

## GOLDFIELD AND OTHER MINING POLICY AND LEGISLATION

### 10.1 The Common Law Tradition of Ownership of Gold and Precious Metals

The right to 'royal metals' was one of the Crown's prerogative rights that the Government in New Zealand has assumed existed as soon as English law was received with the proclamation of sovereignty in 1840. The assertion of this prerogative in Elizabethan times had a pragmatic function, in that it allowed the developing English state to control the coinage and to finance an army, and a philosophical foundation in the supremacy of the monarch. In New Zealand, the early assertions of Crown right in minerals were in reference to lands already acquired from Maori. The first explicit assertion of the prerogative over precious metals came in the royal instructions of 1846, in clause 30 of chapter 13 'On the Settlement of the Waste lands of the Crown'. Private agreement with Maori in respect of the mining of minerals was also prohibited in the 1846 Native Land Purchase Ordinance. Later the Gold Fields Act 1858 typified the developing tradition by providing for the statutory regulation of mining while explicitly acknowledging the prerogative rights of Her Majesty the Queen in respect of the colony's gold mines and gold-fields on lands already acquired by the Crown.<sup>1</sup> Section 43 stated that, 'Nothing in this Act shall be deemed to abridge or control the prerogative rights of Her Majesty the Queen in respect of the gold mines and gold fields of the colony.' The 1858 Act did not address the question of Crown access to minerals on land still under customary title. In 1873, the Crown also claimed the power to resume privately owned lands required for the purposes of mining, under the Resumption of Land for Mining Purposes Act 1873. No compensation would be paid for the gold itself; a prerogative which is preserved today under the Crown Minerals Act 1991.

This approach can, however, be compared to that of the United State of America, where no mineral prerogative operates and where it has been accepted that, until surface rights are acquired, a Native American tribe's rights in the land extends to all elements that make the land valuable.<sup>2</sup> Canada also, in the past 15 years, has allowed increasing recognition of indigenous rights to sub-surface resources, de-

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1. Dr Robyn Anderson, *Gold Mining Legislation and Policy*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 1-4

2. *United States v Klamath and Moadoc Tribes of Indians*, (1938) 304, us 119, 123 (cited in Anderson, p 5)

spite their earlier acceptance of the principle of the royal prerogative.<sup>3</sup> Certainly, British common law attitude to minerals, as transferred to New Zealand, ‘ran directly against the grain of Maori tikanga which . . . demonstrated a deep spiritual and cultural affinity with the land in all aspects’.<sup>4</sup> Maori did not generally use metals, such as gold, either for tools or decoration (although they used pounamu for these purposes) or as a measure of wealth. They did, however, dig below the surface for ochre and presumably would not have made a categorical distinction between surface and subsurface resources in doing so.

Two cases in New Zealand in the 1890s, *Aitken v Swindley* and *Chambers v Busby*, make it clear that land granted to Maori by the Crown (having passed through the Native Land Court) was under title which did not convey to the Maori grantees the right to the Royal Metals on their land, nor debar the Crown from mining or authorising mining on that land.<sup>5</sup> A third case in the 1890s, *Re Application by Beare and Perry*, challenged the Crown’s right to extend its jurisdiction to Maori reserved land, and demonstrated that Maori were still able at that time to withhold reserved lands from the jurisdiction of the Government (according to the judgement of Chief Justice Stout).<sup>6</sup>

## 10.2 Goldfield Negotiations, Agreements, and Legislation, 1850–75

As the following sequence of events shows, while earlier agreements with Maori in respect of goldfields tended to take into account the Treaty of Waitangi, Government tactics became increasingly aggressive, based on arguments of public interest and equal right under the law (meaning that access to Maori land was to be comparable to European, as with rating also). This was disadvantageous to Maori whose ability to withhold lands and negotiate satisfactory terms was undermined.

The Coromandel Agreement in 1852 followed the first discovery of gold on land still held under Native title in the Coromandel (see vol iii, ch 2). The New Ulster Government had previously recognised that Maori interests would have to be negotiated under circumstances such as these. Wynyard, as Acting Governor, noted the need to assure Maori that he had ‘on the part of the Government, their interests, their rights and their welfare at heart’ in all negotiations.<sup>7</sup> The Native Secretary, Nugent, was responsible for conveying this message to Maori at the Kapanga site in the Coromandel, where there were indications of a payable field. He emphasised that Maori and Government must act together in the management of the gold.<sup>8</sup> The

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3. Among other developments is the recognition of native ownership identified within the Nisga’a Treaty of British Columbia (February 1996), which states that the Nisga’a Government will own all mineral resources on or under the surface, although its ability to develop such resources is constrained by obligations to provincial and federal governments.

4. Anderson, p 4

5. 15 NZLR 517, and 16 NZLR 253 (respectively), (cited in Anderson, p 4)

6. *Re Application by Beare and Perry* (1899–1900) 2 GLR 242 (cited in Anderson, p 3)

7. Wynyard to Grey, 25 October 1852, inward correspondence from Lieutenant-Governor to Governor, dispatch 121, g-8/8 (cited in Anderson, p 9)

minutes of the Executive Council indicate an awareness also of a balance required between maintaining the confidence of Maori in the good faith of the Government without abandoning the Royal prerogative to minerals. In particular it was noted that:

Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to attempt fully to enforce Her Majesty's Royal Prerogative Rights in the case of gold found on Native land because it would be impossible to satisfy the owners of the particular land in question – or the Natives of New Zealand generally, that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands, estates . . .<sup>9</sup>

The Executive Council was not willing, however, to abandon the royal prerogative to the extent of allowing Maori to manage the resource themselves. Instead, it was resolved that arrangements would be made for the Government to manage the goldfield and for Maori to receive 'a fair proportion of the proceeds', namely, one third of the licence fee to be imposed.

With the increasing prospect of further exploration and rushes by miners, Maori were anxious for mutually agreed arrangements to be established in relation to further exploration.<sup>10</sup> At a subsequent meeting held at Patapata intended to secure such an agreement, representatives from a number of Hauraki iwi emphasised that they wanted a limited opening of their lands to mining, and that they expected the Government to provide proper protection of those lands Maori wished to exclude from explorations. Acting-Governor Wynyard emphasised the Crown's protection of Maori interests and property in his opening address, saying:

I come to offer the protection of the Government . . . to protect you from all and every annoyance, you might otherwise be exposed to from the strangers that may come here . . . and to preserve good right to your land and property, as subjects of the Queen.<sup>11</sup>

An agreement was subsequently signed on 27 November 1852 at Patapata between Wynyard and Ngati Whanaunga, Ngati Paoa and Ngati Patukirikiri which opened up the land belonging to the signatory tribes (calculated at about 17 square miles) and emphasised that the *land was to remain with the Native owners*, although the compact was sketchy in its administrative detail. In consideration for opening up their lands, Maori were to receive a rate dependent on the number of miners involved, which Wynyard himself considered an 'insignificant' sum in relation to

8. Nugent to Colonial Secretary, 23 October 1852, despatch 121, encl e, g-8/8, Wynyard to Chiefs, 18 October 1852, despatch 121, encl b, g-8/8 (cited in Anderson, p 10)

9. Extract of Minutes of Executive Council, 19 October 1852, despatch 121, encl d, g-8/8 (cited in Anderson, p 10)

10. Ligar to Colonial Secretary, 6 November 1852; Lanfear to Heaphy, 3 November 1852, despatch 125, encl d, g-8/8; Wynyard to Grey, 13 November 1852, despatch 127, g-8/8 (cited in Anderson, p 15)

11. Wynyard's address, encl in Wynyard to Grey, 25 November 1852, despatch 128, g-8/8 (cited in Anderson, p 12)

the revenues generated by the licence fee. He therefore offered Maori an additional two shillings' tax on every licence issued as reward for their faith and confidence in the Government. These measures were hoped to induce others to open up their lands also.<sup>12</sup> Maori who objected to the Government's terms and did not open up their lands, argued (amongst other things) that the entire licence fee should be handed over to Maori and the Government should be reimbursed for administrative expenses only.<sup>13</sup>

Despite clause 9 of the Patapata agreement guaranteeing that tribes would not be intruded on until they had consented to the opening up of their land, secret prospecting on Te Mātewaru lands (outside the 'Government district') indicated rich gold deposits. Compensation paid to Maori for these diggers apparently encouraged the reopening of the discussion of the extension of the mining district<sup>14</sup> albeit unsuccessfully, due to Maori demands which the Government refused to accept, and the behaviour of diggers who resented abiding by those demands. The Government made only limited responses to trespass onto closed lands, partly because of its fundamental objective of opening the area up to European miners. Action was, however, taken against miners when the Government felt that failure to do so might dissuade other Maori from opening up their lands.

The first major gold rushes in New Zealand took place in Otago and Canterbury on land already purchased by the Government. Consequently, in 1858, the first statute for the management of goldfields was explicitly confined to Crown land and did not deal with mining on *land still under native title*. The Gold Fields Act 1858 did, however, assert a prerogative right by stating that the Governor could proclaim a goldfield under the Act (s 2). The policy governing the management of goldfields, on the other hand, continued to require negotiation with Maori right-holders before their lands could be brought within the operation of the Act. The 1858 Act also established the rudiments of a regulation system which would persist and expand over the next fifty years.<sup>15</sup> Section 40 of the Act allowed the Governor to make and prescribe all rules and regulations pertaining to goldfields. The Goldfield Act 1862, which repealed the 1858 Act, still made no provision for the inclusion of customary land within a proclaimed field.

The 1858 Act was still in force when gold was found on Maori land at Taitapu in Nelson in 1862. The area concerned was an 88,000 acre reserve (from a sale in 1855) under the control of Ngati Rarua, Ngati Tama and Te Atiawa. Maori objected to the working of the land unless they received revenues similar to those received by the Crown on the Collingwood goldfield in Nelson. James Mackay, as Assistant Native Secretary, moved to ensure that the Crown's right to regulate the minerals was maintained and that Europeans would not occupy lands where Native title had not been extinguished.<sup>16</sup> Having met with local Maori who expressed their interest

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12. Minute from Wynyard for the Executive Council, 24 November 1852, despatch 128, encl d, g-8/8 (cited in Anderson, p 13)

13. 'Speeches of Native Chiefs at . . . Patupatu', despatch 128, encl c, g-8/8 (cited in Anderson, p 14)

14. Gold commissioner's report, 26 April 1853, ia 1853/1108 (cited in Anderson, p 15)

15. For discussion of this system see Anderson, p 18

in opening the land to mining, dependent on certain conditions, Mackay acceded to Maori demands and entered into a formal agreement with Ngati Rarua on 10 February 1862. The agreement of Ngati Tama and Te Ati Awa, and other groups with possible interests at Taitapu, was not sought. Despite the promising potential of the terms of the agreement, Ngati Rarua were to lose immediate control of the block and eventually the complete freehold, over the next 20 years.<sup>17</sup> This was the result of the final clause of the deed which conveyed to the Governor, or those appointed by the Governor, the power to make other rules and regulations for the Taitapu goldfields.<sup>18</sup>

In 1861, anxious to open up the Coromandel lands for mining, the Government pursued the purchase of lands at Coromandel. However, with the mining of the area a priority, officials were instructed to assure those Maori unwilling to part with their lands that arrangement would be made by the Government which would not involve the alienation of territory or the sanction of mining activity beyond that required for prospecting.<sup>19</sup> The Government also accepted that compensation would be payable to Maori. Despite these terms, Maori control of their subsurface resources was undermined because the Government had assumed that Maori had no choice but to agree to full-scale mining. Furthermore, by not paying royalties to Maori in direct relation to the value of the field, later governments were able to argue that they had never conceded the right to the gold itself.

On 2 November 1861, McLean signed a deed with Ngati Paoa, Ngati Whanaunga and Ngati Patukirikiri representatives which enabled the immediate opening up of lands from Waiau to Moehau (Cape Colville) while also affirming the tribes' ownership of that area (as the 1852 agreement had done). The agreement acknowledged Maori concern that they retain a measure of control of the mining process. The Government agreed to 'adopt measures to preserve order among the Europeans and Maories'<sup>20</sup> in the event of an influx of diggers. A final condition of the agreement was that Maori would not receive payment until valuable quantities of the gold were found, even if gold was carried off the land in the interim.

Maori continued to offer reasonable co-operation to Government provided that they retained ownership of their lands. In reality, however, the Government could do little to protect Maori interests. Maori, in turn, were forced to make concessions to European demands in order to maintain peace in their region. In particular, miners protested and challenged the provision within the agreement which excluded land at Koputauaki, under the control of Paora, which was suspected to contain rich sources of gold. In response to this pressure, the Government began to arrange the opening of that land, unbeknown to the Maori proprietors and contrary

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16. 'Mackay to Native Secretary', 12 February 1862, in Mackay, *Compendium*, vol 1, p 321 (cited in Anderson, p 20)

17. Anderson, p 21

18. 'Deed of Agreement', 10 February 1862, in Mackay, *Compendium*, vol 1, pp 322–333 (cited in Anderson, p 21)

19. 'Fox to McLean', 21 November 1861, *New Zealand Gazette*, 22 November 1861, p 300 (cited in Anderson, p 23)

20. 2 November Agreement, *New Zealand Gazette*, 22 November 1861, p 302 (cited in Anderson, p 24)

to the agreements made with Maori. According to Anderson, H Hanson Turton, who accompanied diggers to Paora's land, attempted to protect Maori interests while at the same time working to bring the block within mining operations,<sup>21</sup> presumably to satisfy the Government's objectives and the diggers' demands. Government incentives for diggers increased, as did the number of diggers coming to the Coromandel. Maori continued to reject offers of purchase and began to patrol the boundaries of their reserved lands as reports came in of diggers sneaking across boundaries in the night. Governor Grey arrived unexpectedly at Coromandel in June 1862, announcing that he wanted Paora's land opened up. Maori leaders called on the support of the King movement, placing the district under the mana of the King in response to Grey's assertions. Against the advice of his ministers, Grey pushed ahead with his 'divide and rule' tactic by obtaining the consent of one party of right-holders to the freehold of the land at Tokatea.<sup>22</sup> His actions encouraged a false sense of satisfaction amongst Pakeha and the Government that the problem had been satisfactorily resolved, as well as creating a lasting impression that Maori in the area had been 'unduly influenced by the Maori King'. Furthermore, his actions created lasting divisions within the hapu Te Mātewaru between those who had, and had not, supported the agreement.<sup>23</sup>

In 1862 the Coromandel was proclaimed a goldfield under the Gold Fields Act 1858. Because the Act did not deal satisfactorily with land still held under Native title, the Coromandel field, for the purposes of the Act, was defined as being 'Wastelands of the Crown' and the boundaries of the field were provided. Within these boundaries were lands still under negotiation according to the 1861 agreement, for which Maori right-holders had not received payment, including the Tokatea block. A second agreement, reached over land at Kapanga, Ngaurukehu and Matawai, failed to adequately distribute revenues amongst the various Maori proprietors. Disputes constantly arose over the terms of agreements between Coromandel Maori and Turton, who was administering the fields, over issues such as rent and public works takings. According to Anderson, Turton favoured the public interest and 'refused to countenance Maori efforts to participate in the profits generated by the field.'<sup>24</sup> For example, when Maori attempted to charge ground rent for tent sites and for the removal of timber from their lands, Turton accused them of making 'extortionate' demands.<sup>25</sup> With respect to public works takings for roads and bridges to which Maori objected, Turton reasoned that 'the natives by agreeing to our occupation and working of the Gold Field necessarily give up the right of road to it . . . [and the] right of all suitable landing places leading to them'.<sup>26</sup>

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21. Turton to Attorney-General, 27 January and 30 June 1862, Coromandel Resident Magistrate's outward letterbook, bacl, a-208/634 (cited in Anderson, pp 25–26)

22. BPP, vol 13, p 155 (cited in Anderson, p 28)

23. Anderson, p 28

24. Ibid, p 32

25. Turton to Pollen, 28 August and 12 September 1862, bacl, a-208/688; Turton memo, February 1863, bacl, a-208/634 (cited in Anderson, p 32)

26. Turton to Pollen, 28 August 1862, Coromandel commissioner of Crown lands outward letterbook, bacl, a-208/688 (cited in Anderson, p 33)

Following a lull in gold strikes at Coromandel (as fields were vacated because of the outbreak of war), and news of finds in Otago and other goldfields elsewhere, miners began to return to Coromandel in 1864. Maori proprietors who had not received payments for mining undertaken previously from 1861 to 1863, began strongly to demand compensation. Meetings to resolve this matter revealed that there had been little consultation between Maori and Government as to the terms of the earlier agreements and no records were kept as to how many diggers had worked the field. Mackay concluded that a fresh agreement was required and, in spelling out the terms of the agreement, he admitted that compensation payments to Maori were necessary in light of the failure of the Government to keep correct accounts and in order to satisfy the demands of Maori for payment without further delay. In doing so, he emphasised that a breach of faith on the part of Government could prevent the working of other fields in the district.<sup>27</sup>

In 1864, gold was also discovered south of Coromandel at Ohinemuri, Kauaeranga and subsequently Te Aroha. Mackay signed preliminary deeds with Ngati Tamatera, Ngati Maru, and Ngati Whanaunga, which opened up agreed lands to mining (except for burial grounds, cultivations and places of residence). It is arguable that consent was only won after the commencement of war, as adherence to earlier principles of holding onto the land started to break down. The final deed of 'cession' was signed in March 1869 by 80 signatories from Ngati Maru and Ngati Whanaunga. The deed was similar to the earlier Taitapu agreement in that it set out the respective entitlements of Maori and miner, and established a system (albeit rudimentary) for administering licencing revenues. Gold was also reported to have been found at Puriri in 1867, and in July 1867 Mackay managed to negotiate a very limited opening of Kauaeranga (Thames). At every opportunity, the Government sought Maori co-operation with statements such as:

If we unite together in this way we shall have treasures and riches, become a great people, and have everything that the heart can desire . . . This requires co-operation, mutual aid and assistance . . . Your children will be benefited, our children will be benefited . . .<sup>28</sup>

Under the Gold Fields Act 1866, the Government first moved to bring Maori-owned land within the control of mining legislation by extending the definition of 'Crown lands' to include any land leased or otherwise obtained by the Government for mining purposes. The Amendment Act in 1868 more fully described the parameters of Government power over customary land. Section 8 allowed the Governor the explicit authority to make, alter or revoke regulations for gold mining in the case of lands upon which the Governor had obtained 'power by lease agreement or consent of the Native owners thereof to authorise mining', whether that area was still held under native title or a certificate of title issued under the Native Lands Act.

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27. 'Letter Mackay to Native Minister', 19 October 1864, AJHR 1869, a-17, encl e, p 17, (cited in Andersen, p 34)

28. *Daily Southern Cross*, 5 June 1867

The mining of the foreshores was awarded a degree of statutory recognition also. In particular, section 9 of the Gold Fields Act 1868 stated the need for Government to negotiate with Maori for the opening of the foreshores for mining (see ch 13 below). With respect to the Kauaeranga foreshore, the Government initially relied on negotiation with Hauraki Maori, finding that some Maori agreed to hand over management of the foreshore to Government, while others wished to continue to lease the more valuable land north of the Karaka Stream themselves. The Crown responded by pushing through the Thames Sea Beach Act in 1869 (against the advice of the Select Committee which investigated the Act), establishing Crown pre-emption over the area.

In October 1868, all former regulations referring to leases were revoked and new lease conditions less favourable to Maori were introduced.<sup>29</sup> When doubts arose as to the status of Maori land under the operations of the Gold Fields Act (in particular whether it was not in fact private land once it had passed through the court, and therefore exempt from the Act), the Auckland Gold Fields Proclamations Validation Act was passed in 1869 which stated that agreements previously negotiated with Maori were valid and binding even though native title might have been subsequently extinguished. The lands were deemed 'so far as mining purposes for gold is concerned but not further or otherwise to be Crown lands and not private lands.'<sup>30</sup> Maori protested the fact that the Act had not mentioned reservations agreed to, and further protested the lack of consultation with respect to the proclamation. They confirmed their acceptance of the previously negotiated agreements, but objected to subsequent developments and insisted on consultation regarding further developments.<sup>31</sup> Evidently, Mackay supported Maori in their rejection of the 1869 measure, and anticipated that it would lead to a reduction in the revenues paid to right-holders. He stated that:

the leasing regulations . . . are likely to cause considerable injustice to the Native owners of the gold field, as entailing a certain falling off in the miners' rights fees received, and a consequent diminution in the amount payable to them by the Crown.<sup>32</sup>

Consequently, section 111 of the Gold Mining District Act 1871 tacitly acknowledged the injustice of reducing revenue to Maori and amended the provision relating to payment of revenue, a provision which was also entrenched in section 173 of the Gold Mining District Act 1873. Maori were accordingly entitled to receive revenues from licenses and for battery and machine sites.

In the 1870s, Government policy in respect of goldfields changed from the negotiation of agreements (whereby Maori ceded the right to mine on their land) to the purchase of the land itself in order to obtain gold and other resources. Between 1870 and 1875 a number of blocks outside the ceded goldfield district went through

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29. *Auckland Provincial Government Gazette*, 29 October 1868, p 485 (cited in Anderson, p 53)

30. S 2 of the Auckland Gold Fields Proclamations Validation Act 1869

31. 'Petition of Certain Natives at Hauraki . . . Relative to the Thames Goldfield', ma 13/35c (cited in Anderson, p 54)

32. 'Report by Mackay on Thames Gold Fields', 27 July 1869, AJHR, 1869, a-17 (cited in Anderson, p 54)

the Native Land Court and were purchased on behalf of the Government and proclaimed within the goldfield. Anderson comments that the Government deliberately sought to obscure the full value of those lands from Maori.<sup>33</sup> By 1885, the Government had also purchased the majority of the area opened by cession agreement in 1868 and 1869.

By way of example, from 1868 to 1875, the Government pursued new tactics in their attempts to open up Ohinemuri for mining. Mackay is reported to have scattered money amongst those Maori whose consent he sought 'like maize to the fowls',<sup>34</sup> making payments amounting to over £15,000 to individuals, although title to the block was undetermined. Mackay also encouraged certain Ngati Tamatera to accumulate debt against their lands at Waikawau and Moehau on the peninsula. In short, the policy was described by a later Under-Secretary of the Native Department as:

an attempt to break down the opposition of the Natives by gradually purchasing interest by interest in the land and thus bring about by dealings with individuals that which could not be accomplished with the Natives in a body.<sup>35</sup>

Certain Maori elements continued to resist Government demands, eventually agreeing to the alienation of the freehold of Waikawau and Moehau, but restricting the Ohinemuri transaction to a lease arrangement only. The Government agreed to leasehold, but imposed harsher conditions on Maori by using the leverage it had acquired from mounting debt against the land. For example, while Maori would receive all rents, royalties, moneys and fees, the Government would retain payment of such until debt against the land had been cleared. Maori ability to repay debt out of mining revenues was diminished by Government policy and legislation governing the goldfields administration and within two years, the purchase of freehold interests in the block had resumed.<sup>36</sup>

Te Aroha, land which had been reserved from a previous sale, was opened up despite the lack of complete Maori consent. Wilkinson, the Government's agent at the time, stated that:

as it was now apparent that the bold but necessary stroke of opening the field, whether some of the Natives were willing or not, could be carried out without any real danger, it was decided to do so; and . . . arrangements were made for the opening, which took place by Proclamation, . . .<sup>37</sup>

Later in this statement it was noted that dissenting Maori 'seemed quite taken aback and were unable at first to realise the position' although they subsequently accepted the agreement as a *fait accompli*. The Government gained the right to mine for all minerals at Te Aroha through this agreement.

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33. Anderson, p 40

34. Rawiri Taiporutu at Te Paeroa meeting, 21 May 1882, ma 13/54a (cited in Anderson, p 41)

35. Under-Secretary to Solicitor General, 30 August 1937, ma 1 19/1/193 (cited in Anderson, p 41)

36. Anderson, p 42

37. 'Wilkinson to Gill', 28 May 1881, AJHR, 1881, g-8, p 10 (cited in Anderson, pp 44-45)

### 10.3 Goldmining Legislation and Policy, 1875–1900

Throughout the latter part of the nineteenth century, Hauraki Maori expressed increasing dissatisfaction with the implementation and administration of goldfield agreements, and petitions relating to many aspects of the agreements were lodged by Maori with increasing frequency. According to Anderson, such complaints were generally explained away by officials as demonstrating Maori greed or confusion as the revenue from fields declined. It is possible, Anderson argues, that Maori grievances were actually the result of the declining revenues received by them as (amongst other things), their freehold interests were alienated and new fields were brought into operation under tougher terms.<sup>38</sup> Abuses in the administration of goldfields in the 1870s were later acknowledged by officials and it was admitted that ‘many errors were made some owners not receiving what they were entitled to’.<sup>39</sup> One official commented that:

much must be left to the discretion of the officers in the field – upon whose report the revenue is allocated. When taking over the allocation of this revenue I found the grossest abuse if this discretionary power had been permitted to grow up.<sup>40</sup>

At Taitapu, for example, the Government altered the regulation of the field at will and acknowledged no obligation to consult with Taitapu owners in doing so. Subsequent legislative developments only served to diminish further Maori control over their lands. For example, the Reserves and Endowments in Mining Act 1882 enabled the Minister to bring under the jurisdiction of the Act any Native reserves he saw fit to include, and to authorise mining on them.

The Mining Act 1886 altered the organisation and fee structure of various goldfields in Hauraki to bring them into line with fields operating in the South Island. Despite the fact that the changes proposed in the legalisation were in violation of agreements already in existence, the Government pressed ahead. The absence of discussion in the House of the cession agreements and Maori ownership of a section of the Hauraki field has been noted by Anderson.<sup>41</sup> The Act greatly reduced the income Maori received from all sources (in addition to other damaging amendments) and revenues were further reduced in the following year. Maori protested and again found support and sympathy within the Government, this time from Wilkinson who argued that the Government had not lived up to the underlying commitment of its original agreement with Maori, estimating that they would only receive a fraction of their former revenues under the new system. Wilkinson acknowledged also that the Government had sacrificed Maori interests for those of the mining community. In particular, he pointed out that in offering gold diggers better and cheaper facilities than agreements had stated, the Government had

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38. Anderson, p 46

39. Jorlasse to Receiver General, 23 February 1898, t 1 40/71 (cited in Anderson, p 49)

40. Kenrick to Under-Secretary, 1 May 1884, md 1 84/497 (cited in Anderson, p 49)

41. Anderson, p 56

benefitted the gold digger at the expense of Maori revenue and thus, in Wilkinson's words 'in a measure broke faith with them.'<sup>42</sup>

As mining came to a halt in various fields, Maori discovered the Government was unwilling to release its grip on leased lands, despite the fact that they now lay idle with respect to mining. With the passage of the 1887 Mining Act (no 2), it became increasingly difficult for Maori to control their lands and minerals. The Act provided that 'where the Natives have ceded their lands for mining purposes, and had made a contract and conditions as to the ceding of that land, the Governor was to have the power to alter and vary the terms of that contract without the consent of the Natives'. Even Seddon, who had appeared to disregard the interests of Maori in advocating the interests of mining, opposed this provision, calling instead for consent and 'mutual give-and-take between the two parties.'<sup>43</sup>

The revival of mining in the 1890s saw a revival also in the Government's attempts to ensure access to mineral resources, in particular those on Maori reserved lands. While the Government conceded that Maori were justified in their grievance regarding the reduction of revenues, it was not prepared to budge on other matters such as rents. To compensate for the loss of revenue, the Mining Act 1891 was passed which required wages-men and tributers to take out miners' rights for claims on native land, thereby increasing the potential revenue paid to Maori. As miners protested this provision and Maori continued to protest other aspects of mining legislation, the purchase of the land in question was increasingly raised as the only viable solution to the problem.<sup>44</sup> At the same time, Seddon, as Minister of Mines, was able to restrict the application of the aforementioned clause in determining that it was not intended to work retrospectively, thereby reducing its remedial effects for Maori.<sup>45</sup> Maori petitioners complained in 1893 and 1894 that this interpretation of the clause contributed towards their loss of revenue, which they calculated at over £3000 since the introduction of the legislation in 1886 and 1887. In 1894, the Goldfields and Mines Committee accepted the petitioners' claims and recommended that the Government take steps to ascertain the extent of the loss in order to recoup the petitioners.<sup>46</sup> The Government made no response.

In 1892 an attempt to remove the legislative requirement for the consent of a majority of Maori land owners to the opening up of their lands for mining was thwarted. The requirement remained until it was removed in 1910 (see below). An amendment to the Mining Act in 1896 declared that any lands reserved from cessions for residences, cultivations or burial grounds were to be made available for mining purposes 'in the like manner in all respects as if they had been ceded.'<sup>47</sup> Maori protest to this provision described it amongst other things, as the 'first step

42. 'Report on the question of miners' rights . . .', 30 May 1889, no 89/1255, j 1 96\1548 (cited in Anderson, p 56)

43. NZPD, 1887, vol 59, p 280 (cited in Anderson, p 62)

44. See *Thames Advertiser*, undated extract, md 1 89/85 (cited in Anderson, p 58)

45. Reid to Minister of Mines, 13 May 1892, md 1 89/85; Seddon minute, 8 September 1892, md, 1 93/513 (cited in Anderson, p 58)

46. 'Gold Fields and Mines Committee Report', 31 August 1894, md, 1 94/2887 (cited in Anderson, p 58)

47. S 56, Mining Amendment Act 1986

towards confiscation'. The speaker in this instance continued that 'he could not believe that such an alteration had been made with any desire to benefit the Natives.'<sup>48</sup> Section 16 of the Act also allowed the Native Land Court, on investigation of title or partition, to declare land ceded for mining purposes on application of the Governor and consent of a majority of owners.

The Government increasingly held firm to the position that the Crown had always held rights to minerals and that at no point had it purchased these from Maori.<sup>49</sup> This stance was opposed, however, by Robert Stout and others who questioned the application of British common law to the New Zealand situation raising, amongst other things, the Treaty of Waitangi as a matter to be considered. The member for Northern Maori, Hone Heke, argued that the Treaty 'shows completely that the land property and every other property contained thereon . . . belonged to the Natives.'<sup>50</sup> Opponents also reminded the House of the agreements made with Maori as early as 1852 which, they suggested, clearly indicated that the Government had at that time acknowledged Maori interests in sub-surface resources.<sup>51</sup> For the most part, however, supporters of the Act were of the opinion that the Treaty had no part in a progressive society and was not recognisable in law.<sup>52</sup>

#### 10.4 Twentieth-Century Developments

In 1900, the system by which revenues were paid out was altered. Anderson observes that 'With the fragmentation of holding, and the much reduced returns on gold field lands still in Maori hands, distribution of revenues broke down.'<sup>53</sup> Amongst other things, only those owners who actually applied to the paying officer were paid, in a development which Treasury officials later admitted was a 'retrograde step' for Maori.<sup>54</sup>

Legislative provisions relating to Maori land remained largely unchanged in the first two decades of the twentieth century. One major exception, initiated without opposition or comment in the House, was an amendment in 1910 to the Mining Act which dropped the requirement for majority consent from Maori for land to be opened to mining once it had passed through the land court. Through other legislative developments, by 1926, Maori land was governed by a more complicated set of rules and provisions pertaining to mining than was general land.

In the 1930s, renewed petitioning by Hauraki Maori led to the establishment of a commission of inquiry headed by MacCormick, chief judge of the Maori Land Court, to look into the payment of revenues under the goldfields agreement and the

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48. NZPD, 1892, vol 78, p 429 (cited in Anderson, p 63)

49. NZPD, 1896, vol 95, p 43 (cited in Anderson, p 64)

50. Ibid, p 312 (cited in Anderson, p 65)

51. Ibid, p 285 (cited in Anderson, p 66)

52. Ibid, pp 280, 305 (cited in Anderson, p 65)

53. Anderson, p 69

54. 'Hauraki Goldfields Native Reserves: Treasury Statement Relative to the Petitions', ma, 13/35c (cited in Anderson, p 70)

transfer of the freehold of goldfield blocks to the Crown. Having been denied access to the records on which their claim was based (on the grounds that this might give rise to ‘a lot of allegations that might be fanciful but very difficult to answer’), Maori argued two things.<sup>55</sup> First, that the rights in revenues had not passed with the freehold as the goldfield blocks were sold and should have continued to be received by Maori. Secondly, they argued that the Crown had breached a ‘fiduciary trust’ by buying these blocks. The latter argument was rejected by the Crown because the law would not recognise a ‘fiduciary trust’ except that set up by specific statute. The Crown, in presenting its defence, concentrated on strict accounting of payments to individuals in the case of the blocks under scrutiny. The commission found no legal wrong-doing on the part of the Crown in this respect but did express a measure of unease about the nature of the goldfield transactions. It recommended that the Government make a limited payment to Maori in light of the fact that Maori in the district were so ‘badly off’ and found themselves with very limited land suitable for development.<sup>56</sup> The sum of £30,000 to £40,000 was suggested. For the next 50 years, Hauraki Maori attempted to win Government acknowledgement of this recommendation. According to Anderson, the Government was reluctant to open the doors to many similar complaints regarding the equity of its early transactions.<sup>57</sup>

### 10.5 Sub-surface Resources other than Gold

While the Crown initially focused on the ownership and extraction of gold, records indicate that silver was mined also from 1869 although it is unclear under which authority this was carried out.<sup>58</sup> Furthermore, in agreements in 1875 and 1881 the Government established control over all sub-surface properties, including kauri gum. The Mines Act in 1877 reflected the expanding definition of minable substances from ‘gold’ to ‘gold, or any other metal or mineral other than gold’. The Coal Mines Acts Compilation Act 1905, brought together all legislation previously passed which related to Coalmines. The Bauxite Act and the Steel Industry Act, both passed in 1959 asserted Crown ownership of uranium and sole right of access to iron sands, and the right to take land for bauxite mining (with compensation payable).

Prior to 1937, ‘treaties’ had been entered into between some East Coast Maori landowners and oil companies that were prospecting for petroleum below their land. A ‘royalty’ was payable to the owners if petroleum was discovered in payable quantities.<sup>59</sup> In 1937, however, the petroleum resource was nationalised and brought within the Government’s ownership under the Petroleum Act 1937, which ‘virtu-

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55. Native Under-Secretary to Crown Solicitor, 14 February 1938, ma 1 19/1/193, vol 2 (cited in Anderson, p 73)

56. ‘Notes of Hauraki Goldfields Inquiry’, 6 March 1939, g1–3, p 7 (cited in Anderson, p 76)

57. Anderson, p 78

58. AJHR, 1901, c-2, p 12 (cited in Anderson, p 85)

59. Ben White, ‘The McKee Oilfield’, report commissioned by the Waitangi Tribunal, November 1995, Wai 145 rod, doc m17, p 8

ally confer[red] upon the Minister of Energy an absolute discretion as to the granting of licences without any special consideration for private property rights or objections'.<sup>60</sup> While landowners would be compensated for damage to the surface of the land, the licensee was under no compulsion, according to the Act, to notify the actual owners or occupiers of the land before entering the land, if those owners or occupiers were Maori. Instead, the licensee was to give notice of their intention to do so to the registrar of the Maori Land Court, and to any non-Maori occupiers of the land (according to section 24(1) of the Act).<sup>61</sup>

During the Bill's debate in the House, Apirana Ngata, opposition Member for Eastern Maori asked:

Did the Maori know there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant of these things that have been made possible by pakeha, he is to have no benefit or advantage for them today? If so, it will not hold water.<sup>62</sup>

His argument was supported by William Bodkin, Member for Central Otago, who said that:

the Treaty of Waitangi guaranteed those rights to the Maori people at Common Law, and now the Parliament of New Zealand is seeking to take away those rights and vest them in the state.<sup>63</sup>

The supporters of the Bill, however, argued that a different notion of equality was established under Article 3 of the Treaty, which meant that Maori should not be treated any differently from Pakeha with respect to oil.<sup>64</sup>

The 1937 Act remained in place until it was replaced by the Crown Minerals Act 1991. This Act required all persons acting under the Act to have regard for the principles of the Treaty of Waitangi. It also identified petroleum, gold, silver and uranium existing in its natural condition in land to be the property of the Crown.

The issue of the sub-surface rights under the Treaty is also raised in respect of geothermal power. Three phases of legislative control have been identified affecting the ownership and use of geothermal resources in New Zealand.<sup>65</sup> From the 1880s to the 1950s, legislation protected and controlled thermal areas largely for tourism purposes. For example, the Thermal Springs Districts Acts 1881 and 1883 (see vol iii, ch 7) gave the Crown a monopoly over the acquisition of Maori land in

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60. K Palmer, *Planning and Development Law in New Zealand*, Sydney, Law Book Company, 1984, vol 2, p 973 (cited in White, p 11)

61. Anderson, p 88

62. NZPD, 1937, vol 249, p 1044 (cited in White, p 9)

63. Ibid, p 1048 (cited in White, p 10). Note that the Common Law position is that the Crown acquired radical title along with sovereignty in 1840 subject to Maori customary title.

64. NZPD, 1937, vol 249, p 1039 (cited in Anderson, p 90)

65. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1991, pp 121–133

Taupo and east of Taupo. Also, the Scenery Preservation Act 1903 extended the Crown's power of compulsory acquisition in thermal areas for the purpose of scenery preservation to include the entire country.

A second phase began with the Geothermal Steam Act 1952 which stopped short of vesting the ownership of the resource in the Crown, instead vesting the sole right to take, use and apply it for the purpose of generating electricity. The Act allowed the Crown to enter land to test for geothermal activity and to compulsorily acquire land under the Public Works Act 1928 through which the resource could be accessed. Full compensation was payable for the damage or loss of land. Soon after the Act was passed, the Crown sought to widen its control with the Geothermal Energy Act 1953, which vested 'the sole right to tap, take, use and apply geothermal energy on or under the land . . . in the Crown, whether the land has been alienated from the Crown or not' (s 3(1)). The Act recognised and protected Maori and others' uses of geothermal energy which could be served by a shallow bore (not exceeding 61 metres in depth). The Crown retained the right to enter and compulsorily acquire land, as set out in the 1952 Act, with compensation payable only if the energy was of actual benefit to the owners or occupiers of the surface land (s 14).

In the third legislative phase, the Water and Soil Conservation Act 1967 vested the sole right to use all 'natural water' – which included geothermal water, steam or vapour – in the Crown, and required users of the resource to be licensed in an attempt to promote the conservation of the resource. Finally, the Resource Management Act 1991, which repealed the 1967 Act and most of the Geothermal Energy Act 1953, maintained the Crown's existing rights to resources.

## 10.6 Conclusions: Treaty Issues Arising

The Crown in New Zealand initially modified the Royal prerogative in respect of its access to gold in recognition of the guarantee made to Maori under the Treaty of Waitangi that they would retain possession of their lands and taonga, for as long as they desired. Accordingly, early assertions of the prerogative respected Maori desires to withhold from mining certain lands still held under customary title. As early as the 1850s, however, pressure mounted from miners to open up this land also. While the Government continued to acknowledge the restrictions the Treaty placed on the application of the Royal prerogative, and often assured Maori that their rights would be protected, it very soon not only attempted to bring land under Native title within the State's mining jurisdiction (to appease miners' demands), but also refused to relinquish control and management of the fields to Maori (even after mining activity on the land had ceased), as they had requested. Instead, Maori were paid an increasingly small percentage of the revenue generated by mining.

Despite Maori continuing to offer the Government reasonable cooperation in its efforts to open up further fields for mining, from 1869, the Government's kawana-tanga authority was asserted, through legislation, over Maori attempts to retain

control of gold resources, and the land on which they were mined. Therefore, although the Crown can argue that it had no legal obligation to acknowledge Maori Treaty rights in respect of gold-bearing land, in the 1850s and 1860s it in fact did so. The progressive diminution of Maori rights over the land (and hence of rights in respect of gold mining) which the Crown had initially acknowledged, has elements of bad faith. Moreover, the disturbance to Maori surface rights by mining was severe, and equity alone suggests that it should have been amply compensated by a generous share of mining revenue.

In respect of sub-surface resources other than gold, in a recent finding in the *Ngawha Geothermal Resource Report*, the Waitangi Tribunal found that:

the Crown's obligations to manage geothermal resources 'in the wider public interest' must be constrained so as to ensure the claimants interest in their taonga is preserved in accordance with their wishes.<sup>66</sup>

The Tribunal has also affirmed a 'development right' in respect of resources which Maori were using in 1840, meaning the right to use lands, forests and fisheries in new ways, taking advantage of new technology after 1840 as before it. Thus the *Ngati Tahu Sea Fisheries Report 1992* acknowledges that Maori could expect a 'treaty development right to a reasonable share of the [resource]' – in this case fisheries at great depth or hundreds of miles offshore.<sup>67</sup>

The application of the 'taonga' principle (together with the 'development right' principle) to sub-surface resources that Maori were not using before 1840 is problematic. On the one hand Maori did not apparently use gold, petroleum or coal, nor did they 'mine' the sub-surface to any great depth. On the other hand, they did use the 'upper' subsurface for geothermal waters, ochre, and a variety of stones used for implements and ornaments. As Ngata's statement implies, Maori had a wholistic view of the rohe they controlled, not sharply distinguishing surface and sub-surface any more than they distinguished a sharp boundary between land and sea or lagoon. Rangatiratanga and kaitiakitanga extended throughout the rohe. On the other hand, the assertion of priority rights to commodities from a previously unprecedented and undifferentiated sub-surface may owe as much to European notions of property as to Maori law. But in this context, the common law definition of 'land' does include the sub-surface. This was acknowledged in many early land purchase deeds. More recently the Court of Appeal, in *Tainui Maori Trust Board v Attorney-General* (1989), held that coal-mining rights were 'interests in "land" and hence subject to the State-Owned Enterprises Act 1986'.<sup>68</sup>

Attempts to resolve this issue by logical extension of one set of these arguments or the other is less helpful than seeking a reasonable balance of kawanatanga and rangatiratanga Treaty principles. It is arguably not in the public interest to encourage the further privatisation of the sub-surface for the benefit of the surface right-

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66. *Ngawha Geothermal Resource Report*, p 137

67. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 303

68. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513–515

holders. On the other hand, the Crown would be acting unreasonably if it did not recognise the disturbance of the lifestyle of surface right-holders as deserving of generous compensation by a share in the development of the resource, as joint-venture partners wherever possible.<sup>69</sup> Moreover, the manner of the Crown's access to sub-surface (via acquisition of rights to the surface) ought to have strict regard to the Treaty principles. Thus, in respect of the geothermal resources at Ngawha, the Tribunal found that the Crown had 'acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi C block and the hot springs toanga located on the block.'<sup>70</sup> In this sense too, the manner of the Crown's access to the gold reserves in Hauraki and Taitapu in the nineteenth century showed less than scrupulous regard to the Treaty obligation of active protection of Maori interests.

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69. It should be noted that the governments of Papua New Guinea and Vanuatu both carefully re-examined the principles by which sub-surface rights would be managed given the very strong assertion of claims by the villagers who held the surface rights. Both opted firmly for a continuance of the British legal inheritance, whilst negotiating generous shares of compensation (or 'royalties') for both the local district governments and the villagers. It might be suggested that the war on Bougainville demonstrates the injustice of the state's denial of private ownership of the sub-surface. That would, however, in the opinion of this author, be a misconception. The Bougainville provincial government was happy with the revenue arrangements in the 1980s, as were the village elders. The rebellion on Bougainville was launched by a group of young and ambitious men discontented with the distribution of the revenue within the local community and jealous of the elders.

70. *Ngawha Geothermal Resource Report*, p 74

