Valley Authority Technical Publication No 48 (Waikato Valley Authority, Hamilton 1987), 43-44; R P Boast, *Geothermal Energy - Maori and Related Issues* (Ministry for the Environment, 1989), 11-17; Evelyn Stokes, 'Public Policy and Geothermal Energy and Development: The Competitive Process on Maori Lands', paper presented to a symposium on *New Zealand and the Pacific: Structural Change and Societal Responses,* School of Social Sciences, University of Waikato, 19-20 June 1987.

40 *Muriwhenua,* 230 (emphasis added).

(iv) The past Maori failure to make by-laws for fishing grounds, under enabling laws from 1900, was not due to tribal disinterest, for the Governor reserved no fishing grounds.

(v) The right of regulation has become a duty in our time, to protect the resource and to bring a certainty to the law. This is now required through population and other changes. *It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules.*

(vi) It is the right of tribes to determine their own membership, to licence their own members and to deny tribal fishing rights to those of its members who do not observe its rules.

(vii) It is the right of tribes to permit persons outside the tribal group to enjoy any part of the tribal fishing resource, whether generally or for any particular purpose or occasion.

(viii) As a matter of custom, Maori individuals have no greater fishing rights than members of the general public when fishing outside their tribal areas, except to the extent that they have an authority from the local tribe and abide its rules.

(ix) Neither custom nor the Treaty confers on any Maori the right to destroy the resource.

(x) It is consistent with the Treaty that the Crown and the tribes should consult and assist one another in devising arrangements for a tribal control of its treaty fishing interests, that they should aid one another in enforcing them, and that the tribes should furnish the Crown with all proper returns.

The Tribunal is clearly articulating the right of the tribes to greater participation in environmental management than is the case at present, but the place of tribal rules in this process, and its interrelationship with ownership matters, is not so clear. The Tribunal's primary focus appears to be on tribal self-regulation as an incident of ownership - that is, once the tribal share of the resource has been determined and in some way vested in the tribe, then the tribe can regulate the resource itself and in accordance with rules of its own choosing. This begs the question, of course, as to what the 'tribal share' of the resource is, and how that share is to be ascertained and vested. (In *Muriwhenua* those questions were to be determined by negotiation with the Crown, but some specific suggestions were also made, most notably that the Crown should establish substantial fishing reserves.) There seems little difficulty with the proposition that a resource owned by a tribe should be managed by it in its own way. The real problem is whether tribal regulation, and tribal customary law, should have a role where the resource is not tribally owned.

One possible approach is to allow tribes to regulate completely resources in their tribal area irrespective of current ownership. Thus the Tuwharetoa/Te Arawa peoples could completely regulate geothermal energy resources in the central North Island; or the Muriwhenua tribes could exercise complete control of the fishing around their tribal area to the outer limits of the continental shelf. The tribes, in other words, would become the regulatory agencies, and would supplant existing management by central and local government agencies. Whether this is feasible is perhaps questionable. It certainly does depend on the resource at issue. The writer has argued elsewhere that a generous and creative response to the *Muriwhenua* findings would be to allow the Muriwhenua tribes to regulate the local fishery through a fisheries court which could be subject to review by the ordinary courts. This could operate as a type of pilot scheme, to test the feasibility of tribal regulation of non-tribal personnel, and to allow the difficulties inherent in translating customary fishing rules into the language of formal regulations to be addressed.[41] The alternative to complete tribal regulation is tribal self-regulation of some discrete, defined part of the resource, combined with tribal participation in overall management by central, regional and local agencies. The discrete, defined part of the resource need not necessarily be owned by the tribe - it could be, for instance, Maori fishing reserves which presumably would still be "owned" by the Crown.

Geothermal energy provides a convenient example of how a management regime of the latter kind might be established. Overall management of geothermal energy would continue to be by catchment/regional water boards as at present, supplemented by the Ministry of Energy, and conducted by means of geothermal water management plans which would be prepared after due consultation with tribal authorities. A central coordinating Geothermal Commission, on which there could be a 50% Maori representation, would have certain policy and management functions. In addition, however, tribes could 'opt out' of the system, and have complete management of certain defined areas, such as Ohinemutu, which would be run by iwi or hapu and in accordance with tribal law. [42]

However precisely tribal customary rules are given status, there will be further problems relating to promulgation and enforcement.[43] Legal rules must be

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41 See R P Boast, The Developing Law Relating to the Treaty of Waitangi and Environmental Law', in J E Dixon, N J Ericksen and A S Gunn (eds) *Ecopolitics III: Proceedings* (Environmental Studies Unit, University of Waikato, September 1988) 24, 29-30.

42 This is the framework advocated by the author - see Boast, *Geothermal Energy: Maori and Related Issues,* (above, n 39), 30-33.

43 For an extended analysis of the problems involved in recognition of indigenous customary laws, see generally Law Reform Commission (Aust), *The Recognition of Aboriginal Customary Laws,* 2 vols (Canberra 1986), and especially Chapter 8. Recently an argument has been made advocating an increased role for Maori customary rules in the operation of the criminal justice system: see Moana Jackson, *The Maori and the Criminal Justice System: He Whaipaanga Hou - A New*

published and be generally available, especially if they are to apply to non-tribal personnel. This is a fundamental aspect of the rule of law. However, the task of translating the concepts and requirements of customary codes into comprehensive regulations will not always be easy. There may well be some resistance to codifying and publishing customary laws on the part of tribal elders. There may also be some feeling that to do so might weaken the unwritten law's moral force. The process might be seen to carry risks of exposing traditional tribal matters to public - and perhaps unfriendly or ignorant - gaze. However, despite these difficulties - which certainly should not be minimised - tribal codes clearly can be translated into written regulations and enforced as such. This happens with tribal fishing codes in Oregon and Washington for example. Enforcement of tribal codes could also present difficulties, but such difficulties need not necessarily be insurmountable - especially if tribal authorities are supported by other agencies (specifically, the police, and departments such as the Ministry of Agriculture and Fisheries).

The conclusion is, once again, that there are no simple solutions. The extent to which tribal self-regulation in accordance with tribal customary rules is suitable will depend on the tribe, the resource, and the extent to which Maori concerns and aspirations can be built into existing regulatory structures.

D Taonga

The third key expression in the Treaty, after kawanatanga and rangatiratanga, is 'taonga', meaning 'things treasured'. The Waitangi Tribunal has been careful to emphasise that the term taonga is not confined to items of tangible property - rivers, lakes, burial sites - but extends to intangible treasures, including the Maori language, or tribal mana. In *Motunui* the Tribunal accepted the claimants' submission that "the general word 'taonga' embraces all things treasured by their ancestors, and includes specifically the treasures of the forests and fisheries".[44] In *Orakei* the Tribunal summed up its earlier analyses of the expression as follows:[45]

> We also considered 'taonga' in the *Te Atiawa (ie Motunui) and Manukau* reports. Williams' Dictionary renders it as 'property, anything highly prized'. We emphasise here, as described in our earlier reports, that 'taonga' is not limited to property and possessions. Ancient sayings include the haka (posture dance) as a 'taonga' presented to visitors. 'Taonga' may even include thoughts. We have found it includes fisheries (Te Atiawa Report 1983) and language (Te Reo Maori Report 1986).

Perspective, Department of Justice, Policy and Research Division, Study Series 18 (Department of Justice November 1988), especially pp 33-44, where the author decisively rejects the often-made claim that Maori society lacked a legal system of its own.

44 *Motunui,* 59.

45 *Orakei,* 134.

The concept of taonga, then, is highly elastic; it may even include "the whole environment and people",[46] and could be used to argue that the Treaty has guaranteed to the Maori people at least some degree of environmental protection - clean air, water, uncontaminated shellfish resources, etc. Sometimes it is difficult to define the precise nature of the taonga even when fairly specific resources are at issue. For instance, is the taonga in respect of geothermal resources limited to specific sites of surface thermal activity (Ohinemutu, Orakeikorako, Whakarewarewa, Ohaaki) or the whole underground geothermal system? (The answer probably is that it is both.) The term taonga can also have a dual meaning extending to a physical resource (a lake, for example) and the associations, memories and traditions associated with that resource. Such an example is the Wanganui River. In a recent hearing before the Rangitikei-Wanganui Catchment Board relating to river-flow levels, witnesses for Maori objectors made the river's status as a taonga very clear.[47]

> J E Ritchie also presented a submission prepared by G. Habib which stated that in the Maori idiom, the Whanganui River is a Taonga, a most precious possession. As such the river is many things, both present and past, both physical and metaphysical, both real and unreal, at once a precious possession and a source of sustenance, a means of communication with the Gods, the Tipuna, the Kaitiaki and the Taniwha, and a manifestation of Wairu, Mana, Tapu and Noa ... . Every part of the river and its environs is sacred to the Whanganui Maori - they are part of the river and the river is part of them. The water which moves in the river and its tributaries is not just water but also the blood of the ancestors. All things are connected.

An exhaustive definition of taonga is simply not possible. Its implications will have to be worked out on a case-by-case basis. An argument can certainly be made that the Treaty itself guarantees a right of environmental quality - as Indian tribes have begun to argue with respect to some treaties in the United States.[48] Furthermore, the Maori holistic view of nature and the environment - the spiritual and metaphysical dimensions - must also be recognised in any future system of law relating to resource management which seriously aspires to take cognisance of the Crown's treaty obligations.

E Other Concepts

A number of other concepts, derived not from the language of the Treaty, but from the discourse of the law, assist in comprehending requirements of the Treaty.

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46 See M M Gray et al, *The Treaty of Waitangi and its Significance for Resource Management Law Reform,* unpublished paper for the Ministry for the Environment prepared by the Centre for Resource Management in association with the Centre for Maori Studies and Research, University of Waikato, July 1988, Appendix II (account of the hui, Taumutu, 27-29 May 1988), p 44.

47 *Wanganui River Minimum Flow Review, Report and Recommendations of the Tribunal,* Rangitikei-Wanganui Catchment Board and Regional Water Board, 20 September 1988, p 7.

48 See below, 20-21.

The first is the distinction between rights and privileges. This has not been much employed to date in New Zealand, but is a fundamental feature of discussion in the United States.[49] To take a concrete example: Ngati Whakaue of Rotorua have a Treaty-based right to their share of the geothermal resource, as it is protected by a Treaty, the fundamental text which constitutes the legitimacy of the New Zealand state. Their entitlement to the resource is of a different order from members of the Rotorua Bore-Users Association, who have a revocable privilege only: Treaty rights are of a different order from the general right of all not to be discriminated against or to share in the benefits of resources owned by the Crown. To argue otherwise, to maintain that the Maori have the same entitlements as everyone else, is another way of saying that the treaty should be of no account, since the state should not discriminate whether or not a Treaty exists. This point has been made repeatedly in United States case law.[50]

A second useful distinction, which has been developed by the Waitangi Tribunal, is that between 'balancing' and 'priority'. Sometimes Maori interests are of such a nature that they should be given a priority - but on other occasions such interests have to be balanced against the competing demands of other sectors of society and must sometimes give way. In its most recent report, *Mangonui Sewerage*, the Tribunal declined to make a finding in favour of the applicants, deciding instead that Maori interests in protection of marine resources (including certain spiritual-metaphysical concerns) had to give way to the necessity for a local sewerage scheme to be established. The sewerage scheme had, after all, to discharge somewhere; Maori people benefited from it too; the scheme had been well designed using the best available technology and the new technique of disposal through an artificial wetland system.[51] From this case it is not, however, possible to generalise as to precisely when Maori interests should receive priority, and when they should be balanced. This, too, will have to be developed on a case-by-case basis. The balancing/priority distinction is related to, but distinct from, the rights/privileges distinction, in that even a Treaty-based right must sometimes give way to other public interests. Treaty rights do not necessarily prevail in all contexts.

Finally, there is the concept of partnership, made famous by the Court of Appeal's decision in *New Zealand Maori Council* v *Attorney-General*. In this case the Court of Appeal interpreted the phrase "principles of the Treaty of Waitangi" in a statute to mean, preeminently, a relationship of partnership. The Treaty constitutes a partnership between the Crown and the various Maori tribes, but the precise implications of the term partnership have yet to be worked out. In *Maori Council* itself the Court of Appeal rejected the argument that the Crown had to consult with the relevant tribe in relation to every piece of land to be transferred from the Crown to a state-owned enterprise. This relationship of partnership is

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49 See below, 21-23.

50 The starting point is *United States* v *Winans* 198 US 371 184, 63 L Ed 555, 39 S Ct 203. See 198 US 380-381. See also *Washington* v *Fishing Vessel Association* 443 US 658, 61 L Ed 2d 823, 99 S Ct 3055 (1979), esp 61 L Ed 2d 842-43.

51 See *Mangonui Sewerage Report*, Wai-17, August 1988, 7.

analogous to, but not quite the same as, the relationship between, say, partners in a law firm or an engineering consultancy. Whether it is legitimate for it to be claimed that the relationship of partnership means that the electoral system has to be remodelled to give 50% of the vote to the Maori people, or that it implies a 50% control of all resources, is highly questionable. The Waitangi Tribunal's careful, case-by-case exploration of kawanatanga, rangatiratanga and taonga may be a more fruitful approach. Sometimes, of course, the Treaty guarantees may well require a 50% share in either ownership or management in order to protect rangatiratanga; sometimes even more than that will be required. But each case is specific to particular resources and particular tribes. The danger of the concept of partnership is that it can lead to too easy generalisations.

III THE UNITED STATES MODEL

A The United States Context

The relationship between tribal treaty rights and resource management issues has been most fully explored in the United States, principally due to litigation in the Federal courts relating to fishing rights, arising mainly in the Pacific Northwest and on the Great Lakes. Many of the conclusions of the American courts are very relevant to the New Zealand situation, and have already been extensively drawn on by the Waitangi Tribunal,[52] but it also needs to be remembered that the American litigation arises in a constitutional and jurisdictional context which is very different from New Zealand.

Most obviously the United States has a federal system, and the complex interplay between state and Federal jurisdictions gives the courts much more room to manoeuvre in according status to Indian treaties than is available in a unitary system such as New Zealand's. It is elementary that legislating over Indian tribes is a Federal matter, while fisheries and wildlife management is a matter for the states. American law, furthermore, differs from New Zealand and English law in that treaties are regarded as part of municipal American law of a status equivalent to the constitution itself,[53] and that this status applies with equal force to treaties

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52 The Waitangi Tribunal in *Muriwhenua* closely analysed the Federal Court decision in *United States v. State of Washington* 384 F Supp 312 (1974). See *Muriwhenua,* 159-168.

53 The Supremacy Clause of the United States Constitution, Article VI clause 2 provides that:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

concluded with Indian tribes.[54] The effect, generally, is to enhance Indian treaty rights at the expense of state controls over resources such as fish and wildlife. On the other hand, Indian treaties are not wholly 'supreme' since they can be overridden by express Federal legislation.

These simple principles can, however, swiftly assume considerable complexity. Areas within state jurisdiction can be 'pre-empted' by the Federal government if, for instance, it concludes a treaty which deals with subject-matter normally within the jurisdiction of the states. The provisions of the treaty, and any Federal law made in pursuance of the treaty, will override the state legislation; once again, this rule extends to treaties concluded with Indian tribes.[55] On the other hand, matters within Federal jurisdiction can sometimes be regulated by state law. In *Washington v. Puyallup Tribe of Indians (Puyallup II)* the Supreme Court held that Indian treaty rights to take fish can be restricted by state conservation laws[56]

> Rights can be controlled by the need to conserve a species; ... the police power of the State is adequate to prevent the steelhead [trout] from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

This seems at first sight to violate completely the constitutional position of Indian treaties, and the approach in *Puyallup II,* though it has been repeatedly confirmed in other cases,[57] has been subject to sustained criticism, both from commentators and the Federal courts in yet other cases.[58] Probably, however, the

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54 *Worcester* v *Georgia* 31 US (6 Pet) 515 (1832); *United States* v *43 Gallons of Whiskey,* 108 US 491 (1883); *United States* v *State of Michigan* 471 F Supp 192, 265 (1979).

55 The relevant principles are summarised by the Court of Appeals, Ninth Circuit, in *United States* v *State of Washington* 520 F 2d, at 684:
By virtue of its police power, the state has initial authority to regulate the taking of fish and game. The Federal government, however, may totally displace state regulation in this area ... . The Federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and Indian nations. [citations omitted]

56 414 US 44 (at 40), 94 S Ct 330 (at 334), 38 L Ed 2d 254 (1973).

57 Most notably in the Supreme Court decision in *State of Washington* v *Washington State Commercial Fishing Vessel Association* 443 US 658, 61 L Ed 823, 99 S Ct 3055 (1979).

58 See Jack L Landau, "Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest (1980) 10 Environmental Law 413". In *United States* v *State of Michigan* 471 F Supp 192 (1979) Chief Judge Fox of the United States District Court followed earlier decisions which held that treaty rights cannot be affected by state law in any circumstances, basing this on differences in the wording of Indian treaties (see ibid,

real reason for the decision in *Puyallup II* was the pragmatic one that fisheries management laws are, generally, a state matter: therefore if state law in this area has no power to affect treaty fishing rights, Indian treaty fishing will in effect be unconstrained by *any* fetter relating to conservation. These constraints on treaty rights to resources are, however, very restrictively defined, as will be seen.

B The American Fisheries Cases

The American decision which received particular emphasis in the Waitangi Tribunal's *Muriwhenua* report is *United States* v *State of Washington*. This was a decision of a United States Federal District Court sitting at Tacoma, Washington, often referred to as the "Boldt decision", after the presiding judge, Senior District Judge Boldt. Judge Boldt was bound by the earlier Supreme Court decisions in the Puyallup cases,[59] and had to accept that Indian treaty rights could be overriden by state conservation laws, at least insofar as the relevant treaties were concerned. Nevertheless, working within this limitation, Judge Boldt was able to hand down a judgment which revolutionised American law, and which had the incidental effect of stirring up a great deal of angry controversy. (The parallels with the outcome of *Muriwhenua* need no emphasis.) The resource at issue was the extremely valuable and important anadromous salmon and steelhead trout fishery of the Pacific Northwest. The fish run annually up the great rivers of Oregon, Washington and British Columbia, and support a vitally important commercial and recreational fishery. The proceedings were filed by the United States, suing as trustee for Indian tribes in an area west of the Cascade Range in the State of Washington. The plaintiffs argued that state laws restricting Indian fishing were in breach of treaties entered into between the tribes and the United States in 1854 and 1855. The treaty fishing rights at issue were off-reservation rights; as well as preserving exclusive on-reservation fishing (not at issue), the treaties also reserved certain off-reservation rights to the Indians to take fish in the ceded area. The Treaty of Medicine Creek, December 26, 1854, typically stipulated:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common* with all citizens of the Territory ... .

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270), but this was rejected by the United States Court of Appeal, Sixth Circuit, on appeal: see *United States* v *State of Michigan* 623 F 2d 448 (1980), which followed and applied *People* v *Le Blanc* 399 Mich 31, 248 NW 2d 199 (1976), a decision of the Supreme Court of Michigan.

59 *Puyallup Tribe of Indians* v *Washington* 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689 (1968) *(Puyallup I); Washington* v *Puyallup Tribe* 414 US 44, 94 S Ct 330, 30 L Ed 2d 254 (1973). The treaty language in the *Puyallup* cases was the same as that which Judge Boldt was called upon to interpret in *United States* v *State of Washington*. The different treaties and very different language at issue in *United States* v *State of Michigan* 471 F Supp 192 (1979) concerned with treaties concluded with the Chippewas of the Great Lakes, gave the District Court scope to distingiush *Puyallup I* and *Puyallup II*.

The Court interpreted this to mean that the treaty-right fishermen were guaranteed the opportunity to take up to 50% of the annual harvestable catch, undoubtedly the most controversial feature of the decision. The Indians were thus entitled to one-half of a valuable fishery, a fishery which plays a dominant role in the economy of the Northwestern states.

Just as important as the '50%' finding, however, was the Court's emphasis on the tribal right of self-regulation. Generally, the tribes were entitled to regulate themselves, provided that certain criteria were met,[60] and could thus operate entirely outside the constraints of state fisheries law. Some of the tribes had already drawn up and put in place their own fisheries regulations: these tribes could proceed to self-regulation forthwith. As soon as the other tribes had met the requirements - to the satisfaction of the Federal courts, not the state licensing agencies - they could do likewise. Judge Boldt, while accepting that the state could regulate treaty fishing, defined this power restrictively: the state could intervene *only* by means of:[61]

> specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

In other words, the state can intervene only if the Indians consent; or, failing that, under the direction and supervision of the Federal Courts, after all parties have had an opportunity to be heard. The courts are the guardians of the Constitution and the Treaties. Furthermore, in exercising this restricted power, the state must first direct its attention to restricting the non-treaty commercial and recreational fisheries. Only if such restriction is not in itself able to achieve the goals of resource conservation can the state turn its attention to the treaty fishermen. Commercial and recreational fishermen only, have a privilege to take fish, but the treaty Indians have a right to do so.[62]

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60 The criteria were identified as follows: "The tribe shall have (a) Competent and responsible leadership; (b) Well organised tribal government reasonably competent to promulgate and apply tribal off-reservation fishing regulations that, if strictly enforced, will not adversely affect conservation; (c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations; (d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe; (e) An officially approved tribal membership roll; (f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters." See 384 F Supp 341 (1972).

61 See 384 F Supp 342 (1974).

62 See 384 F Supp 332 (1974).

The aftermath of the Boldt decision was complex, and full of controversy. State fishing interests reacted angrily. There were shootings and boat rammings; an effigy of Judge Boldt was hanged in a fishing net outside the Federal Court at Tacoma by angry commercial fishermen. The State of Washington showed no enthusiasm about drafting fishing regulations which gave effect to Indian treaty rights, but when it finally did so the regulations were immediately challenged by commercial fishing organisations in the Washington State courts. The State courts found in favour of the fishing interests, which then led to the case being brought to the attention of the Federal Courts once again. It was not until the matter reached the Supreme Court, which in its decision in *State of Washington* v *Washington State Commercial Passenger Fishing Vessel Association* upheld the Boldt decision in nearly all essential respects, that the controversy finally came to an end and the State of Washington bowed to the inevitable. It was in *Fishing Vessel* that the "moderate living needs" formula was established: the tribes were entitled to whichever was the lesser of either 50% of the harvest or, alternatively, whatever percentage would meet the moderate living needs of the tribe.

Meanwhile, following the lead set by the Pacific Northwest tribes, Indian tribes elsewhere in the United States began successfully attacking state fisheries laws. Litigation involving treaty fishing rights of the Chippewas on the Great Lakes led to the Federal Court decision in *United States* v *State of Michigan* The judgment upheld the Indian claims, but took the matter one step further, by holding that the state had no power to regulate Indian treaty fishing *at all.*[63] Although the matter has not been finally disposed of, it seems that the extreme formulation of *United States* v *State of Michigan* is unlikely to prevail.[64] Most recently claims by other bands of Chippewas against the State of Wisconsin for its fishing regulations have also met with success in the Federal Courts: see *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians* v *State of Wisconsin.*

While these developments were proceeding on the Great Lakes, other aspects of *United States* v *State of Washington* remained to be litigated. Two substantial

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63 See *United States* v *State of Michigan* 471 F Supp 192, 267-270. The Court was able to distinguish *Puyallup I* and *Puyallup II* because the terms of the Chippewa treaties were completely different.

64 See the interim appeal decisions in *United States* v *State of Michigan* 623 F2d 448 (1980), *United States* v *State of Michigan* 653 F 2d 277 (1981). Both these decisions preferred the approach of the Michigan Supreme Court in *People* v *Le Blanc* 399 Mich 31, 248 N W 2d 199 (1976), which upheld state fishing regulations provided that the regulations (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favour other classes of fishermen. The Wisconsin cases also form a lengthy saga in their own right: see *United States* v *Bouchard* 464 F Supp 1316 (1978); *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians* v *Voigt* 700 F 2d 341 (1983); *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians* v *State of Wisconsin* 653 F Supp 1420 (1987); *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians* v *State of Wisconsin* 686 F Supp 226 (1988).

issues remained: first, should hatchery-bred, artificially propagated fish be included within the tribal share of the resource, as against the 50% figure relating only to what could be attributed to 'natural' regeneration of the runs? Secondly, there was the 'environmental' issue: was it implicit in the treaties that there was a right to have the fishery habitat protected from man-made environmental degradation? In 1980 the Federal District Court at Tacoma, this time presided over by one Judge Orrick, in yet another lengthy judgment, answered both questions in the affirmative: *United States* v *State of Washington* (Phase II). The hatchery issue caused little difficulty. The state's argument that first-generation hatchery salmon and trout should be excluded from the tribal allocation was rejected. The establishment of hatcheries was only necessary because of the "commercialisation of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area".[65]

It was the second issue, the 'environmental' question, which posed the greatest difficulty for the Court. The Pacific Northwest Fishery, once of staggering superabundance, was by the late 1970s in a state of serious decline. Things had got so bad that in 1978 the National Marine Fisheries Service and the United States Fish and Wildlife Service had begun investigating whether certain upriver trout and salmon runs could qualify for protection under the Endangered Species Act.[66] The main cause of the decline was hydroelectric power construction: the Columbia is the most dammed major river in the world, and many other rivers in the region have been dammed. Water quality has been affected by effluent from pulpmills and cities; water temperatures have been increased by draw-off for irrigation projects; streams have been smoothed and straightened or have had gravel removed from them. In addition, pressure from fishing has increased, especially at sea: many of the fish were caught by United States and Canadian fishermen before they had an opportunity to run up the rivers to spawn. Catches had as a consequence plummeted dramatically.[67]

In United States v *State of Washington (Phase II)* Judge Orrick accepted the plaintiffs' arguments on the environmental issue, and agreed that "implicitly incorporated in the treaties' fishing clause is *the right to have the treaty habitat*

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65 *United States* v *State of Washington (Phase II)* 506 F Supp 187, 203 (1980).

66 See Bodi, 'Protecting Columbia River Salmon Under the Endangered Species Act' (1980) 10 Environmental Law 349; M C Blumm, 'Reexamining the Parity Promises: More Challenges than Successes to the Implementation of the Columbia River Basin Fish and Wildlife Program' (1986) 16 Environmental Law 461.

67 See D T Hornstein, Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries, (1982) 61 Oregon Law Review 93, esp 93-98; C F Wilkinson and D K Conner, The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource (1983) 13 Kansas Law Review 18, esp 78-102; E Chaney, The Last Salmon Ceremony: Implementing the Columbia River Basin Fish and Wildlife Program (1986) 22 Idaho Law Review 561, 562-3.

protected from man-made despoliation".[68] The treaty right is a right to *take fish*, not to go fishing in the hope of catching something. The decline of the fishery was itself a breach of the treaty right. As Judge Orrick put it, the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken".[69] The next issue to determine was the precise scope of the treaty entitlement. The plaintiffs' contention that the appropriate standard was based on "no significant deterioration" was rejected. Instead, following the United States Supreme Court approach in the *Fishing Vessel* case, the court adopted an "impairment of moderate living needs" approach. The state carries the burden of proving that its environmental policies do not impair the tribal right to obtain a moderate living from the resource.[70]

On appeal the Federal Court of Appeals upheld Judge Orrick on the hatchery issue, but disallowed the finding on the environmental issue. This, however, was only on the basis of a legal technicality:[71] the environmental issue is still, in fact, very much alive and is in many ways receiving increasing prominence. Now that the equal allocation rule between treaty and non-treaty users has become general in the states of the Pacific Northwest (Washington, Oregon and Idaho) Indian tribes have focused their attention much more on environmental aspects. Stocks have become so depleted now that even a 50% share is no longer adequate to provide a moderate standard of living for any tribe. (Indeed in the latest Great Lakes case, *Lac Courtes Oreilles Band of Lake Superior Indians* v *Wisconsin*, the District Court reached the shattering conclusion that even if the Indian tribes could harvest every available resource in the ceded area that would still not provide the tribe with a moderate living standard today.) This has led, generally, to a more cooperative approach between the tribes and state and federal agencies as all strive to take steps to improve the environment of the Northwestern rivers in the interests of resource sustainability. A major boost to this process was important federal legislation enacted in 1980: the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) and the Salmon and Steelhead Conservation and

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68 506 F Supp 187, 203 (1980).

69 506 F Supp 203 (1980).

70 See 506 F Supp 208 (1980): "The tribes' treaty allocation is currently set at 50 percent of each harvestable run. That the ceiling has been applied creates the presumption that the tribes' moderate living needs exceed 50 percent and are not being satisfied under the treaties. As the burden is upon the state to demonstrate to the Phase I court that the tribes' needs may be satisfied by a lesser allocation, the state must also bear the burden in Phase II to demonstrate that any environmental degradation of the fish habitat proximately caused by the state's actions (including the authorisation of third parties' activities) will not impair the tribes' ability to satisfy their moderate living needs".

71 *United States* v *Washington (Phase II)* 759 F 2d 1353 (1984) (United States Court of Appeals, Ninth Circuit). The Court of Appeals ruled that the environmental issue was not, in the way in which it had arisen in this case, suitable for the granting of a declaration. A more specific set of facts was needed. The Ninth Circuit's approach has been criticised as evasive: see Judith W. Constano, "The Environmental Right to Habitat Protection - A Sohappy Solution" (1986) 61 Washington Law Review *731*.

Enhancement Act.[72] Pursuant to this legislation the Northwest Power Planning Council, after full consultation with affected Indian tribes and other bodies, promulgated in 1982 an ambitious programme for restoration of the resource, the Columbia Basin Fish and Wildlife Program. The Indian tribes (on both sides of the border) have also played a key role in prodding their respective governments to finally conclude in 1985 a treaty between the United States and Canada for the purpose of salmon conservation.[73] In the same year a compromise formula was reached in the Federal Courts on the application of the 50-50 allocation rule to Alaska (in *Confederated Tribes and Bands of the Yakima Indian Nation* v *Baldridge*.[74]

Clearly the Indian tribes have moved far beyond the stage of bringing claims to establish a treaty-based share of the resource. They are now important participants in management - at state, federal and even international levels (the tribes are represented on the United States-Canada Pacific Salmon Commission, an international body set up to implement the 1985 treaty). Litigation has certainly not come to an end, but it is now of a rather different order, reflecting a closer unity of fisheries regulatory interests, including Indian tribes. An example is *Confederated Tribes* v *Federal Energy Regulatory Commission*.[75] Here the Yakima Indian Nation, and the Washington and United States fisheries management agencies brought joint proceedings successfully to invalidate the relicensing of a hydroelectric power station on the Columbia River on the grounds that fisheries management issues had not been appropriately addressed by the federal licensing agency. The court rejected the defendants' argument that the hydroelectric power license could be used before fisheries issues had been settled.

C Rights and Privileges

The United States courts have been careful to distinguish between treaty 'rights' and the mere privileges that other sectors of society may be entitled to. This distinction flows from the aboriginal rights of the various tribes and from the treaties. The treaties were negotiated between fully sovereign entities. The treaties have a constitutional status equivalent to the constitution itself. Members of the tribes entered into the political unit of the United States voluntarily, and subject to the terms of the treaties: this gives treaty rights a special status, and such rights are quite separate and distinct from rights of equal protection guaranteed to all citizens by the Fourteenth Amendment.

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72 16 USC #839, ##3301-3345. For commentary on this legislation see "Symposium on the Northwest Power Act" (1983) 13 Environmental Law 593-1029.

73 See Thomas C Jensen "The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview" (1986) 16 Environmental Law 363.

74 605 F Supp 833 (1985).

75 746 F 2d 466 (1984).

Judge Boldt in *United States* v *State of Washington* put it this way:[76]

> An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations, wherein tribal members may make their homes if they chose to do so. The tribes also reserved the *right* to off-reservation fishing 'at all usual accustomed grounds and stations' and agreed that 'all citizens of the territory' might fish at the same places 'in common with' tribal members. The tribes and their members cannot rescind that agreement or limit non-Indian fishing pursuant to the agreement. However, off reservation fishing by other citizens is not a right but merely a *privilege* which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

Chief Judge Fox in *United States* v *State of Michigan* said:[77]

> As is clear in this case, the Michigan Indians had both aboriginal rights and rights guaranteed by the Treaty of Ghent when they signed the 1836 Treaty. They retain these rights. Other citizens of Michigan possess only a privilege to fish. That they possess a mere privilege is recognised by Michigan law. The Treaty of March 28, 1836 guarantees a right to fish which is distinct from the *privilege* to fish enjoyed by other citizens of the state of Michigan.

The same point was made, albeit in a rather different way, by the United States Supreme Court in *Fishing Vessel* when it rejected the argument put forward by the State of Washington's counsel - which had received support in the Washington State Supreme Court[78] - that according special protection to Indian fishing rights violated the equal protection clause of the Fourteenth Amendment. Equal protection and discrimination laws were, in the Supreme Court's view, utterly irrelevant. The Indian rights were to be given status not because the Indian race was generally entitled to special status, but because treaties had to be upheld. Not to do so, to hold simply that the Indians had the same rights as everyone else, would be to render the treaty inoperative: it would be as if it had never been signed.[79]

D Applications to New Zealand

Much of the United States experience is, I believe, valuable and suggestive for law-makers in New Zealand. The first aspect to be emphasised must be the rights/privileges distinction. The analysis developed in the United States courts in this particular regard is directly applicable to New Zealand, and for the same reasons. New Zealand is based on a voluntary compact between the tribes and the Crown. The terms of that compact are set out expressly in the text of the Treaty of Waitangi. It must follow that the rights protected by the Treaty are of a

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76 *United States* v *State of Washington* 384 F Supp 312, 332 (1974).

77 *United States* v *State of Michigan* 471 F Supp 192, 266 (1979).

78 See *Puget Sound Gillnetters Association* v *Moos* 88 Wash 2d 677, 565 P 2d 1151.

79 See *State of Washington* v *Washington State Commercial Passenger Fishing Vessel Association* 443 US 658, 61 L Ed 2d 823, 99 St 3055, esp 61L Ed 2d 837-38 (1979).

'higher-order' character. Maori people, like the Yakimas or the Chippewas, have much more guaranteed to them than the same right to fish under the general law as is allowed to everyone else. Treaty rights have to mean more than just the right that everybody has not to be discriminated against. Either the Treaty has status or it does not; if it does, then this conclusion must inexorably follow.

Thus the Muriwhenua tribes have a *right* to their fisheries; Ngati Whakaue have a *right* to the geothermal steam, at least at Ohinemutu; the Whanganui tribes have *rights* to their river and its resources.

It is not to say that the scope of these rights may always be the same. They will often be highly variable. Nor does it follow that the rights can never be qualified. The United States courts are generally in accord in concluding that Indian treaty fishing rights must sometimes give way in the interests of conservation. Nevertheless, a treaty-based right, once it has been defined, is of a special quality. Ngati Whakaue's entitlement to the geothermal resource is of a different character to that of the Rotorua Bore-Users Association.

The second aspect of legal developments in the United States which needs emphasis is the willingness of the courts to consider seriously whether treaty guarantees contain an implied obligation to safeguard environmental quality. This, too, is directly translatable to the New Zealand context. A right to a share in the inshore fishery is of little benefit if the fishery has been depleted by pollution and bad management in the past. Alternatively, it can be maintained that Crown policies which have led to environmental degradation of the Waikato river (dammed, polluted and re-channelled as it is, like the Columbia) or reduced flows in the Wanganui are in themselves breaches of the Treaty.

Other lessons from the American experience are more of a political, than a jurisprudential, character. The United States legal system has allowed treaty issues to be fully litigated. The Federal Courts certainly have not shrunk from the implications of the conclusions they have reached, and despite the far-reaching nature of those conclusions, society in the Pacific Northwest has coped with the necessary changes, even if there has been much controversy. Events in the United States also show a change in emphasis which may well be duplicated here, a shift from an adversarial phase in which resource entitlements were litigated case by case, to a cooperative, collaborative phase in which the tribes and fisheries management agencies have now joined forces in order to achieve the vital goals of resource conservation. This has met with considerable success: already there are signs of recovery in some of the fish runs of the Northwest. Daniel Evans, Senator and former Governor of Washington, speaking in 1986, said:[80]

> A new spirit of cooperation now permeates salmon and steelhead management. Last year was the first time in ten years when the steelhead season was unclouded by

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80 D J Evans, Keynote Address, "Toward the Return of Pacific Salmon and Steelhead" (1986) 16 Environmental Law 359, 361.

litigation. The Northwest States, the federal government, and the Indian tribes are now working together to establish catch limits, to survey and rehabilitate habitat, and to gather the information necessary to improve further the runs. In large part it is because of this cooperative management that salmon and steelhead runs are as healthy as they now are.

If a similar process of cooperation develops in New Zealand the outlook for both environmental quality and race relations will be bright.

IV STATUTORY REFERENCES TO THE TREATY IN EXISTING CONSERVATION AND NATURAL RESOURCES STATUTES

A Direct References

Section 4 of the Conservation Act 1987 states as follows:

> *Act to give effect to Treaty of Waitangi* - This Act shall so be interpreted and administered as to *give effect* to the principles of the Treaty of Waitangi [emphasis added].

The Environment Act 1986 employs a quite different formula. There is no reference to the Treaty in any of the sections of the Act. The Long Title, however, lists a number of purposes of the Act, of which the third, (c), is to:

> Ensure that, in the management of natural and physical resources, *full and balanced account* is taken of -
>
> (i) The intrinsic values of ecosystems; and
> (ii) All values which are placed by individuals and groups on the quality of the environment; and
> (iii) The principles of the Treaty of Waitangi; and
> (iv) The sustainability of natural and physical resources; and
> (v) The needs of future generations [emphasis added]

The formula adopted in the Conservation Act is, therefore, somewhat stronger than that found in the Environment Act. In the latter the "principles of the Treaty of Waitangi" are merely one of five named factors of which "full and balanced account" is required to be taken. In the Conservation Act, by contrast, there is a reference to the principles of the Treaty in a specific section of the Act; there are no competing or complementary criteria against which these principles are required to be evaluated; and the actual language of the direction is positive - the Act is to be applied so as to "give effect" to Treaty principles.[81] Here a contrast can be made

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81 The only judicial comment on s 4 of the Conservation Act to date is *Re Pouakani Block Application* unrep, Maori Land Court, Waiariki District (Rotorua), 9 June 1988 (65 Taupo Minute Book 1), where Hingston J, in a case involving a boundary dispute

with yet another formula, this time section 9 of the State-Owned Enterprises Act 1986:

> *Treaty of Waitangi* - Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

In the State-Owned Enterprises Act the obligation is expressed negatively, rather than positively. The Act is to be interpreted so as not to derogate from the Treaty. This is not as strong as the requirement in the Conservation Act actively to give effect to the principles of the Treaty.

Do these variations in language reflect any clearly determined deliberate approach by the drafters of the legislation? This seems unlikely. There is no apparent explanation as to why the variations were chosen, or how these variations relate to the subject-matter of the various statutes. The actual variations in language, although confusing, are probably not especially significant: the negatively worded requirement of the State-Owned Enterprises Act was regarded as adequate by the Court of Appeal to support its 'partnership' finding in *NZ Maori Council v Attorney-General*. The precise formula in the legislation mattered little to the outcome of that case. The differences in phraseology which have arisen to date are probably accidental, and can be explained by the vagaries of the law drafting process. Nevertheless a single clear formula to be employed in all statutes would certainly be preferable, and would eliminate the risk of unnecessary confusion.

A much more significant feature of the statutory references is not their differences but their common use of the phrase "the *principles* of the Treaty of Waitangi". It is noteworthy that the statutory language does not say "the Treaty of Waitangi" or "the *provisions* of the Treaty of Waitangi". How significant this may be is uncertain.[82]

Such language may give scope for a body of precedent to be built up - perhaps by expanding and developing the concept of 'partnership' - while the express language of the Treaty becomes of secondary importance. The difficulty in attempting to make predictions in this regard is that there is virtually no precedent from the ordinary courts - apart, of course, from the *Maori Council* case - exploring what the 'principles' of the Treaty are. The Waitangi Tribunal has articulated and refined its own set of 'principles', but these are firmly based on the language of the Treaty. It may be that there really is no difficulty or contradiction, that the 'principles' of the Treaty are in fact coextensive with the language or the provisions of the Treaty, as was in fact stated by Somers J. in *Maori Council v. Attorney General*:[83] Rangatiratanga is both principle and provision. At present there is no indication of

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between the Department of Conservation and Maori landowners, held that s 4 required the Department to negotiate in a spirit of compromise and good faith.

82 An attempt at a different formula, which avoids the expression "principles of the Treaty" is found in the Preamble to the current Maori Affairs Bill.

83 [1987] 1 NZLR 641, 693.

any cleavage opening up between the fairly clear guarantees of the Treaty embodied in its text, and Treaty 'principles' *based on* that text.

B Indirect References

A number of statutes make general references to Maori interests without specifically referring to the Treaty of Waitangi at all. Here, of course, there is even less consistency than is the case with direct references. One example is section 88 (2) of the Fisheries Act 1987, which stipulates: "Nothing in this Act shall affect any Maori fishing rights". An equivalent provision has been in existence since 1877, although it is only recently that the full implications of this statutory language have begun to be explored by the courts.[84] Another example is section 3 of the Town and Country Planning Act 1977 which lists among the matters of national importance to be "recognised and provided for" in the preparation, implementation and administration of planning schemes and in determining planning applications and appeals:

> (g) The relationship of the Maori people and their culture and traditions with their ancestral land.

Such provisions deserve to be classified as 'indirect' references to the Treaty, given the growing willingness of the courts to take some cognisance of the Treaty in determining their scope. Such provisions are wide enough to open the door to the Treaty: the courts do not, in any case, now seem to need much encouragement to introduce Treaty matters into their decisions. This is shown by a decision arising under section 126(10) of the Mining Act, *Re an Application by City Resources (NZ) Ltd,* a 1988 decision of the Planning Tribunal.[85] Here Sheppard J rejected an application for an exploration licence on the basis that the licence would, if granted, be an affront to the local tangata whenua. The actual statutory criterion relied upon by the Tribunal was section 3(l)(g) of the Town and Country Planning Act, which is imported into the statutory requirements governing the granting of mining licences by section 129(9)(d) of the Mining Act 1971. The particular interest of *City Resources* is that the Planning Tribunal was willing to take the

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84 The full legislative history is set out in *Muriwhenua,* 321-329. Cases dealing with the effect of s 88(2) are *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680; *New Zealand Maori Council, Runanga o Muriwhenua Inc* v *Attorney-General,* unrep, High Court, Wellington, 30 September 1987 (CP 553/87); *Ngai Tahu Maori Trust Board* v *Attorney-General,* unrep, High Court, Wellington, 12 November 1987 (both Greig J). See also *Muriwhenua,* 96-108; P G McHugh 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 Victoria University of Wellington Law Review 247.

85 Unrep, Planning Tribunal, Wellington, 6 May 1988 (MIN 24/87).

Treaty into account in determining the scope of the statutory requirement. The Tribunal informed the Minister that:[86]

> ... by granting the exploration licence you would be enabling exploration parties to enter land which is held sacred by the tangata whenua, and to disturb its soil, in a way which would not be consistent with the Crown's duty under the Treaty of Waitangi, nor with the relationship of the Maori people and their traditions and culture with their ancestral land, and which would be an affront to the tangata whenua

Clearly there needs to be greater consistency in the ways in which references to the Treaty are formulated in statutes. The Mining Act, for instance, has continued to cause real problems of interpretation and application, due to the overall objective of the statute to facilitate mining: see Part 5D below.

This analysis has thus far avoided the question whether statutory references to the Treaty are in fact needed at all. Cooke P in *Maori Council* v *Attorney-General* accepted a submission that the Treaty is relevant to the interpretation of all statutes, at least in the sense that there is an interpretive presumption that Parliament does not intend to derogate from the Treaty.[87] In *Huakina Development Trust* v *Waikato Valley Authority*,[88] Chilwell J used the Treaty as a background, or a 'context', in reaching the conclusion that Maori spiritual values have to be taken into account in determining water rights applications, despite the complete absence of any reference to the Treaty or to Maori values of any kind in the relevant statute, the Water and Soil Conservation Act 1967. Nevertheless, explicit statutory references to the Treaty should be placed in all conservation and natural resources legislation. This will avoid the necessity for scrutinising the statute for language which displaces a presumption that the Treaty should not be departed from. Specific statutory provisions are obviously clearer and can be much stronger than a mere presumption of interpretation. Still, it is worth remembering that if the legislature is slow in taking action it may be upstaged by the courts as, indeed, in *Huakina* it already has.

V EXISTING RESOURCE MANAGEMENT REGIMES AND TREATY ISSUES

A Freshwater Resources

Ownership of rivers and lakes is regulated in part by statute and in part by common law rules. At common law the bed of a tidal river is vested in the Crown,

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86 *Re an Application by City Resources,* above n 85, 17.

87 *See Maori Council v. Attorney-General* [1987] 1 NZLR 641, at p 656, where Cooke P accepted a submission that the Treaty "should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty".

88 [1987] 2 NZLR 188.

although the Property Law and Equity Reform Committee has expressed the view that this archaic rule is outmoded, and should be abolished.[89] Otherwise, at common law, river ownership is governed by the *ad medium filium* rule: riverbeds belong to riparian owners. The boundary extends out to the middle line of the river. Navigable rivers, however, by statute, belong to the Crown: the relevant statutory provision was first enacted in 1903 and is now to be found in section 261 of the Coal Mines Act 1979. (A "navigable" river is defined as a "river of sufficient width and depth [whether at all times so or not] to be used for the purpose of navigation by boats, barges, punts, or rafts".)[90]

Other rivers are regulated by specific statutory provisions. Empowering statutes enacted for various purposes vest certain rivers in the Crown - for example, the Waimakariri River Improvement Act 1922, or the Ashley River Improvement Act 1925. Another example is section 14 of the Maori Land Amendment and Maori Land Claims Adjustment Act 1926. This vests the bed of Lake Taupo and the bed of the Waikato River downstream to the Huka Falls and the right to use these waters in the Crown. A right-of-way around the lake margin is reserved to the public, and the beds of certain streams running into the lake are also vested in the Crown. As settlement, section 16 of the Act establishes the Tuwharetoa Trust Board which is entitled to receive an annual payment as well as half of the annual revenue from Lake Taupo fishing licences.[91]

Ownership and management responsibilities relating to lakes can be very complicated, as is illustrated by Lake Horowhenua:[92]

> The lake *bed*, the Hokio Stream outlet and about 50 ha of fringing land are administered by local Maori trustees for the Muaupoko people. The water is controlled

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89 Property Law and Equity Reform Committee, 'Recommendations', in *The Law Relating to Watercourses: Seminar Proceedings,* Water and Soil Miscellaneous Publication No 86 (National Water and Soil Conservation Authority: 1985), p 9.

90 This outmoded definition - of a quite inappropriate concept - creates many problems. For when is a river "navigable"? Does it actually have to be currently used for purposes of navigation - regular riverboat traffic of some kind? What about changes in the character of the river caused by man-made interferences which alter the flow of or impede the river - do such changes render the river "non-navigable" and thus re-vest it in riparian owners? For a very restrictive view of "navigability" see *Tait-Jamieson* v *G C Smith Metal Contractors Ltd* [1984] 2 NZLR 513 (Savage J); see also *The King* v *Morison* [1960] NZLR 247. The law relating to riverbed ownership is in a lamentable state of confusion and is in desperate need of clarification.

91 For discussion of the background to this legislation, see J Te H Grace, *Tuwharetoa* (Reed 1959) 516-519; P. Burstall "Trout Fishery - History and Management" in D J Forsyth and C Howard-Williams, *Lake Taupo: Ecology of a New Zealand Lake* (DSIR 1983), 119-131; and the Maori Land Court decision in *Re the Beneficiaries of Tuwharetoa Maori Trust Board* (1965) 44 Tokaanu MB 1. Lake Rotoaira is the subject of special legislation of its own: see Maori Purposes Act 1959.

92 A C Walsh, 'Manawatu/Horowhenua: The Maori Present' in B G R Saunders (ed), *Manawatu and its Neighbours* (Massey University, Palmerston North 1987), 142.

> by the Manawatu Catchment Board, and the water *surface* by the Lake Reserve Board. Four of the seven board members are Maori. The fresh water lake, once an important food source and an important historical site for the Muaupoko is in an advanced state of eutrophication caused largely by the daily discharge of six million litres of tertiary treated sewage from nearby Levin. The construction of an alternative sewerage system - on nearby Maori land! - commenced in 1986. The Muaupoko Trustees have asked for the full contol of Lake Horowhenua.

Ownership of lakes and rivers is of course a key issue in many Waitangi Tribunal claims. The Tainui Trust Board is currently attempting to settle its raupatu (confiscation) claim with the Crown by direct negotiation, with unresolved issues to be referred to the Waitangi Tribunal. Tainui is seeking, amongst other things:[93]

> exclusive title to and control of the Waikato River. It wants compensation from the Crown for the affront to the mana of the river and for its pollution and depletion since confiscation.

Another example is provided by the Wanganui River, which has been the subject of a great amount of litigation concerned essentially with the problem posed by the issue of individualised titles to riparian Maori landowners. Do such owners (and their successors in title) also own the river bed to its half-way point, or does the river bed vest in the tribe as a separate entity? In *Re the Bed of the Wanganui River*,[94] the Court of Appeal adopted the probably erroneous view of the Maori Appellate Court that there was no customary rule which allowed for tribal ownership of the river as a whole, and held that the *ad medium filium* rule also applied to Maori Land Court titles. The issue remains, however, vital to the Whanganui Tribes. In 1979 Titi Tihu, by then 100 years old, who was the plaintiff in the Wanganui River litigation when it first began in 1938, lodged a formal petition with the House of Representatives seeking a title issue for the river in the names of the Whanganui tribes.[95] The Wanganui is also the subject of a claim lodged before the Waitangi Tribunal.[96]

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93 Tim Grafton, 'Land Claim Talks Affect Huge Area', *Dominion Sunday Times* Wellington, 15 May 1988, p 5. For further information on the Tainui claim see *He Whakatakotoranga Kaupapa: Submission to the Treaty of Waitangi Tribunal. Makaurau Marae, Ihumatao,* Centre for Maori Studies and Research, University of Waikato, Occasional Paper No 25, 1984. This document was presented to the Waitangi Tribunal then hearing the Manukau claim, and was presented by Robert Te Kotahi Mahuta and others. The background to the Tainui claim to the Waikato river bed is set out at pp 40-41 and in further detail in a long appendix by Philip Harris.

94 [1962] NZLR 600.

95 See *Tai Whati: Judicial Decisions affecting Maori Land* (Maori Affairs Department: 1981), 96-99.

96 Waitangi Tribunal Provisional Claim No 146, R R W Wright for Interim Whanganui River Trust Board, re Whanganui River and Tributaries and Surrounding Land (claim lodged 24 Feb 1988).

The principal management statute is the Water and Soil Conservation Act 1967. This statute makes no reference to the Treaty or to Maori interests of any kind, despite the fact that the Act completely expropriates rights to take and discharge natural water, replacing the common law with an elaborate system of water rights granted and administered on the Crown's behalf by regional water boards. A key problem for Maori objectors was that it was long-standing catchment board and Planning Tribunal practice (the Planning Tribunal hears appeals from the boards) not to accept evidence of Maori spiritual or metaphysical concerns, such as the affront caused by mixing Waikato River water with the waters of the Manukau. Maori objectors were required to point to specific 'environmental' effects, such as damage to shellfish beds, before their evidence could be recognised. Thus in *McKenzie v Taupo County Council*[97] the evidence of Maori objectors, in a case dealing with a proposal to build a marina on Lake Taupo, while heard, was not taken into account by the Planning Tribunal. The evidence related to concerns that the marina would obstruct the spiritual flow of water from Lake Taupo down the Waikato and so out to sea, the path followed by the spirits of the dead on their journey to Cape Reinga. Although unsuccessful in the Planning Tribunal, Maori objectors did in the end have the satisfaction of seeing the Minister of Conservation refuse consent for the marina, in part because of the concerns of the Whanau o Rauhoto sub-tribe of Ngati Tuwharetoa.[98]

However in *Huakina Development Trust v Waikato Valley Authority*, Chilwell J, in an important and innovative decision, dramatically overturned longstanding regional water board and Planning Tribunal practice. In this case the Waikato Valley Authority, now the Waikato Catchment Board, had, in its capacity as a regional water board, granted a water right to a local dairy farmer allowing him to discharge dairy-shed waste into a stream which flowed into the Waikato. The Huakina Development Trust, representing Tainui of the Waikato Heads-Manukau area, objected, and appealed to the Planning Tribunal against the grant of the right. At both the regional water board stage and the Planning Tribunal stage it was held that Maori spiritual values and the cultural relationship of Tainui to the waters of the region were not proper matters to be taken into account in balancing the benefits and detriments of the water right. The Water and Soil Conservation Act made no provision for that. Chilwell J, however, found that Maori spiritual and cultural values undoubtedly were relevant to the benefit-detriment analysis. The weight to be accorded such evidence was, however, a matter for the deciders of fact,

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97 (1987) 12 NZTPA 83.

98 "Helen Clark [Minister of Conservation] said development on the lake had occurred on a piecemeal basis at the discretion of various local authorities. A management plan integrating all the Department of Conservation's responsibilities was required. She recommended examination of a request from the Tuwharetoa Trust Board that legislation give equal partnership in administering the lake to the Crown and the tangata whenua. The Waitangi Tribunal has promised to hear as soon as possible an objection from a Taupo woman, Mrs Win McKenzie, to siting the marina at Nukuhau": 'Conservation Dept Strikes Again', *New Zealand Herald,* 24 December 1987, p l.

for the regional water board and the Planning Tribunal on appeal.[99] Chilwell J also laid down some general guidelines relating to the establishment of tribal spiritual values or cultural relationships with a resource. The custom must, firstly, exist and be probable; secondly, it must be lawful; thirdly, it must be reasonable taking the whole of the circumstances into consideration.[100]

It is not necessary for present purposes to examine Chilwell J's reasoning as to how these requirements could be derived from the language and context of the Water and Soil Conservation Act.

An indication of the consequences of *Huakina* at regional water board level is shown by the recent decision of the Rangitikei-Wanganui Catchment/Regional Water Board on the flow levels in the Wanganui.[101] A lengthy section of the report of the Board's Tribunal is concerned with Maori spiritual values. The Board recommended (at p 22) that:

> In recognition of the spiritual, cultural and traditional fishing value of the Wanganui River to the Wanganui Maori the Tribunal considers that the full natural flow of the Wanganui River at the Western Diversion intake should be restored. This would allow the main artery of the river to flow without impediment, along the flight path of Taranaki, from its source to the sea.

The Board's decision, which in effect reduced the draw-off from the Wanganui and its upper tributaries by 50% (the draw-off being a series of diversions for the Tongariro power project), which the Board saw as a compromise between Maori and conservation values - as opposed to the requirements of electricity generation - has been bitterly denounced by Electricorp. The Corporation, which is now embarking on a 15-year programme of applying for water rights to replace the Crown water rights formerly enjoyed by the Electricity Department and the Ministry of Energy, has seen itself as suffering a serious reverse and has appealed the decision. Electricorp has claimed that it will have to spend $17 million a year burning fossil fuels to replace energy lost by restoration of the Wanganui. Conservation interests, on the other hand, have pointed out that Electricorp will still remain the major user of the water, and Whanganui Maori have vowed to fight the appeal.[102] Similar conflicts and litigation are certainly going to proliferate as Electricorp moves to obtain water rights for rivers such as the Rangitaiki, the Waikato, the Waitaki and from lakes Manapouri and Waikaremoana.

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99 *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188, 227.

100 *Huakina,* ibid.

101 See Rangitikei-Wanganui Catchment Board and Regional Water Board, *Wanganui River Minimum Flow Review: Report and Recommendations of the Tribunal (20* September 1988).

102 See Stephen Bell 'Boards Halve Wanganui Hydro Power' *The Dominion,* 19 October 1988, p 5; 'Electricorp Hit By New Minimum Flow Levels' *The Dominion,* 20 October 1988, p 12.

Huakina is an important case which is already having a significant impact on water board practice. Nevertheless, it should be borne in mind that it establishes only that Maori spiritual and cultural concerns are relevant to the determination of water rights. The case does not hold that such concerns should have any kind of priority. The Waitangi Tribunal in the *Mangonui Sewerage* report determined, it will be recalled, that while on some occasions Maori concerns will have to be "balanced" against competing considerations, on other occasions they will have to receive priority. The current water and soil regime, even as reinterpreted in the light of *Huakina,* cannot be relied on as a means of according *priority* to Maori concerns. How is that to be achieved? One obvious answer is that those rivers which have the status of taonga should be returned to tribal ownership and management. An alternative is returning ownership and improving tribal input into management. The bed of the Waikato, or the Wanganui, might be returned, but management of the water should remain with the water boards (or regional councils) but with changes to the management structure of such bodies. (The same issues arise with geothermal resources, and the possible options are discussed in the next section.) The objective would be to allow tribal input into policy questions, the devising of water management plans, determining water classifications and so on. Many tribes are seeking a 50-50 participation in management, and in many cases this will have to be very seriously considered (for example, Lake Taupo, the Wanganui River, the Waikato River). For some rivers and lakes complete ownership and management also deserves serious consideration, especially when the water has a special status and where the river or lake has not already been subject to sustained exploitation (for example, the Arahura River, Lake Waikaremoana, Lake Rotoaira, possibly the upper Wanganui River). This would be subject to the Crown's right to intervene in the interests of conservation, as described above.

Finally, steps should also be taken to make qualitative improvements to polluted rivers and lakes. The Treaty can be relied on to support a guarantee of environmental quality, in much the same way as can the Indian treaties of North America.

B Freshwater Fisheries

The important question of Treaty rights to freshwater fisheries has to date received little scrutiny before the courts or the Waitangi Tribunal. Many inland Maori places of habitation were situated next to lakes or swamps, or sometimes even within swamps, partly for defensive purposes but principally because of the valuable resouces they could provide. Eels, koura (freshwater crayfish), whitebait, lampreys and other indigenous fish formed an important part of the wealth and mana of many tribes. Some of the issues relevant to freshwater fisheries were briefly traversed in the Waitangi Tribunal *Report on a Claim by H T Karaitiana relating to Lake Taupo Fishing Rights.*[103] This claim, which lapsed due to the claimant's failure to respond to information sent out to him from the Waitangi

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103 Wai-18, 15 October 1986.

Tribunal, arose out of the provisions of the Native Land Claims Adjustment Act 1926. This reserved to certain Maori of Tuwharetoa the right to catch "indigenous fish" in the lake. However, following the acquittal of a Maori on charges relating to the taking of smelt from the lake, the Maori Purposes Act 1981 amended the 1926 Act to the effect that "indigenous" did not mean indigenous to New Zealand but only indigenous *to the lake*, a change that can only be regarded as mean-spirited in the extreme. Judge Durie, in his short report to the Minister, thought that the following issues were deserving of further exploration:

(a) whether the Tuwharetoa people should have an exclusive right to lamprey, whitebait and eel, or their particular rights recognised in any general regulation thereon;

(b) whether the Tuwharetoa fishing rights in respect of fish indigenous to the lake should extend to include fish indigenous to New Zealand though not necessarily indigenous to the lake, on the basis that the right relates to a resource (the lake) and carries with it a right to develop that resource;

(c) whether the Tuwharetoa people should have any other particular rights where non-indigenous fish have depleted the indigenous resource.[104]

Judge Durie's category (c) relates, of course, to the severe impacts on the indigenous fishery caused by introduced trout. In some ways these are parallel with the "hatchery" issue in *United States* v *State of Washington (Phase II)*. By analogy a claim to a certain percentage of the trout resource to compensate for the near extinction of the indigenous fishery would appear to be quite sustainable. Such arguments could also be pursued in relation to other lakes, such as lakes Rotorua or Tarawera.[105]

C Geothermal Resources[106]

Geothermal resources have long been, and continue to be, valued taonga of the related Arawa and Tuwharetoa peoples. The hot springs at places such as Ohinemutu, Whakarewarewa, Ohaki or Orakeikorako were (and to some extent still are) extensively used for cooking, therapeutic, and medicinal purposes.[107] An

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104 Ibid, p 2.

105 For Lake Rotorua, see Don Stafford, "The Rotorua Lakes' Case" in Don Stafford et al, *Rotorua 1880-1980* (Holmes & Co, Rotorua 1980); *Tamihana Korokai* v *Solicitor-General* (1912) 32 NZLR 321; Native Land Amendment and Native Land Claims Adjustment Act 1922, s 14.

106 This section draws substantially on an earlier study by the author, *Geothermal Energy: Maori and Related Issues,* Resource Management Law Reform Working Paper No 26, (Ministry for the Environment, 1989).

107 See Ferdinand von Hochstetter, *Geologie von Neu-seeland,* 1864, English Translation, C A Fleming (ed), *Geology of New Zealand,* (Government Printer, Wellington 1959), p 165 (Ohinemutu); p 167 (Whakarewarewa). On Maori history of Orakeikorako see

extensive body of customary rules, and an elaborate framework of myth, historical associations and memories has grown up relating to the thermal areas, and there could scarcely be a clearer example of a tribal taonga than a place such as Ohinemutu or Ohaki. The geothermal resource is viewed as the gift or legacy of Ngatoro-i-Rangi, the great tohunga and explorer who called upon his sisters to bring fire from Hawaiki to warm him on the frozen slopes of Tongariro, and in this way created the thermal areas. Dr Evelyn Stokes has written of the need to treat the legacy of Ngatoro-i-Rangi with proper care and respect:[108]

> Among Ngati Tahu it is often said that if the gifts of Ngatoro-i-Rangi are not treated with respect, he has a way of answering back. We know that hydrothermal eruptions occur now and again at Rotokawa and elsewhere. We know that the behaviour of geothermal areas seems difficult to predict or explain sometimes. The message of this is that we are but guardians, kaitiaki, caretakers of this resource.

Currently the management of geothermal resources is divided between the Ministry of Energy, which administers the Geothermal Energy Act 1953, and the catchment/regional water boards, in this instance the Waikato and Bay of Plenty catchment boards. The two boards exercise their powers pursuant to the Water and Soil Conservation Act 1967 which as we have seen, following the judgment of Chilwell J in *Huakina*, requires Maori spiritual and cultural values to be taken into account in decision-making. Such a requirement, however, would be difficult to 'read in' to the Geothermal Energy Act, representing as it does the exploitative approach to natural resources characteristic of its time. Section 3 of this Act expropriates the entire geothermal resource by providing that:

> the sole right to tap, take, use, and apply geothermal energy on or under the land shall vest in the Crown, whether the land has been alienated from the Crown or not.

Ngati Tahu, a sub-tribe of Tuwharetoa, occupying the Orakeikorako-Tauhara-Reporoa area north of Taupo have filed a claim with the Waitangi Tribunal claiming, amongst other things, that this provision is in breach of the Treaty. In the eyes of the claimants:[109]

> The Crown preempted ownership of the taonga under the Geothermal Energy Act 1953 without reference to Maori people. Nowhere in this Act is there reference to Maori attitudes and values towards geothermal resources as taonga, which among Te Arawa, Ngati Tahu and Ngati Tuwharetoa of the Rotorua-Taupo district were and still are a highly esteemed resource.

E F Lloyd, *Geology and Hot Springs of Orakeikorako, New* Zealand Geological Survey Bulletin No 85, (DSIR, Wellington 1972), pp 9-10.

108 E Stokes, "Rotokawa Geothermal Field: Submission to Waikato Valley Authority from Ngati Tahu Tribal Trust" (on file with Waikato Catchment Board, Hamilton, as part of objectors' evidence in Balcairn Geothermal Development and Investments Ltd water rights application, 1987), p 5.

109 Ngati Tahu/Tauhara North Waitangi Tribunal claim (on file with Waitangi Tribunal, Wellington), para 3.

The division of responsibility between the boards and the Ministry, which was productive of some confusion in the past, has now been classified and seems to function reasonably well. The dominant role is played by the catchment boards. The Ministry of Energy controls the allocation of geothermal energy through the grant of licences or authorities, and has the power to direct the closure of bores. The catchment boards grant and administer water rights and are actively involved in geothermal management through the preparation of geothermal management plans. Overall national coordination is provided by the Ministry of Energy's *Geothermal Resources Policy and Management Framework* (1986). This document lists as one of its objectives:[110]

> To take into account people's cultural beliefs including the relationships, as determined by customary usages and practices, between the culture and traditions of the Maori people, and any geothermal fields.

Of crucial importance are the geothermal water management plans now being prepared by the catchment boards. Water management plans have no statutory basis at the present time, but it is quite likely that they will shortly receive some form of statutory backing. Fortunately it seems that the boards are taking real care to ensure that Maori concerns are built into the process of designing and implementing the plans. The Waikato Catchment Board has, for instance, appointed a full-time Maori liaison officer and has adopted a set of interim guidelines to govern geothermal water rights applications which give considerable emphasis to Maori concerns. All the same, it can be queried whether even full consultation of this kind really adequately reflects Maori tribal interests in this resource. How can this be given adequate reflection in any new structures which may be established as an outcome of the current resource management law reform?

The first option is tribal regulation of the entire resource. This would involve complete transfer of the whole geothermal resource to tribal authorities, who would then control all mining and licensing aspects in place of the existing functions of the catchment boards and the Ministry of Energy. A sustainable argument can certainly be made that the whole resource (as opposed to specific thermal areas) is a taonga. Still, it may be asked whether Te Arawa and Tuwharetoa are either able or willing to take complete control of the geothermal resource, and there is an argument too, that in view of this resource's scarcity and uniqueness, the Crown - by virtue of its kawanatanga (carrying the right, and perhaps the obligation, to make laws for conservation control) - must have a role to play.

A second option is some kind of system of dual regulation, in which the existing authorities and tribal authorities would both have separate rights over the resource. An applicant for rights to take geothermal water at Rotorua would need

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110 *Geothermal Resources; a Policy and Management Framework* (Ministry of Energy, Wellington, 1986), objective 3.

the separate consents of, say, the Bay of Plenty Catchment Board and the Arawa Iwi Authority.

The third option is a mixed system in which the tribes would have exclusive management of certain defined thermal areas (for instance, Ohinemutu) and would also share in the overall management of the resource by means of some kind of partnership with the existing water management agencies. A structure of this kind would cause minimum disruption and allow the valuable work already done by the catchment boards to continue and be built upon. Overall coordination could be achieved by means of a central Geothermal Commission, made up of representatives of the tribes, the central government and the catchment boards (or whatever new local government institutions replace them). It could decide which areas could be returned to direct tribal management, coordinate management and scientific advice and assistance, and monitor overall conservation strategy.

There is certainly an urgent need for something to be done about situations such as that confronting Ngati Whakaue at Ohinemutu. Ngati Whakaue has recently received a notice from the Ministry of Energy, acting in accordance with the Geothermal Energy Act and the 1986 Management Framework, requiring the tribe to pay a resource rental for geothermal steam taken from bores on Maori land at Ohinemutu. Ngati Whakaue consider this a disappointing breach of a relationship of trust and confidence they believe themselves to have with the Crown, symbolised by Te Arawa's traditional loyalty to the Crown and by the Fenton Agreement of 1880.[111] Ngati Whakaue have so far refrained from lodging a claim with the Waitangi Tribunal, but are instead conducting direct negotiations with the Crown seeking the enactment of special legislation to enable them to make use of their own resource. In view of Ngati Whakaue's right to this resource as a taonga (not a mere privilege) their request seems only reasonable; their concerns could also be met by a mixed management structure as suggested above.

D Mining

New Zealand's mining laws, in ownership and management aspects alike, are extremely complex. In regard to mineral ownership, the source of much of the complexity can be put down to two factors. Firstly, mineral ownership and surface ownership are *severable*: ownership of minerals is an estate in land in its own right, and indeed a separate certificate of title can be issued. When land is sold, the seller can retain the mineral rights, which may in turn be sold separately to third

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111 In 1880 Chief Judge Fenton, on behalf of the Crown, concluded an agreement with Ngati Whakaue and certain other Arawa tribes at the Tamatekapua meeting-house at Ohinemutu. It is clear from this agreement that Ohinemutu was specifically excluded from the arrangement by which land surrounding the village was to be leased on 99-year leases through the agency of the Crown. There was also generous provision made for reserves, regarded by Ngati Whakaue as gifts to the new town of Rotorua. The Fenton Agreement was given legislative effect in the Thermal Springs District Act 1881 and the Thermal Springs District Act 1883.

parties. This has accounted in particular for the complexity of mineral titles for coal in the Huntly district. Secondly, when land is initially sold by the Crown, the Crown may grant or withhold mineral titles. Crown policy has been variable on this, but the general trend has been towards reserving mineral ownership and associated rights in the Crown grant, now a fixed rule in the Mining Act 1971 and the Coal Mines Act 1979. In ascertaining mineral rights, much, therefore, depends on the date of the original Crown grant and the statutory rules on mineral title in existence at that time. The picture is further complicated by special common law rules or statutes which explicitly vest certain minerals and hydrocarbons in the Crown (gold and silver, uranium, petroleum, and natural gas).

Mining management law is also complex. There are two main statutes, the Mining Act 1971 and the Coal Mines Act 1979. Coal mining licensing, for reasons that seem quite old fashioned now, is put in a special position in that objections to the application only receive judicial scrutiny if on matters of law, and are heard not in the Planning Tribunal but in the District Court. The Mining Act of 1971, however, contains a procedure by which objections are heard by the Planning Tribunal, which has the power to make binding recommendations to the Minister.

Owners of Maori land can veto mining on it: such land is not "open for mining" without the consent of the owners.[112] However, this is not an absolute rule in that the Mining Act does allow for private and Maori land to be declared open for mining without the owner's consent in certain restricted circumstances.[113] Maori can, of course, object to mining licence applications, either on general environmental grounds, or on the basis of section 3(l)(g) of the Town and Country Planning Act: "the relationship of Maori people and their culture and traditions with their ancestral land".[114] It should also be noted that one type of mining privilege, an exploration licence, can be granted over *any* land, whether or not it is land "open for mining" in terms of the Mining Act, and holders of such licences have the right to enter onto private or Maori land whether the owners are willing to consent or not.

Three recent cases have focused on Maori concerns insofar as these relate to the grant of contested mining privilege applications by the Planning Tribunal. The first is *Re an Application by Winstone Concrete Ltd.* This was an application for a prospecting licence. The tangata whenua objected on the basis, first, that the prospecting activities of the applicant company threatened their sacred places (wahi tapu), and, secondly, that the applicant had shown generally that it was not willing to take local Maori spiritual and cultural values into account. The Planning Tribunal was sympathetic, but felt that it would not be appropriate to refuse a prospecting licence for these reasons. The Tribunal felt that the issue could

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112 Mining Act 1971, ss 30, 35 and 36.

113 Ibid, s 37.

114 Ibid, s 129(9)(d). This incorporates the "matters of national importance" listed in s 3 of the Town and Country Planning Act as the criteria required to be taken into account by the Planning Tribunal in determining applications for mining privileges.

be dealt with by the imposition of conditions to protect the wahi tapu. It was not that the Treaty was irrelevant, but that its requirements could be met without having to refuse the application. Observed the Tribunal:[115]

> ... [W]e are able to conclude that the Treaty does not provide a sound basis for refusing the prospecting licence on the ground that prospecting activities might disturb wahi tapu whose locations the tangata whenua are unwilling to identify. Even though they may remain unwilling to identify them to the applicant, with its commercial motivation, the spirit of reciprocity in the Treaty calls for them to identify the locations to an officer of the Crown. It is only in that way that the Crown would be able in practice to perform the duty which the tangata whenua invoke, that of protecting the wahi tapu to the fullest extent that is reasonably practicable.

In *Re an Application by City Resources (NZ) Ltd*[116] the Tribunal was once again willing to take the Treaty into account in determining the scope of the statutory requirements. The Tribunal went so far as to observe that although the Treaty is not enforceable as municipal law "it does give rise to a duty owed by the Crown", a duty which the Tribunal expected the Minister of Energy to honour.[117] In this case the Tribunal recommended that the application for an exploration licence be refused. The reason for the different results in *Winstone Concrete* and *City Resources* was probably that since the latter was an application for an exploration (as opposed to a prospecting or mining) licence, the grantees would have the right to enter on to private land.

The latest decision, *Re Applications by Freeport Australasian Minerals*, was also concerned with Maori objections to exploration licence applications. In this case, however, the Tribunal recommended that the application be granted and the objections be disallowed. The factual situation does not seem very different from the *City Resources* case, and the *Freeport* case clearly represents an effort by the Tribunal to shift direction. In *Freeport* the Tribunal characterised the Mining Act as "an Act designed to facilitate knowledge of mineral resources". Observed the Tribunal:[118]

> We are not here to re-write the laws of this country. What we are called upon to do is to attempt the unenviable and indeed impossible task of trying to balance the requirements of an Act which cuts across rights of ownership of both Maori and European lands for the public good.

The Tribunal did, however, make the grant of the exploration subject to conditions, as follows:[119]

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115 *Re an Application by Winstone Concrete* (1987) 12 NZTPA 257, 260.

116 Planning Tribunal, 6 May 1988 24/87, A 26/88 (Judge Sheppard).

117 Ibid, 13.

118 Planning Tribunal, 29 March 1989, Min 84/87, W 25/89, esp p 10 and p 15.

119 Ibid, 17-18.

1 Prior to entering on to any Maori land or land owned by any Maori land incorporation the licence holder shall give 14 days notice of his desire to consult with the owners and/or administrators of that land. The consultation shall be for the purpose of ensuring that the spiritual and cultural values of the Maori people in respect of any sites that they may identify shall be respected. Should the land owners or administrators not desire to consult then the applicant may proceed to exercise his right. Should the owners desire to consult and identify sites of spiritual and cultural significance then a plan prepared by and at the expense of the licence holders identifying such sites shall be lodged with the Inspector of Mines.

2 That the land shall not be disturbed, nor shall employees of the applicant enter upon land within a radius of four kilometres of the peak of Mount Hikurangi without permission of the owners.

In all of these cases the issues at stake related to management, and not to ownership. This was also the case in the only Waitangi Tribunal decision which has focused on mining matters - the *Manukau* report. This was, of course, primarily an environmental claim. Principal concerns related to water quality, shellfish contamination and water depletion in the Manukau waters, and to ownership and management questions relating to the harbour. A number of other matters were raised, however, one of which was the ironsand mining operation conducted by New Zealand Steel on former Maori land at Maioro near Waikato Heads. The Tribunal discussed the manner in which the land was taken, the pitifully small amounts of compensation which were eventually paid, and the concerns of the applicants about risk to wahi tapu from forestry and mining operations.

In regard to the issue of compensation, the Tribunal found that the allegation that the land at Maioro had been taken for forestry when it was really intended for mining was not proven, at least not against the Forest Service itself.[120] The Tribunal thought that the areas of wahi tapu which had been voluntarily excluded from mining had been defined wider than was necessary in the circumstances, and also doubted "whether dispersed burials needed to restrict mining".[121] The Tribunal rejected the recommendation sought by the applicants that all mining at Maioro cease until all wahi tapu had been identified.[122] The Tribunal's recommendations relating to mining at Maioro were a considerable disappointment to the claimant tribe, Ngati Te Ata, and the tribe took the step of referring the matter to the United Nation's Working Group on Indigenous Populations; the chairwoman of the working group, Professor Erica-Irene Daes visited Maioro in January 1988.[123] Her report, which called for increased Maori self-government (while noting "the

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120 See *Manukau, 33.*

121 *Manukau, 82.*

122 Ibid.

123 "Tribe Asks UN Help On Mining", *New Zealand Herald,* 4 January 1988.

relative success of New Zealand in the relationship with the Maori people") was released by the Associate Minister of Foreign Affairs in May 1988. The report, while encouraging to Ngati Te Ata, does not appear to have led to any changes in the situation at Maioro.

Management-related claims concerned with the effects of mining operations form aspects of other claims lodged before the Waitangi Tribunal. The Muriwhenua land claim, for example, is in part concerned with damage done to Parengarenga Harbour on the Aupouri Peninsula as a consequence of silica sand mining operations,[124] and the Ngati Tahu claim has raised concerns about the obliteration of thermal areas by sulphur mining operations at Rotokawa, near Taupo.[125] Another example might be the damage done to upper Waikato lakes (Waahi, Kimihia, Hakanoa, etc) by coalmining operations: it is safe to assume that this is one of the matters currently being traversed by Tainui in its negotiations with the Crown.

Of a completely different order, of course, are *ownership* claims relating to minerals and hydrocarbons. Such claims might include taonga-based claims to certain minerals, quarries or mineral-bearing areas (such as the greenstone-rich Arahura River in Westland). Pre-European Maori society made considerable use of minerals such as greenstone (pounamu), obsidian, basalt, argillite, greywacke and andesite: some of these minerals were traded the length and breadth of the country.[126] Then there are compensation claims, such as the Tainui raupatu claim in which the coal resources of the Waikato are sought to be taken into account in determining the compensation that ought to be paid for the confiscation. It is certainly clear that the coal resources of the Waikato were well-known prior to the New Zealand Settlements Act 1863: they are, for example, described in detail in Hochstetter's *Geology of New Zealand,* published in 1864 but based on research conducted in the late 1850s.[127] A desire to obtain the coal resources of the Waikato might well have been part of the motivation for invasion and confiscation. Certainly Tainui is now pursuing a claim for coal.[128] Confiscation claims relating

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124 "Maoridom Needs Help, Says UN Official", *The Dominion,* 27 May 1988, p 2; Vern Rice, "UN Report Looks At Maori Rights", *The Dominion Sunday Times,* 12 June 1988, p 12.

125 See Muriwhenua Claim, reproduced in *Muriwhenua,* 245-254, paras 11-15 (seeking a review of both ownership and management aspects).

126 See B Brailsford, *Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington, 1984); Janet Davidson, *The Prehistory of New Zealand* (Longman Paul, Auckland, 1984), 96.

127 See C A Fleming (ed), Ferdinand von Hochstetter, *Geology of New Zealand* (Government Printer, Wellington 1959), 68-73.

128 See Vanessa Stephens, "Maoris Seek Coal Claim Talks", *The Dominion,* 27 June 1988, p 2. Since this paper was written a major development has been the proceedings brought by Tainui relating to the government's plans to transfer coal-mining licences to Coalcorp, a state-owned enterprise. *R Te K Mahuta and Tainui Maori Trust Board* v *Attorney-General*: CA 126/89). Judgment on the only issue argued so far, whether a coal mining licence is an 'interest in land' - if it is transfers of such interests will be

to hydrocarbons have been made by Taranaki tribes. In March 1988 Taranaki tribes brought proceedings in the High Court at Wellington seeking an injunction to restrain the sale of the Crown's shares in Petrocorp to Fletcher Challenge Limited. The basis of the action was similar to the *Maori Council* case: the Taranaki tribes argued that the sale would affect the Crown's ability to compensate them should tribal claims lodged before the Waitangi Tribunal prove successful. The crucial difference between this case and *Maori Council* was that the relevant statute made no reference to Treaty rights: in the absence of such statutory authority, Ellis J allowed the Crown's motion to strike out the claim to succeed.[129]

It is also possible to envisage claims which simply ask for the return of certain resources since they were never referred to or conveyed in the Treaty, and which therefore remain tribal property. American case-law can readily be found to support this proposition: there it is known as the principle or doctrine of 'reserved rights'.[130] It is not, however, proposed to explore the implications of this for New Zealand mineral claims in this paper, save to note that it would be difficult to make such a claim in situations where alienations of Maori land to the Crown specifically included minerals in the conveyance. Such a conveyance would extinguish the aboriginal title in the minerals.

The complexity of mining ownership law has recently led to proposals for reform. In 1986 the Ministry of Energy released a Report of the Review Team on Mining Legislation.[131] This report recommended that the ownership of all minerals - except aggregates - be resumed by the Crown. This would include all minerals on Maori land, although Maori landowners would be able to continue to veto mining. This proposed wholesale expropriation of all privately held minerals has not, to all appearances at least, been taken up, and present approaches now under the aegis of the Resource Management Law Reform (RMLR) have a different focus: on the rights of landowners, and on providing scope for Treaty-based claims to be litigated through.[132]

To summarise:

(i) Ownership of minerals is exceptionally complex and technical. Maori ownership claims could be based on claims to minerals as taonga, as aspects of confiscation claims, and by reliance on the reserved rights

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subject to the protective provisions of the Treaty of Waitangi (State Enterprises) Act 1988 - is currently awaited from the Court of Appeal.

129 *MRR Love and Taranaki Trust Board* v *Attorney-General,* unreported, 15 March 1988, CP 135/88 (High Court, Wellington).

130 *See United States* v *Winans* 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905); *United States* v *Wheeler* 435 US 313, 98 S Ct 1079, 55 L Ed 2d 303 (1978); *United States* v *State of Michigan* 471 F Supp 192, 253-55 (1979).

131 *Report of the Review Team on Mining Legislation* (Ministry of Energy, Wellington, 1986).

132 See "People, Environment and Decision Making" (supra n 2), 41-44.

doctrine. None of these questions has received any kind of sustained scrutiny so far, which makes generalisation very risky.

(ii) The law relating to Maori input into mining management issues is developing rapidly. The Planning Tribunal has shown itself more than willing to allow Treaty-related arguments to be taken into account, and on one occasion has refused an application for an exploration licence largely on the basis of objections by the tangata whenua. However, it appears that the main determinant in such cases will be the type of mining privilege that is being sought. The statutory reference to Treaty issues in the mining legislation is very 'indirect' and needs to be clarified and strengthened. The points mentioned in relation to geothermal energy are also equally applicable to mining. Places such as the Arahura River should be completely owned and managed by the tangata whenua as a taonga. As with geothermal management, Maori representation on whatever new structures are to be set up to administer the resource needs improvement.

E Archaeological Site Management

New Zealand law relating to the protection and management of archaeological sites is surprisingly elaborate and complicated. The earliest legislation relating to the protection and management of archaeological sites was enacted as long ago as 1903.[133] However, a modern system of management and control of archaeological sites did not arrive until 1975, when the Historic Places Act 1954 was amended. The relevant provisions were later incorporated into the Historic Places Act 1980, which is now in the process of being reviewed by the Department of Conservation. The legislation is basically regulatory: no person may excavate or modify any archaeological site, wherever situated, without the permission of the Historic Places Trust. Modification of an archaeological site without such permission is a criminal offence, carrying serious penalties.[134] The legislative framework is essentially the same as for natural resources such as water, geothermal energy or petroleum: the entire resource is in effect nationalised or expropriated, and the right to exploit the resource is vested in a governmental licensing agency exercising discretionary statutory powers. The 'resource' here, however, is rather unusual: it is best thought of as the right to produce archaeological information through the application of archaeological techniques to sites. All persons wanting to modify

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133 Scenery Preservation Act 1903, s 3. This empowered the Scenery Preservation Board to "inspect any lands possessing scenic or historic interest or on which there are thermal springs, and shall make inquiries respecting the same ... and shall from time to time recommend what lands, whether Crown, private or Native lands should be permanently reserved as scenic, thermal, or historic reserves". There are now about 80 historic reserves, which include a number of significant ancient pa. The reserves are now regulated by the Reserves Act 1977, administered by the Department of Conservation.

134 Historic Places Act 1980, ss 44, 46, 54.

sites, even professionally trained archaeologists, and certainly the owners of the sites, must obtain permission.

New Zealand's heritage of archaeological sites is enormous. One expert estimated in 1978 that there were about 200,000 sites in the country.[135] Tens of thousands of sites are listed in the New Zealand Register of Archaeological Sites (NZRAS), administered by the Historic Places Trust and the New Zealand Archaeological Association, but this represents only a fraction of the total. This great resource includes both Maori sites (pa sites, storage pits, middens, terraced hillsides, burials) and 'historic' archaeological sites (19th-century battlefields, shipwrecks, relics left by the 19th-century goldmining and kauri milling industries). The resource is also at risk, mainly from agricultural practices, but also from afforestation, subdivision development, mining and hydroelectric schemes. It has been estimated, for instance, that in the Motueka region only about four percent of known sites are at present undamaged: the norm is for sites to be partially destroyed.[136] The rich archaeological heritage of Auckland has been sadly diminished since most of the volcanic cones of the thickly-populated Tamaki isthmus, on which the pre-European pa stood, have been quarried away for road metal.[137] Out of 36 known Maori settlements on the volcanic cones of Auckland, 15 have been quarried away this century.[138]

The Historic Places Trust, which since 1986 has operated in association with the Department of Conservation,[139] thus has complete control over the management of a resource - a large part of which is of paramount value and significance to the Maori people. Again, the question needs to be asked whether the existing management structure fits within the requirements of the Treaty. Has the Crown, in expropriating the resource and vesting it in what is in effect, if not in name, a government agency, exceeded its right of kawanatanga to the detriment of rangatiratanga? Obviously protection by the Historic Places Trust is a vast advance on no protection at all, which is the situation which prevailed before 1975. With the changing climate of opinion in the 1980s, however, it is now the case that more formal recognition needs to be given to the views of tribal authorities in archaeological resource management. In addition, various important sites are in

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135 A D Challis, *Motueka: An Archaeological Survey,* (Longman Paul, Auckland 1978).

136 Ibid 38.

137 See generally, D Simmons, *Maori Auckland* (Bush Press, Auckland 1987). Simmons notes that up to 1971 about 240 hectares of stone-enclosed remnants of Maori gardens survived at Pukini, but these have been mostly obliterated since then (ibid, 61). In 1927 Wesley College Trust gave one of the hills at Three Kings, covered with a complex of Maori fortifications and kumara pits, to Mount Roskill Borough; the Borough allowed much of the area to be built over, the hill has been quarried and a water tower now sits on the summit (ibid, 55). Other examples of such mismanagement abound around Auckland.

138 A. Fox, 'Pa of the Auckland Isthmus: An Archaeological Analysis', *Records of the Auckland Institute and Museum,* Vol 14 (1977) 1, 1-2.

139 See Conservation Act 1986.

direct Crown ownership as historic reserves, and it may well be appropriate for some of these to be returned to direct tribal ownership.

The regulatory provisions of the Historic Places Act 1980 are administered by professionally trained archaeologists, who, in administering the provisions of the Act place primary weight on scientific criteria. Archaeological and traditional Maori views of the past do not always have a great deal in common, and potential for conflict and misunderstanding can arise only too easily, especially when archaeological work is focused on human remains.

The Historic Places Trust has devoted considerable attention to this issue. The Trust will certainly not issue a permit to dig up a known burial ground of recent date. Skeletal material is often found at archaeological excavations, however, and in April 1979 the Historic Places Trust held an important meeting at Dunedin to decide what should be done in such a situation. Present were representatives of Maori communities, archaeologists, and staff of the Trust's Archaeology section. It was agreed that before any archaeological excavation was commenced, consultations should be held with local Maori elders. Should any skeletal material be uncovered, then the work would have to stop and the local Maori people should be consulted as to what ought to be done. The bones should only be taken away for further study with the consent of the tangata whenua. Preferably they should be taken to the School of Anatomy at Otago Medical School in Dunedin - this being the only institution with the necessary facilities. If the tangata whenua so wished, the bones could be reinterred nearby.[140] This is only a voluntary code, but most archaeologists seem willing to comply. Otago University's programme of archaeological excavations in the Wairarapa in the 1970s, during which a considerable amount of skeletal material was excavated and studied, was conducted with the assistance of the Wairarapa Maori Tribal Committee.[141] It may be, however, that the time has come for the 1979 code of practice to be enacted into legislation.

The 1980 Act set up a separate procedure for protecting "traditional sites". A traditional site is defined as:[142]

> a place or site that is important by reason of its historical significance or spiritual or emotional association with the Maori people or to any group or section thereof.

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140 See R P Boast *The Law Relating to Archaeological Sites, Historic Places and Buildings in New Zealand,* (LLM Thesis, Victoria University of Wellington 1983) 326-27. For a discussion of equivalent issues which have arisen in the United States, see M B Bowman "The Reburial of Native American Skeletal Ramains: Approaches to the Resolution of a Conflict" (1989) 13 Harvard Environmental Law Review 147.

141 H M Leach (ed) *Prehistoric Man in Palliser Bay,* (National Museum of New Zealand, Wellington 1979) iii.

142 Historic Places Act 1980, s 2.

This seems a reasonable definition of the Maori expression wahi tapu. Such places may simultaneously be archaelogical sites, but, of course, not necessarily; some sites of great archaeological importance (Wairau Bar, for example) may not be wahi tapu at all, and the converse can also be true. Wahi tapu in the strict sense include such diverse places as the burial place of the Tainui canoe in the sandhills behind Auauaterangi Marae at Kawhia, Spirits Day and Cape Reinga, burial islands in lakes Rotokakahi, Rotorua, and Taupo, and Kupe landing sites. Wahi tapu might also, of course, include natural features like Mount Tongariro or Mount Hikurangi, which certainly the Historic Places Act was never intended to deal with.

The procedure in the Historic Places Act is linked to section 439A of the Maori Affairs Act 1953, which was inserted by an amendment in 1974. This stipulates that on the application of the Minister of Maori Affairs, the Maori Land Court may:

> consider a proposal that any piece of land (whether Crown land, Maori land, or General land) should, by reason of its historical significance or spiritual or emotional association with the Maori people or any group or section thereof, be set aside as a Maori reservation ... and make a recommendation to the Minister.

If general land, of course, the land would need to be compulsorily acquired.[143] Landowners can also apply to have land set aside as a Maori reservation, and this has been done on numerous occasions to enable areas of special importance, most usually marae, to be set aside.[144] Under the Historic Places Act 1980, an applicant seeking protection of a site as a "traditional site" can make an application to the Trust. If satisfied that the place or site "is or may be" a traditional site, the Trust has the choice of referring the matter to the Minister of Conservation, who in turn must refer it on to the Minister of Maori Affairs (who refers it to the Maori Land Court under section 439A, if the Minister thinks that course appropriate). Instead of referring it to the Minister of Maori Affairs the Trust can, as an alternative, refer it to a "Maori authority" which can then decide what, if any, action it wants to take.[145]

This particular procedure must be one of the most useless and ineffectual devices ever placed on the New Zealand statute book. It is also extremely vague and non-committal. Why owners of Maori land should ever be expected to bother with a cumbersome procedure in which an application has to be scrutinised by the Trust, the Minister of Conservation, and the Minister of Maori Affairs (who may or may not action the matter by referring to the Maori Land Court, which can itself only make a "recommendation" back to the Minister) is a mystery. Maori landowners can make a direct application to the Land Court in their own right; alternatively, if the land in issue is not Maori land, a direct approach to the Minister can be made,

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143 Maori Affairs Act 1954, s 439A(2).

144 For an analysis of the purposes of Maori reservations see Judge Durie's decision in *Re Mount Tauhara Maori Reservation* (1977) 58 Taupo MB 168.

145 Historic Places Act 1950, s 50.

requesting an application under section 439A. The Historic Places Act procedure merely complicates matters unnecessarily to no obvious purpose. In any event, if the wahi tapu is on Crown or general land, everything depends on the willingness of the Crown to set Crown land aside or to compulsorily acquire private interests and pay compensation.

Mention should also be made of section 270 of the Treaty of Waitangi Act 1975 (inserted in 1988).[146] This allows wahi tapu on land owned by a state-owned enterprise to be "resumed" by the Crown. The interest of this provision lies in subsection (4) which deals with what happens after resumption:

> Upon its resumption ... the land or interest shall be dealt with in accordance with an agreement made between the Crown and the relevant tribe, or, if they fail to agree, in accordance with any recommendation of the Waitangi Tribunal pursuant to an application made under section 6 of the Treaty of Waitangi Act 1975.

This gives the Tribunal the power to make a binding judicial decision on whether the land should remain Crown land; or if it is to be returned to Maori ownership, precisely to whom and on what conditions. Still, the Tribunal has no control over the question whether the land be resumed in the first place - that is an executive decision.

"Traditional sites" do not receive the same protection under the Historic Places Act 1980 as do "archaeological sites". It is not necessary to apply for permission to modify a traditional site - unless, of course, it is also an archaeological site. It will not fall into the latter category unless there are some surface archaeological features, which in many categories of traditional sites may well not be present. Alternatively the purely archaeological features may be marginal, and the traditional values great. In this latter situation, if regulatory decisions are to be made on a basis of placing primary weight on scientific significance, a decision to modify might well be granted. It is not clear to what extent the Trust places reliance on traditional significance in making its decisions. A case can be made for giving traditional sites equivalent protection to archaeological sites and for ensuring that traditional and archaeological significance are ranked as equivalent.

To summarise:

(i) The structure of archaeological resource management in New Zealand needs to be reconsidered. Complete control by a governmental regulatory agency should be broadened to shared control by government and tribal authorities.

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146 Treaty of Waitangi (State Enterprises) Act 1988, s 10.

(ii) The special importance of human remains and the responsibilities of the tangata whenua need to be recognised in legislation, preferably along the lines of the criteria formulated by the Historic Places Trust in 1979.

(iii) The time is now ripe for wahi tapu and archaeological sites in Crown ownership to be returned to tribal ownership and management (subject, once again, to the Crown's kawanatanga based right to intervene, if necessary, in the interests of conservation).

(iv) Traditional sites need to receive the same protection as archaeological sites.

(v) The criteria relating to Trust decisions to modify sites should be clarified and spelt out in the legislation, to make it clear that traditional and scientific significance should rank equally.

F The Town and Country Planning Act 1977

The Town and Country Planning Act 1977 is the centrepiece of this country's resource management laws. The system is essentially a North American style zoning system, administered by country, borough and city councils. It is a highly judicialised system. Applications for planning consent are made to council planning committees, which tend to conduct their hearings in a formal, judicial manner, with evidence being given on oath and lawyers and expert witnesses playing a major part; appeals to the Planning Tribunal are heard in an even more structured and judicialised manner, reminiscent of the High Court. Rights of public participation are wide, and there is usually considerable public participation in the preparation of district schemes (the planning document for each council) and in planning applications. It is possible that the formalised nature of the planning process may be rather off-putting to Maori objectors; but there are also signs of growing confidence and of an ability to participate effectively in the system.

The Town and Country Planning Act makes no reference to the Treaty of Waitangi. In this it resembles the Geothermal Energy Act 1953, the Water and Soil Conservation Act 1967, the Mining Act 1971 and the Coal Mines Act 1979. What it does have is section 3(l)(g), which lists as one of seven matters of national importance to be "recognised and provided for" in the "preparation, implementation and administration" of all district schemes "the relationship of Maori people and their culture and traditions with their ancestral land".

Section 3(l)(g) has been commented on in numerous decisions of the Planning Tribunal, and commentary on this case law already forms a substantial literature.[147]

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147 G Asher, "Planning for Maori Land and Traditional Maori Uses" (1982) 65 Town Planning Quarterly; J Tamihere, "Te Take Maori: Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law" (1985) 5 Auckland

Yet of more importance in day-to-day planning reality are the provisions of the district schemes and the general policies and practices of council staff in implementing them. A true evaluation of the effectiveness of section 3(l)(g) is not possible without a detailed study of all of New Zealand's district, regional and maritime planning schemes, in order to determine whether planners are taking account of Maori needs and concerns by, for instance, giving marae appropriate zoning. Such a survey is unfortunately beyond the scope of this publication, but it should be a safe prediction to make that provision for Maori community needs in district schemes is likely to be variable and inconsistent.

Section 3(l)(g) has the effect of listing Maori concerns alongside six other criteria. It provides for balancing, but not for the priority which Maori requirements must sometimes have, as was emphasised by the Waitangi Tribunal most recently in the *Mangonui Sewerage* report.[148] Consideration must be given to devising a town and country planning system which will enable this priority of Maori interests to be given effect, when appropriate. A clear statutory reference to the principles of the Treaty would be useful, but would it be enough? By itself, such a directive would achieve little until all of its implications had been worked out through the courts.

The object, as emphasised throughout this paper, must be to get the balance right between kawanatanga and rangatiratanga. A consequence might be that if Maori communities so wish it, their taonga, and perhaps all Maori land, should fall outside the planning system altogether. Or possibly it could be integrated into the system in a way which will preserve rangatiratanga. There is no reason why the right of self-regulation implicit in rangatiratanga should not extend to planning consents and planning controls. If Maori communities wish to opt out why should they not be given an opportunity to do so? A community such as Ohinemutu could prepare its own scheme, and hear and determine planning objections and applications itself. It could be linked into the rest of the system at the Planning Tribunal stage, which would hear appeals from applications made to Maori community planning authorities just as it hears appeals from city and borough councils.

In *Arawa Maori Trust Board v. Rotorua City Council*,[149] the existing difficulties that arise between the administration and control of Maori land under the supervision of the Maori Land Court on the one hand, and the town and country

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University Law Review 137; S Kenderdine, "Statutory Separateness (l): Maori Issues in the Planning Process and the Social Responsibility of Industry" [1985] NZLJ 249, and "Statutory Separateness (2): The Treaty of Waitangi Act 1975 and the Planning Process" [1985] NZLJ 300; S Bielby, "Section 3(l)(g) of the Town and Country Planning Act 1977" (1988) 6 Auckland University Law Review 52. Some recent publications of the Ministry for the Environment as part of RMLR are of particular interest, especially K A Palmer, *The Planning System and the Recognition of Maori Tribal Plans*, October 1988 (RMLR Working Paper No 28, Part B).

148 See *Mangonui Sewerage*, supra n 47, p 7.

149 (1979) 6 NZTPA 520.

planning system on the other, became very clear. The case was concerned with Mount Tarawera, set apart in 1973 as a Maori reservation under section 439 by the Maori Land Court. The land was set aside as a place of historical, geological and scenic interest for the common use and benefit of Ngati Rangitihi, an Arawa tribe. The land was in turn vested in the Te Arawa Maori Trust Board. The Te Arawa Trust Board sought the permission of the Maori Land Court to give a licence to a tourist operator to construct and utilise an airstrip on the mountain. The Maori Land Court gave approval, but the Trust Board then had the hurdle of additionally obtaining planning permission from the territorial local authority. In the end planning consent was granted after an appeal to the Planning Tribunal. The case shows the difficulties faced by Maori landowners who are encumbered with a double system of control - by the Maori Land Court and by the town and country planning system.

Surely a better way would be for the Arawa Maori Trust Board to have its own planning system. It could hear the objections itself and make its own decision. An appeal could go to the Planning Tribunal directly. In determining such an appeal the Planning Tribunal would need the benefit of much clearer statutory references to the Treaty and its implications than can be found in the existing Town and Country Planning Act.

In the *Mangonui Sewerage* report (August 1988) the Waitangi Tribunal gave careful attention to the difficulties Maori objectors had with the planning system. The Tribunal found that:[150]

> The objection rights in planning laws do not fulfil Treaty obligations when there is not the facility for prior consultation with local tribes. The practical difficulty is that, through the neglect of tribal rights in former years, there is now a dearth of legally recognisable institutions representative of the tribes readily able to formulate a tribal position. Subject to the provision of such institutions, which in our opinion the Crown must now provide, the Planning Tribunal should have power to defer proceedings where in its opinion consultation is required.

G *Sea Fisheries*

The Waitangi Tribunal's emphasis on tribal self-regulation was developed in the *Muriwhenua* report specifically in the context of fisheries.[151] Tribal authorities should regulate the tribal share of the resource in accordance with tribal rules, possibly by means of a tribal fisheries court such as already functions in the states of Oregon and Washington. The management issue presents little difficulty. An elaborate body of tribal fisheries management law already exists, much of which (since it is made up of very clear and readily definable rules) could easily be translated into the formal language of regulations.

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150 Page 60.

151 See *Muriwhenua*, 230-238.

In *Muriwhenua* the Tribunal, following its earlier *Motunui* and *Manukau* reports, called, too, for the establishment by the Crown of Maori fishing reserves - which could be done under existing legislation - sufficient, at the very least, to establish the economic security of the Muriwhenua tribes and to enhance and protect tribal mana. The location of such reserves should in part be determined by the location of remaining areas of coastal Maori land and Maori settlement. Different rules and requirements might be needed for different reserves:[152]

> The variables are numerous and if the Treaty is not to be the cause of the very conflict that it sought to avoid, many special arrangements may need to be settled. Some tribal fishing reserves may need to be open to all people, others to all local residents. Some may warrant full Maori control, others a joint management. Commercial uses may be appropriate in some cases but not others.

Over at least some of these reserves, the Muriwhenua tribes should exercise full regulatory control. In Muriwhenua in particular:

> large areas should be reserved under tribal control. Whether any such areas are commercially-used must be a matter for the tribes concerned though special reasons may exist, or may later appear, to warrant state impositions.

In other words the Crown, by virtue of the kawanatanga ceded to it, has the right to step in and override tribal self-management but, as has been emphasised in this paper, in a restricted range of situations - that is, in the interests of conservation, and only when the attempts to achieve the goal of conservation by regulating non-Treaty fishing has proved unsuccessful.[153] The situation envisaged by the Tribunal is similar to that prevailing in the Pacific Northwestern states of the United States. There, too, treaty rights must give way in the interests of conservation - but once again, only in a restricted range of situations which almost exactly duplicate those being advanced by the Waitangi Tribunal as suitable for New Zealand.

The Tribunal also considered that the precise detail relating to Maori fishing reserves could be dealt with by some institution such as the Maori Land Court:[154]

> Tribal fishing reserves, their nature, size and number, should to the extent practicable be settled between the Crown and the tribes with ultimate recourse to an independent arbiter, like the Maori Land Court which originally dealt with such matters. (This Tribunal would likely decline to hear further claims to fishing reserves in the event that an alternative procedure was arranged.) ... The creation of such reserves must not depend on administrative pleasure.

The Tribunal's approach is consistent with its general emphasis on tribal distinctiveness and the need to tailor solutions to specific circumstances. A

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152 *Muriwhenua*, 232.

153 See *Muriwhenua*, 232.

154 *Muriwhenua*, 232.

procedure enabling Maori fisheries reserves to be allocated through careful investigation in the Maori Land Court is obviously in accord with this approach. However, since *Muriwhenua* the Crown and the tribes negotiating through the Maori Council have attempted to find a general solution to the fisheries issue, without apparent success. The matter has now been set down for major litigation in the High Court. The High Court has allocated five months for the hearing, which is scheduled to commence in October 1989.[155] This does seem to illustrate the dangers of the one-off, grand solution approach - specific settlements of the *Manukau* and *Muriwhenua* claims through the establishment of fishing reserves, as the Waitangi Tribunal recommended, might have been a more fruitful approach. It would probably have had greater legitimacy: a negotiated deal always runs the risk of non-compliance by those who feel left out of the negotiations. If *Muriwhenua* and *Manukau* had been settled as suggested, future claims relating to fishing could have been dealt with much more speedily, as a framework for settlement evolved and was put in place. Case by case litigation is not necessarily slower or more expensive than elaborate negotiations conducted between the state and national organisations.

H Environmental Impact Reporting and Assessment

Environmental impact reporting was begun in the United States in 1970, when President Nixon signed into law the National Environmental Policy Act 1969 (NEPA).[156] Since its inception in the United States, environmental impact reporting has been adopted in many countries, including Canada, Australia, Eire, France, West Germany, the Netherlands, South Korea and Japan.[157] New Zealand adopted a form of environmental impact reporting and assessment in 1973, with the Environmental Protection and Enhancement Procedures (EP & EP), originally

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155 The full title of these proceedings is *Ngai Tahu Maori Trust Board, the New Zealand Maori Council, the Tainui Trust Board, Runanga o Muriwhenua Inc* v *Attorney-General and others* ("First Bracket"); *M Rata, R Te K Mahuta, T G O'Regan, J Henare* v *Attorney-General and others* ("Second Bracket") and *NZ Fishing Industry Association* v *Attorney-General and Others* ("Third Bracket") CP 553/87, 559/87, 743/88, 759/88 etc. Issues arising in the litigation include the interpretation of s 88(2) of the Fisheries Act 1983, and the definition of the fishing rights retained by Maori under Article II of the Treaty. An interim judgment was released by Eichelbaum C J and McGechan J on 19 May 1989 in which it was held that the Waitangi Tribunal's *Muriwhenua* report was not binding as to matters of fact, but was admissible as a standard work of general literature under s 42(2) of the Evidence Act 1908 and as a "public document" at common law. Meanwhile the government has introduced a second attempt at a partial legislative settlement with a redrafted Maori Fisheries Bill which sets in place a coordinating regulatory agency which will implement a fisheries settlement on a national, as opposed to a tribal, basis. This approach seems to run counter to the approach devised by the Waitangi Tribunal in *Muriwhenua* and elsewhere.

156 Pub L No 91-180, 83 Stat 852, 42 USCA paras 4331 et seq.

157 See generally B O Clark, R Wisset and P Wathern, *Environmental Impact Assessment: A Bibliography with Abstracts* (Mansell, London, 1980).

prepared jointly by the Commission for the Environment and an Officials' Committee for the Environment, and modelled very largely on NEPA.[158] Neither EP & EP nor the Commission for the Environment itself had any statutory basis whatever, and although the Commission's auditing functions are now conducted by the Parliamentary Commissioner for the Environment, set up under the Environment Act 1986, the Enhancement Procedures still lack a statutory basis. The principal reason for the non-statutory nature of the New Zealand procedures was a desire to avoid the vast proliferation of litigation that has resulted from NEPA in the United States.

The purpose of an environmental impact report (EIR) is clear enough: it is a planning document intended to benefit both the public - who can react by forwarding submissions to the auditing agency - and the proponent, who is forced to develop strategies for implementing the project, for obtaining the necessary statutory approvals and for isolating problems in advance. However, the effectiveness of the system in New Zealand has been hampered both by its confused relationship with the rest of planning environmental law, and by a willingness on the part of politicians to alter the Procedures for reasons of their own. Major changes were made in 1978, for instance, when Cabinet emphasised that for many projects the statutory processes would themselves be quite adequate and a full environmental impact report would therefore be unnecessary.[159] There has been a growing tendency for proponents of government projects to prepare, instead of a full environmental impact report, an environmental impact assessment which is generally less substantial, and not open to full public submission, nor to independent auditing. But exactly when an assessment as opposed to an environmental impact report is required - or indeed, when it is necessary to prepare either - is impossible to state with any degree of confidence.

Although until recently most major government projects involved a full environmental impact report, the future of the procedure is uncertain. If the new planning legislation which emerges after RMLR has run its course is binding on the Crown - as it almost certainly will be - then one of the main purposes of the current formal environmental impact reporting and assessment system will be lost. The Crown will have to make planning applications like every one else. Consequently a separate system of objection and auditing would be superfluous. The days of constructing large scale government public works seem to have drawn to a close in any case. Significantly the latest major RMLR document, *People, Environment and Decision-Making* (December 1988),[160] points out that once its

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158 See generally S J Mills, "Environmental Impact Reporting in New Zealand: A Study of Government Policy in a Period of Transition" [1979] NZLJ 472-484, 494-501, 515-524.

159 For commentary on the changes that have been made see Mills, above n 158, and the Commission for the Environment's *Environmental Policy and Management in New Zealand: A Working Document for the OECD Country Review*, 1980, Chapter 1.

160 *People, Environment and Decision Making* (above n 2), 59. The authors envisage that while development proposals must include impact assessments, "this need not be an

proposed Resource Management Planning Act has been enacted "the current EP & EP will become largely redundant".

How adequately have Maori concerns been taken into account in environmental impact reporting and assessment as it has operated up to the present? Only a complete analysis of all reports, assessments and audits would reveal an answer. The result of such a survey would probably reveal considerable unevenness, but a gradual improvement. Some reports and audits do show considerable attention being given to concerns of local Maori communities and it is scarcely conceivable that in current circumstances such concerns are becoming more likely to be ignored. The current auditing agent, the Parliamentary Commissioner for the Environment, is well-informed about Maori concerns. In November 1988 the Commissioner released a major report, *Environmental Management and the Principles of Waitangi*, the mere existence of which makes it unlikely that Maori concerns will be ignored in the auditing process. Furthermore, the Long Title of the Environment Act 1986 has as one consequence the fact that the Parliamentary Commissioner for the Environment is obliged to take full and balanced account of the principles of the Treaty of Waitangi in auditing EIRs.

A useful case study is afforded by the Ohaki geothermal power project. The environmental impact report (EIR) was prepared in 1977, and submissions were made by Dr Evelyn Stokes of Waikato University who had a close association with the Ngati Tahu people of the Tauhara-Reporoa district, who were not only the tangata whenua but also the owners of the land in which the geothermal power station was to be constructed. In her submission Dr Stokes was critical of the earlier Waahi power station project at Huntly, and suggested ways in which the mistakes associated with that particular project could be avoided. She argued in particular that 'community hearings' be established on the model applied by Mr Justice Berger when investigating the proposed Mackenzie Valley Pipeline in the Canadian Arctic.[161]

The Mackenzie Valley Project, and especially Mr Justice Berger's report, *Northern Frontier, Northern Homeland* (1977), have achieved classic status as a pioneering effort to take account of the special concerns of indigenous people in a major development project.[162] A sustained effort was made to allow Canadian

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elaborate separate impact assessment" (p 58). For some projects a "call-in" technique might be employed, which "could involve detailed impact assessment and an independent audit" (p 59), but the clear implication is that this would be an exception. Generally impact assessment *as a planning technique* will be integrated into ordinary statutory approvals.

161 E Stokes, *Broadlands Geothermal Power Station Environmental Impact Report: Submission to the Commission for the Environment* (1977) pp 9-10.

162 See T Berger, *Northern Frontier, Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry* (1977), vol I, esp Chapters 8-11. For commentary, sec M. Jackson, 'Thc Articulation of Native Rights in Canadian Law' (1984) 18 University of British Columbia Law Review 255.

native communities to structure proceedings in their own way. Thirty-five separate hearings were held altogether, at which about 1,000 witnesses gave oral evidence to the inquiry. The agenda was set by the communities themselves, and no effort was made to hurry matters or to force witnesses to conform to eurocentric models of conducting debate.

M. Jackson, who acted as Special Counsel to Mr Justice Berger, describes the process as follows:[163]

> Instead of a typical government hearing lasting a few hours, hearings in many of the villages went on for two or three days. Hearings would start in the early afternoon and often would go into the early hours of the morning. In many villages a traditional dance would be held after the hearing to which the judge and the inquiry staff would be invited.

Mr Justice Berger was able to conclude:[164]

> Those who wonder why the feelings of the native people have not previously appeared so strongly as they do now may find their answer in the fact that the native people themselves had substantial control over the timing, the setting, the procedure and the conduct of the inquiry's community hearings. The inquiry did not seek to impose any preconceived notion of how the proceedings should be conducted. Its proceedings were not based upon a model or an agenda with which we, as white people, would feel comfortable. All members of each community were invited to speak. All were free to question the representatives of the pipeline companies. And the inquiry stayed in a community until everyone there who wished to say something had been heard. The native people had an opportunity to express themselves in their own languages and in their own way.

The Waitangi Tribunal, of course, is another example of the successful use of community hearings of the kind described by Mr Justice Berger.

At Ohaki, certainly, following the EIR and Dr Stokes' submissions, real efforts appear to have been made. Long-term leases of the land were negotiated which contained provisions protecting the marae, urupa and other wahi tapu, and provided too for the restoration of the Ohaki thermal pool and for the supply of steam and hot water to the marae buildings. The process seems to be regarded as having achieved a reasonably successful and satisfactory compromise. More recent geothermal developments have, however, led to new concerns which have been eloquently described in another study by Dr Stokes.[165] The new factor is increased competition between government agencies, private companies and state-owned

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163 M Jackson, above n 162, 274.

164 T Berger, *Northern Frontier, Northern Homeland* (above n 162), 95-96.

165 E Stokes, 'Public Policy and Geothermal Energy Development: The Competitive Process on Maori Lands', Paper presented to the *Symposium on New Zealand and the Pacific: Structural Change and Societal Responses,* University of Waikato, 19 June 1987.

enterprises for geothermal and water rights, which has led to a situation which is extremely confusing and stressful for local Maori communities.

The 'community hearings' model certainly is appropriate for consideration of developments which affect Maori communities, especially those located away from the main cities. No formal provision requiring such hearings is to be found in the present text of EP & EP or in any other planning legislation. The concerns raised by the Waitangi Tribunal in relation to objections to planning applications have already been noted.

Much of the focus of this study has been on substantive law, not on procedure. But procedure, of course, is of vital importance. A serious commitment to taking the principles of the Treaty into account in the area of resource management planning must extend to an effort towards a bicultural approach to procedure when appropriate. That this is feasible is convincingly shown by the example of the Waitangi Tribunal itself.

VI CONCLUSIONS

A Kawanatanga, Rangatiratanga, and Conservation

The Waitangi Tribunal has already developed a clear and satisfying analysis of the relationship between kawanatanga and rangatiratanga in the context of resource management. The Tribunal's approach has been consistent, but it was in *Muriwhenua* that its analysis was developed most fully. The Tribunal's approach can be restated as a set of propositions as follows:

(1) Neither kawanatanga nor rangatiratanga are absolute rights. They qualify and restrict one another: the Crown's kawanatanga is restricted by the tribes' rangatiratanga, and vice versa. Thus the Treaty, if it is ever implemented fully, must operate as a constitutional fetter on parliamentary sovereignty.

(2) Sometimes, however, kawanatanga can override rangatiratanga.

(3) In terms of subject-matter, one area in which the Crown's kawanatanga can override tribal rangatiratanga is that of conservation. Laws binding on all for the purpose of conservation are not contrary to the Treaty.

(4) However, before such a limitation is within the terms of the Treaty (and is in that sense "constitutional") it must be "absolutely necessary" for conservation, and it must be shown that controls over those who lack Treaty rights have been applied first. Only if regulation of non-Treaty interests has proved insufficient can rangatiratanga be overriden in the interests of conservation.

This formula can readily be translated into a number of contexts. Is, for instance, a complete ban on whaling contrary to the Treaty of Waitangi? The answer would in part turn on whether a whale fishery was a recognised tribal taonga. If so, then a ban on whaling *is* contrary to the Treaty unless (a) it is absolutely necessary in the interests of conservation, and (b) whether restrictions on non-Treaty persons (Pakeha, and Maori who did not catch whales) are insufficient to achieve the objective of conservation. It might be argued that conservation of whales is now so important that allowing anyone to catch them is contrary to the objective of conservation. Or it might be the case that this is only true of some species, but not of others. If it cannot be claimed that such a restriction is now essential in the interests of conservation, then some part of the whale fishery must be returned to tribal ownership and/or management. Of course it does not follow that the tribe will then embark on some kind of an orgy of whale hunting. If it did, and that was detrimental to the conservation of the resource, then the Crown could in any case intervene. But it is much more likely that the tribe (say Ngai Tahu) would impose its own ban on whale hunting. Tribal customary law is evolving and is no more static than is the common law; it is also capable of recognising that whales are now worthy of having 'rights' (fifty years ago neither the common law nor indigenous customary law conceived of any such thing).

The precise answers to all these questions about whale conservation need not, in any event, detain us. The point is that the framework developed by the Waitangi Tribunal does provide a workable analytic technique by which to evaluate whether conservation laws are within the metes and bounds of the Treaty of Waitangi. The importance given to conservation is paralleled in the very similar legal structure which has evolved in the United States fisheries cases.[166] There, it will be recalled, the courts are willing to accept that state wildlife management law can override treaty rights, but only if necessary for conservation, and only if those possessing non-treaty revocable privileges have been regulated before a start is made on holders of treaty rights.

The above example of whaling has revealed, however, that the *Muriwhenua* approach gives no clue as to what the tribal share of the resource actually is - the ownership issue. Let us assume that the whale fishery is a tribal taonga of Ngai Tahu, and that the Marine Mammals Protection Act is a breach of Ngai Tahu's Treaty rights, at least in respect of certain species of whales which are now relatively plentiful in New Zealand waters. What should be done to redress that? What percentage of the whale fishery off the former coastal lands of Ngai Tahu

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166 See Part III B above. A somewhat similar development is occurring in Canada. In *Sparrow* v *R* [1987] 2 WWR 577 the British Columbia Court of Appeal held that an Indian food fishery was an aboriginal right protected by s 35(1) of the Constitution Act 1982, and was an interest entitled to priority over other groups with interests in the resource, subject to regulations 'reasonably necessary' for management and conservation.

should now be returned to tribal management? All of it? 50%? A symbolic amount to restore tribal mana?

This problem reveals the limitations of a management centred approach to resource management law reform. Another example will reinforce the point. Ngati Whakaue of Rotorua occupy Maori land adjacent to Lake Rotorua. The Ministry of Energy is requiring the tribe to pay a resource rental for geothermal steam taken from Maori land and used to heat marae buildings and some houses. Is this contrary to the Treaty? The geothermal resource is definitely a taonga. Is it necessary in the interests of resource conservation that Ngati Whakaue be regulated in this way? Have non-Treaty resource users been fully 'targeted' first? The answer to both questions is almost certainly 'No'; therefore the Crown is in breach of the Treaty. Ngati Whakaue should be left to regulate their own share of the resource. Only if such tribal self-management is detrimental to the objective of resource conservation can the Crown intervene. This might, perhaps, involve closing down bores, although how making Ngati Whakaue pay a rental can ever be justified is not easy to see.

The above analysis has sidestepped one crucial point. What is Ngati Whakaue's share of the resource? Just the steam and hot water accessed by putting bores on individualised blocks of land belonging to persons who are members of Ngati Whakaue? Or does it extend wider than that - perhaps to the whole of the geothermal resource under all of Ngati Whakaue's former lands which would include the whole of the modern city of Rotorua and beyond?

The question as to what share of the resource should be given to Ngati Tahu or to Ngati Whakaue to control are questions of resource ownership. Giving effect to the tribal right now need not necessarily involve a transfer of ownership. But determination of the tribal right which must now be redressed is an ownership matter. The difficulty is that no answer can be given because so many basic ownership questions remain to be litigated and authoritatively settled.

B Ownership, Management and Litigation

A process of law reform which focuses only on questions of management but side-steps the all important ownership issue may achieve much that is useful, but will of course leave the fundamental ownership issue to be resolved by some other means. It is all very well to say that the Muriwhenua tribes have the right to regulate the tribal share of the fishery according to tribal law - but what is the 'tribal share'? How is that to be determined and vested?

The decision in *United States* v *State of Washington* similarly insisted that the Indian tribes had the right to regulate the tribal share of the resource according to tribal laws. But the court also was able to determine and fix the tribal share - 50% of the annual harvestable runs of fish. That ownership entitlement was derived from an analysis of the texts of the treaties concerned. The '50% rule' is now general in the Pacific Northwest states. It is at least as compelling that no less than 50% of unalienated resources in New Zealand form the basis of the 'ownership'

determination here. As a bare minimum, Ngati Whakaue's rights must extend to 50% of the geothermal resource under former Ngati Whakaue land, for example. But that is a relatively simple example, and even so is complicated by the absence of any authoritative determination of whether Ngati Whakaue ever intended to part with geothermal resources on land they leased or generously gave away pursuant to the Fenton Agreement of 1880. Without having a defined answer to that issue, negotiation is very difficult as it involves untested speculation about what legal rights might be.

With the Muriwhenua fishery there are even more difficulties. What is the content of the fishery - all species, traditionally fished species? When land was alienated, was it assumed that the fishery went with it, or not? What validity is there in the Crown's assumption that it acquired property rights to the foreshore by mere operation of law?

In short, negotiation is almost impossible when there is so much uncertainty about basic legal questions to do with resource ownership. Resource management is a lesser problem: the Waitangi Tribunal has already evolved a convincing analysis of how management questions should be approached. But by itself it can only take us so far - much depends on the response to ownership problems, and that response is difficult when so many fundamental legal problems need to be authoritatively settled. Lawyers who are familiar with United States and Canadian developments might well feel confident about predicting what the outcome of litigation might be, but a prediction, no matter how confident, is not the same thing as having something authoritatively settled in New Zealand.

A prime function of the law is to provide a framework of reasonable coherence and certainty within which decisions can be made. Contracts can be made in the knowledge, hardly thought about consciously, that the courts will enforce them. Companies are set up and commercial decisions made in the knowledge that the consequences of incorporation are clear and well-recognised. (That was not always so of course: much litigation was necessary before the consequences of incorporation under the Companies Acts had been hammered out in the courts.) With Treaty ownership issues there is too much legal uncertainty for negotiations to proceed, and the fact must be faced that a process of litigation will be necessary before the outlines become clear. Although negotiation and discussion is probably preferable to the often time-consuming, messy and expensive business of litigation, it needs to be recognised too that negotiations are themselves often messy, time-consuming and expensive and do not have the advantage of leading to an authoritative solution.

If litigation has to take place, it must be on a basis of full participation. In the United States the Federal Government, in its capacity as trustee for the Indian tribes, litigates on behalf of the tribes in order to get the authoritative solutions which are necessary. In New Zealand, by contrast, tribal claims are argued *against* the Crown, which feels obliged to counter them as defendant. At the very least, a full and generous provision of legal aid is necessary to allow the necessary stage of litigation to be embarked upon and worked through. Once that has been achieved, a

drawing together of all forces concerned with environmental quality - the tribes, environmental groups and state agencies - may occur, a development which is now occurring in the United States.

It should be emphasised here that by litigation the writer is expressing no preference for litigation in the ordinary courts. On the contrary, the preferred mode of litigation should continue to be the Waitangi Tribunal. The Tribunal manages to combine the advantages of the 'community hearing' and the usefulness of litigation in creating authoritative solutions. Although the Tribunal's recommendations are not binding on the Crown, the corpus of principle it has built up is undoubtedly authoritative and has been regarded with great respect by the High Court and the Court of Appeal.

The Tribunal has been highly successful in resolving and putting an end to such painful and divisive problems as the Orakei dispute, which festered for nearly a century until the Tribunal carefully investigated and documented it. The equally painful Ngai Tahu claim - Te Kerema - which has also festered for a century, now is receiving its best chance ever of being sensitively and appropriately dealt with and resolved. Halting the Tribunal's work would be a highly retrograde step.

Treaty claims are complex, both legally and factually. They inevitably take time to investigate and report on. It is, indeed, the care and thoroughness of the Tribunal's work which has won such widespread respect.

C Structural Changes

The Resource Management Law Reform exercise, referred to at the commencement of this paper, is being conducted in tandem with a major reorganisation of New Zealand's local and regional government. Linked to the latter is the government's programme of devolution of control over Maori affairs to local or regional iwi authorities.

One objective of these changes is simply clarity and orderliness: a desire to reduce and consolidate New Zealand's plethora of local bodies. There will be fewer local government units with, generally, an expanded range of functions. Much more of New Zealand's government will be conducted at the regional level as opposed to the central or local level than has previously been the case. This illustrates a second overall objective, that of decentralisation towards (to coin a phrase) regionalisation. The primary beneficiaries seem to be the existing catchment/regional water boards, which for most of the country are the only functioning regional units of local government currently in existence.

The basic structure is usefully set out in *Statement on Reform of Local and Regional Government* issued by Dr Michael Bassett, the Minister of Local Government, in August 1988. It sets out the following framework:[167]

(a) There will be two main classes of local authority:

(i) Regional councils, which will have the following functions:
regional planning and civil defence,
maritime planning,
the functions of catchment boards and regional water boards,
Other functions the [Local Government] Commission may see as appropriate including the existing functions of regional authorities;

(ii) Territorial authorities which will be directly elected and will be responsible for broadly the same range of functions as at present.

(b) Where a local government function cannot be performed by a regional council or a territorial authority, the Commission may provide for continuation of, or constitute, a special purpose authority for that function.

(c) Subject to the foregoing, the allocation of functions between regional, territorial and special purpose local authorities will be the responsibility of the Local Government Commission under criteria prescribed in the legislation.

(d) Regional councils will have a primary role in resource management, and for that reason regional boundaries are to conform, as far as practicable, with the boundaries of one or more catchments.

The combination of RMLR and the Local and Regional Government Reform represents an unparalleled opportunity for the Treaty guaranteed right of tribal rangatiratanga to now be given practical effect. Whether this will actually be the outcome remains to be seen. There is little indication so far as to what the precise relationships between the new institutions of regional and local government and the iwi authorities will be, nor of the relationship between iwi management planning and town and country planning. The point has already been made in this paper that there seems to be no reason why the planning authority for Maori land and resources cannot be the iwi authority, which in this respect should be parallel to and not subordinate to district and regional councils. Iwi authorities should be left alone to zone Maori land and develop planning schemes; development applications could be made to the iwi authority's planning committee in the same way that town planning decisions will be made by district council planning

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167 Page 5.

committees. Iwi authorities could also run licensing procedures for those inland and coastal fisheries under Maori control. These parallel systems could then be linked by sharing common judicial appeal and review institutions in the Planning Tribunal and the courts. It seems, however, that the government's vision is somewhat narrower.

The Local and Regional Government Reform has run into some criticism from Maoridom for failing to consult adequately in the spirit of the *Maori Council* decision. Dr Bassett's rejection of a proposal from the Maori local government reform consultative group that Maori people appoint one-half of the representatives on local authorities is hardly surprising. But dissatisfaction with the Government's approach has also been expressed by Sir Graham Latimer of the New Zealand Maori Council. According to a report in *The Dominion*, 4 March 1989:

> Maori Council chairman Sir Graham Latimer has condemned the pattern of local government reform, saying its failure to observe the principle of partnership was an insult to Maoridom.
> A three-day national hui convened by the Maori consultative group on local government reform ended in Lower Hutt yesterday.
> Sir Graham said the reform's silence on Maori local government issues showed the Government's Maori affairs policy *Te Urupare Rangapuu* (Partnership Response) had already been sidelined.
> Despite the 1987 Court of Appeal decision on the Treaty of Waitangi, the approach of Local Government Minister Michael Bassett and his officials toward the treaty and the principle of tribal management had been almost contemptuous, Sir Graham said.
> It appeared Dr Bassett was condemning Maoridom to a further master-servant relationship with local government bodies.

Certainly the guiding principle of the reform should be the Treaty and its guaranteed protection of rangatiratanga and taonga. The difficulty is the complexity and regional variations of Maoridom. What is appropriate for Ngati Kahu may not be appropriate for Ngati Tuwharetoa or Te Arawa. A real effort to implement local government structures which conform to the Treaty will almost certainly conflict with the government's aim to establish a tidy and simplified system.

D Summary

1 In terms of resource management, the Waitangi Tribunal, partly by a process of creative adaptation of North American cases, has already developed a useful and coherent model of the respective roles of the Crown and of Maoridom. Conservation laws, within certain defined limits, are a valid exercise of kawanatanga.

2 Statutory references to the Treaty and to Maori interests in conservation and resource management statutes are vague and confusing. Some make no reference to either the Treaty or Maori interests (such as the Geothermal Energy Act). Those statutes which do refer to the Treaty use a confusing variety of

formulae. All these provisions should be replaced by a clear and standardised reference to the Treaty, preferably in a central coordinating statute.

3 In areas such as mining, geothermal energy, fisheries, water management etc, the current resurgence of the Treaty is already having a major impact on courts, tribunals and government agencies. This impact is of course uneven and is constrained by the limitations of the relevant statutes. Nevertheless there is clearly a 'new thinking' very much in evidence which will probably continue to develop and which is unlikely to be affected to any great extent by attempts of central government to reverse the trend.

4 Resource ownership questions are more difficult than resource management. Litigation is probably unavoidable in such areas as ownership of fisheries, minerals or petroleum. The law in New Zealand is undeveloped and authoritative answers are required to a number of issues. Without such authoritative decisions it is difficult to see how negotiations can succeed. Negotiations are just as expensive, time-consuming and difficult as litigation.

5 The Treaty itself arguably contains within it a guarantee of environmental protection.

6 The basic principle should be tribal self-management of tribally owned resources and of other resources which, even if not tribally owned, are tribal taonga which can appropriately be managed tribally (such as fisheries reserves).

7 The present conjunction of RMLR and Local and Regional Government Reform is an ideal opportunity for instituting a system of tribal self-regulation.

8 More generally, New Zealanders need to make themselves more aware of developments on the above lines in North America and elsewhere. New Zealand's problems are not unique. Canada, the United States and Australia are all having to come to terms with the legacy of colonialism. This process of coming to terms can be, if sometimes stressful, also positive and rewarding.

9 Finally, there are no quick-fix and easy solutions. Waitangi Tribunal claims will simply have to be worked through. Litigation over a number of basic issues will have to occur. A new legal framework is being set in place, and it is absurd to suppose that the trend can either be reversed or that all the implications and consequences can be swiftly and easily put in place.

POSTSCRIPT

While this paper was in the final stages of preparation for publication, on 3 October 1989, the Court of Appeal gave judgment in the proceedings brought by Tainui relating to the Crown's proposal to transfer coal mining licences to Coalcorp.[168] In this decision all five judges held that a coal mining licence was an 'interest in land' (and thus fell within the clawback provisions of the Treaty of Waitangi (State Enterprises) Act 1988), and that the sale of surplus properties by Coalcorp as agent was governed by the requirements of section 9 of the State-Owned Enterprises Act 1986 and the requirements laid down by the Court of Appeal in *Maori Council* v *Attorney-General.*

The decision was on a narrow point, but in his judgment Cooke P makes a number of points of more general interest. He repeated his observation, made earlier in *Maori Council,* that "the Court should be slow to ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty",[169] although in this case it was not necessary to apply any such principle as both issues could be resolved "quite readily on the standard principle of looking for the natural and ordinary meaning of legislative words in their context".[170] Cooke P further noted that the confiscation or raupatu issue had already been investigated in detail in the 1927 Royal Commission on Confiscated Native Lands. "No doubt," observed Cooke P, "the findings of the Commission go far to explain the fact that for the purposes of this case the Crown has not challenged that a considerable proportion of Raupatu lands were confiscated in breach of the Treaty".[171]

Since the facts of the matter are well known, there would, in Cooke P's view, be little to be gained by a Waitangi Tribunal investigation. It would be preferable for the Treaty partners to "work out their own agreement" in a process in which "judicial resolution should be very much a last resort".[172] Cooke P was also willing to accept that coal "can be classified as a form of taonga".[173] He indicated that while the concept of partnership certainly does not mean "that every asset or resource in which Maori have some justifiable claim to share should be divided equally"[174], any settlement should take into account the taonga status of the coal and Maori contributions to the industry.

> A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably

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168 *Re Te K Mahuta and Tainui Maori Trust Board.* v *Attorney-General and others, Unreported, 3 October 1989 (CA 126/89).*

169 Ibid, per Cooke P, p9.

170 Ibid.

171 Ibid 34.

172 Ibid 37.

173 Ibid 38.

174 Ibid 32.

> less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.[175]

It is therefore probably best to regard Cooke P's judgment as a further commentary and refinement of the partnership concept first explored in the Court of Appeal's 1987 *Maori Council* decision. The emphasis given by Cooke P that partnership does not mean a fifty per cent share of every resource in which there is some legitimate claim was earlier emphasised by the court in the 1989 state forests case: *New Zealand Maori Council* v *Attorney-General*.[176] Further developments and refinement can be expected. It is still an open question, however, whether the 'partnership' approach is as satisfactory as the Waitangi Tribunal's preferred option of a case by case exploration of the implications of kawanatanga, rangatiratanga and taonga. The writer's personal view is that a Waitangi Tribunal report on the confiscation issue would actually be an outstandingly useful contribution. While the Report of the Sim Commission of 1927 is a valuable document, it could not compare with an authoritative up-to-date review of the whole issue by the Waitangi Tribunal.

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175 Ibid 381.

176 Unreported, 20 March 1989, CA 54/87.