

## 10. GENERAL CONCLUSIONS

### 10.1 INTRODUCTION

This document is the result of the Waitangi Tribunal commissioning an exploratory overview report to facilitate the hearing of the indigenous flora and fauna claim. The Tribunal sought an analytical narrative of Crown policies, practices, actions and inactions with regard to indigenous flora and fauna during the years from 1912 to 1983. The report was also to cover Maori responses, actions and grievances.<sup>1</sup>

This exploratory overview has focused mainly on primary sources, complemented in only a limited way by secondary sources. The primary sources have included the formal Crown record of statutes, the record of Parliamentary debates and reports to Parliament, and the archived records of selected Crown agencies. The narrative documents what those records reveal about the instances, incidents and issues that have influenced the evolution of policy. It has developed these episodes as far as has been possible from the records which came within the scope of this overview research. It indicates where further research will be required.

In organising the research for this narrative and presenting its results, an ecological approach has been adopted. This 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. An important aspect of this approach is that the first part of the report is organised on the basis of ecosystems. Arguments concerning the impact of the Crown's actions are also developed in terms of ecosystems and natural processes wherever possible, given the limitations of the archival record in this regard.

This ecological approach to the indigenous flora and fauna extends to cultural ecology. Because the *raison d'être* for this report derives from the Treaty of Waitangi, the references the report makes to words in the Treaty that might have meaning in indigenous flora and fauna terms are made with ecological considerations. Thus, 'forests' in article 2 of the Treaty is considered to be inclusive of birds like kereru, no less than 'fisheries' is inclusive of fish. The study also allows that as much as the epithet of 'taonga' in article 2 embraces swamp birds, swamp fish and swamp plants like harakeke, it must also embrace the swamp itself. The reporting of the

1. Direction Commissioning Research, ROI #3.14, WAI 262, Waitangi Tribunal, 15 June 1999

Crown's swamp drainage actions and compulsory land acquisitions for drainage purposes, and Maori grievance as a result of those actions, has therefore been on this basis.

Of particular importance in this regard because of the very common usage in the Crown record of its translated English equivalent, 'land', is the term 'whenua'. 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, was broadly similar to the customary Melanesian concept of 'vanua'. Vanua has been called a 'pre-scientific ecosystem concept'.<sup>2</sup> It holds that land, water and the human environment are an indivisible entity.<sup>3</sup> The Waitangi Tribunal has similarly recognised the customary conception of the Whanganui River by Whanganui iwi as a 'single and indivisible entity' and 'ancestral living being'.<sup>4</sup> Wherever possible, the research and interpretation for this project has made allowance for the possibility that Maori used the term 'land' (in the early part of the 1912 to 1983 period at least) with this ecological perspective of whenua, as being 'the nourishing matrix for a hapu harvesting the resources of its ancestral territory'.<sup>5</sup>

Part I of this overview reports on Crown actions in relation to a series of indigenous ecosystem themes: swamp ecosystems; coastal ecosystems; and lake and river ecosystems. The choice of ecosystems was determined by the fact that, historically, these were the environments where Maori society was concentrated at the time of the signing of the Treaty of Waitangi. There is a likelihood that their productivity and customary value in indigenous flora and fauna terms meant they merited the epithet of taonga.

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

Part III of the report addresses the way in which the Crown, in its actions to preserve the indigenous flora and fauna and exercise its authority over them, has recruited support services. There are two themes here: acclimatisation societies for animal protection; and the Crown's own research agencies for determining the value of the indigenous flora and fauna in the conservation estate.

This report's general conclusions are presented in three forms:

2. 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 University Press, Cambridge, 1998, pp 8–9; see also M Gadgil and F Berkes, 'Traditional resource management systems', *Resource Management and Optimization*, vol 8, 1991, pp 127–44

3. K Ruddle, E Hviding and R E Johannes, 'Marine resources management in the context of customary marine tenure', *Marine Resource Economics*, 7, 1992, pp 249–273

4. Waitangi Tribunal 1999, *Whanganui River Report*, p.338<sup>44</sup>

5. W Pond, 'The land as tradable commodity', *New Zealand Books*, December 1997, pp 32–3; review of Alan Ward's 1997 *National Overview* in the Waitangi Tribunal's Rangahaua Whanui Series

- ▶ A brief, chapter-by-chapter synopsis of the themes, summarising the elements and trends of the Crown's actions concerning the indigenous flora and fauna between 1912 and 1983.
- ▶ A synthesis of the various themes in relation to the changing tide of twentieth century New Zealand society. This spans the period from the late colonial era of 1912 to the beginning of New Zealand's reappraisal of its Anglocentric constitutionalism in the early 1980s. This synthesis focuses on particular periods that are significant in terms of the way the Crown's actions concerning the indigenous flora and fauna had a bearing on Maori. This synthesis highlights the historical situations in which Crown officials referred to the Treaty of Waitangi with respect to the indigenous flora and fauna. It also highlights those actions taken by the Crown that the historical evidence suggests had little or no regard for Maori, caused Maori to suffer prejudicial effects, and might have constituted an abrogation of the Treaty guarantee to Maori with respect to natural resources.
- ▶ A series of recommendations suggesting where further, more focused research work might be undertaken. In particular, these recommendations indicate where the actions highlighted in the previous paragraph need to be looked at in more detail.

## 10.2 A SYNOPSIS OF EACH CHAPTER THEME

### 10.2.1 Swamp ecosystems, swamp drainage, and the development of wetland conservation

In 1840, New Zealand's lowland plains were mostly swampy or seasonally wet environments. This made them some of New Zealand's most productive environments in terms of fish, wildlife and renewable materials. Traditionally they were highly important to customary Maori culture. The high inherent fertility of these low-lying environments also led European settlers to recognise their potential to be drained and developed as farmland.

The decline in the area of New Zealand's wetlands, which was one consequence of the colonial imperative to drain swamps and develop them for farmland, is one of the most dramatic known anywhere in the world. Eighty-five per cent of the wetlands that existed in 1840 are gone. This

percentage is far higher than in European countries where modern agriculture undertook large-scale draining of swamps and marshes.

The public works the Crown undertook to drain swamps had an enormous impact on the indigenous flora and fauna of New Zealand's swamp ecosystems. In most regions, virtually all the former natural wetlands were drained to create farms. Such levels of loss in local indigenous flora and fauna, and the parallel disruption of their natural life processes, had a substantial impact on the customary Maori relationship with the indigenous flora and fauna. Chapter 2 illustrates this impact by reporting on a series of local swamp drainage developments.

By 1912, Crown law and policy showed the influence of the advent of refrigerated shipping in the 1890s and the huge potential export markets refrigeration had generated for dairy products. Politicians equated the task of providing fertile flat land to satisfy this demand with the national interest.<sup>6</sup> Building on early colonial legislation such as the Highways and Watercourse Diversion Act 1858 and the Public Works Act 1876, the Crown significantly increased its involvement in swamp drainage and flood mitigation schemes, with several local empowering Acts. Legislation such as the Native Land Act 1909<sup>7</sup> (which rendered customary Maori title unassertable against the Crown) and the Public Works Act 1908 (which enabled the Crown to compulsorily acquire Maori land for public works) enabled the Crown to take out of customary title any swampland it wanted for massive swamp drainage schemes, such as those on the Hauraki Plains, and along the Manawatu and Rangitaiki rivers. By 1912, very little fertile flat land remained under customary title.

Despite these drainage initiatives, considerable areas of lowland swamp still supported indigenous vegetation in 1912, much of it kahikatea forest. This forest was a specific target of the Government's Royal Commission on Forestry in 1913. Because it considered that 'no land is more suitable for occupation than that of the white-pine [kahikatea] swamps, when drained' the commission recommended the 'removal of the trees forthwith'.<sup>8</sup>

Some swamps are land that has become inundated with water. Other swamps were formerly estuaries, lagoons or lakes. In the main, the Crown treated swamps as merely wet land, whose wetness was an impediment to its agricultural use, and applied the property principles of private land ownership in purchase and survey operations. This is reflected in the

6. Park, *Nga Uruora*, pp 63, 68

7. Section 84 of the Native Land Act 1909

8. Report of the Royal Commission on Forestry, AJHR, 1913, C-12, pxxiv

present-day rectilinear grid survey pattern of plains landscapes that were formerly swamps.

It was the wetness of swampland that made it prime habitat for much indigenous flora and fauna. But by 1912, only a fraction of the former extent of swamp country survived in Maori title. As some of the selected examples of swamp drainage developments (Rangitaiki and Whakaki) indicate, these remnants of whenua which stayed in Maori title were commonly the swamps' natural drainage outlets to the sea; they were also the sites that Crown drainage engineers sought to dredge for spillways. Before their incorporation in local drainage schemes, these surviving lowland swamp remnants would have been some of the biologically richest and most productive environments in the landscape.

The Swamp Drainage Act 1915 enabled the Crown to obtain all the land and water within a legally declared 'drainage area'. If any owners resisted their land being included in a drainage scheme, the Crown could include it compulsorily. Owners who resisted were often Maori who preferred to retain the indigenous flora and fauna properties of their swamps. Maori complained that the law bore more heavily on their land than it did on freehold land. But throughout most of the period between 1912 and 1983, the common view of Crown officials was that the loss of swamps and their indigenous life was of no consequence. Nor was the customary Maori association with them. As a Commissioner of Crown Lands advised in 1938, concerning Lake Omapere and its swamps: 'The natives' ascertaining that a further lowering of the lake will detrimentally affect the food supply in the surrounding districts is speculative. The Natives do not rely on the eels to the same extent as formerly for food supplies'.<sup>9</sup>

For all the swamps examined in this report – at Hauraki, Rangitaiki, Poukawa, Omapere, Tangonge and Whakaki – it can be concluded that their tangata whenua held a body of customary law pertaining to rights to the use, management and ownership of the indigenous flora and fauna. This customary association with swampland environments was drawn upon, in evidence to the Maori Land Court, to resist the Crown's assertion of title. In all of the cases where the court incorporated this evidence in its investigation of title to swamplands – at Omapere for example – it found the swamps to be some of the more significant places in the local landscape and subject to Maori customary title.

Most of the major swamp drainage schemes were completed by the 1940s. But the Crown continued to facilitate swamp drainage through

9. Commissioner for Crown Lands to Under-Secretary of Lands, 27 March 1936, Lake Omapere, BAAZ 1109/167a, NA Auckland

local drainage and catchment boards until the 1980s. In some instances, Maori owners of swamplands had them drained so they could farm them. New legislation, such as the Soil Conservation and Rivers Control Act 1941, was directed at development. It made no reference to swamplands having non-development values. It did not make any provision for the protection of swamplands. It was only towards the end of the 1912 to 1983 period that the Crown began to recognise the indigenous flora and fauna values that had made swamps taonga in customary Maori terms, and began to protect them from development. On the basis of surveys undertaken in the 1950s and 1960s, the Crown's wildlife protection agency began urging the Crown to initiate policies and programmes to protect wetlands. But it was not until the early 1980s that the Crown's major land development agencies, for example the Department of Lands and Survey and the Ministry of Works and Development (through the National Water and Soil Conservation Organisation) advanced wetland protection policy and programmes.

### 10.2.2 Coastal ecosystems

The estuaries, lagoons, river mouths, rocky shores and mudflats of the coastal foreshore include most of the few natural ecosystems in New Zealand whose indigenous flora and fauna are still able to sustain human life. It is for this reason that these ecosystems have continued to be of great significance to Maori endeavouring to retain customary rights to the indigenous flora and fauna. From 1912 until the 1970s, petitions seeking to retain customary rights to the foreshore and its life dominate the record of Maori petitions to Parliament concerning the indigenous flora and fauna.

Very few of these petitions resulted in the petitioners having their pleas satisfactorily answered. The Crown's response to the petitions was determined by three principles: that customary indigenous rights to natural resources and environments had no place in modern New Zealand; that Maori could not enjoy rights above and beyond those of the general public; and that the Crown's ownership of the coastal foreshore where Maori claimed ancestral interests was not negotiable.

This overview has focused on three themes of Crown action concerning the indigenous flora and fauna of the coast. The first, on the foreshore, draws on and complements Richard Boast's 1996 Rangahaua Whanui report, *The Foreshore*. The other two themes concern the reclamation of

coastal sand environments, and the Department of Lands and Survey's coastal reserves survey of the 1960s and 1970s. Both of these programmes sought and acquired Maori coastal lands. The Crown was involved in coastal sand reclamation under the Sand Drift Act 1908 from the time it was passed right up until the 1980s. Vast areas of mobile dunes or sand-drifts with low diversity of indigenous flora and fauna were converted to marram grass cover or exotic forest. In the process, a multitude of small, biologically rich dune lakes and wetlands that were traditional mahinga kai sites (for birding, eeling and fishing, as well as for harvesting plant materials) were lost. Under the heading of 'reclamation', the Crown sought large areas of Maori-owned coastal sand country to convert to farmland and commercial plantation forests. Commonly, reclamation was undertaken on the basis of a perception by Crown officials that the natural, open, mobile character of coastal sand dune country was a 'menace', and that the widespread Maori ownership of such land posed a threat to the agricultural settlement of adjoining lands. In some districts such as Aupouri, Maori sought to have their coastal lands reclaimed by forestry plantations. It was not possible to determine, from the research undertaken for this study, to what extent this may have happened more generally.

The main concern of chapter 3 is with the foreshore, in particular the harbours and ocean beaches of Tai Tokerau. It was in these environments, particularly Hokianga Harbour and Ninety Mile Beach, that the contest between the Crown and Maori became most disputatious.

The Crown began acting on the assumption that it owned the foreshore by prerogative right of common law in the late 1860s. Matters since then concerning ownership of the foreshore and rights to its indigenous flora and fauna have, as Boast says, been complicated by a thicket of statutes.<sup>10</sup> By 1912, the effective exclusion of Maori customary rights to the foreshore was reinforced by a raft of legislation, such as the Native Land Act 1909 which made customary title unassertable against the Crown.

When the Crown's ownership of the coastal foreshore was challenged by Maori, as it frequently was (and often with the support of Maori Land Court judgements), the Crown referred to the authority it drew from English common law relating to tidal waters. To express the idea of the Crown's prerogative right to the foreshore, officials in 1932 cited a legal text, *Halsbury's Laws of England*, to the effect that 'the seashore or foreshore (for in legal parlance these expressions mean one and the same

10. R P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (first release), November 1996

thing) is that portion of the realm of England which lies between the high-water mark of the ordinary tides and low-water mark'.<sup>11</sup>

By 1933, the sheer number of Northland foreshore cases that were pending in the Native Land Court was causing concern, even alarm, in the Crown Law Office. Worried that the Crown's legal position was tenuous, officials sought a legal mechanism that could effectively and permanently nullify Maori claims to the foreshore. A 1933 paper proposing general legislation for that purpose concluded that it would afford the Crown the 'protection against native claims which might otherwise have been obtained had section 100 of the Native Land Act, 1909, not been repealed'.<sup>12</sup>

At the root of the Crown officials' anxiety was the uncertainty of the Crown's assumed title to the foreshore, and concern at what might happen in the absence of any statutory declaration of Crown ownership, namely 'the probability of native claims on an extensive scale to tidal lands as native customary lands'.<sup>13</sup> This anxiety reached a head in the 1930s when Crown officials seriously considered legislation that would 'definitely remove these lands from native customary claims to ownership'.<sup>14</sup>

The result of this legal contest has been that the ownership of the foreshore, perhaps the most important environment in New Zealand life, is more debatable and ambiguous than any other zone of the indigenous flora and fauna.<sup>15</sup> In his report on the foreshore, Boast describes the legal situation relating to foreshore ownership as continuing to be 'hopelessly confused and unsatisfactory'.<sup>16</sup>

The situation can be traced back to a succession of court decisions concerning the foreshore in the latter decades of the nineteenth century and the early twentieth century. As far as the Crown was concerned, these court decisions effectively removed the Treaty of Waitangi from consideration as a legal factor in the determination of foreshore ownership. Crown opinion held that, because the Treaty had no statutory base, neither could the customary resource rights which Maori claimed were guaranteed them by article 2 of the Treaty. In the years immediately before 1912, this was reinforced by legislation that rendered Crown title unassailable by Maori customary title.

As a result, between 1912 and 1983 Crown legislation and policy concerning the coastal ecosystems on which traditional Maori relied so extensively made very limited concessions to customary Maori rights to indigenous flora and fauna. When Maori sought to prevent the Crown from

11. *Halsbury's Laws of England*, 4th ed, para 653 and 655, cited as within Memorandum from Crown Solicitor to the Under-Secretary of lands, 7 March 1932, re Ngakororo case; cited in Boast, p 92, app 6

12. Legal Opinion on Reclamations, (undated but almost certainly 1933), file report of conference of Crown officials, ABWN 6095 W5021/425 15/46 – Reclamations general, NA Wellington

13. *Ibid*

14. *Ibid*

15. Boast, p 75

16. Boast, p 69

authorising foreshore reclamations in the 1930s, and the Native Land Court ruled that the foreshore was 'Native customary land (papatupu)', Crown officials asserted that allowing 'tidal lands [to remain] as native customary lands will prove a serious danger to the undertaking of reclamation works'.<sup>17</sup> To ensure the Crown's authority, the Under-Secretary of Lands proposed 'indicating to the prospective native claimants by legislation, the futility of such tactics'.<sup>18</sup>

The best legal recognition that Maori could obtain of their customary relationship with the indigenous flora and fauna of the coast was a special, though seldom exclusive, usage right to fisheries in specific places and for particular fauna. And because in practice the situations in which Maori customary fishing rights were legally permitted were so few, there was, for most of the 1912 to 1983 period, no legal provision for Maori fishing custom to play a part in the control and management of coastal resources. The Statutes Amendment Act 1946 which provided for the appointment of honorary fisheries officers, whilst not specifying Maori, was the first statute with the potential to allow Maori involvement in the management and control of their customary tribal fisheries.<sup>19</sup> It was not until 1979 that any statute, in this case the Maori Purposes Act, vested a coastal ecosystem (a lagoon near Kaiapoi) significant to Maori specifically in Maori trustees as a customary fishery.

### 10.2.3 Lake and river ecosystems

Some of the most significant customary Maori taonga in terms of indigenous flora and fauna are lakes and rivers. As well as their profound value as markers of tribal identity, lake and river ecosystems are important for their biological productivity and the ecological connections they provide to swamps and coastal estuaries. This is especially so for fish species.

As was the case with the foreshore, the Crown historically defined lakes and rivers in New Zealand on the basis of English legal conventions. It sought to delimit lakes and rivers as discretely bound entities in terms of their beds and water bodies. The purpose of these conventions was to bring waterways under the land title system, in order to apportion private property rights.

But the key to the biological productivity of lakes and rivers is not so much the water and beds by which they are defined in Crown law. Rather, it lies in the systemic ecological connections between the waters of lakes

17. Legal Opinion on Reclamations, (undated but almost certainly 1933), file report of conference of Crown officials, in Reclamations general, ABWN 6095 W5021/425 15/46, NA Wellington

18. Under-Secretary of Lands to Commissioner of Crown Lands, Auckland, 4 September 1940, re 'Native claims to Mudflats and Tidal Lands', ABWN 6095 W5021/231 7526, p 2, Ngakororo mudflats, NA Wellington

19. Section 29 of the Statutes Amendment Act 1946: Appointment of honorary fisheries officers

and rivers, their biota and the lands containing them. This was how Maori customarily considered lakes and rivers and was the basis for their systems of ownership and rights. The Waitangi Tribunal found against the Crown in this regard, in the Whanganui River and Te Ika Whenua Rivers claims. The Tribunal found that in adapting the English legal convention of rivers as discretely bound legal entities, the Crown had little or no regard for the customary Maori perception of waterways as 'living beings'.<sup>20</sup>

The history of Crown legislation concerning New Zealand waterways is described by Ben White in the Rangahaua Whanui report *Inland Waterways: Lakes* as constituting an abrogation of Maori rights.<sup>21</sup> Central to the Crown's actions concerning the indigenous flora and fauna of lakes and rivers was its assumption that it should be the owner of all waterways in New Zealand. The Crown only overtly asserted this position when Maori sought to establish customary rights to lakes or rivers. It considered its paramountcy over waterways to be attendant upon its sovereign rights acquired by virtue of the Treaty.

The Crown's assumption that it was the owner of New Zealand's waterways was driven to a large extent by the colonial imperative that the English situation, where individuals held private rights in navigable waterways, should not be allowed to pertain in New Zealand. It would appear to be this imperative that led to Maori losing rights in both rivers and lakes which had been guaranteed by the Treaty of Waitangi. With rivers, such as the Whanganui, historical evidence shows that Maori often did not consider themselves to have automatically alienated their interests in water when they alienated adjacent land. However, the Crown determined that public rights of navigation and fishing were best protected by Crown ownership of all navigable rivers, and it attempted to extend its prerogative rights to them. When the courts rebutted this contention, the Crown passed legislation to vest the beds of navigable rivers in the Crown.

The Crown acted somewhat differently with respect to lakes. When Maori pressed a claim of ownership to a particular lake, the Crown opposed it. The Native Land Court, in such instances, invariably ruled in favour of Maori, mainly on the evidence of customary fisheries but also because of other values including metaphysical ones. Judge Acheson's 1929 judgment on Lake Omapere referred to Maori regarding the lake and its swamp margins as 'a treasured possession' – a taonga, in other words.<sup>22</sup> Acheson added that had Omapere's Nga Puhi owners anticipated they

20. Waitangi Tribunal, *The Whanganui River Report*, 1999, pp 336–337

21. Ben White, *Inland Waterways: Lakes* Waitangi Tribunal Rangahaua Whanui Series, 1998, p 265

22. Judge Acheson's reference to Omapere as a 'treasured possession' of Nga Puhi is used as illustration here on the reasonable assumption that the term is with reference to lake's renewable resources, that is, its indigenous flora and fauna.

might lose their title to the bed of the lake by signing the Treaty, they would not have done so and their numbers would have been sufficient to reject it.<sup>23</sup>

By the time of Acheson's judgement on Omapere, the Crown was operating on the principle that it was the owner of lakes and rivers as a consequence of its allodial title. It was anxious to minimise the extent of any legal acknowledgement of the existence of customary title; no less invariably than the Native Land Court ruled in favour of Maori customary title to lakes, the Crown appealed the rulings. Some Crown appeals lodged in the 1930s against Court decisions in favour of Maori title were not resolved until the 1950s.

Perhaps the most important Crown actions in this regard were the acquisitions of the Rotorua lakes and Lake Taupo. Motivated by the need to preserve public access to the lakes for the burgeoning tourist industry that was developing around trout fishing, the Crown contested Te Arawa's assertion of customary title to the Rotorua lakes. When this was unsuccessful in the courts, the Crown legislated a settlement. In the wake of this settlement, in 1922, a similar agreement was legislated for Lake Taupo with Tuwharetoa. The general consequence of this approach was that, by the late 1920s, the Crown had become accustomed to treating lakes and rivers as entities it owned and controlled, and for which it could make laws and policies unconstrained by customary title and other rights and interests of Maori. Lakes Horowhenua and Rotoaira were notable exceptions to this.

The spectrum of actions by various Crown agencies which flowed from the Crown's assumption of ownership and control had a cumulative and comprehensive negative effect on the indigenous flora and fauna of lakes and rivers. Many of these actions, which so detrimentally altered lakes and rivers as indigenous ecosystems and as Maori environments of high prestige and resource value, might not have occurred had the Crown acknowledged customary Maori authority over particular waterways.

The legislation relating to lakes and rivers between 1912 and 1983 was of two kinds. First, various laws were enacted to assert the Crown's ownership of lake and river beds and to negate and eliminate customary ownership. Secondly, legislation governing freshwater fisheries in New Zealand was primarily angled towards the acclimatisation and management of exotic fish species, the introduction of which had a lethal effect on the indigenous species of customary Maori lake and river fisheries. The Crown's view throughout the 1912 to 1983 period was that Maori rights concerning

23. 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

rivers and lakes and their ecosystems were confined solely to the right to take indigenous fish. Crown actions in this regard took two forms. First, when Maori came before the courts on charges relating to fishing in waterways, and argued that the Treaty guaranteed customary fishing rights, the Crown challenged the existence of such rights in lakes and rivers, and the courts were reluctant to allow them. Secondly, when the courts actually affirmed Maori ownership rights in these environments, as was the case with many lakes, the Crown acted to extinguish them.

This exploratory overview of lakes and rivers has looked primarily at Crown actions concerning the ownership of and Maori customary rights to the indigenous flora and fauna. It has done so because these actions, the assumptions and principles behind them, and the Maori responses in contesting them, underwrote the Crown actions that followed. These were manifold, ranging from the introductions of exotic fish which ecologically transformed many lakes and rivers, to harnessing lakes and rivers for hydroelectricity or making them conduits and repositories of human waste and industrial effluent. The Crown was also an active agent in controlling lakes and rivers by way of the management regimes it established nationally, regionally and locally for catchment control and river management. Furthermore, the Crown's long-standing policies of rural land development had cumulative downstream effects, significantly altering lake and river ecology to the detriment of many species of the indigenous flora and fauna

The Crown actions that followed legal contests concerning ownership have not been researched for this overview, but they are matters that had considerable bearing on the indigenous flora and fauna of lakes and rivers, and they merit further research.

#### 10.2.4 Scenery preservation

By 1912, the transformation of New Zealand's indigenous landscape by European settlement was well advanced. During the first decade of the twentieth century, the Government paralleled its active engagement in the land settlement process with a programme of 'scenery preservation'. This was designed to 'preserve for the generations who follow a few samples of the primeval scenery that existed in the country at the advent of European occupation', as one Prime Minister put it.<sup>24</sup> But by the time the Crown began preserving scenery, land settlement was rapidly confining the indigenous

24. Rt Hon W F Massey, Minister in Charge of Scenery-Preservation, AJHR, 1915, C-6

flora and fauna to Crown and Maori-owned land. As a consequence, Maori-owned land was targeted for scenery preservation. The Premier Richard Seddon specifically referred to Maori land when introducing the initial Scenery Preservation Bill in 1903. Soon after the Scenery Preservation Act became operative, a senior Crown official stated that 'to exempt Native lands from acquisition for scenery purposes would practically nullify the Act as the bulk of the scenic and historic spots, especially in the North Island are either native owned or Native Reserves'.<sup>25</sup>

Reserving land with indigenous flora and fauna for its scenery was first contemplated in legislation and policy in the mid-1880s,<sup>26</sup> but designated 'scenic reserves' were not introduced until the Lands Act was passed in 1892. This Act enabled the Governor to reserve 'any land wherein or whereon natural curiosities or scenery may exist of a character to be of national interest'.<sup>27</sup> This amendment to the Lands Act was, in part, a belated attempt to preserve the source of New Zealand's growing tourist trade from the excesses of land clearance. No provision was made, either in the Act or elsewhere, for how reserves were to be decided upon and looked after. In 1901, the reserves were vested in the Department of Tourist and Health Resorts. During the first decade of the twentieth century, 265 reserves of various kinds were declared under the Lands Act.<sup>28</sup> By 1903, scenery preservation had its own Act, and a government commission that actively sought to give legal protection to land with scenic values. By 1920 almost half of the thousand or more scenic reserves which exist in New Zealand today had been gazetted.<sup>29</sup>

Scenery preservation was founded on one particular culture's aesthetic of land and beauty. The Crown's attempt to construct a sense of nationhood through scenery has been called inherently culturalist for the way it wrote the natural curiosities of the land into both a sense and symbolising of identity, but in so doing wrote out the customary place of Maori in the environment of Aotearoa.<sup>30</sup> Preserving scenes gave antipodean expression to a European cultural idea whose roots have been traced to English Romanticism. The word 'scene' derives from the theatre. The idea of land as scenery, and its parallel, 'The Art of Scenic Travel',<sup>31</sup> emerged in English culture in the latter part of the eighteenth century, not much more than a century before the New Zealand Government began to pass laws to preserve scenery. The scenic travel quest, the forerunner of modern tourism, was forged in the aesthetic conventions of the 'picturesque', the 'sublime' and the 'beautiful'. These ideas reached the peak of their popularity in

25. C Robinson, Acting Superintendent, Tourist and Health Resorts, 13 September 1904; quoted in Roche, p 83

26. For example, in the debate on the first Tongariro National Park Bill, Alfred Newman proposed that 'all these natural curiosities . . . should be the property of the colony for all time', NZPD, vol 57, May 20, 1887.

27. Section 235 of the Lands Act 1892

28. L W McCaskill, *A History of Scenic Reserves in New Zealand*, Department of Lands and Survey, Wellington, 1972

29. By 1920, there were 525 scenic reserves across the country; AJHR 1920, C6, p 4

30. James Muir, 'The Changing of the Forest: Ecological Colonialism, Legislation, and the New Zealand Bush 1840 – 1920', MPhil in History thesis, University of Waikato, 1995, p.178.

31. Russell Noyes, 'Wordsworth and the Art of Scenic Travel', in *Wordsworth and the Art of Landscape*, Haskell House, New York, 1973

Europe at the time Europeans began encountering and colonising New Zealand. They were the conventions drawn upon by George Forster, the German naturalist on James Cook's 1777 expedition to the South Pacific, to express how Dusky Sound enchanted him: 'The grandeur of this scene was such, that the powers of description fall short of the force and beauty of nature, which could only be truly imitated by the pencil of Mr Hodges [an artist on the expedition]'.<sup>32</sup> Little more than a century later, English travellers were describing New Zealand's natural landscapes as 'the most beautiful scenery in the world'.<sup>33</sup>

That scenery preservation was a notion of the colonising Pakeha culture, and was not shared by Maori, was made apparent in 1906 by the member of Parliament for Eastern Maori, Apirana Ngata, when he criticised the methods by which the Scenery Preservation Commission had acquired Maori-owned land. Implicit in Ngata's suggestion that 'it would pay the colony if the Natives were approached in a proper way' was the principle that scenery preservation was culturally specific; scenery preservation was for 'the colony', and neither inclusive of Maori nor in their interest.

The years immediately before and after 1912 were very significant in this regard. The Government recognised the connections between New Zealand's natural scenery, tourism and national revenue, and so established law and policy to preserve such scenery. It determined that Maori land would need to be obtained for the purpose. In some districts, notably Rotorua where tourism was growing rapidly, the acquisition and reservation of Maori land and its indigenous flora and fauna was specified as a national priority. When Maori resisted the Crown's efforts to obtain the land base and the range and quality of indigenous environments which it sought for scenery preservation, legislation was amended to enable compulsory acquisition.

The 1910 amendment to the Scenery Preservation Act enabled the Public Works Act 1908 to be used to compulsorily acquire land for scenery preservation. It was three years before the effect of the amendment was evident in the gazetting of scenic reserves. The highest number of new reserves established in any one year was in 1912. Only three of that year's 92 new scenic reserves were formerly Maori land. The following year, however, was the year in which the most new scenic reserves were declared from Maori land. Of the 59 new reserves gazetted in 1913, 22 were formerly Maori land; more than three times the number of reserves that had been

formerly freehold. The Crown continued to acquire Maori land for scenery preservation into the 1960s, but the years from 1913 to 1917 appear to have been the peak period. In these five years, some 63 scenic reserves out of a total of 238 were created from Maori land.<sup>34</sup>

A core principle of scenery preservation legislation was the prohibition of any human use of scenic reserves, in order to preserve the indigenous flora and fauna. The 1910 amendment to the Scenery Preservation Act, which enabled Maori land to be compulsorily acquired, also provided for rights to be granted to former Maori owners of reserved lands. These included the right of the Governor to permit former owners to hunt birds not specially protected by the Animals Protection Act in the reserves created from their lands. Similarly, where former Maori lands contained urupa, the Governor could grant Maori the right to bury their deceased in those burial grounds. These provisions continue to be part of scenery preservation legislation. As far as the research for this overview has been able to establish, they have not been used.

An inquiry initiated by Eruera Tirikatene in the late 1930s revealed that only 1834 acres of Maori land was taken by proclamation between 1920 and 1935. Although the Crown was still endeavouring to acquire Maori land with indigenous flora and fauna values in order to establish scenic reserves in the 1960s, the legal provision for compulsory acquisition was used less and less after 1930. The chapter on scenery preservation in this overview focuses on the years from 1912 to 1920, when the Crown was most active in compulsorily acquiring Maori land for scenic reserves. The acquisition records of a small number of scenic reserves that were acquired by the Crown in this period were studied for this overview. It is suggested that, for the purposes of the indigenous flora and fauna claim, this is the main aspect of scenery preservation that requires further research.

Paralleling the scenery preservation imperative from the 1920s were an emergent sense of nationhood among Pakeha New Zealanders and a growing populist regard for the indigenous flora and fauna. Although this public consciousness was influential in the evolution of the national park concept between the 1920s and the 1950s, it had limited impact on scenic reserves legislation, other than a 1926 amendment to the Scenery Preservation Act which made provision for 'setting apart' areas for 'the preservation or protection of the native flora or fauna of New Zealand'.<sup>35</sup> Popular regard for the indigenous flora and fauna did not particularly manifest itself in the scenic reserves component of the conservation estate until the

34. Annual figures of land acquisition for scenery preservation for the early post-1912 period are derived from figures in Roche, p 92.

35. Section 4 of the Scenery Preservation Amendment Act 1926

mid-1960s, when ecological representativeness started to become a major focus of reserves policy.<sup>36</sup> The great majority of scenic reserves have kept their original purpose as roadside beauty spots for travellers. This is evident in their small size compared, say, to national parks. In 1983, New Zealand's 10 national parks comprised some 2,051,000 hectares or 7.66 per cent of the nation's land area, whereas its 1157 scenic reserves comprised only 352,600 ha or 0.71 per cent of the country. Most reserves were less than five hectares in area. The great majority of the smaller reserves, occurring in the coastal and lowland zones in the main, were gazetted between 1912 and 1920 – the period in which most Maori land was acquired.

### 10.2.5 National parks

The national park idea in New Zealand originated with Tongariro National Park. In 1887, Te Heuheu Tukino sought to save the native integrity of Tuwharetoa's mountains by placing them under the mana of Queen Victoria, and thus stave off the Crown's subdivision of tribal land. This act is called the 'Gift', formed the genesis of the park.

The national park idea subsequently became a cornerstone of nature conservation in New Zealand. National parks are the areas acquired by the Crown in order for people to experience, as visitors, nature relatively untouched by the modern world. As areas in which land with indigenous flora and fauna is preserved from the impacts of human settlement, national parks have become among New Zealanders' most highly regarded landscapes, and are vital to the tourist industry.

The fundamental precept of national park law and policy is the 'preservation of . . . native plants and animals . . . ecological systems . . . and natural features', and the maintenance of environments in 'their natural state'. These principles have their roots in the European aesthetic tradition.<sup>37</sup> New Zealand's national parks were founded on the approach established in Yellowstone National Park in the western United States in the 1870s, which sought to preserve land in its natural state by completely excluding human habitation and use, other than as visitors. Like scenery preservation, national parks had their origin in the colonising process. Integral to the process in New Zealand was an immigrant culture's perception of land and nature overwhelming and eliminating a native culture and its perceptions.

36. Referred to in section 10.2.8 below

37. Quotes from part I of the National Parks Act 1980

In all but a few New Zealand national parks, this has not been much of an issue. Most national park land is in mountainous, high country environments that, while auspicious in Maori traditions, were subject to only ephemeral and seasonal Maori settlement at most.

None the less, the national park imperative in New Zealand, which sought to set land apart from human settlement, preserve it in 'its natural state' and ensure that its indigenous flora and fauna were interfered with 'as little as possible'<sup>38</sup> acted against the incorporation of Maori customary rights of access to, and association with, the indigenous flora and fauna, or the involvement of tangata whenua in national park operations. Other than representation on two national park boards, Maori were notably uninvolved with national park matters between 1912 and 1983.

But while the national park concept in New Zealand was characterised by the exclusion of Maori customary natural resource rights, it could not be argued that national park policy or legislation were used in any general way against the Maori interest. The Crown did not use national parks as a general mechanism to secure its ownership and control of Maori lands and their constituent indigenous flora and fauna. Nor did national park policy and legislation function to extinguish Maori customary rights over such land. Of the national parks established between 1912 and 1983 only one, Te Urewera National Park, was established from a land base of which a substantial proportion was Maori-owned.

Te Urewera iwi were not averse to keeping their lands in their natural state. Indeed, well into the twentieth century, the region was distinguished from the rest of the country by the extent to which its tangata whenua continued to hold a relationship with the indigenous flora and fauna. It was a relationship for which Te Urewera iwi assumed ancestral rights, and was as much about the use of the indigenous flora and fauna as about their conservation.<sup>39</sup> Some of the actions the Crown took to effect its objective of creating a national park in Te Urewera, such as the prohibition on milling it imposed on Maori forest owners, acquiring Maori land for 'scenic purposes' but using it for other purposes and the pressure it put on Te Urewera iwi to release their lands for national park acquisitions, might have abrogated the ancestral rights of Te Urewera iwi.

Te Urewera is the national park in which a historical analysis of the Crown's actions most particularly raises questions with respect to Treaty of Waitangi principles. The Crown had demonstrated its interest in Te Urewera for its natural scenery and potential for tourism since the 1890s.

38. Condensed from ss 1–3, National Parks Act 1952

39. Diane Crengle, 1993 *Taking Into Account the Principles of the Treaty of Waitangi*, Ministry for the Environment, Wellington

From the 1930s there was also considerable Crown interest in the settlement and utilisation of Te Urewera lands, and disagreements arose between Crown land agencies as to which parts of Te Urewera should be settled and developed and which should be conserved in their natural state. After joint-departmental investigations of the Urewera Native Reserve to try to resolve these disagreements, Crown officials began stating that the forested country of Te Urewera ‘should be made a National Park, for which purpose it is undoubtedly well adapted.’<sup>40</sup> From the late 1930s, the Crown objective became ‘the preservation of the greater portion of the Urewera in its natural state’.<sup>41</sup> This was achieved when the Urewera National Park was gazetted in 1954. The Crown decided in 1948 that ‘a gradual policy of acquisition of Maori land would be pursued’.<sup>42</sup> But although senior Crown officials stated that ‘it is essential that the goodwill of the Natives should be secured, as without it the adequate protection of the Crown areas might easily become exceedingly difficult’,<sup>43</sup> it would seem there was negligible consultation on the part of the Crown with Te Urewera iwi.

Two major studies on the impact of Crown actions in Te Urewera on its iwi have concluded that the central imperative of Crown policies throughout this period was to wrest control of the forests from their ancestral iwi in order to create the national park.<sup>44</sup> Both studies concluded that Te Urewera iwi were very considerably disadvantaged by the national park and by the actions taken by the Crown which led to it being created from their whenua. Both studies suggested that Te Urewera iwi have been insufficiently included in the national park’s management, and that the situation is one that needs repair.

### 10.2.6 Animal and plant protection

Some of New Zealand’s indigenous flora and fauna, birds in particular, have proved to be especially vulnerable to the respective waves of human settlement. A massive loss of bird habitat occurred in the second half of the nineteenth century as a consequence of agricultural settlement. By 1912, Pakeha sportsmen, and Maori birders who continued to exercise their customary rights in a landscape grossly depleted of its indigenous forests and wetlands, were making such huge demands on native birds that the Government passed laws proclaiming most species to be absolutely protected.

40. Under-Secretary of Lands to Minister of Lands, 24 February 1936, F1 8/2/5, Urewera Country, vol 3, 1923–1937, BAHT 1466/445a Urewera Country, NA Auckland; cited in Campbell p 26

41. Ibid

42. Memorandum from Under-Secretary of Lands and Asst Director of Forestry to Minister of Lands and Commissioner of State Forests, 23 December, 1948, Urewera Country: Crown Land and Maori Lands, in BAHT 1466/547b, NA Auckland

43. Under-Secretary of Lands to Minister of Lands, 24 February 1936, file 8/2/5 Urewera County, vol 3, 1923–1937, NA Wellington; cited in Campbell, p 26

44. Evelyn Stokes, J Wherehuia Milroy, Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere: People, Land and Forests of Te Urewera*, University of Waikato, Hamilton, p 36; Leah Campbell, *Te Urewera National Park 1952–75*, Urewera Overview Report for the Crown Forestry Rental Trust, Wellington, 1999

These ‘animal protection’ laws had a significant and widely valued effect on preserving the indigenous flora and fauna. Had they not been enacted when they were, and maintained in subsequent legislation, it is probable that many indigenous bird species would no longer survive. But the Crown introduced its animal protection laws into a landscape whose indigenous culture had evolved highly elaborate birding customs. This led to ongoing Maori resistance. Maori members of Parliament vigorously opposed the animal protection laws when they were first introduced in the early 1900s, arguing that the Pakeha settlers who had cleared land and introduced foreign predators were the cause of the massive decline in native bird numbers. None the less, in the language of Crown animal protection officers and acclimatisation society rangers, Maori birders became ‘poachers’ and were considered a major cause of the decline of indigenous bird numbers.

Soon after 1912, the animal protection legislation was amended to enable particular areas to be designated ‘sanctuaries’ for the protection of indigenous fauna. Early examples were the islands of Hauturu, or Little Barrier, and Kapiti, both of which had been significant sites in Maori terms. Hauturu’s iwi, Ngati Wai, were evicted by military force in the 1890s when the Crown acquired the island as ‘a Forest Reserve as a place of shelter for the indigenous birds of New Zealand’ free from the stoats and other introduced predators on the mainland.<sup>45</sup>

For almost a decade after 1912 some customarily hunted native bird species, notably kereru, were legally classified as ‘native game’. They were not statutorily protected, but subject to periodic closed seasons. Some districts in which customary Maori birding remained a way of life, notably Te Urewera, were exempted from closed season provisions. But Maori continued to hunt kereru and other birds throughout the country, and to cite the Treaty of Waitangi as giving them the right to do so. In 1917, one acclimatisation society whose ranger was having trouble apprehending Maori birders asked the Department of Internal Affairs to obtain an opinion from the Crown Law Office on the standing of the Animals Protection Act with respect to the Treaty of Waitangi. The Crown Solicitor replied that Maori enjoyed no special rights to the kereru. He said that if the Treaty of Waitangi meant to give Maori ‘such an exclusive right . . . no legislation has been passed conferring the right’.<sup>46</sup> He compared the situation with fisheries. But he said the position was ‘stronger against Maoris with regard to Native game than it is with regard to fish because “fisheries” are

45. Ross Galbreath, *Walter Buller; The Reluctant Conservationist*, Government Printer, Wellington, pp 165, 182

46. ‘Native Pigeons and the Treaty of Waitangi – Report of Crown Solicitor, Crown Law Office’, 27 September 1917, IA 1 25/12/4, NA

referred to in Article II of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty'.<sup>47</sup>

With the enactment of the Animals Protection and Game Act 1921, the Crown banned all hunting of kereru and terminated the exemptions that had existed in districts like Te Urewera. No longer were Maori forested lands exempted from the Crown's governance of native birds. By this date, legislation had effectively transferred authority over New Zealand's native birds from Maori to the Crown. Yet in Te Urewera – and in many other districts – the Crown's animal protection officers and the acclimatisation society rangers to which the Crown delegated powers (and partially funded) had difficulty carrying out this legal strategem. Constant flouting by Maori of the Crown's wildlife laws in the early 1920s led to questions in Parliament. Asked whether the Government could 'compel the Maoris to comply with the Act', the Minister of Internal Affairs could only say that he did not know whether the Government could 'compel them or not, but this is the Act as it stands, and it applies to Maori'.<sup>48</sup>

The animal protection laws were enacted and amended several times up until 1921, and became the permanent foundation of laws in this regard until 1983. In the process, any customary rights to native birds that article 2 of the Treaty of Waitangi might have guaranteed Maori were effectively nullified. The few exceptions were Crown agreements with certain iwi for the harvesting of titi, whalebone and feathers, and a provision in scenic reserves legislation since 1910 authorising the Minister to 'grant to Maoris . . . from time to time . . . the right to take or kill birds within any scenic reserve which before the reservation or taking thereof was Maori land'.<sup>49</sup> The provision in the 1953 Reserves and Domains Act, for example, required that such hunting was not 'in contravention of the provisions of the Wildlife Act, 1953, or any regulations or Proclamation or notification under that Act'.<sup>50</sup> The research for this overview revealed no instance of provisions of this kind being implemented between 1912 and 1983.

Partial as it is to the Crown's view, the record of Crown actions reveals that of all matters concerning the indigenous flora and fauna, the outlawing of Maori customary rights to native birds ranks with the legal assumption of ownership of the foreshore as having been the most contentious among Maori. Kereru was inevitably at the centre of this contention; many Maori continued to act as though the Crown's laws regarding kereru never existed or did not apply to them. A significant portion of the record of the Crown's activities in relation to animal protection consists of

47. Report of Crown Solicitor, Crown Law Office, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917, IA 1 25/12/4, NA Wellington

48. NZPD, 1921, vol 191, p 376

49. Section 7 of the Scenery Preservation Amendment Act 1910

50. Where the 1953 Reserves and Domains Act referred to the Wildlife Act 1953, earlier scenery preservation legislation referred to the Animals Protection Act.

reporting the efforts that wildlife agencies mounted to apprehend Maori birders.

The relationship between the Crown and certain iwi regarding titi, or muttonbirds, stands in marked contrast to the legal situation pertaining to kereru. This is especially so in Murihiku, where customary harvesting of titi has continued from traditional times to the present under agreements between the local iwi and the Crown. The Waitangi Tribunal has already commented on the lack of any breach of Treaty principles in the Crown's actions in this regard, in *The Ngai Tahu Report*.

Plant protection by the Crown has had quite a different history from animal protection. Not only does Crown law afford protection to plants through different Acts from those which protect animals, it does so in different ways. Furthermore, while animal protection legislation has been widely used and has a complex history of legal amendment, the Plant Protection Act has been little used and remains unmodified after being enacted in 1934.

While the animal protection legislation began protecting indigenous species by listing them as statutorily protected, when plant protection began in 1934 under the Native Plants Protection Act, it protected all indigenous species considered to be plants at the time. Animal protection legislation, such as the Animals Protection and Game Act 1921 and the Wildlife Act 1953, established and policed protection for listed native animals wherever the listed species occurred. However, other than under the very little-used Native Plants Protection Act, native plants have only had Crown law protection where they occur in declared conservation lands such as reserves and national parks. This has been effected by Scenery Preservation, Reserves and National Parks Acts which have prohibited cutting, breaking or removing native plants. The Reserves Act, in this regard, does give the Minister of Lands the power to allow very limited harvesting of native plants for Maori customary purposes. If such allowances were ever made, no record of them has been seen in this research. Nor was any instance observed in the archival research undertaken for this study of the Plant Protection Act having any impact on Maori.

### **10.2.7 The Crown's relationship with acclimatisation societies**

Historically, acclimatisation was undertaken in New Zealand by the Anglo-settler culture as part of the establishment of an agricultural economy

and to enable recreational hunting and fishing. In the early 1860s, settlers began forming acclimatisation societies to facilitate the introduction of foreign plants and animals. Parliament empowered the introductions and societies alike with statutes designed to ‘encourage’ acclimatisation.<sup>51</sup> The environments of primary interest for the anglers, hunters and rangers of the acclimatisation societies – the lakes and rivers, and coastal and swamp ecosystems – were some of the most significant to Maori because of the indigenous flora and fauna they supported. Many of these land-and-water environments were so comprehensively changed by the introduction of alien species that they effectively became different ecosystems.

Consequently, the relationship between Maori and the Crown-supported acclimatisation societies was rarely founded on cooperation. As the Waitangi Tribunal has already observed concerning Ngai Tahu, the societies’ emphasis on introduced species, based on European views of what was suitable for food and what for sport, differed greatly from Maori who wanted to retain their own food resources.

With the encouragement of the Crown, the acclimatisation societies had, by 1912, introduced some 130 or more species of birds, about 40 species of fish, and over 50 species of mammal to New Zealand. About 30 of the birds, about 10 of the fish, and about 30 of the mammal species subsequently became established in the wild.<sup>52</sup> It was these early introductions, in the main, that made some of New Zealand’s lake, river and swamp ecosystems among the most ecologically transformed on earth. Among them are many that were likely to have been taonga at the time the Treaty of Waitangi was signed.

The Crown has at all times retained ultimate legislative control in its partnership with acclimatisation societies. But from the beginning, the Crown delegated many regulatory powers to the acclimatisation societies. This included some of the powers over indigenous fauna it acquired when it acquired sovereignty under the Treaty of Waitangi. The consequent authority that the acclimatisation societies exercised through the latter part of the nineteenth century – and on through much of the period up until 1983 – was directed towards Maori who violated animal protection legislation. This delegated authority has been described by Robert McDowall in his history of acclimatisation, *Gamekeepers of the Nation*, as being without peer anywhere else in the world.

51. Animals Protection Act 1867: ‘an Act to Provide for the Protection of certain animals & for the Encouragement of Acclimatization Societies in New Zealand’, 10 Oct 1867, no 35; cited in McDowall, pp 55, 470

52. McIntock, *Encyclopaedia of New Zealand*, Government Printer, 1962, vol 1, pp 3–4

The Crown's initial acclimatisation laws were intended to facilitate the establishment of foreign species in the wild and safeguard them from poachers. This legislation was concerned almost entirely with the welfare of introduced species. But after the 1867 Animals Protection Act, animal protection and acclimatisation laws also made specific references to the indigenous fauna. Indigenous species were described as 'native game' as distinct from the 'game' species that were imported and acclimatised. The 1873 amendment to the Animals Protection Act specifically referred to 'native game' with respect to the powers held by acclimatisation society rangers and hunting and fishing licences.<sup>53</sup> There was no reference in the amendment to Maori having rights in regard to the indigenous fauna that were classed as 'native game'.

By the beginning of the twentieth century, the New Zealand landscape was in an advanced stage of profound ecological transformation. Many indigenous fauna species, like kereru, which had been favoured and plentiful 'native game' were in obvious and dramatic decline. This caused widespread concern. As public and political opinion shifted from the ready assumption that introduced species would eventually replace New Zealand's native species, towards the idea that the native species themselves needed protection, the animal protection laws began to change. In the process, the acclimatisation societies' functions were extended to embrace the welfare of indigenous species as well.

By 1912, acclimatisation societies were licensing fishers and hunters and policing the Animals Protection Act under powers delegated by the Crown. They were, in this sense, like local government agencies. Courtesy of the Crown, the societies gained regulatory power over land and water resources and animal habitats which the Crown considered it owned on behalf of the nation.<sup>54</sup> Public funds were directly injected into the societies' coffers for a range of acclimatisation purposes, and the Animals Protection Amendment Act 1920 contained a provision for the societies to use moneys from licence fees and fines to facilitate their activities, including research.<sup>55</sup>

But the 1920s also heralded the beginnings of public criticism of the acclimatisation imperative and the acclimatisation societies' powers. Beginning with the Animals Protection and Game Act 1921, a shift in emphasis from acclimatisation and introduced species to indigenous species and their environments is discernible in animal protection legislation. The species that featured most in the criticisms that were made of the

53. Animals Protection Amendment Act 1873, [No 42, Cl32]; cited in McDowall, p 57

54. These are summarised in McDowall, *Gamekeepers for the Nation*, Canterbury University Press, Christchurch, p 53

55. Section 6(2) of the Animals Protection Amendment Act 1920

acclimatisation societies was the possum. The societies played a major role in the possum's introduction around the country, and it was not declared a noxious animal until 1956.

By the late 1930s, the acclimatisation societies were spending at least a third of their income from licences and fines on 'ranging and protecting native birds',<sup>56</sup> a fact that the societies were using to defend themselves against the criticism of the growing nature conservation movement (notably the New Zealand Native Bird Protection Society, the precursor of today's Royal Forest and Bird Protection Society). The Native Bird Protection Society was critical of the acclimatisation societies' commitment to the protection of the indigenous fauna and the powers the Government had delegated to the societies in that regard. The result was increasing regulation of the acclimatisation societies in the Wildlife Act 1953.

These changes were not welcomed by the acclimatisation societies, and they were part of an increasingly constrained relationship with the Crown that culminated in the societies' disestablishment in the late 1980s. They were replaced by regional Fish and Game Councils as part of the restructuring of the wider Government environmental sector. But although they lost some of their former influence, between 1953 and 1983 the acclimatisation societies remained a major force in the many issues involving the indigenous fauna. This was most evident, perhaps, in relation to the wild and scenic rivers legislation.

#### **10.2.8 Crown research into the indigenous flora and fauna: biological surveys for conservation**

Central to the process of protecting the indigenous flora and fauna, as the Crown has done in national parks and scenic reserves, is the way in which 'nature' has been represented and its primary elements, the indigenous flora and fauna, given value. In New Zealand, this assessment of value was largely made by biological scientists working in Crown research agencies.

Valuing the indigenous flora and fauna was undertaken exclusively by Crown officials trained in the western scientific tradition. It did not embrace *matauranga Maori* in any way. The Crown research institutions who undertook the surveys and scientific evaluations of the indigenous flora and fauna, and the Crown land management agencies who commissioned them, involved no Maori personnel in any way. This effective exclusion of Maori from the domains of Crown activity concerning the governance,

56. Wellington Acclimatisation Society, 1938, quoted in McDowall, p 155

care and knowledge of the natural world was not deliberately anti-Maori. It was a consequence of many factors, not least the fact that few Maori were educated in the sciences to the tertiary level from which the Crown's research agencies recruited personnel. But it contributed to creating a cultural disjunction between many Maori and the Crown governance of the conservation estate.

The conceptual basis that eventually led to Crown research scientists undertaking surveys and determining the 'scientific values' of the protected areas in the Crown's conservation estate was not formalised in legislation until 1926. An amendment to the Scenery Preservation Act that year contained the first provision for 'setting apart' areas for 'the preservation or protection of the native flora or fauna of New Zealand'.<sup>57</sup> But it was scenic, not scientific values that dominated the purposes of protecting indigenous environments until 1965, when public concern about the ecological state of the nation's scenic reserves led to a major reassessment of the reserves' purposes. Prior to the 1960s, Crown research into the indigenous flora and fauna had been predominantly taxonomic.

The Crown's 1965 assessment of the nation's scenic reserves identified the need for a basic inventory of the conservation estate in indigenous flora and fauna terms. Underwriting this assessment was an assumption that the indigenous ecology of any New Zealand landscape had a particular 'original' nature that could be defined and delineated by scientific ecology. This led to some small-scale ecological surveys by the Department of Scientific and Industrial Research, and then to a series of national scientific surveys in the 1970s and 1980s, which culminated in the New Zealand Protected Natural Areas Programme. Surveying New Zealand's natural environments became a major Crown research effort. The favoured unit for survey, classification and evaluation was vegetation 'type'. This led to the concept of ecological representativeness (determined largely by vegetation type) becoming a major determinant of indigenous flora and fauna value. A significant result of this research was a major legislative change which incorporated ecological representativeness as a primary purpose of reserves. In the Reserves Act 1977, the representativeness of natural ecosystems and landscapes paralleled scenic value in the stated purposes of New Zealand's conservation reserves.

57. Section 4 of the Scenery Preservation Amendment Act 1926

### **10.3 A SYNTHESIS OF CROWN ACTIONS CONCERNING THE INDIGENOUS FLORA AND FAUNA BETWEEN 1912 AND 1983**

Researching and writing an analytical narrative of Crown policies, practices, actions and inactions with regard to indigenous flora and fauna for the period 1912 to 1983 is not like reporting the history of a particular Crown programme or institution, an iwi, a geographic claim or even a resource category like lakes or rivers. The principal theme – the indigenous flora and fauna – embraces a very wide range of matters. It featured in a wide range of Crown actions and in the histories of many Crown agencies. Although there were many occasions when Crown agencies cooperated on programmes, and cross-referenced between legislation such as the Reserves, National Parks, Wildlife and Fisheries Acts, there was no unity of structure or organisation on the part of the Crown under the heading of ‘indigenous flora and fauna’.

However, when the themes which comprise the eight chapters summarised above are looked at in synthesis there are matters on which a general impression can be reported. Not least of these are the shifts in Crown law and policy concerning the indigenous flora and fauna, as the Crown responded to changing attitudes in the late colonial era around 1912.

A concluding synthesis can also be made concerning the way in which Crown law and policy concerning the indigenous flora and fauna served to effectively write Maori (and Aotearoa) out of both the natural history of New Zealand and the national systems developed for the conservation of the indigenous flora and fauna. A related, though separate, section highlights the historical situations in which Crown officials referred to the Treaty of Waitangi in respect of the indigenous flora and fauna.

In the following sections, five particular periods in which these historic shifts are most evident are highlighted. These periods are presented chronologically, but they are not contiguous with one another.

#### **10.3.1 The decade straddling 1912 (1907–1917)**

When the Waitangi Tribunal established the parameters for this project, 1912 was selected as the commencement date. That year saw a change of Government that was significant in terms of Crown policies concerning Maori land. However, in terms of the Crown’s actions concerning the indigenous flora and fauna and their bearing on Maori, 1912 was the mid-point in a decade of substantial legislative and policy activity. Partly

for that reason, a section on the period immediately prior to 1912 is included in each of the thematic chapters in this report.

In 1907, when Apirana Ngata criticised the methods by which the Crown's scenery preservationists were endeavouring to acquire Maori-owned land, he did so by saying that 'it would pay the colony if the Natives were approached in a proper way'. In the same year, New Zealand became a Dominion and officially ceased to be a colony. Only a decade later, in the wake of Gallipoli, any reference in the archival record to New Zealand being a colony was negligible.

A related interpretation of the term colony is used by Alan Ward in his 1997 *National Overview* report for the Waitangi Tribunal. Ward characterises colonisation as a struggle for the control of valued resources, notably land. Integral to the New Zealand colony was the sharp conflict of interest between Maori and settler. Needing land, forests and fisheries, the Crown and the settlers were not willing to include Maori in the institutions of government, unless Maori acceded to the continued alienation of those resources.<sup>58</sup>

The year 1912 is in the middle of a crucial decade in that regard. The legal historian Paul McHugh describes this period of New Zealand's history as one of 'juridical as well as actual submission of native peoples to the authority of Anglo-settler authority'. By about 1907, most of the Maori-owned land needed for European settlement had been obtained and its appropriation was no longer central to Government policy. It was a time when the 'passing of the Maori' was widely seen as inevitable and imminent. Crown legal opinion anticipated the eventual assimilation of Maori into a culturally undifferentiated population.<sup>59</sup> But the Crown also believed that any legal recognition of Maori customary rights that gave them separate, special status would be undesirable and discriminatory – as well as an impediment to state progress.<sup>60</sup> A succession of new laws between 1907 and 1912 collapsed the mana and vitality of Maori customary rights and titles by making them unassertable against the Crown.

Residual Maori rights were legally protected in a few instances, such as the 1908 Fisheries Act's guarantee that nothing in the Act 'shall affect any existing Maori fishing rights'. But, as Claudia Orange has written, the Crown's view was that such customary rights 'could be tolerated, because they were destined to fall into disuse; amalgamation and a declining Maori population would carry New Zealand closer to the attainment of that . . . Waitangi promise of one people under one law'.<sup>61</sup>

58. Alan Ward, Executive Summary, in *National Overview*, Waitangi Tribunal Rangahaua Whanui Series, 1997, vol I, p 30

59. Paul McHugh, 'Aboriginal Identity and Relations in North America and Australasia', in Ken S Coates and P G McHugh, *Living Relationships: Kokiri Ngatahi*, Victoria University Press, Wellington, 1998, p 109

60. Paul McHugh, 'Australasian narratives of constitutional foundation', in Klaus Neumann, Nicholas Thomas and Hilary Ericksen, Editors, *Quicksands: Foundational Histories in Australia and Aotearoa New Zealand*, University of NSW Press, Sydney, 1999, p 103

61. Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, Port Nicholson Press, Wellington, 1987, pp 188–89

The Crown did not display tolerance when Maori seriously challenged the paramountcy of its authority. The Crown actively sought to remove indigenous rights. Thus, when Te Arawa made an application to the Native Land Court to determine title to the beds of the Rotorua lakes, the Crown countered the challenge through the courts. When the Court of Appeal rejected the Crown's argument, the Crown resolved the issue by passing legislation to secure title.

Where Maori did not mount substantive action to claim customary rights to the indigenous flora and fauna in this period, the Crown took a passive stance. Prior to the Animals Protection and Game Act 1921, for example, kereru was protected by declaring closed seasons which prohibited hunting the bird. Maori did not challenge that law, but widely ignored it, claiming Treaty of Waitangi rights to kereru. The acclimatisation society rangers who enforced the law sometimes sought Crown assistance to prosecute Maori offenders. On one occasion an acclimatisation officer asked the Crown if Maori had rights under the Treaty of Waitangi to shoot native pigeons. The Minister of Internal Affairs replied that the Crown was not prepared to answer the question.<sup>62</sup> When, in 1917, another acclimatisation society requested a Crown Law Office opinion 'to contradict authoritatively a very prevalent idea that because of the Treaty of Waitangi, Maoris can shoot a Pigeon when European sportsmen are debarred from doing so', the Crown Solicitor simply advised that Maori enjoyed no special access rights to the kereru. He said that 'anything in the Treaty of Waitangi cannot affect this position. Whatever force or effect that the Treaty may have nothing therein can override the direct provisions of a statute'.

The Crown Solicitor based his opinion on the related issue of access to fisheries under the Treaty of Waitangi, specifically a Supreme Court decision that found Maori had no claim to tidal fisheries because no prior legislation had granted them that right.<sup>63</sup> But he considered that 'the position is stronger against Maoris with regard to Native game than it is with regard to fish because "fisheries" are referred to in Article II of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty'. Significantly, the Crown Solicitor stated that his assessment was not binding on the court, especially 'in the present confused state of the Animals Protection law'. The legal situation was sufficiently uncertain that he did 'not think that any Society should be given a copy of a Law

62. Refer to section 7.4.1.1 in chapter 7 of this report for further detail.

63. Namely, *Waipapakura v Hempton*, 33 NZLR 1065

Officers opinion either for themselves or for their Rangers to produce in Court'.<sup>64</sup>

Between 1907 and 1917 a succession of Crown laws and policy actions had a substantive bearing on the customary relationships that Maori had with the native plants and animals:

- ▶ The Animals Protection Amendment Act 1907 prohibited customary trapping or snaring of 'native game', enabled the Governor to prohibit the destruction of any indigenous bird, provided for native birds to be declared absolutely protected and for closed seasons for 'native game'. Together with a subsequent amendment in 1910, these Acts substantially removed customary Maori authority in regard to native bird species and laid the foundation for future animals protection and wildlife legislation.
- ▶ Commencing work in 1907, the Government's Scenery Preservation Board considered 'acquisition and reservation of Maori lands containing thermal attractions in the Rotorua District' and 'acquisition and reservation of land on the banks of the Whanganui River' to be two of its four priorities. These were both areas of particular significance to Maori.
- ▶ The Native Land Act 1909 provided for native customary title to be made unassertable against the Crown.
- ▶ The Scenery Preservation Amendment Act 1910 was enacted to enable land to be taken under the Public Works Act 1908 'so as to give the Crown an undoubted right to take for scenery-preservation purposes lands at present held by Native owners'.<sup>65</sup> It overcame what Crown scenery preservation officials considered the main legislative stumbling block to acquiring land and indigenous flora and fauna for scenery preservation.
- ▶ In 1913, the Government's Royal Commission on Forestry determined that as a general principle 'no forest land which is suitable for farm lands, except if it is required for a scenic or climatic reserve should be permitted to remain under forest if it can be occupied and resided upon' and that because 'no land is more suitable for occupation than that of the white-pine [kahikatea] swamps, when drained' it recommended those forests be removed from the landscape 'forthwith'.<sup>66</sup>
- ▶ The Department of Internal Affairs reported that in 1913 the Rotorua and Taupo acclimatisation societies paid local hunters 0500 in

64. Refer to section 7.4.1.1 in chapter 7 of this report for further detail.

65. NZPD, 1910, vol 153, p 890

66. Report of the Royal Commission on Forestry, AJHR, 1913, C-12, pxxiv

bounties to ‘extirpate’ native shags until they ‘were all destroyed’, in order to protect rainbow trout.<sup>67</sup> Between 1914 and 1915, 2064 shags were killed this way in the Government’s effort ‘to rid the district of these birds’.<sup>68</sup>

- ▶ In the 1914 case *Waipapakura v Hempton* the Supreme Court ruled that generally, the Treaty of Waitangi was not enforceable in the New Zealand courts, and that the Fisheries Act 1908 did not create particular fishing rights for Maori of the kind the Treaty allowed.
- ▶ The Animals Protection Amendment Act 1914 enabled the Public Works Act 1908 to be used to acquire any land ‘as a sanctuary for imported or native game or for the breeding and preservation of such game in the same manner in all respects as if such land were taken for a public work’ under that Act.<sup>69</sup>
- ▶ The Swamp Drainage Act 1915 enabled the Governor to declare any area of land to be a drainage area, and ‘to take, under the Public Works Act, 1908, as for a public work, or purchase (whether under the provisions of Part XIX of the Native Land Act, 1909, or otherwise), any area of land within the drainage area the acquisition of which is, in his opinion, necessary for the more effective carrying-out of the drainage or other works authorised by this Act, or for the better disposal of the Crown or other land within the drainage area’.
- ▶ Influenced by the Supreme Court’s decision in *Waipapakura v Hempton*, the Solicitor General Sir John Salmond determined in 1916 that the inner harbour of Whanganui-a-Orotu, whether it had been included in the Crown’s purchase of the surrounding area or not, was tidal water. Maori customary title extended only to the high water mark. Salmond stated that ‘whatever the title of Natives may be to inland non-tidal waters they have no title to any part of the sea, whether land-locked or otherwise’.<sup>70</sup> Salmond’s determination was to have widespread application in foreshore matters.
- ▶ In 1917, the Solicitor General Sir John Salmond issued instructions that the Crown should be represented at the Native Land Court hearing concerning Te Arawa’s application for title to the Rotorua lake beds and should ‘dispute the rights of the Natives to obtain freehold orders for the inland navigable waters of the Dominion’. Salmond was of the opinion that Native customary title was limited to dry land and did not include waters.<sup>71</sup>

67. AJHR, 1913, H-2. For example, the AJHR 1914 H-21 ‘Fishing at Lakes Rotorua and Taupo’, stated that ‘[d]uring the season 1,506 shags were destroyed at Taupo and Rotorua’.

68. AJHR, 1915, H-21, ‘Fisheries at Lake Taupo and Rotorua: Destruction of Shags’

69. Section 2(1) of the Animals Protection Amendment Act

70. Salmond to Under-Secretary of Lands, 28 August 1916, cited in Boast, p 39. A copy of the file is Document #A8(d), ROI, WAI 55

71. Refer to section 4.3 in chapter 4 of this report for further detail.

### 10.3.2 1921–1926

This was the high point in a crucial shift of emphasis in animal protection legislation. Acclimatisation and introduced species lost their previous importance, and protecting indigenous species and their environments became increasingly significant. The Animals Protection and Game Act 1921 was a turning point in this regard. The Act was a dramatic shift towards unilateral Crown control of all indigenous fauna. In particular, in declaring the kereru absolutely protected throughout New Zealand (revoking its status as ‘native game’ which had meant it could be hunted in some years since the 1910 amendment), the Act effectively completed the legal alienation of Maori rights to native birds.

The Scenery Preservation Amendment Act 1926 was the first legislation to specify that ‘the preservation or protection of the native flora or fauna of New Zealand’ was a statutory purpose of Crown lands. The amendment was also significant in that it made the first legal provision for the maintenance of reserves, notably with respect to the non-indigenous species that by then were causing considerable damage to protected indigenous ecosystems. Many of the species with which the amendment was concerned had been the subject of earlier Crown acclimatisation policies to establish them in the New Zealand environment. Significantly, possums were specifically exempted from the operation of the Act.

### 10.3.3 1929–1933

This period was particularly significant in terms of the foreshore. By the early 1930s, Maori foreshore claims were widely regarded as ‘absurd and reactionary, a challenge to the state at a time when the state’s dominant role in all aspects of national life and economy was taken for granted’.<sup>72</sup> However, great concern remained in the Crown Law Office, particularly in relation to the uncertain statutory basis for the Crown’s assumption of ownership of the foreshore. In Northland, especially, a huge number of foreshore cases were pending in the Native Land Court. Crown officials sought a legal mechanism that could effectively and permanently nullify Maori claims to the foreshore.

There was concern among Crown officials at ‘the probability of native claims on an extensive scale to tidal lands as native customary lands’ in the absence of any statutory declaration of Crown ownership. Such native claims were described as posing ‘a serious danger to the undertaking of

72. R P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (first release), November 1996

reclamation works'.<sup>73</sup> The officials met on the matter in 1933 and proposed general legislation that would 'definitely remove these lands from native customary claims to ownership'.<sup>74</sup>

#### 10.3.4 1952–1953

This was perhaps the most intensive period of major statutory activity concerning the indigenous flora and fauna between 1912 and 1983. The National Parks Act 1952, the Reserves and Domains Act 1953, and the Wildlife Act 1953 were enacted. While the powers of acclimatisation societies were considerably constrained by the Wildlife Act, none of these Acts represented much change in terms of Maori and their relationship with the indigenous flora and fauna.

#### 10.3.5 1975–1983 (following the Treaty of Waitangi Act 1975)

When the Treaty of Waitangi Act 1975 was passed, the Treaty of Waitangi became part of New Zealand's unwritten constitution and the Waitangi Tribunal was established. In the early 1980s the Treaty of Waitangi Act became a factor affecting Crown programmes concerning the indigenous flora and fauna.

The Treaty of Waitangi and the lack of protection afforded to Maori fishing rights were significant themes when the 1983 Fisheries Bill was before Parliament. During the debate, most of the Maori members of Parliament suggested that the Bill should be deferred until the Maori Affairs Bill, then also before Parliament, was passed, or until the rights guaranteed to Maori under the Treaty of Waitangi gained legal recognition. In the event, the Fisheries Act 1983 made no reference to the Treaty. It did, however, continue the historic provision in fisheries legislation that 'nothing in this Act shall affect any Maori fishing rights'.

Neither the National Parks Act 1980 nor the 1983 *General Policy for National Parks* made any specific reference to the Treaty of Waitangi. However, the *General Policy* did state, with respect to liaising with local interest groups, that 'in particular, consultative procedures with local Maori groups which have historical or spiritual ties to land in national parks will be fostered, and the views of such groups will be fully considered in formulating management policies'.<sup>75</sup> In 1983, the Secretary for Maori Affairs suggested to the National Parks and Reserves Authority that the parallel

73. Legal Opinion on Reclamations (undated but almost certainly 1933), file report of conference of Crown officials, ABWN 6095 W5021/425 15/46 – Reclamations general, NA Wellington

74. Ibid

75. Ibid, p 8

‘General Policies for Reserves’ was a Treaty matter, and one ‘on which the Maori people are often not well represented’. He stated that given that ‘a good proportion of the privately owned land in New Zealand which would be suitable for reserves is now in Maori ownership’, it would be desirable ‘for all those associated with reserve policies to be aware of the principles enunciated in the Treaty of Waitangi’. The draft General Policy allowed, as had reserves legislation since 1910, for customary Maori birding where the land had previously been in Maori title. The Secretary for Maori Affairs wanted the principle reworded so ‘that all commitments about the taking or killing of birds in scenic reserves which immediately before reservation were Maori land be honoured’.<sup>76</sup>

The principles of the Treaty of Waitangi were not included in Crown laws concerning the indigenous flora and fauna until the Conservation Act 1987<sup>77</sup> and the Environment Act 1986<sup>78</sup> were enacted when environmental administration in New Zealand was restructured.

### 10.3.6 The effective exclusion of Maori and matauranga Maori from Crown actions concerning the indigenous flora and fauna

A recent commentary on the establishment of parks and reserves in New Zealand typifies the process as ‘ecological colonialism’. It describes Crown law and policy concerning the indigenous flora and fauna as serving ‘to write Maori out of’ both the natural history of New Zealand and the national systems developed for the protection of the indigenous flora and fauna. The author, James Muir, cites the Crown’s forcible eviction of Maori from Hauturu (Little Barrier Island) in the 1890s as the best example of the ‘anti-Maori position of these protection measures’.<sup>79</sup>

There is indeed considerable archival evidence supporting the argument that between 1912 and 1983 the Crown effectively wrote Maori out of both the natural history of New Zealand and its national protection systems for the indigenous flora and fauna. However, there is very little evidence throughout the vast volume of archived Crown records that have been researched for this project of Crown officials taking what could be called an ‘anti-Maori position’.

There is evidence that people policing animal protection laws on behalf of the Crown identified Maori as a particular problem. An example is the report in 1914 from a Wanganui Acclimatisation Society ranger of ‘considerable feeling amongst the settlers in the back blocks owing to the fact that

76. T M Reedy, Secretary of Maori Affairs to the Secretary, New Zealand National Parks Authority, 26 September 1984, ABJZ 869 W4644 19/15/3, p 3, NA Auckland.

77. For example in New Zealand Conservation Authority, *Finding Common Ground; He Rapunga Tahitanga*, Discussion Paper ‘Maori Customary Use of Native Birds, Plants and Other Traditional Materials’, Wellington, 1997, p 42

78. Diane Crengle, *Taking Into Account the Principles of the Treaty of Waitangi*, Ministry for the Environment, Wellington, 1993

79. James Muir, ‘The Changing of the Forest: Ecological Colonialism, Legislation, and the New Zealand Bush 1840 –1920’, MPhil in History thesis, University of Waikato, 1995

the Natives are shooting Pigeons while the whites are by law debarred'.<sup>80</sup> Similar sentiments were expressed by Crown wildlife rangers between 1950 and 1970. Maori were referred to as the 'enemy of the pigeon'<sup>81</sup> and operations were planned to 'destroy the Maori mana, by exposing probably one of the last major areas of hunting known only to the Maori'.<sup>82</sup>

Evidence that Maori were considered to be a problem is occasionally evident in Crown actions concerning the foreshore. In the early 1930s, for example, when senior Crown officials sought legislation to remove the foreshore from Maori customary claims, they did so in order to stave off 'a serious danger to the undertaking of reclamation works by the probability of native claims on an extensive scale to tidal lands as native customary lands'.<sup>83</sup>

That said, the archival record of Crown agencies between 1912 and 1983 is characterised by a general absence of any reference to Maori. Similarly, when Crown officials constructed systems for the protection of the indigenous flora and fauna, no reference was made to Maori having a place in New Zealand's natural history. Pre-existing Maori relationships with the indigenous flora and fauna were treated as no longer having any significance. The purpose of this section is to indicate what these actions might be.

The prevailing impression gained by the present author is that Crown actions between 1912 and 1983 concerning the indigenous flora and fauna generally marginalised Maori and Maori values. Collectively, Crown actions in this regard typify what the legal historian Paul McHugh recently called 'a narrative of settler-state foundation that effectively excluded the aboriginal inhabitants'.<sup>84</sup> McHugh made a comparison in this regard between New Zealand and Australia. Whereas the settler-state in Australia was founded on the supposition of *terra nullius*, the New Zealand form 'explicitly negated tribal sovereignty, which, during the mid-nineteenth century, had been such a threat to Crown hegemony'. In both countries, however, the result was the same: 'historical narratives of state foundation that licensed and supported constitutional fictions of absolute Crown sovereignty unqualified and unqualifiable by any aboriginal aspect'.<sup>85</sup>

In Crown actions concerning the indigenous flora and fauna, this 'effective exclusion' could be said to have been of three kinds:

- ▶ First, there were very few instances, anywhere in New Zealand, in which Maori customary rights were an element of the control and

80. Secretary, Wanganui Acclimatisation Society to J Hislop, Department of Internal Affairs, 4 March 1914, IA 1 23/12pt1; Francis Henry Dillon Bell, NZPD, 1914, vol 170, p 240

81. D S Main, Field Officer to the Conservator of Wildlife, Rotorua, 19 January 1959, re 'The Pigeon of the Urewera Forests', BAHT 5119/11b – Pigeon (Department of Internal Affairs), NA Auckland

82. Ranger Nilsson, Murupara, to D J Stack, Internal Affairs Department, Whakatane from 28 September 1970, re a trip 'Horse Trails and Pigeon Camps – Headwater of the Apiti Stream, Urewera National Park', in BAHT 5119/11b, NA Auckland

83. Legal Opinion on Reclamations (undated but almost certainly 1933), file report of conference of Crown officials, in Reclamations general, ABWN 6095 W5021/425 15/46, NA Wellington; see also section 3.4.1 in chapter 3 of this report.

84. It is from this statement of McHugh's that the title of the present report derives.

85. Paul McHugh, 'Australasian Narratives of Constitutional Foundation', in Klaus Neumann, Nicholas Thomas and Hilary Ericksen, Editors, *Quicksands: Foundational Histories in Australia and Aotearoa New Zealand*, University of NSW Press, Sydney, 1999, pp 103, 106–7

management structures that the Crown installed for the conservation of the indigenous flora and fauna or their ecosystems.

- ▶ Secondly, in matters concerning the indigenous flora and fauna the Crown made negligible reference to the Treaty of Waitangi between 1912 and 1983. When any reference was made, it was accompanied by legal reasoning that the Treaty had no basis in statute.
- ▶ Thirdly, a multiplicity of Crown actions in which the Crown had little or no regard for Maori caused Maori to suffer prejudicial effects. These actions might be regarded as abrogating the article 2 Treaty guarantee to Maori with respect to natural resources.

As stated above, the marginalisation of Maori and the effective exclusion of Maori customary rights by the Crown's actions in relation to the indigenous flora and fauna have been general rather than total and comprehensive. There have been a number of exceptions. These are indicated below.

#### **10.3.7 Instances of Maori customary rights being retained in Crown structures concerning the indigenous flora and fauna**

This overview has noted a few instances in which legal provision concerning the indigenous flora and fauna was made in respect of Maori. These constitute exceptions to the general trend of Crown actions excluding Maori, and include the following:

- ▶ Agreements were reached between the Crown and iwi for harvesting indigenous fauna (titi, or muttonbirds) on the Rakiura Titi Islands, as well as on several other off-shore islands.
- ▶ Very limited provision has existed in scenic reserves legislation since 1910, allowing for Maori to be granted rights to take certain native birds from reserves that were originally Maori land. This provision has always been subject to animal protection or wildlife legislation, and although still extant under section 46 of the Reserves Act 1977, it appears never to have been made operative.
- ▶ There is provision under section 55 of the Wildlife Act 1953 enabling the taking of protected species for Maori cultural and traditional uses to be authorised.
- ▶ There is provision under section 42 of the Reserves Act 1977 for the Minister to allow very limited harvesting of native plants for Maori customary purposes.

- ▶ Maori have retained ownership of the Ninety Mile Beach foreshore, and numerous other foreshores.
- ▶ Since the Fisheries Act 1908, all fisheries legislation has included the proviso that ‘nothing in this Act shall affect any Maori fishing rights’.
- ▶ Maori have retained customary rights and title to a few lakes. One example is Rotoaira, which was reserved as a Maori fishery. It was subsequently ecologically modified when trout were introduced by an acclimatisation society and the Crown used the lake for a hydroelectricity scheme.
- ▶ Limited customary fishing rights to native species in the Rotorua lakes and Lake Taupo were allowed for in agreements between the Crown and Te Arawa and Tuwharetoa in 1922 and 1926 respectively.

### 10.3.8 References to the Treaty of Waitangi concerning the indigenous flora and fauna

References to the Treaty of Waitangi in the records of Crown agencies from the 1912 to 1983 period take two highly contrasting forms: a great many Maori petitions to Parliament cited the Treaty; the Crown agencies themselves hardly ever referred to the Treaty, other than to reiterate that it had no legal authority. This can be largely explained by the fact that Maori understood the Treaty to be a pact that gave them guarantees to resources such as fisheries, lakes, foreshores and native birds. The Crown, on the other hand, adopted the position established by the courts in the 1870s that legally the Treaty was a nullity unless incorporated into domestic statutes.

This set a firm precedent for subsequent decisions by the courts, and for the Crown to ignore Maori rights in favour of Pakeha interests when Maori claimed Treaty rights. Initially, this happened in relation to Maori tidewater fishing rights.<sup>86</sup> A 1901 case, *Nireaha Tamaki v Baker*, led to the Crown adopting the principle that Maori customary law did not exist with regard to foreshore areas.<sup>87</sup> The Court’s ruling was reinforced by statutory provision in 1909, in section 84 of the Native Lands Act, which held that Maori customary title was unenforceable against the Crown. Maori were thus unable to bring proceedings in the courts on the basis of customary title for trespass on areas of foreshore.<sup>88</sup>

Maori members of Parliament referred to the Treaty at length in parliamentary debates on scenery preservation and animal protection legislation in the 1900s. None the less, the Crown’s actions at that time – and, in

86. Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, Port Nicholson Press, Wellington, 1987, pp 186–7

87. *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382

88. Boast, p 36

fact, throughout the period between 1912 and 1983 – were underwritten by the legal opinion that the Treaty had no legal application in matters concerning natural resources and Maori customary rights to them.

This project has revealed a few instances in the early decades of the twentieth century when senior Crown officials gave an opinion on the bearing of the Treaty on the indigenous flora and fauna. The first was in response to an acclimatisation society ranger who sought the Crown's assistance to prosecute Maori offenders. The ranger asked the Crown if Maori had rights under the Treaty of Waitangi to shoot native pigeons. The Minister of Internal Affairs replied that the Crown was not prepared to answer the question.<sup>89</sup>

A significant Crown decision concerning the Treaty and the indigenous flora and fauna was made a few years later. In 1917, another acclimatisation society requested the Department of Internal Affairs to seek a Crown Law Office opinion 'to contradict authoritatively a very prevalent idea that because of the Treaty of Waitangi, Maoris can shoot a Pigeon when European sportsmen are debarred from doing so'. The Crown Solicitor stated that Maori enjoyed no special rights to the kereru. He said that if the Treaty of Waitangi meant to give Maori 'such an exclusive right . . . no legislation has been passed conferring the right'.<sup>90</sup> He based his opinion on the related issue of access to fisheries under the Treaty of Waitangi, specifically a Supreme Court decision that the Treaty of Waitangi was not enforceable in the New Zealand courts and that Maori had no claim to tidal fisheries because no legislation had given them that right.<sup>91</sup> The Crown Solicitor added that the position was 'stronger against Maoris with regard to Native game than it is with regard to fish because "fisheries" are referred to in Article II of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty'.<sup>92</sup>

Despite this, Maori all around the New Zealand coast continued to believe that their fishing and foreshore rights were guaranteed by the Treaty of Waitangi. This is the predominant theme in Maori petitions to Parliament concerning the indigenous flora and fauna. From 1912 until the 1980s, a near-continuous succession of Maori petitions claimed 'that the Treaty of Waitangi meant to give such an exclusive right to the Maoris'; pleaded 'to give effect to the Treaty of Waitangi and to confirm our right and that of our children'; and prayed 'that the Treaty of Waitangi be embodied in the Statute Book of the Dominion of New Zealand'.<sup>93</sup> Maori litigants in court cases against the Crown concerning the title to lakes, rivers

89. Refer to section 7.4.1.1 in chapter 7 of this report for further detail.

90. 'Native Pigeons and the Treaty of Waitangi – Report of Crown Solicitor, Crown Law Office' 27 September, 1917, IA 1 25/12/4, NA Wellington

91. Namely *Waipapakura v Hempton* (33 NZLR 1065)

92. Report of Crown Solicitor, Crown Law Office, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917, IA 1 25/12/4, NA Wellington

93. Petition of Tahupotiki Wiremu Ratana and 30,128 others, 1932, no 239/1932/3, AJHR & LE Series, NA Wellington

and foreshores inevitably cited the Treaty's guarantee of Maori rights. However, it was very rare for the Crown or court officials to acknowledge that the Treaty did any such thing. One of the few instances was in 1929 when Judge Acheson of the Native Land Court stated that Lake Omapere's Maori regarded their lake as 'a treasured possession'. Acheson observed that, in 1840, had Omapere's Nga Puihi owners considered that would lose their title to the bed of the lake by signing the Treaty of Waitangi, they would not have done so and their numbers would have been sufficient to reject it.<sup>94</sup>

Throughout almost all of the period between 1912 and 1983, the Crown's actions with respect to the indigenous flora and fauna were determined by the assumption that the Treaty had no statutory base in New Zealand law. Speaking in a parliamentary debate in 1956 the member for Eastern Maori, Mr Omana, summed the situation up:

the Maoris were given undisturbed possession of their forests, but I know that not all of the Members of this House would agree to a Maori getting one of his true foodstuffs, the pigeon. I know that many petitioners think the Treaty of Waitangi should be embodied in the statute book so they can get this delicacy . . . As one who has presented many petitions on the Treaty of Waitangi to this House, I know that the Maoris present their petitions on reasonable grounds. We know that a treaty must be ratified to give it status. Unless a treaty is ratified it is useless, not worth the paper it is written on. That was stated during a hearing by the Privy Council in England of a petition, based on the Treaty of Waitangi, concerning forests in the National Park area. We were told we had no grounds, because the Treaty had no legal status.<sup>95</sup>

Eventually there was a change in thinking. In the mid-1980s, a decade after the Treaty of Waitangi Act 1975 established the Waitangi Tribunal, Crown officials began making references to the Treaty in terms of the article 2 guarantee of customary Maori rights over their resources, lands, forests, fisheries and taonga (see section 10.3.5 above).

94. 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

95. NZPD, 1956, vol 309, p 1612

## 10.4 RECOMMENDATIONS FOR FURTHER RESEARCH

### 10.4.1 Swamp ecosystems, swamp drainage, and the development of wetland conservation

The records of the local and regional authorities (drainage boards, catchment boards, harbour boards and others) that the Crown empowered to undertake swamp drainage need to be researched. This needs to be undertaken with a focus on legislation such as the 1915 Swamp Drainage Act, which enabled Maori-owned swampland to be taken under the Public Works Act. Some records will extend well after 1915.

Swamps were undoubtedly customary taonga. Many were impacted upon by Crown actions in ways that were at variance with the principles inherent in article 2 of the Treaty. However, archival research undertaken for this overview found negligible reference in the Crown record to the Crown's swamp drainage operations having a negative effect on Maori, or of Maori views and responses. This overview has not been able to conclude adequately on the impact of swamp drainage on the indigenous flora and fauna valued by Maori or with respect to Treaty rangatiratanga guarantees. The records of local and regional authorities will need to be researched for this purpose.

From the analysis of Crown law and policies relating to swamp drainage and the series of examples that are reported in chapter 2, it would be tempting to draw the conclusion that the Crown's actions in swamp drainage were consistently against the Maori interest and represent a major abrogation of the Treaty guarantee to Maori in article 2. But while the selected examples suggest that might commonly have been the case, it was not always or necessarily so.

The emphasis in the Crown records that were examined for this project was on issues of land and water ownership, legislation and policy. To obtain the perspective needed on the impact of these drainage operations on Maori and the extent to which to which Maori were casualties or beneficiaries, this overview needs to be complemented by research into local administrative records. A recent example of this kind of research is the Crown Forestry Rental Trust-funded environmental history of the Poverty Bay-Waipaoa catchment area being compiled by the geography department of the University of Auckland. This study is examining how the drainage of Maori-owned swamp and waterway systems was effected through the East Coast Commissioner. The commissioner's office acted

as ‘improver’ of land on the owners’ behalf, but often without the owners’ permission.<sup>96</sup>

#### 10.4.2 Coastal ecosystems

The records of the local and regional authorities (drainage boards, catchment boards, harbour boards and others) that the Crown empowered to undertake coastal works need to be researched. This needs to be done with a focus on the ecological alteration of estuaries and coastal lagoons that occurred as a result, and any resulting loss of mahinga kai. In particular, the records of harbour boards regarding foreshore reclamation under Crown statute need to be looked at.

Similarly, a closer study needs to be made of coastal sand reclamation and the Government’s coastal reserves survey of the 1960s and 1970s. For coastal sand reclamation, the records of the New Zealand Forest Service need to be researched. For the reserves survey, the records of the Department of Lands and Survey need to be researched.

#### 10.4.3 Lake and river ecosystems

The main task of researching the indigenous flora and fauna of river and lake ecosystems, the Crown actions concerning them and Maori responses to those actions remains to be undertaken. It will need to extend beyond the issues of fisheries and the ownership of lake and river beds with which this exploratory overview has been primarily concerned, to the multitude of lake and river works the Crown undertook that have affected these ecosystems. Such research needs to include the catchment works which local and regional authorities, notably the catchment boards, were empowered by Crown laws to undertake. This research will need to be integrated with further research on both coastal ecosystems and swamp ecosystems.

Further research into Crown actions in relation to lakes and rivers will need to be complemented by research into the ecological transformations that these actions caused. It will need input from freshwater ecologists and Maori kaitiaki who have retained responsibilities in respect of these ecosystems, as well as historical studies of customary freshwater fishing rights.

96. Brad Coombes, Geography Dept, University of Auckland, pers comm, 13 July 2000

#### 10.4.4 Scenery Preservation

Further research is needed in relation to scenery preservation for the indigenous flora and fauna claim. This will need to centre on the Crown's compulsory acquisition of Maori-owned land for scenic reserves. It should focus, in particular, on the period between 1913 and 1917 which appears to have been the peak period of Crown acquisitions for this purpose. In these five years, some 63 scenic reserves were created from Maori land. In 1913, the year the most scenic reserves were declared from Maori land, 22 of the 59 new reserves gazetted were formerly Maori land. This was more than three times the number of reserves that had been formerly freehold.

It is recommended that this research be undertaken systematically. That is, all scenic reserves that were created from Maori land between 1913 and 1917 should be researched. The file records of the Department of Lands and Survey's land district offices will be more important than the head office record, because the local record tends to preserve more of the details with respect to dealing with Maori owners, the Native Land Court, and compensation awards and payments. Any researcher examining the Crown record on scenic reserves will need to be aware that the systematic national databases that the Department of Conservation maintains on all scenic reserves are often not a reliable record of the date on which a particular reserve was initially acquired by the Crown. The only reliable record is the opening date of the actual Department of Lands and Survey file on the reserve.

#### 10.4.5 National parks

A closer focus on aspects of the establishment of Urewera National Park is needed. Most importantly, the actions of Crown officials need to be examined in the period leading up to the formal establishment of the national park in 1954, when Maori owners of indigenous forest were prohibited from milling them. As well, the record of dialogue between the Crown and Te Urewera iwi at the time that Urewera National Park was being finalised needs to be researched. It is the present author's impression, from research undertaken on Te Urewera for other projects, that Tuhoe and Ngati Ruapani elders wanted to establish areas within the park where they and their people could continue their customary use of the indigenous flora

and fauna. Research into this aspect of the creation of Urewera National Park will need to include the recorded memory of Te Urewera iwi.

#### **10.4.6 Animal and plant protection**

Further research needs to focus on the situations highlighted in section 10.3.7 in which Maori customary rights to the indigenous flora and fauna have been retained by Crown law. In particular, the historic provision of such rights in animal protection and wildlife legislation since 1910 needs to be examined. Section 7 of the Scenery Preservation Amendment Act 1910 provided for the Governor to grant Maori the right to take birds from scenic reserves which were formerly in Maori ownership. An equivalent provision in the Reserves Act 1977 enables the Minister to 'grant to Maoris the right to take or kill birds within any scenic reserve which immediately before the reservation or taking thereof was Maori land, provided the taking and killing of the birds would not be in contravention of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act'.

This research will need to be aligned with the further research recommended under scenery preservation (see section 10.4.5), focusing on the files of all scenic reserves which were created from Maori land. Similarly, the records of the Department of Lands and Survey's district offices will be more important than the head office record.

#### **10.4.7 The Crown's relationships with acclimatisation societies**

The acclimatisation societies' files need to be researched in parallel with the associated Crown records regarding the apprehension and prosecution of Maori 'poachers', as they were called, of native birds and fish.

Apprehension and prosecution of Maori birders and fishers was primarily the responsibility of acclimatisation society rangers between 1912 and 1983. This was particularly so in the earlier years when legal and policy parameters were being established and consolidated. The acclimatisation societies were given specific powers under animal protection and fisheries legislation. Chapter 8 presents limited direct evidence of apprehensions and prosecutions, because little information about these events exists in the portions of the Crown record that were researched for this overview. Furthermore, acclimatisation society files were not researched in relation

to this topic or any other aspect of the relationship between the Crown and the acclimatisation societies.

A particular matter requiring further research and legal analysis is the extent to which the Crown's delegation of powers to, and partial funding of, acclimatisation society rangers effectively made those rangers agents of the Crown.

#### **10.4.8 Crown research into the indigenous flora and fauna**

No recommendation.

