

1. INTRODUCTION

1.1 BACKGROUND

This document is one of a series of reports written for the Waitangi Tribunal to assist it in hearing the indigenous flora and fauna claim (Wai 262). As was stated in the Tribunal's direction commissioning research of 15 June 1999, the Tribunal sought an exploratory overview that would provide an analytical narrative of Crown policies, practices, actions and inactions with regard to the indigenous flora and fauna for the period 1912 to 1983. The report was also to cover Maori responses, actions, and grievances.¹

This exploratory overview focused mainly on primary sources. These were complemented in only a limited way by secondary sources. The primary sources included statutes, the record of parliamentary debates and reports to Parliament, and the archived records of selected Crown agencies. Part of the report's conclusion indicates where further records will need to be researched.

Spanning much of the twentieth century from the end of the colonial era, the years between 1912 and 1983 were very active and diverse in terms of Crown actions relating to the indigenous flora and fauna. These ranged from land development policies, such as swamp drainage and coastal reclamation, to various facets of forestry and conservation and a myriad of research programmes. The sheer volume of Crown archives, nationally and regionally, is immense. To provide the Waitangi Tribunal with an analytical narrative that spanned the range of Crown actions from this era, a selection of themes was necessary. These themes form the eight main chapters of this report.

Once the themes had been selected, the archival research concentrated first of all on the formal legislative and parliamentary records to establish the statutory and policy framework of the Crown within each theme. Next, a far more limited examination of Crown agency files was undertaken, mainly at National Archives in Auckland, Wellington, and Christchurch. This sought to identify the instances and incidents that reveal the issues that arose historically within each theme. Maori responses, actions and grievances are reported as they appear within both the formal Crown record and archived Crown agency files.

1. Wai 262 record of inquiry, commission 3.14, 15 June 1999

In organising the research for this report and presenting its results, an ecological approach was adopted. This was for two reasons. First, it reflects the fact that the author's expertise in indigenous flora and fauna matters lies more in ecology and landscape history than natural resource law, plant and animal taxonomy or Maori tikanga.

Secondly, the principle that, by nature, the indigenous flora and fauna are parts of ecosystems is central to this report. These ecosystems comprise rivers such as the Whanganui, harbours such as Manukau and lakes such as Omapere, as well as indigenous forests and swamps. While these ecosystems may be less tangible than individual animal and plant species such as kereru, koaro and kiekie, they are no less identifiable as taonga. So too is the life force of the river or lake, whether in the sense of mauri or of life-sustaining processes.² Adopting an ecological approach meant that Crown actions in relation to the indigenous flora and fauna and Maori responses to them could be reported on an ecosystem basis.

Two initial tasks for researching Crown actions concerning the indigenous flora and fauna and Maori responses to them were to decide:

- ▶ first, what is in and what is outside the embrace of 'indigenous flora and fauna'; and
- ▶ secondly, what are the most useful categories and boundaries for delineating and grouping the range of environments within the embrace of indigenous flora and fauna.

The following section defines and explains the principles and key concepts that were used to define what is within the ambit of 'indigenous flora and fauna', and sets out the categories by which the research was undertaken and the report's chapters were structured.

1.2 DEFINITIONS OF KEY PRINCIPLES AND CONCEPTS

Significantly, the Treaty of Waitangi was a written document drawn up by the literate party and translated into Maori for the benefit of the non-literate party. Precisely what Maori ceded by signing the Treaty remains in dispute today, and much of the disputation turns on what was meant and understood by the slippery words that represented the concept of sovereignty.³

The research for this report revealed numerous instances in which the Crown and Maori differed considerably in how they valued particular

2. In *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, p95, the Tribunal found that 'a river may be a taonga as a valuable resource. Its "mauri" or "life force" is another taonga. The mauri of the Manukau Harbour is another taonga.'

3. Mark Williams, 'Immigrants and Indigenes', in *Meanjin* 4, 1996

indigenous flora and fauna resources. The difference was particularly evident in environments comprising both land and water such as foreshores, estuaries, lagoons, lakes and rivers.

The Crown commonly acknowledged Maori title with respect to land but just as commonly assumed (on the basis of sovereignty) that it should be the owner of waterways. In constructing systems of governance from the conventions of English common law with respect to inland waterways and tidal lands and waters, the Crown did not allow that lakes, swamps and foreshores were possessions that were as highly prized by iwi as their lands. The result was that environments of this kind featured prominently in Maori grievances concerning the indigenous flora and fauna.

These different cultural expectations are also evident in the text of the Treaty itself. As the Tribunal recognised in some of its earliest findings, the Maori and English texts point to different expectations that are basically a reflection of two different cultures.⁴ In the Maori view, foreshores and lakes are taonga that were held by iwi under Maori customary law and were not ceded to the Crown when it acquired sovereignty. In the Crown's view, it acquired title to foreshores – as part of the realm of England – when it gained sovereignty.

The Waitangi Tribunal has recognised that the difference between the Crown and Maori conceptions of natural ecological systems is a significant matter that needs to be allowed for in Treaty claims concerning natural resources. In *The Whanganui River Report*, the Tribunal identified the principle of English law that 'native title is to be rendered conceptually in its own terms, and not in terms of systems that have grown up in England'.⁵ In this regard, the Tribunal distinguished between the Maori and Crown law understanding of the river. Maori customarily understood the river as a tupuna or ancestor and thus as a single and indivisible entity or life system. The Crown understood the river as the conventions of English law did: separated into beds and water, and divided by centre lines and the ownership boundaries of adjoining properties.

Fundamental differences between the customary Maori conception of the environment and the conception of Crown law pervade the entire subject of the indigenous flora and fauna. These differences are predominantly ecological in nature, and because this research commission was undertaken from the perspectives of ecology and environmental history, particular care was taken with ecological content.

4. *Report on the Manukau Claim*, p93

5. Waitangi Tribunal, *The Whanganui River Report*, Wellington, GP Publications, 1999, p336

There is a paucity of Maori perceptions of the environment within the written historical record – a generic problem in Treaty-based historical research. Similarly scarce is information on Maori views of Crown actions. Hence it would be easy to develop an analytical narrative that drew entirely on the understandings of lakes, rivers, foreshores and swamps that is implicit in Crown law and the writings of Crown administrators, managers, rangers and researchers. The research for this report was undertaken with an awareness of the ‘one-sidedness’ of the Crown record in that regard. It has endeavoured to allow for that in the analytical narrative.

To that end, the research for this exploratory overview and the writing of this report was organised and executed on the basis of a series of key principles and concepts. These are now introduced and defined. Some of these principles and definitions relate necessarily to the text of the Treaty of Waitangi, notably article 2.

The principles are as follows:

- ▶ Principle 1: Indigenous flora and fauna equates to and includes the ecosystems in which the plant and animal species evolved, or of which they are constituent members.
- ▶ Principle 2: The customary Maori meaning of the term ‘indigenous flora and fauna’ is contained entirely within article 2 of the Treaty of Waitangi.
- ▶ Principle 3: Ecosystems can be living taonga in terms of article 2 of the Treaty.
- ▶ Principle 4: Translation of the Treaty word ‘whenua’ into ‘land’ must allow for the fact that ‘whenua’, at least, includes the indigenous flora and fauna in its ambit.

1.2.1 Principle 1

Indigenous flora and fauna equates to and includes the ecosystems in which the plant and animal species evolved, or are constituent members.

(1) Defining ‘indigenous’

The term ‘indigenous’, in relation to flora and fauna, is rarely used in the Crown record and as far as can be ascertained it is not defined in statute. When the term indigenous is used it is as biological scientists and nature conservationists commonly use it: to distinguish lifeforms or ecological systems that are ‘natural to New Zealand, or native’⁶ in the sense that they

6. For example, in the draft *New Zealand’s Biodiversity Strategy: Our Chance to Turn the Tide*, Wellington, Department of Conservation and Ministry for the Environment, 1998, glossary, p134

have either evolved in New Zealand or formed their distinctive characteristics here.

This use of the term 'indigenous' is in contrast to that of the Wai 262 claimants. As expressed in their statement of claim, the operative principle is the customary association of a species with Maori prior to the arrival of European settlement. Kumara, for example, is a species that most Pakeha scientists would term 'non-indigenous' because it is known to have been introduced to the New Zealand region, apparently from the Americas. However, it is included as a particular species in the indigenous flora and fauna claim because the claimants consider it to be an indigenous species. The claimants' perspective is influenced by the degree to which various forms, or cultivars, of kumara were developed in Aotearoa by Maori gardeners.

This study makes allowance for both uses of the term 'indigenous'. Kumara however, does not feature in this narrative.

(2) Defining 'flora' and 'fauna'

In the Reserves Act 1977 'flora' means plants of any kind and 'fauna' means animals of any kind. This is the common usage of these terms. Significantly, though, the term 'animal' is defined in the Reserves Act 1977 as not including human beings.

(3) Defining 'indigenous flora and fauna'

The formal use of the term 'indigenous flora and fauna' adopted by the Waitangi Tribunal, and under which heading it commissioned this research, derives from the primacy that the indigenous flora and fauna claim has given to the term. Notwithstanding the defining importance of the term in the indigenous flora and fauna claim, 'indigenous flora and fauna' was used in a very limited way historically in relation to Crown actions. This is partly because the term 'indigenous' was rarely used until the 1970s.

Strictly speaking, the term did not appear in any statute until section 3(a) of the Reserves Act 1977. The term 'native game', which first occurred in animal protection legislation in the 1860s, clearly means 'indigenous fauna'. Allowing for 'native' to equate with 'indigenous', the term 'indigenous flora and fauna' first appeared in Crown policy in the original Scenery Preservation Commission's canon on the design of a national scenic reserve system. It was only when the needs of settlement had 'been amply

met and provided for', wrote the commission, 'that comparatively small portions of land especially attractive in scenic appearance, and usually somewhat poor in quality or rugged in character, are set aside in an endeavour to preserve *the native flora and fauna* in that locality' (emphasis added).⁷

The first statutory appearance of the term in the period under review was in section 4 of the Scenery Preservation Amendment Act 1926, which specified that Crown lands given the status of scenic reserve were 'set apart' not only for preserving scenery but also for 'the preservation or protection of the native flora or fauna of New Zealand'.

The term made an appearance of a different kind in the 1930s, when the Royal Society of New Zealand began seriously questioning Crown policy on the indigenous flora and fauna. The society proposed that the Crown should establish a national Board for the Protection of Flora and Fauna.⁸ In essence, what the Royal Society had in mind was an organisation similar to today's New Zealand Conservation Authority, but with a major oversight role for scientific research into the indigenous flora and fauna.

The term 'native flora or fauna' had a significant place in the Reserves and Domains Act 1953. But rather than restating the phrase in the Scenery Preservation Amendment Act, the 1953 Act restated a provision of the National Parks Act 1952: '*the native flora and fauna* in the reserves shall as far as possible be preserved and the introduced flora and fauna shall as far as possible be exterminated' (emphasis added).

The Crown's biological survey of reserves, which began in the late 1960s, included ecology in the ambit of the term 'flora and fauna'. A primary objective of the biological survey of reserves was to 'ensure that reserves include a complete cross-section of our flora and fauna, and provide a full range of samples of primitive New Zealand landscapes'.⁹ This was subsequently given legal expression in the Reserves Act 1977. In the Act's general purposes, 'indigenous flora and fauna' was separated from 'environmental and landscape amenity or interest' and 'natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value'. Similarly, in section 3(a) and (b), the purpose of enabling 'the survival of all *indigenous species of flora and fauna*, both rare and commonplace, in their natural communities and habitats' (emphasis added) was separated from 'the preservation of representative samples of all classes of natural ecosystems and

7. 'Report of the Scenery Preservation Commission for 1907', AJHR, C-6, p2

8. Communication between the Royal Society of New Zealand and Crown officials, and Crown correspondence, IA46/41 Protection of Flora and Fauna, NA Wellington; see also sec 8.3.

9. G C Kelly, 18 March 1968, 'A Biological Survey of Reserves'; CH252 5/6/2, vol 1, NA Christchurch. The subject is the topic of chapter 9 of the present report.

landscapes which in their aggregate originally gave New Zealand its own recognisable character’.

In interpreting the Crown record between 1912 1983 with an eye to what the Waitangi Tribunal terms ‘Maori responses/actions/grievances’,¹⁰ the research for this project allowed for three senses of the term ‘indigenous flora and fauna’:

- ▶ the native plants and animals that are endemic to New Zealand or occur naturally here (this is the usual use of the term by the Crown in statutes and policy between 1912 and 1983);
- ▶ a term integrating both the native plants and animals themselves and their ecosystems (the prevailing use of ecologists, although in recent years the term ‘biodiversity’ has largely superseded ‘flora and fauna’ in both New Zealand public policy and internationally); and
- ▶ a term integrating the native plants and animals as vital components of the traditional, indigenous Maori life-support system and thus subject to traditional rights (the use of the Wai 262 claimants, and of some Maori petitions to Parliament).

(4) *Defining ecosystems*

An ecosystem is a community (of plants and animals, including people) and its environment, treated together as a functional system of complementary relationships, and transfer and circulation of energy and matter.¹¹

Where the ecosystem concept is used, as it is increasingly internationally, for natural resource and environmental management, the requirement is for each ecosystem to be discrete enough to be named and mapped as a real landscape entity. But the emphasis is not on boundaries so much as on representing the life of the world, or of any geographic entity such as the Whanganui River or the Manukau Harbour, as a myriad of interacting systems.

Crown law in New Zealand concerning land and the indigenous flora and fauna has tended not to be ecosystem-based. It has treated the dynamic living systems of nature as it has land; as precisely bound, static, discrete subdivisions of the earth’s surface.

The philosophy of ecosystem management developed out of critiques of western resource management. These critiques recognised that reliance on protected areas to protect biodiversity long-term was not working as effectively as it might, and that more ecological coherence (that is, greater

10. Wai 262 record of inquiry, commission 3.14, 15 June 1999

11. Geoff Park, *New Zealand as Ecosystems: The Ecosystem Concept as a Tool for Environmental Management and Conservation*, Wellington, Department of Conservation, 2000, p19

linkage between natural areas) and restoration of natural processes was necessary.¹² As Wendy Pond reported to the Waitangi Tribunal in her 1997 study *The Land with All Woods and Waters*, the ecosystem concept and its implications for restructuring systems of resource management based on western legal domains of land as owned property have brought about a dialogue between ecological science and indigenous peoples.¹³

There is limited documented evidence of this dialogue in New Zealand. However, the Waitangi Tribunal's findings concerning the Manukau Harbour, Whanganui River, and Ika Whenua rivers provide good examples (see 1.2.3.1 below).

1.2.2 Principle 2

The customary Maori meaning of the term 'indigenous flora and fauna' is contained entirely within article 2 of the Treaty of Waitangi.

The relevant passages of the two original versions of article 2 are:

- ▶ 'o ratou wenua o ratou kainga me o ratou taonga katoa' (recently translated as 'their lands, villages and all their treasures'¹⁴); and
- ▶ 'their Lands and Estates Forests Fisheries, and other properties which they may collectively or individually possess'.¹⁵

As the term 'indigenous flora and fauna' is expressed in the indigenous flora and fauna statement of claim, the term's primary historical context is the resource ecology on which Maori society had become traditionally dependent prior to the establishment of Crown governance. Given the limited alteration of the New Zealand ecosystem by non-indigenous species of flora and fauna by 1840, this ecology was essentially indigenous in character.¹⁶

The statement of claim states that 'indigenous flora and fauna me o ratou taonga katoa'¹⁷ relates to all aspects of natural resources, in the widest sense, within the term 'taonga' in article 2 of the Treaty of Waitangi. The claimants make specific reference, in this regard, to the landscape situation 'prior to the arrival of the colonial government'.¹⁸ The corollary is that the wording of the Treaty in 1840 captured and preserved the customary Maori relationship with the indigenous flora and fauna, establishing a foundation from which a right of relationship descends to the present day.

12. Ibid, p7

13. Wendy Pond, *The Land with All Woods and Waters*, Waitangi Tribunal Rangahaua Whanui Series, 1997, p10

14. Professor Sir Hugh Kawharu's translation, Court of Appeal, 29 June 1987 (quoted in *Taking into Account the Principles of the Treaty of Waitangi*, Ministry for the Environment, Wellington, 1988, p7)

15. The Treaty of Waitangi Act 1975

16. Most ecological opinion would say this is a reasonable assumption; notwithstanding the evidence, such as the chapter on New Zealand in Alfred Crosby's book *Ecological Imperialism: The Biological Expansion of Europe*, Cambridge, Cambridge University Press, 1986, that by 1840 many exotic species had become established in the Bay of Islands.

17. Wai 262 record of inquiry, claim 1.1(a)

18. Ibid; Wai 262 record of inquiry, paper 2.3

(1) Defining 'fisheries' and 'forests' in indigenous flora and fauna terms

This report treats the terms 'fisheries' and 'forests' as meaning more than fish and trees respectively. It treats them as ecosystems. This is because of the likelihood that important terms in the Maori version of the Treaty, notably 'whenua' and 'taonga' (see 1.2.3.1 and 1.2.4.2, below), have meaning in ecosystem terms.

'Forests' and 'fisheries', are merely very broad categories of ecosystem. Forests could, in one sense, comprise a range of different forest ecosystems, or be simply the forested component of a wider ecosystem, such as the Whanganui River. In some circumstances a fishery might be understood as a wide-ranging system embracing sea, estuary, river, lake and swamp. Or it might be confined to a particular river, lake, or swamp. Certain ecosystems such as swamps might be both forest and fishery.

(2) Fisheries

Support for the view that fisheries are ecosystems and involve not just the fish but the places fished is provided by the Waitangi Tribunal's findings in the *Muriwhenua Fisheries Report*. The Tribunal found that 'fisheries are not determined by reference to the fisheries of England, or the presumptions of law on the ownership of foreshores or the beds of rivers, lakes or seas where those presumptions are not apparent in the Treaty'. It found that 'taonga' in the Treaty included the places where Maori fished and was not limited to the places where they regularly resorted for fishing.¹⁹ These included the fresh waters and seas within and around the Muriwhenua tribes' mainlands and islands, including the swamps, lakes, rivers, inlets, estuaries, harbours, foreshores, beaches and seas.²⁰

(3) Forests

Indigenous forests are not a theme of this report per se. They come into consideration primarily in regard to bird species such as kereru. The definition of forests is therefore made with birds in mind.

In principle, birds are no less integral a component of a forest than fish are of a fishery. Similarly, the productivity of forests (in animal protein terms) is likely to have been a primary reason for their inclusion in article 2 of the Treaty. Forest birding (notably of pigeon species) is, like sea and in-shore fishing, a Polynesian tradition older than the Maori presence in Aotearoa.²¹ That being the case, a reasonable interpretation of what the

19. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p218

20. *Ibid*, p271

21. Geoff Park, 'The Polynesian Forest' in John Morrison, Paul Geraghty, and Linda Crowl, *Science of Pacific Island Peoples*, vol2, *Land Use and Agriculture*, Suva, University of the South Pacific: Institute of Pacific Studies, 1994

term 'forest' in the English version might have meant to Nga Puhi in 1840 would include birds.

A matter to consider in this regard is the extent to which the Treaty of Waitangi is, in ecological terms, a product of the northern harbour environments of New Zealand around 1840. The chiefs who debated the Treaty – who refused to sign the initial drafts that had no article 2 guarantees, but who eventually signed the 6 February 1840 version²² – were all from the northern harbours: the Bay of Islands, Whangaruru and Hokianga.²³ Few contemporary accounts of the forests of those environments survive. One that does, from Waikahanganui in the Hokianga, recorded what appears to have been an annual 'usual take, or harvest' of from '4500 to 5000 birds such as pigeons, parrots and tui'. These birds were taken 'in one month, during the full fruiting of the miro in its season'.²⁴ The snaring techniques by which the birds were taken were made illegal in 1907 by the Animals Protection Act.

The birds of Waikahanganui were probably taonga in their own right. They were part of a forest that was probably a taonga, and as pollinators and dispersers of seed they were part of the mauri or life force of the Waikahanganui, which was also likely considered a taonga.²⁵

22. Judith Binney, 'The Maori and the Signing of the Treaty of Waitangi', in Andersen et al, *Towards 2000: Seven Leading Historians Examine Significant Aspects of New Zealand History*, Wellington, Government Printer, 1990, pp25–26. Further to the statement that 'Busby was responsible for Article 2nd of the Maori Treaty', Binney considers that the Treaty's article 2 references to natural resources derived from the Reverend Henry Williams's and William Busby's understanding of the changes that European exploitation was bringing to the resource ecology of the Maori landscape of the Bay of Islands and Hokianga, and that the Maori relationships to the land and its resources would have to be acknowledged and upheld: personal communication, May 1999.

23. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, p56

24. Lieutenant-Colonel T McDonnell, *Tales of the Maori* (quoted in T.W.Gudgeon, *Defenders of New Zealand*, Auckland, 1887)

25. In the same sense that the Waitangi Tribunal found in regard to the Manukau claim that the mauri of the Manukau Harbour is another taonga: see fn30.

26. New Zealand Conservation Authority, *Finding Common Ground: He Rapunga Tahitanga – Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, interim report and discussion paper, Wellington, 1997, p42

1.2.3 Principle 3

Ecosystems can be living taonga in terms of article 2 of the Treaty.

(1) *Indigenous flora and fauna as taonga*

The concept of living natural resources as taonga has gained wide contemporary acceptance. The New Zealand Conservation Authority, for example, considers mahinga kai to be taonga under article 2 of the Treaty; so too, the environments in which mahinga kai are sustained.²⁶ The Waitangi Tribunal has made similar findings in relation to taonga. None of the following findings explicitly refer to indigenous flora and fauna, but given the nature of the ecosystems involved the indigenous flora and fauna are implicitly included.

In its findings on the Manukau claim, the Tribunal stated that 'taonga' means more than objects of tangible value. A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga. Accepting the contention of the counsel for the claimants that the mauri of the

Waikato River is a taonga of the Waikato tribes, the Tribunal allowed that the mauri of the Manukau Harbour is another taonga.²⁷

In *The Whanganui River Report* the Waitangi Tribunal noted the principle of English law that ‘native title is to be rendered conceptually in its own terms, and not in terms of systems that have grown up in England’. In this regard, the Tribunal found the interest of the Whanganui iwi in the river as a ‘living taonga which is not divisible into its constituent parts,’ to be ‘more extensive than the attributes of ownership according to English legal notions’. Furthermore, the Tribunal found the Crown’s application of the common law doctrine *ad medium filum aquae*, by which Crown laws had divided the river in order to determine ownership over its navigable bed, to be in breach of the Treaty of Waitangi.²⁸

Similarly, in the *Te Ika Whenua Rivers Report*, the Tribunal stated that the Rangitaiki, Wheao and Whirinaki Rivers are ‘tipuna awa and living taonga’. It found that ‘these rivers were and still are to Te Ika Whenua, whole and individual entities in contrast to the separately constructed parts as recognised at common law; namely bank, bed and water’, and that ‘assumption of ownership of the river to the middle line through the application of the common law doctrine of *ad medium filum aquae* differs from and conflicts with the Maori view of ownership’.²⁹

There is negligible reference in the Crown record between 1912 and 1983 to lakes, rivers or other such ecosystems as taonga. But a 1929 judgement by Judge Acheson of the Native Land Court concerning Lake Omapere is applicable. Acheson stated that Omapere’s Maori owners regarded their lake as ‘a treasured possession’. He made the point that if the owners had considered that they would lose their title to the lake’s bed as a result of signing the Treaty of Waitangi, they would not have done so and their numbers would have been sufficient to reject it.³⁰

1.2.4 Principle 4

*Translation of the Treaty word ‘whenua’ into ‘land’ must allow for that fact that ‘whenua’, at least, includes the indigenous flora and fauna in its ambit.*³¹

In Treaty translations, the word ‘whenua’ is commonly translated as equating to the English word ‘land’. That whenua means considerably more than land, to the degree that it includes the people of a place, is evident in the fact that whenua also translates as placenta, and ‘entirely together’.³²

27. *Report on the Manukau Claim*, p93

28. *The Whanganui River Report*, p338

29. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, 1999, ch 11, secs 11.3.1 (a), (c), (e), secs 11.2–11.3

30. Bay of Islands Native Land Court minute book 11, 19 June 1929, pp 4–5 (quoted in Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series, 1998, pp 232–234)

31. Note that, in the original Treaty text, the term is ‘wenua’. ‘Whenua’ is used here on the basis of the greater common usage of that spelling.

32. H W Williams, *A Dictionary of the Maori Language*, Wellington, Government Printer, 1985

(1) Defining 'land'

Unlike the terms 'indigenous', 'flora and fauna', and 'ecosystem', the term 'land' appears abundantly in the record of Crown actions, both formally in statutes such as the Land Act and the Native Land Act, and in ordinary language. Its usage therein has connotations of the solid ground of earth, specifically differentiated from water. Land is commonly defined as the solid matter which constitutes the surface of the earth.³³ It includes life elements (that is, the flora and fauna, indigenous or otherwise) in only a very limited way.

In the English translation of the Treaty of Waitangi land is equated with the Maori word 'whenua', a term that extends considerably beyond the solid surface of the earth to embrace the life support systems that attach to it. These differences in meaning need to be allowed for in interpreting the term 'land' in the Crown record.

(2) Defining 'whenua'

The concept of whenua, in contrast to land, includes life elements to a considerable extent. A recent anthropological interpretation, within a Waitangi Tribunal context, defines whenua as 'the nourishing matrix for a hapu harvesting the resources of its ancestral territory'.³⁴ This definition has limited authority, but it is cited to make the point that because it embraces a 'living system' sense of land, whenua is a concept of considerable significance to matters related to the indigenous flora and fauna claim. The present author has neither the linguistic expertise nor knowledge of Maori terms to report authoritatively on the historical meaning of whenua, but the following is offered in order to draw the Tribunal's attention to the term's significance.

The linguistic associations of whenua would suggest that its customary usage, prior to the interpretation put on it in post-Treaty documentation such as land transactions and laws, was broadly similar to the customary Melanesian concept of vanua. Vanua is related linguistically to the Maori word whenua³⁵ (as well as words such as fenua, fonua and fanua from other Polynesian island cultures). It is significant, in terms of section 1.2.1.4 (above), that in an international review of indigenous ecological knowledge vanua has been called a 'pre-scientific ecosystem concept'.³⁶ Vanua holds that land, water and the human environment are an indivisible entity.³⁷ The Waitangi Tribunal has similarly recognised the customary conception of the Whanganui River by Whanganui iwi as 'a

33. *Collins New English Dictionary*, 1968

34. W Pond, 'The Land as Tradable Commodity', *New Zealand Books*, December 1997, pp32–33; a review of Alan Ward's 1997 *National Overview* in the Waitangi Tribunal's Rangahaua Whanui Series

35. The use of the term 'whenua' in this report is with recognition that in the Treaty it is spelt 'wenua'.

36. Fikret Birkes and Carl Folke, 'Linking Social and Ecological Systems for Resilience and Sustainability', in *Linking Social and Ecological Systems*, Fikret Birkes and Carl Folke (eds), Cambridge, Cambridge University Press, 1998, pp8–9; see also M Gadgil and F Berkes, 'Traditional Resource Management Systems', *Resource Management and Optimization*, vol8, pp127–144

37. K Ruddle, E Hviding, and R E Johannes, 'Marine Resources Management in the Context of Customary Marine Tenure', *Marine Resource Economics* 7, 1992, pp249–273

single and indivisible entity' and 'ancestral living being', although it has not used the Treaty term 'whenua' in this regard.³⁸

Integral to the concepts of vanua and whenua is the principle that cultures dependent on living natural resources – as Maori were before European agricultural settlement and the proliferation of non-indigenous species that accompanied it – adapt their resource management systems (knowledge, practices, controls and so on) to the ecosystems in which they live and on which they depend. Over time, and after feedback from the general pattern of 'unforeseen effects and nasty surprises', the social system experiences the ecosystem's limits and resilience as people and ecosystem evolve together.³⁹

David Abrams has described how many indigenous oral peoples express their assumption 'that the coherence of their language is inseparable from the coherence of the surrounding environment, from the expressive vitality of the more-than-human terrain'⁴⁰. In this sense, the utility of a word such as whenua changes dramatically when the indigenous language and environment are colonised and overwhelmed by an immigrant language.⁴¹

It is likely that when the Nga Puhi chiefs who signed the Treaty used the term whenua in oral exchanges at Te Ti and Waitangi in 1840, they did so as they had customarily: to express the integration of the land, flora and fauna and people of a place as one entity. The Melanesian 'vanua' and its linguistic equivalents are active in this sense today in parts of Oceania where the impact of Western culture is minimal. In those Maori communities described by Sir Apirana Ngata in 1934, which 'depended very largely for food-supply on their community cultivations eked out by supplies taken from river, sea, lake, and bush',⁴² whenua would have continued to be an active concept long after 1912.

A 75-year-old kaitiaki in such a community in 1912 would have been a three-year-old in 1840. Through the 1840s and early 1850s, they would have been the recipient of a knowledge system – including 'whenua' – that preceded the Treaty of Waitangi and the coterie of land purchase agents and surveyors that followed it and progressively established the European concept of land as a simple commodity. It was perhaps just this sense of land, still hanging on in an old kuia's memory, that Ngata had in mind in 1922 when he explained the Treaty to Maori:

38. *The Whanganui River Report*, p338

39. Birkes and Folke, p11

40. David Abrams, *The Spell of the Sensuous: Perception and Language in a More-than-Human World*, Vintage Books, 1997

41. Peter Mühlhäusler, *Linguistic Ecology: Language Change and Linguistic Imperialism in the Pacific Region*, Routledge, 1996, sets out the situation as English and English-based interpretation of concepts such as whenua have overwhelmed their indigenous Pacific meaning and use.

42. Native Affairs Commission, 'The Policy of the Schemes and the Position of Apirana Ngata', AJHR, 1934, C-11, p182

The Queen did not do anything to take away the rights of the Maori over his lands, instead she made the ownership permanent and truly established. This is the reason, dear old lady, you appear before the Maori Land Court to show your rights, whether of land not yet clothed with title, or by long occupation, when you related the trails, the fern root hills, the tawhara (kiekie fruit) swamps or other token and relics of your ancestors . . .⁴³

Wherever possible, this report makes allowance for the possibility that Maori used the term 'land' (at least in the early part of the 1912 to 1983 period) with this ecological perspective of whenua.

Because on the one hand whenua embraces life elements, and on the other it has invariably been translated using the English term 'land', all references to land in the Crown record potentially came within the scope of the research for this report. In practice, of course, given the sheer volume of the record, this would have made the task an impossibility in the time frame available. For this reason, the research for this overview was precautionary with records relating generally to land. Only those Crown agency files in which a concern with the indigenous flora and fauna was relatively and readily explicit were selected.

1.2.5 Structure

Part I of this report details Crown actions in relation to a series of indigenous ecosystem themes: swamp ecosystems; coastal ecosystems; and lake and river ecosystems. Historically, these environments were where Maori society was concentrated at the time of the signing of the Treaty of Waitangi, and their productivity and customary value in indigenous flora and fauna terms makes it probable that they merited the epithet of taonga. It should be noted that one major ecosystem theme, indigenous forests, is not reported on in this study.

Part II of the report focuses on Crown actions concerning what has variously been termed the preservation, protection or conservation of the indigenous flora and fauna. It covers three themes: scenery preservation; national parks; and animals and plant protection.

Part III of the report addresses two areas where the Crown, in its actions to preserve the indigenous flora and fauna and exercise its authority over them, recruited support services: the acclimatisation societies for

43. Sir Apirana Ngata, *The Treaty of Waitangi*, Wellington, Maori Purposes Fund Board, 1922

animal protection; and the Crown's own research agencies for determining the value of the indigenous flora and fauna in the conservation estate.

1.2.6 A note on indigenous forests

Indigenous forests were originally included within the scope of this overview. Legislative records and parliamentary reports concerning indigenous forests were compiled along with primary material for the other chapters in this report. However, it soon became apparent that the subject was so large, and the archival record pertaining to it so huge, that it merited its own separate overview. The chronological compilation of legislative records and parliamentary reports concerning indigenous forests has therefore not been included in this document. It has been submitted to the Waitangi Tribunal as a separate document.

