

CHAPTER 1

INTRODUCTION

1.1 THE COMMON LAW TRADITION OF OWNERSHIP OF GOLD AND PRECIOUS METALS

The Government's policy with regard to minerals in New Zealand has been formulated within the framework of the common law. The Government has acted in the belief that the prerogative rights of the Crown applied as soon as English law was received, at the time of proclamation of sovereignty. Included within those prerogatives was the Crown right to 'royal metals'.

A series of legal precedents, dating back to *Case of Mines* in 1568, was regarded as establishing the ownership of subsurface resources. The Court of Exchequer found in *Case of Mines*, that base metals – tin, lead, iron, copper, and non-precious minerals – belonged to the owner of the soil, but that the right to gold, silver, and their ores and admixtures, lay with the Crown. That right was not an incident of ownership of the soil, but rather, an attribute of the monarchy. The Elizabethan assertion of the prerogative reflected the pragmatic needs of the developing English state to control the coinage, and finance an army, but its theoretical foundation lay in the supremacy of the monarch. The application of that pre-eminent right of the Crown in the case of minerals was summed up by Counsel for the Queen: '[F]or of all things which the soil within this realm produces or yields gold and silver is the most excellent; and of all persons in the realm the King is in the eye of the law the most excellent'.¹

Much of the early pronouncement of a Crown right in minerals in New Zealand was developed with reference to lands which had been already acquired from Maori. The first explicit assertion of a prerogative over minerals was contained in clause 30 of chapter 13 'On the Settlement of Waste Lands of the Crown' of the Royal Instructions of 1846. This empowered the Governor to demise Rural Allotments 'supposed to contain any valuable minerals, reserving to us, our Heirs and Successors a royalty of not less than 15 per centum on the minerals to be raised upon and from any such Lands'.² By a further instruction of 22 December 1847, the royalty was reduced to one-fifteenth.³

A statutory tradition followed in which the Crown's right was preserved, and on occasion, expanded. The Gold Fields Act 1858 provided for the statutory regulation

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1. *Case of Mines* (1568) 77 ER 472. For a discussion of the case, see J C Parcell, 'A Thesis on the Prerogative Right of the Crown to Royal Metals', Wellington, 1960, pp 11–24.
 2. Earl Grey to Governor Grey, 13 December 1846, BPP, vol 5, p 541
 3. Despatch from Earl Grey to Governor Grey, 31 December 1847, BPP, vol 6, p 133

of mining while explicitly acknowledging the continuation of the ‘royal right’ under section 43 which stated that, ‘Nothing in this Act contained shall be deemed to abridge or control the prerogative rights of Her Majesty the Queen in respect of the goldmines and goldfields of the colony’. Again, the focus of the legislature’s attention was on lands already acquired by the Crown. The goldfield was defined as comprising that part of the wastelands of the Crown on which persons were engaged in mining for gold and which were proclaimed as goldfields, as provided for by statute. The 1858 legislation stated that the Crown’s prerogative applied over ‘private lands’, but excepted such areas from the jurisdiction of the warden who was the Government officer responsible for the application of mining law. The means of enforcing the Crown’s power, thus, remained undefined. Accompanying legislation imposed a royalty of 2s 6d per ounce on gold.

The Crown also claimed the power to ‘resume’ privately owned lands, required for mining. That power was first exercised with reference to lands held under title granted after 1873, in the Resumption of Land for Mining Purposes Act of that year. While provision was made for ‘full compensation’, this sum was not to include the value of the gold or silver. That basic principle of a Crown right in precious minerals was confirmed under the progressive application of powers of resumption to other title categories in 1882, 1886, and 1891. Governments in the twentieth century have also expanded, or, preserved those rights. In 1937, the Government extended the prerogative over petroleum. The prerogative tradition remains embodied in current law, which declares under section 10 of the Crown Minerals Act 1991 that:

Notwithstanding anything to the contrary in any Act, or in any Crown grant, certificate of title, lease, or any other instrument of title, all petroleum, gold, silver, and uranium existing . . . in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

It is to be noted, however, that the same statute also requires, under section 4, that due regard be given to the principles of the Treaty of Waitangi.

At first, the New Zealand legislature hesitated to assert a royal prerogative to precious minerals lying under lands still held by Maori. Gradually, however, the assumption of Crown ownership, first pronounced with reference to minerals found on lands which had already transferred from Maori hands, was also explicitly applied to lands still held under native title, or which had been reserved. Much of this encroachment on Maori ability to withhold their lands from the ambit of mining legislation, was formulated within terms of rights of ‘access to’, rather than ‘ownership of’ gold and silver. This process will be discussed, more fully, in a later section.

The common law tradition, and the application of the prerogative right to gold and silver in the colonies, was confirmed by the courts. New Zealand law-makers looked to the Privy Council’s finding in *Woolley v Attorney-General of Victoria*, and to *Attorney-General of British Columbia v Attorney-General of Canada* as establishing colonial jurisprudence on the question.⁴ The decision in both cases rested, ultimately, on the rule set by the Case of Mines. It was accepted that the

Crown had the right to the minerals; the question was rather, whether particular statutes had explicitly passed title to ‘precious metals’. *Esquimaux and Nanaimo Railway Company v Attorney-General of British Columbia*⁵ based on the above findings, also provided support for legislators seeking to ensure the Crown’s access to land, it having been found that a conveyance of the land by Act of Parliament did not carry with it the prerogative to royal metals unless express mention was made, and that the words ‘mine or mineral substance’ were insufficiently precise and apt to constitute such a grant.⁶

The prerogative was also generally accepted by the New Zealand courts. Again, the first New Zealand authoritative decision, *Borton v Howe* in 1899, concerned the rights of Europeans – of a duly authorised miner to discharge fouled water. The Court of Appeal based its decision on the existence of a Crown right to precious metals, subject to the power of the legislature, stating that ‘The auriferous deposits belong to her Majesty, subject to the gold-fields laws of the colony; but her Majesty could not, therefore, be entitled to foul streams beyond the gold-fields to the detriment of grantees of the Crown’.⁷ Chief Justice Stout commented, in a decision of the Court of Appeal, *Skeet and Dillon v Nicholls* in 1911: ‘There is no doubt that the Mining Act [of 1908] proceeds on the presumption that at common law precious metals belong to the Crown, and the Crown has a right to mine for them. . . . This will explain, no doubt, the interference with private property in mining districts.’⁸

The exercise of the Crown’s prerogative was, however, also constrained by statute. The courts might act to protect Maori interests with reference to goldmining, as set out by legislation. The ability of the Crown to extend its jurisdiction over reserves was an issue of increasing debate at the turn of the century. *Re Application by Beare and Perry*⁹ concerned the warden’s right to grant a goldmining licence over part of the bed of the Arahura River, including a portion within a native reserve, established under statute. Chief Justice Stout, in this instance, upheld the right of Maori to withhold such lands from the jurisdiction of the Government. Stout found that the bed of the river outside the reserve, was Crown land in respect of which a mining licence could be granted, but that the remaining area was a native reserve within the meaning of the current legislation, in respect of which the warden had no jurisdiction. He took two facts into consideration; that the river was not navigable, and therefore, the common law rule applied that the bed belonged to the riparian proprietors; and that the Public Trustee had exercised proprietary rights in the river within the confines of the reserve, leasing islands, and so on. He did not support the wider claim to the bed of the river where it ran through Crown land. He looked to the deed of sale, negotiated by

4. *Woolley v Attorney-General of Victoria* (1876–77) 2 AC 613; *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 AC 295. For fuller description of these cases, see Parcell, pp 28–31.

5. (1896) AC 561

6. See Parcell, pp 27–28

7. (1875) 2 NZ Jur 117. Cited in O Morgan, ‘The Crown’s Rights to Gold and Silver in New Zealand’, paper delivered to New Zealand Law and History Conference, 1994, at fn 48.

8. (1911) 30 NZLR 623. Cited in Morgan, fn 46.

9. (1899–1900) 2 GLR 242

James Mackay in 1860, which purported to convey the land with ‘its trees, minerals, waters, rivers, lakes, streams, and all pertaining to the said land’. In Stout’s opinion, it was clear that Mackay had intended that the riverbed should be given back to the signatories. This had been indicated both in his report on the transaction and by the sketch map, accompanying the deed which stated that, ‘The whole of the riverbed of the Arahura belongs to the Natives to its source’. The Crown had failed, however, to fulfil that promise, and in this circumstance, Stout believed that the warden could not treat the riverbed above Mount Tahua (beyond the boundaries of the reserve) as anything other than Crown land.¹⁰

The question of royal mineral rights versus customary rights has had little place in the court’s deliberations. In the 1890s, the Supreme Court dealt with two cases in which questions of native rights were relevant to the argument of the litigants, but which, again, were not directly concerned with Maori customary title. These decisions assumed a royal right of ownership, although not of a derivative right to access, and primarily involved questions relating to the meaning of Crown grant. The court, however, implicitly downgraded the significance of Maori consent in establishing Government authority over the goldfield. In both cases, the court ruled, in the light of *Parata v Bishop of Wellington*, that the Government could not rely on early agreements made with Maori as giving it authority to apply mining laws to land which had been subsequently granted without any restriction on the title, and then, sold to private persons.¹¹

1.2 THE QUESTION OF CUSTOMARY TITLE: A BRIEF BACKGROUND

The common law tradition of the Crown’s right to ‘royal metals’ separates out the right to gold, silver and its admixtures from other attributes of the soil and lodges them in the person of the Crown. Such thinking ran directly against the grain of Maori tikanga which, in the naming of geographical features, in the identification of their tupua in stones, and in their story-telling, demonstrated a deep spiritual and cultural affinity with the land in all aspects, including any minerals to be found within it. Tuhua-nui, named Mayor Island by Pakeha, gained its name from the presence of obsidian. Pounamu was the child of Tangaroa, the sea god, and Anu-matao personifying cold, while Hine-tu-a-hoanga and her sisters, Hine-one and Hine-tu-a-kirikiri, were personifications of sandstone (hoanga), sand, and gravel. According to Maori legend, greenstone had attempted to land on Mayor Island and had been driven away by obsidian and flint. The stories surrounding Hine-tu-a-hoanga link her, symbolically, with daily life. She was the mother of Rata (meaning sharp) who is said to have asked her to help him sharpen his adze, which he whetted on her backbone, so that he could cut down a tree for a canoe.¹² The presence of oil had also been marked by Maori in Taranaki who believed that Seal Rock, a

10. *Re Application by Beare and Perry for Mining Area in the Arahura River* (1899–1900) 2 GLR 243–244

11. See *Aitken v Swindley* (1897) 15 NZLR 517; *Chambers v Busby* (1898) 16 NZLR 523

12. See A W Reed, *An Illustrated Encyclopedia of Maori Life*, Wellington, 1963, pp 81, 132, 154

submerged reef off the coast, had once been an island of bituminous matter which had been ignited by supernatural agency and had burnt to below sea-level. Ernest Diffenbach who visited the area in 1839 noted the existence of a local legend that an atua had drowned and was ‘still undergoing decomposition’ at a spot where there were strong emissions of sulphuric hydrogen gas.¹³ Although no example of pre-contact knowledge or mythologising of gold has been found, Maori clearly demonstrated interest in, and use of, other forms of minerals, for example, coal, pounamu, sandstone, Tahanga basalt, before 1840.¹⁴

In the United States, where no mineral prerogative operates and, a legal separation between surface and subsurface rights has rarely been made,¹⁵ the principle of indigenous ownership of all minerals is recognised even though such minerals might not have comprised part of the traditional economy. It has been accepted that unless otherwise provided, a tribe’s right in the land extends to all elements that make the land valuable.¹⁶ As early as 1853, in *Choteau v Molony*¹⁷ concerning the purchase of mining rights from Native American Indians, the court supported their claim to subsurface rights on the grounds of aboriginal occupancy. The underpinning Supreme Court decision is to be found in *United States v Shoshone Tribe* (1938), which stated that the tribe’s aboriginal title gave it ‘the right of occupancy with all its beneficial incidents’. A treaty guaranteeing the Shoshone ‘absolute and undisturbed use and occupation’ of their remaining tribal lands had been signed in 1868. The court decided, however, that the Shoshone’s claim to minerals and timber derived from an inherent aboriginal right rather than from the reservation by treaty. It found that for ‘all practical purposes, the tribe owned the land’ and that minerals and standing timber were ‘constituent elements of the land itself’. The court also discussed the Government’s fiduciary obligation, noting that while the United States held legal title to the land and power to control the affairs of the Shoshone, ‘it did not have the power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation’.¹⁸

The United States Federal Government has also given consistent recognition to the principle of an aboriginal right to minerals. Although, some of the bitterest episodes in American Indian history of their relationship with white settlers – for example, the forced displacement of California tribes from the Sierra Nevada, and of the Sioux from the Black Hills – were triggered by the discovery of gold in their territories, the value of minerals, generally, has been included in the compensation for lands lost.¹⁹ The reservations that remained to American Indians after a process

13. Cited in J D Henry, *Oil in New Zealand*, London, 1911, p 9

14. See P McHugh, *The Maori Magna Carta*, Oxford, 1991, p 254

15. See John D Leshy, ‘Indigenous Peoples, Land Claims, and Control of Mineral Development: Australian and US Legal Systems Compared’, *University of New South Wales Law Journal*, vol 8, 1985, pp 287–290

16. *United States v Klamath and Moadoc Tribes of Indians*, (1938) 304 US 119, 123 (cited in Allen H Sanders and Robert L Otsea, *Protecting Indian Natural Resources: A Manual for Lawyers Representing Indian Tribes or Tribal Members*, Colorado, 1982, p 7)

17. (1853) 57 How 203, 240 (cited in Sanders and Otsea)

18. *United States v Shoshone Tribe* 304 US 11 (1938) (cited in P McHugh, p 133)

19. See Leshy, pp 277–278

of treaty negotiation, purchase, or compensation after forced expulsion, have been assumed to encompass the minerals as well as the land. In the late nineteenth century, the Congress, in pursuit of assimilationist goals, distributed minerals as well as land among individual Indians. Allottees were then authorised to lease the minerals for development on the approval of the Secretary of the Interior. At the same time, numerous statutes were passed, authorising the leasing of tribal minerals for development.²⁰ As policy shifted away from assimilation to tribalism, the Government practice was to accord tribes with joint control of mineral exploitation. This principle became embedded in legal usage, being adopted as part of omnibus mineral leasing legislation, enacted in 1938, in an attempt to bring uniformity to the statutes governing Indian mineral development. When underlying policy again shifted towards acceptance of tribal self-determination, the Government passed the Indian Mineral Development Act 1982, which sought to give recognition to the desire of some tribes to become more directly involved in mineral exploitation, and to share more directly in the profits, or losses, of ventures. It is to be noted, however, that the statute preserved the trust responsibilities already assumed by the Government, stating that nothing in the Act would 'absolve the Government from any responsibility to Indians, including those which derive from the trust relationship and any treaties, Executive orders, or agreement between the United States and any Indian tribe'.²¹

In the past 15 years, the Canadian Government has also given increasing recognition to indigenous rights in subsurface resources, despite an earlier acceptance of the royal prerogative. There have been three landmark settlements recognising a native right to minerals, including oil and gold. The discovery of the Beaufort Sea field prompted the Government to conclude negotiations with the Inuvialuit, setting a benchmark for subsequent treaty settlements in Canada. The Western Arctic (Inuvialuit) Native Claims Settlement Act 1984, contained a final settlement of absolute title to 91,000 square kilometres of territory, surface rights to an additional 13,000 square kilometres, a sum of \$152 million (to be received between 1984 and 1997), and an ongoing role in resource management. This was followed by the Council for Yukon Indians Umbrella Final Agreement of 1993 which again combined absolute ownership of a large tract of territory, surface rights to a smaller area, and a share in Government royalties from the resource development, as well as a degree of self-government. The fullest recognition of native ownership is contained in the recent Nisga'a Treaty of British Columbia. The Agreement in Principle, dated 16 February 1996, states that the Nisga'a Government will own 'all mineral resources on or under' the surface, including precious and base metals, coal, petroleum, natural gases and geothermal resources, earth, soil, peat, marl, sand, gravel, rock, and stone. In addition, the British Columbia Government must enter into agreement with the Nisga'a regarding the Crown collection of Nisga'a royalties, and the application of provincial administrative systems with reference to claim-staking, recording, and inspection of subsurface exploration and development on Nisga'a lands.²²

20. *Ibid*, p 282

21. *Ibid*, pp 282–284

22. My thanks to Alison Mortimer, Department of Indian Affairs, Canada, for this information.