CHAPTER 3

STATUTORY DEVELOPMENTS, 1868 TO 1900

3.1 INTRODUCTION

Maori found that their authority was diminished in ways that they had not contemplated when entering agreements with the Governor to cede their lands for mining purposes. The balance of power, with the added weight of a huge influx of white population, shifted inexorably towards the Government which quickly abandoned models of partnership without adopting commensurate measures of protection. In effect, all power passed into the hands of the Crown even though the land had not been sold.

The powers of management and regulation exercised by the Government included control over the structure of mining licences, rents and leases which generated the 'native gold field revenues', authority to sell trees and to alter watercourses on Maori land, and the introduction of a special system of justice under a warden on whom Maori were largely reliant for protection of their interests. Futhermore, the Gold Fields Act 1862, and following Acts, enabled the Governor to delegate his powers to the Provincial Superintendent whose imperatives were less likely to encompass negotiated obligations or considerations of Maori welfare. Maori were increasingly distanced from the operation of the goldfield. Whereas a role had been contemplated in the agreements of the 1850s and 1860s, for Maori to participate in keeping control of the field, by the 1870s, the suggestion that Hami Ropiha Tuirangi be authorised to check on miners' permits at Kennedy Bay was rejected out of hand by the Superintendent of Auckland, on the grounds that it was not 'expedient to grant any native the authority to inspect miners' rights as it might lead to a breach of the peace'.[1]

Mining legislation also provided for the use of surface rights, the Government being empowered to issue pastoral licences. These powers were, however, developed with Crown lands in mind. There was no attempt to exercise such powers over Maori land (with the exception of Ohinemuri) until the 1880s, by which time, mining wardens looked to the wording of the statute rather than to the terms of the original agreements. That issue of pastoral licences was strongly, and successfully, resisted by Hauraki Maori who pointed out that no such right had been accorded to the Government. It will be seen, however, that the Government, shortly

1. Fraser to Puckey, 30 January 1871, 'Coromandel Commissioner of Crown Lands, Outward Letterbook', BACL A 608/688

thereafter, strengthened its general powers over Maori land, by-passing protections within the cession agreements.

Nor was there any requirement for the Government to obtain Maori consent to changes in mining regulations even though such might severely reduce revenues supposedly guaranteed by the goldfield agreements. Maori found, too, that while the Government could change the rules under which the field operated, they could not, themselves, withdraw their lands from its jurisdiction, even after mining had declined.

3.2 REDUCTION OF 'NATIVE REVENUES' AT THAMES

3.2.1 The introduction of leasing

Once land had been ceded, it became subject to mining law. The statutory development of mining law affected Maori in two major areas; by reducing revenues supposed to be guaranteed to them by negotiated cession, and by expanding the Crown's powers at the expense of Maori authority over the land and its subsurface properties. The first legislative innovation effecting revenues in the Hauraki district, occurred in 1868. The miner's right system under which the field had been initially opened, gave rise to dissatisfaction among the larger mining interests who considered it to be 'necessary to take out miner's rights for every small interest they held in shares or companies', in order to prevent claim jumping. Miners complained that this had not been contemplated by the cession agreements, and it was proposed that a leasing system be introduced in order to reduce payments to Maori and to give greater security for the investment of capital.[2] The failure of the field to attract large investment was blamed largely on its ownership by Maori. It was explained:

> The tenure of property on the field, together with the uncertain aspect of Native affairs generally, had great weight with capitalists in causing them to refrain from entering upon work, and investing capital upon undertakings from which the undertakers might at any time, as it would appear to them, be dispossessed at the caprice of the aboriginal owners of the land. To give therefore a better tenure to the property, the leasing regulations were brought into force. [3]

On 29 October 1868, the Superintendent of Auckland, calling on the powers vested in him by the Governor under the Gold Fields Act 1866, issued new regulations to give effect to that proposal. Under clause 1, all former regulations with reference to leases were revoked. Clause 23 set forth the new conditions of the lease:

2. 'Mackay evidence before Public Petitions Committee of Legislative Council', 5 August 1869, MA 13/35C, special file no 62
3. AJHR, 1870, D-40, p 19

> In every lease granted under these Regulations for mining purposes, there shall be in the first place a rent reserved after the rate of £2 per acre, per annum, payable half yearly and in advance, for every 15,000 square feet of land comprised therein.[4]

There was no provision, at first, to pay such rents to Maori right-holders.

This innovation was entrenched the following year when the Government passed legislation to protect security of mining title in the Hauraki district. A political challenge to the legal authority of Mackay and, thus, the validity of the original cessions, had been raised at the Native Land Court determination of Maori interests at Kauaeranga. Fenton told the Legislative Council that:

> it was doubtful whether Mr Mackay was at the time a Land Purchase Commissioner, and had a legal right to make the agreements which he did make with the Natives. [T]he proclamation of Mr Weld [revoking the appointments of Land Purchase Commissioners] was well known, and it was not shown that Mr Mackay had received any new appointment, so that there existed doubts as to Mr Mackay's position in the matter.[5]

Other doubts to the status of the goldfields arose because the form of title under which those lands were held, had changed since the leasing arrangements had been made. Private lands were exempted from the operation of both the 1866 Act (under section 3) and the 1868 Amendment (under section 10). Fenton pointed out that, 'the moment these lands passed through the court, and the Native got Crown Grants, the doubt arose whether they did not become so far private lands, and were exempt from the operations of the Gold Fields Act'.[6] To remedy these difficulties, the Auckland Gold Fields Proclamations Validation Act 1869, stated that the agreements of 27 July 1867, 9 November 1867, 9 March 1868, and 13 May 1868 were valid and binding, even though native title might have been subsequently extinguished. The lands covered by the agreements and set out in the accompanying schedule, were deemed 'so far as mining purposes for gold is concerned but not further or otherwise to be Crown lands and not private lands'.[7] Included within the validated proclamations and extensions of the preceding two years, were Williamson's leasing provisions.[8]

Hauraki Maori protested this unilateral alteration in the way the field was run; not merely the reduction of revenues it would entail, but also the General Government's abrogation of power in favour of the provincial body and the movement away from a yearly accounting to one which allowed long-term leases. Thirteen chiefs of Ngati Maru, Ngati Whanaunga and Ngati Tamatera, all of whom had been signatories to the Kauaeranga agreements, petitioned the Government in August 1869. While declaring their loyalty, they protested that Williamson had not consulted with them about the proclamation, and that revenues had been reduced

4. *Auckland Provincial Government Gazette*, 29 October 1868, p 485
5. NZPD, 1869, vol 6, p 4
6. Ibid
7. Section 2 of the Auckland Gold Fields Proclamations Validation Act 1869
8. The Act validated the proclamations of 7 August 1867, 22 August 1867, 20 November 1867, 14 April 1868, 16 May 1868, and 29 October 1868: see the schedule to the Act.

without their agreement, or acknowledgement of their right as owners to receive a portion of the rents from such leases. They confirmed their willingness to abide by the original understanding and to promote the development of the field but insisted on their right to payment and to be consulted about any alteration to negotiated arrangements:

> Your petitioners now object to any gold-mining leases being granted to any persons for the lands included in the said agreements until a definite arrangement is entered into between themselves and the Governor relative to the said leases. That your petitioners are quite willing to render every facility for the outlay of capital, and desire to carry out all arrangements heretofore entered into by them; but they humbly and respectfully submit that the agreements entered into by them did not empower the Governor or his delegate to lease lands for mining purposes.[9]

Mackay supported Maori rejection of the 1869 measure, advising that 'the agreements with the Natives would require amendment, before it would be quite clear that these conferred on the Governor the power to lease lands for mining purposes'.[10] He pointed out that he had assured Maori at the time that all claim holders and their servants would be obliged to take out miners' rights. As long as claims were held under this system, mine owners had a 'direct interest' in ensuring that each employee held a right in order to prevent that claim being jumped, but this incentive was lost under the leasing regulations. In absence of inspection, penalties for non-compliance with the requirement that all servants should hold miners' rights, were rarely enforced.[11] Mackay anticipated that the regulations would reduce the revenues payable to right-holders:

> I hope I may be pardoned for stating that in my opinion the leasing regulations issued by His Honour the Superintendent of Auckland are likely to cause considerable injustice to the Native owners of the gold field, as entailing a certain falling off in the miners' rights fees received, and a consequent diminution in the amount payable to them by the Crown.[12]

Early in the following decade, the General Government provided for the requirements of the Hauraki field by creating a second stream of mining legislation. From 1871 to 1886 when the two branches were again united, the Hauraki district operated under the Gold Mining Districts Acts, while Ohinemuri and the South Island fields came under the jurisdiction of the Gold Fields Acts. The Gold Mining Districts Act 1871 provided for claims to be worked either under miners' rights, or as 'licensed holdings', which gave complete mining tenure for 21 years on an annual payment of £1 for every 15,000 square feet. Other sections of the Act set up licences for machine, business, and residence sites on payment of an annual fee of £10, £5, and £1, respectively. The Thames township was, however, excepted from

9. 'Petition of Certain Natives at Hauraki . . . Relative to the Thames Goldfield', in MA 13/35C. See also 'Public Petitions', Le 1/1869/11.
10. 'Report by Mackay on Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, p 11
11. Ibid, pp 11–12; 'Petition of certain Natives at Hauraki, and evidence relative thereto given by Mackay', 5 August 1869, MA 13/35C, special file no 62
12. Ibid

this structure of fees. At the same time, the Government acknowledged, tacitly, the injustice of keeping for itself, the revenues established under this new set of rules. Under section 111, 'rents arising in respect of land occupied under licenses' would be deemed 'money arising from miners' rights' in the area encompassed by the Auckland Gold Fields Proclamation Validation Act 1869. This provision was entrenched in section 173 of the Gold Mining Districts Act 1873. The reasoning behind this concession was, however, soon lost sight of by miners, local bodies and Government officials who began attacking the provision as going beyond the terms of the original agreement. A narrowing interpretation of what they should receive culminated in legislation reducing their entitlement, introduced over their protest.

3.2.2 The Mining Act 1886

At Hauraki, James McLaren, newly appointed by the Mines Department to oversee the miners' rights system, brought the issue of payments to Maori to his department's attention in 1880. He advocated that the base of the Maori mining income be narrowed, reporting that:

> There is great dissatisfaction, not against me for enforcing the law, but against the law itself, more especially in regard to the double payments that have to be made, thus under a license, £1 per annum has to be paid for every man's ground included in the license and the men employed have each to pay £1 per annum for a miners right to work in the same ground . . . this exclusive of residence sites that may be taken out on the surface . . . .
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> If these & other monies which are obtained over & above what is required to be given to the natives by their original agreement were returned to the Government, or went to the County and Borough, it would then be understood, and would not be so much objected to, but that an extra tax should be imposed for the purpose of apparently giving additional sums to the natives beyond what they are entitled, seems to go very much against the grain.[13]

This suggestion was met with approval by the warden and other department officials, but was considered impossible under the existing state of legislation. Faced with this fact, and reluctant to admit any claim by local bodies who were arguing that they had been entitled to those moneys, the Under-Secretary suggested that the matter should remain in abeyance for the moment, but that McLaren be instructed to 'exercise some discretion in enforcing the payment of fees, and not to enforce anything which [was] not provided for in the Act'. The Minister of Mines endorsed this suggestion, directing that the Mining Inspector should collect rents and miners' right fees, but not those for water races, machine sites, and batteries.[14]

Continuing pressure was brought to bear on Maori receipt of goldfield revenues by the Thames County and Borough Councils which, under the Financial Arrangements Act 1876, claimed all moneys which would have gone previously to the provincial government. After making complaint to the Premier and the Native Minister, the two bodies petitioned the House about the payment of 'additional

13. McLaren to Under-Secretary for Goldfields, 3 July 1880, MD 1 80/618
14. See Wakefield to Minister of Mines, 9 September 1880, and attached minutes, MD 1 1880/633

fees' to Maori. The Gold Field and Mines Committee found that Maori receipt of these fees was in accordance with the law but that the local bodies in the Hauraki district were placed at a disadvantage vis a vis their southern counterparts. It recommended that the Government either compensate the local bodies or purchase out the Maori interest.[15]

The Government was reluctant to admit any claim to revenues which had been already paid out to Maori, but willing to consider the amendment of legislation. The consolidating Mining Act 1886, which assimilated all mining laws, except those relating to coal, altered the organisation and fee structure of the various goldfields in Hauraki, adopting the model in operation in the South Island. Officials had previously warned that Maori would not understand the sudden withdrawal of revenues which they had been in the habit of receiving, and Maori themselves expressed their concern about the Government's legislative intentions, reminding officials of the existence of agreements which would be violated by the proposed changes. [16] None the less, the Government pressed ahead. The cession agreements and the fact of continuing Maori ownership of a portion of the Hauraki field were not even mentioned in the House.

The 1886 Act retained provision for the payment to Maori of revenues from licences as well as from miners' rights, but greatly reduced the income that would be received from these and other sources. There was no requirement under the 1886 Act that men working under licence should also hold miners' rights, while the size of the ground covered by a miners' right was quadrupled. Reductions were made in the number of men who had to be employed in a lease; only one man for every two acres instead of three men for every one acre, as previously required by the 1873 legislation, and none of whom would be required to hold miners' rights. It was also possible to exchange a lease under the 1873 Act for one under the new Act, at much less cost.[17] In the following year, the Maori revenues were again reduced by an amendment, exempting wages men and tributers (persons who worked as employees of an owner of a licensed holding, and those who had made an agreement for a right to mine within an holding in exchange for a portion of the gold found) from the requirement to hold miners' rights.[18]

Thames Maori immediately protested the impact of the 1886 Act and its 1887 amendment. Raika Whakarongotai and others petitioned the House in 1888, and later in the year, Taipari met with the Minister of Lands, questioning why their revenues from licenced holdings had been reduced to 10 shillings per acre.[19] Wilkinson gave strong support to the complaints expressed by the Thames people. He argued that the Government had not lived up to the underlying commitment of the initial agreement, the terms of which had implied 'that the Government was desirous at that time that the Natives should benefit as much as possible through having thrown open their lands for gold mining'. He estimated that Maori would

15. AJHR, 1882, I-2, p 2. See also MD 1 82/894.
16. Kenrick to Wakefield, 4 November 1880, 'Wakefield memo', undated, MD 1 80/1037; Kenrick to Minister of Mines, 13 July 1885, MD 1 85/776
17. See 'Report on the question of miners' rights . . .', 30 May 1889, NO 89/1255, J 1 96/1548
18. See MD 1 94/886, and s 10(5) of the 1887 amendment.
19. Petition no 171, 1888, Whakarongotai petition, MD 1 1888/496; MD 1 89/85

receive only a fraction (one-sixth) of their former revenues under the new system without being 'in any way consulted, or even considered'. Wilkinson's solution was the standard one for Native Department personnel – purchase – but he did acknowledge that the Government had sacrificed Maori interests for those of the mining community:

> In taking a retrospect of this Miners' Rights question it would almost appear as if Government after entering into certain arrangements with the Natives for the opening of the goldfield (such as to what diggers were to pay annually, what area of land each one was to occupy etc) all of which arrangements tended to show that on their being carried out, as proposed, large sums would accrue to native owners, then, goes as it were, into competition with its Native landlords by offering the gold digger better and cheaper facilities for working the Native lands than he originally had under the Goldfields Act and Regulations that were in force when the field was first opened. Government in taking this step apparently overlooked, or ignored the fact that such action, though beneficial enough to the gold digger, was disastrous to the Natives insomuch as it had the effect of reducing their revenue . . . and thus, in a measure broke faith with them.[20]

3.2.3 The Mining Act 1891

The Government was not prepared to move on the question of rents or the size of licensed ground but did concede that Maori were justified in their complaint with regard to the reduction of revenues resulting from the 1887 amendment, relieving wages men and tributers of the necessity of holding miners' rights. The warden who was instructed to investigate the matter, found that the loss to Maori amounted to £567 at Thames, £80 at Ohinemuri, and £30 each at Te Aroha and Coromandel, during the year ending 31 March 1889.[21] In response, the Minister of Mines directed that no more special claims or licensed holdings should be allowed on Maori land unless every person employed held a miner's right, prompting a protest from the warden, that the imposition of such a condition was both illegal and unenforceable.[22]

In 1891, the Government took legislative action to ameliorate this particular loss, the insertion of the pertinent clause into the consolidating statute being prompted by the receipt of a further petition from Hauraki Maori about the reduction of their revenues. Section 50 of the Mining Act 1891 required wages men and tributers to take out miners' rights for claims on native land. The warden's issue of a circular directing attention to this new requirement prompted immediate protest from the mining community. A 'monster' meeting was held under the auspices of the Thames Miners' Union which unanimously called on Seddon to delay implementation of the measure. A delegation also called on the Native Minister, A J Cadman, who acknowledged that Maori had been adversely effected by the legislation, but saw Government acquisition of 'all the land' held by them, as the 'only solution to the problem'. He told the miners' representatives:

20. See 'Report on the question of miners' rights . . .', 30 May 1889, NO 89/1255 in J 1 96/1548
21. Northcroft to Under-Secretary of Mines, 17 August 1889, MD 1 89/85
22. Eliott to Warden, 20 August 1889; Northcroft to Under-Secretary, 12 September 1889, MD 1 89/85

> By doing so, it would be beneficial in a twofold way; namely, that when the land became the property of the Crown, the fee for a miner's right could be reduced, and also the revenue at present being derived by private parties would be placed to the credit of local bodies.[23]

While the Native Department pursued purchase of the freehold, Seddon, as Minister of Mines, undermined the remedial effects of section 50 of the 1891 Mining Act. Seddon deliberately sought to evade the full implementation of the measure, criticising the officer in the field who was caught between the responsibilities of warden and trustee, for attempting its application. Maori leaders, accompanied by the town's leading solicitor, had called on the current warden, Northcroft, asking what was to be done about the failure of miners to comply with the new law and threatening to bring men, working without miners' rights, before the warden's court.[24]

Seddon tried to argue that the original 1867 agreement, setting out the requirement for miners' rights had been intended to apply only to men working on their own behalf. When the Government's legal officer, Reid, rejected this narrow construction, Seddon sought an alternative strategy, contending that section 6 of the Mining Act 1891 prevented its application to matters arising under prior legislation. Reid, agreed that the Act did not apply to mining claims taken out prior to 1891, but recommended that the signatories of the 1867 cession would still have 'at least a strong equitable claim for breach' of section 2 of the agreement, guaranteeing them £1 for every miner on the ground. Ignoring the unfavourable side to this advice, Seddon directed the mining inspector that the 1891 requirement was not intended to apply retroactively.[25]

In 1893 and 1894, Taipari and Hauraki Maori again petitioned the House about the impact of legislation on the understandings developed with regard to their lands within the goldfield. The petitioners complained that the provisions of the 1886 and 1887 legislation, and the limited application of the remedial measure of 1891, had directly resulted in loss of revenues which they calculated at over £3000. Whereas some 4000 miners had been employed on the field, only £800 in miners' rights revenue had been collected since the 1886 Act had come into force. Other revenues in the form of rents, previously allowed under the Gold Mining District Act 1873 had also been severely reduced.[26] The Goldfields and Mines Committee gave some credence to the Hauraki petitions, reporting:

> That your Committee after careful consideration of the documentary and other evidence at their disposal have come to the conclusion That the Petitioners have sustained some loss through breach of the agreement under which the Natives consented to throw open this portion of the Goldfield for gold mining purposes, and recommend the Government to take steps to ascertain the extent of the loss and recoup the Petitioners.[27]

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23. See *Thames Advertiser*, undated extract, MD 1 89/85
24. Northcroft to Under-Secretary Mines, 14 May 1892, MD 1 89/85
25. Reid to Minister of Mines, 13 May 1892, MD 1 89/85; Seddon minute, 8 September 1892, MD 1 93/513
26. 'Petition of Taipari and 26 others', no 126, 1894, MD 1 94/2887
27. 'Goldfields and Mines Committee Report', 31 August 1894, MD 1 94/2887

The Government delayed acting on the matter, prompting further Maori complaint. In 1895, Taipari tried the forum of the Native Affairs Committee, repeating the claims of the previous year and asking that Government act upon the earlier recommendations.[28] Further petitions were sent into Parliament and referred to the Goldfield and Mines Committee in 1900 and 1905. On each occasion the petition was recommended for favourable consideration, without response from the Government.

3.3 EXPANSION OF GOVERNMENT ACCESS

3.3.1 Early statutory definitions

The second aspect of mining legislation affecting Maori in the nineteenth century was the process of definition, and ultimately, expansion, of Crown powers. Two general trends were developed; the extension of the Crown's rights to minerals other than gold, and the securing of access to minerals in all land whatever the state of its title.

The first mining legislation in New Zealand, the Gold Fields Act 1858, passed in response to South Island discoveries, enabled the Governor 'by Proclamation to constitute and appoint any portion of the Colony, to be a "Gold Field"' but did not consider the question of Crown rights with regard to land still held by Maori. [29] Subsequent legislation, enacted in the 1860s and 1870s, largely assumed that Maori could withhold lands from Government management, focusing on the question of the Governor's powers once the consent of Maori right-holders had been gained, or on land privately-owned by Europeans. The initial legislative statement pertaining to mining on land held under native title was contained in the Gold Fields Act 1866, which stated that 'Crown Lands' would be 'construed to mean and include not only the Demesne Lands of the Crown in New Zealand, but also any other land whatever over which the Governor shall by lease agreement or otherwise have obtained power to authorize gold mining thereon'. That basic definition was retained over the next 40 years, but as the century drew to a close, the tenor of mining legislation began to change. After 1880, the legislature actively expanded the rights of Government to gold and other minerals, lying within Maori land whether held under Crown grant, or under customary title, and including blocks specifically reserved from earlier mining cessions.

3.3.2 Access to gold lying under foreshore lands

When the Gold Fields Act was amended in 1868, a degree of legislative recognition was given to Maori ability to control the use of the foreshore. Section 9 of the Gold Fields Act Amendment Act pointed to the Government's need to negotiate with them for the opening of such lands to mining. The Government in Council was empowered to include lands below the high-water mark in the goldfield:

28. Petition no 185, 1895, MD 1 95/2427
29. Section 2, Gold Fields Act 1858

> Provided that when any such land abuts upon any land specified in the last preceding section [lands for which the Governor had obtained power to authorise mining by lease agreement from Maori] such land so lying below high-water mark shall be for the purposes of this Act be deemed to be land over which the Native title has not been extinguished.

This provision was interpreted as confirming the Government's sole power to deal with the foreshore, but also as recognising 'an interest' on the part of Maori.[30]

The Government confirmed its power of monopoly under the Thames Sea Beach Act 1869, representing a retreat from the tacit recognition of native title to the foreshore, of the preceding year, which had proved inconvenient. At Kauaeranga, mining interest (prompt and cheap exploitation) ran counter to that of Maori (return commensurate with its traditional and auriferous value). When Maori refused to give way, the Government attempted to assert its prerogative over both the foreshore and gold, but in view of the strength of opposition, had to rely on a pre-emptive right to ensure its control.

At first, the Government decided to negotiate with Hauraki for the opening of the Kauaeranga foreshore. Richmond, recognising that Maori would challenge any Crown assertion of ownership of the mudflats, which had a history of intense traditional usage, directed Mackay to follow the guide of the Gold Fields Act 1868, as providing for the negotiation of agreement between the Government and owners of adjacent lands.[31] While some Ngati Maru, led by Taipari, agreed to the Government taking over responsibility for the development and administration of the foreshore, others – most notably Rapana Maunganoa – wished to lease the area for themselves. Included in the area withheld from Government management were the mudflats to the north of Karaka Stream, adjoining some of the most valuable goldfield land.

The response of the Government in the form of the Thames Sea Beach Bill, represented a blunt assertion of the Crown's prerogative both over lands below the high water mark, and over 'all precious metals wherever they might be found'. That position was, however, unsustainable at the Thames. Strongly worded petitions were received from various Hauraki groups, including from those willing to open the foreshore to mining, stating that the Government had no rights over the mudflats; that 'our hands, our feet, our bodies, are always on our places of the sea; the fish, the mussels, the shell-fish are there. Our hands are holding onto those, extending even to the gold beneath.' Hauraki Maori were united in the view that 'control of all the places of the sea' lay with them.[32] When the Bill was examined by a select committee, Mackay supported the Hauraki position, testifying that Maori would reject the Crown's assertion of ownership, that they greatly valued the Kauaeranga mudflats and, with the exception of Taipari, had not come to any agreement with the Government regarding their use. He told the select committee that 'I think the Natives will take this position: they will say that they are owners of

30. G S Cooper to Mackay, 17 October 1868, Le 1/1869/133
31. Acting Under-Secretary to Civil Commissioner, 17 October 1868, Le 1 1869/133
32. Petition of Te Moananui, 5 August 1869 (cited in 'Report of Committee on Thames Sea Beach Bill', AJHR, 1869, F-7, app E, p 18)

that land for mining and for every other purpose, and that they will resist any action taken by the Government in the matter'.[33]

In view of Maori protest and earlier Government recognition of their title, by the exclusion of the foreshore in the first Thames goldfield transactions, the passage of the 1868 Act, and subsequent negotiations for the cession of those lands, the Select Committee recommended that the Government delay legislative steps until the question of ownership could be clarified. The Government feared, however, that private competition would 'enormously increase' the expense of bringing the area under the jurisdiction of the Gold Fields Act, if it did not gain immediate control of the foreshore lands.[34] The legislature pushed ahead with the Bill, omitting the prerogative clause but establishing Crown pre-emption over the area. The Crown's control over precious minerals was further strengthened by Fenton's Native Land Court decision at Kauaeranga in which rights pertaining to the foreshore were separated out. Although Taipari and Ngati Maru could demonstrate the proofs of ownership demanded by Fenton, in particular, the setting of acknowledged marks such as stake nets, signifying a 'full and exclusive right', he declined to make a an order for the 'absolute property of the soil, at least below the surface'. Instead, he awarded Maori, 'the exclusive right of fishing . . . the surface of the soil of all that portion of the foreshore or parcel of land between the high water mark and low water mark'.[35]

3.4 IMPACT OF MINING LEGISLATION IN THE 1890S

For the next two decades, legislative innovation largely concerned the organisation of the field, affecting Maori in terms of their receipt of revenues, rather than their ability to withhold lands from mining operations, but a revival of mining productivity as a result of new technology in the 1890s, initiated a movement on the part of the Government towards ensuring access and development of mineral resources, including those within reserved Maori lands.

At the same time, Maori began to challenge the status of the cessions and goldfield legislation. Not only was there increasing dissatisfaction with the implementation of the mining agreements, but they now found that the Government was not prepared to release its grip on their lands even though mining activity had finished on them. At the large meeting held at Parawai, Thames, in 1885, Mango pointed out to Ballance that 'Some of the lands that they gave for goldmining are now lying idle, and they want the Government to remove the Goldfields Regulations from those lands where there is no mining'.[36] To the contrary, the trend was for wardens to issue long-term occupation and residence licences, and to bring various categories of reserved lands within the compass of mining legislation. Some Maori sought to withdraw their lands from the operation of the goldfield,

33. 'Report of Committee on Thames Sea Beach Bill', AJHR, 1869, F-7, app E, p 9
34. See Gisborne, NZPD, 1869, vol 6, p 833
35. Fenton judgment, HMB 4, p 245. See NLC order for Te Tapuae o Uenuku no 1, 23 May 1871 as an example of the wording employed.
36. 'Notes of a Meeting held at Parwai, Thames . . .', AJHR, 1885, G-1, p 38

arguing that if the Government failed to pay revenues originally promised, the land should revert to them 'unfettered with gold mining laws'. Some looked to their Crown Grant for protection, while others contested the warden's powers through the courts. These challenges were met by a toughening Crown stance in the 1880s and 1890s. There was a growing assertion amongst officials and legislators of the common law view that the ownership of precious metals lay with the Crown. That position was entrenched by legislation which increased the Government's powers to enter Maori lands, whatever the status of title, and expanded definitions of the rights expressed within the Royal Prerogative to include the power to ensure the development of all mineral resources.

In this period, Maori became increasingly distanced from control of both mineral resources and the land in which they were contained. A deterioration in their position vis a vis the goldfield administration is marked, first, by the Mining Act (No 2) 1887 which provided that, 'where the Natives have ceded their lands for mining purposes, and had made a contract and conditions as to the ceding of that land, the Governor was to have the power to alter and vary the terms of that contract without the consent of the Natives'.[37] The Maori members did not speak on the Bill, but it may be noted that the measure was too rich for the blood of Seddon, although he was generally a strong advocate of the mining interest. As a member of the Opposition, he objected that the legislation took advantage of those who had given their lands into the Government's jurisdiction. He agreed that it was in the interests of mining that the contract should be altered, but pointed out that, 'there ought to be consent, and a mutual give-and-take between the two parties'.[38] Nevertheless, the Act passed.

Maori ability to withhold lands from mining operations also diminished greatly in these years. The Reserves and Endowments in Mining Districts Act 1882 extended the operation of mining legislation to all public reserves and endowments within duly proclaimed districts. Although 'reserves made for the use, support, or education of aboriginal Natives' were excluded from the Act's operation, the Governor in Council was empowered to bring any such reserves, under its jurisdiction, as he saw fit. Under section 205 of the consolidating Mining Act of 1891, the Governor could proclaim any Native reserve to come under its operation and fix the fees payable. Initially, the Government acknowledged that a distinction existed between reserves set up under court-awarded title, and lands reserved from the original agreements by which the goldfield had been opened. The latter remained closed to mining, but in 1896 an amendment declared any lands reserved from cessions for residences, cultivations or burial grounds to be available for mining purposes 'in the like manner in all respects as if they had been ceded'.[39]

Maori protested the trend of this legislation – and, in particular, at how it ate away their rights to revenues and to withhold unopened lands, without their prior knowledge of, or consent to, those changes in the law. In the debates on the Mining Act Amendment Act 1892, Taipua criticised the Government's disregard of Maori

37. NZPD, 1887, vol 59, p 280
38. Ibid
39. Section 56 of the Mining Act Amendment Act 1896

interest: 'What the Natives complained of was this: that each succeeding Parliament endeavoured to make the laws worse than those passed by the previous Parliament'.[40] Taipua also condemned the direction of Government policy towards greater control at the expense of Maori autonomy and rights, the Act setting a standard rental for licensed holdings and special claims, whereas that matter had previously been open to negotiation:

> He could not believe that such an alteration had been made with any desire to benefit the Natives. It seemed to him to be the first step towards confiscation. . . . The Government appeared to be taking year by year more absolute power with regard to the disposal of Native lands, and they proposed now to take all management from the Natives.[41]

Seddon, now in office as Minister of Mines, retreated completely from his former rhetoric of 'mutual consent'. He presented the measure as 'reinstating' Maori to the position they had occupied by the Thames goldfield cessions of 1867 to 1869, in that they were to receive £1 for every man working on the ground, and that 'and to enable this to be done, the rents were to be reduced to the nominal sum of 1s per acre'.[42] Seddon did not explain the logic of this argument. It seems, however, that the rights of Maori were to be met in one area, only by the sacrifice of their interests in another.

A move was made, also, to empower the Native Land Court to bring Maori lands within the jurisdiction of mining legislation. Clause 5 of the Bill (section 16 of the Act) allowed the Native Land Court, on investigation of title or partition, to declare the land in question as ceded for mining purposes, on application of the Governor and consent of the majority of owners. The clause was amended by the Goldfields Committee to read, 'unless a majority of the Native owners object', but as a result of Opposition criticism, was changed back to the original phrase, requiring active consent. Taipua objected, none the less, that the interests of the minority were undermined, again, without telling them that such a step was intended, or ensuring that there was sufficient provision for notice.[43]

Part of the impulse for the 1892 amendment was generated by Maori efforts at Waihi to prevent the warden from issuing an occupation licence giving surface rights over land at Mangakiri–Waitete, reserved under the Native Land Act. In the view of the warden, the block which had not been excepted from the Ohinemuri goldfield lease was 'subject in all respects to the operation of the Mining Act and Regulations as other native lands held by the Crown for goldmining purposes'.[44] Ngati Koi, the owners, objected before the warden's own court, that the original mining cession had been superseded by the Native Land Court award which had issued title without any mining right reserved to the Crown.[45] Investigation by the warden revealed that title to other blocks in the district were in a similarly

40. NZPD, 1892, vol 78, p 429
41. Ibid
42. Ibid, p 430
43. Ibid, p 385
44. Northcroft to Under-Secretary of Mines, 29 September 1893, MD 1 93/1108
45. Warden to Under-Secretary of Mines, 30 October 1891, BACL A 208/29

unsatisfactory state. On Sheridan's suggestion, he adjourned the case until after the next session, so that a clause might be inserted into the mining legislation, 'rectifying the mistake'.[46] Reassured by section 17 of the 1892 Act, and arguing that the Maori grantees were not themselves using the block for agricultural purposes, the warden then proceeded to allow pastoral leases to issue over the Mangakiri–Waitete reserve, except for one or two acres which showed signs of cultivation.[47] When Ngati Koi complained, they were informed that the warden had acted in accordance with the law, and that the Government could not interfere.[48]

In 1895, complications arose again over lands within the Ohinemuri goldfield, with reference to the status of Maori rights to minerals. Waihi blocks nos 1 to 6 had been reserved from the original lease, and had been subsequently awarded to the Maori owners with a specific restriction on their right to alienate the right to mine for gold or other precious metals to private persons except with the written consent of a Native Land Court judge. George Vesey Stewart later claimed to have purchased the 'freehold' of these blocks, but since no such approval had been gained, the mining rights were considered, at least at first, to remain vested in Maori.[49] When gold was found in the area, Te Moananui offered to cede the mining rights to the Government. This offer was initially accepted, but Sheridan later rejected the deed drawn up by Mair, because it implied that Stewart's claim to the surface property was invalid. He now took the position that the restriction in the grant was ultra vires because it implied that the right to mine was vested in the 'Native Owners' rather than in the Crown.[50] The Minister of Mines, Cadman, instructed that the opinion of the Solicitor General be sought 'whether or not the Government has the power to throw it open for mining without negotiating further with the Native owners'. Cooper's report set out the current legal position regarding the ownership of gold and precious metals. His opinion was firmly bedded in the decisions of courts of law, citing the *Case of Mines*, *Johns v Rivers*, and *Woolley v The Attorney-General of Victoria*. In his opinion, the restriction in the grant was 'mere surplusage' since 'the Native owners never had the right to the gold and silver within these lands'. [51]

The Government firmly espoused the position that the Crown did not need to purchase the right to mine from Maori, but already held it.[52] Troubled by challenges to the warden's issue of licences under mining legislation, the Government clarified and expanded its powers through statutory provision. Since 1873, the Crown had reserved the power to 'resume' lands held by Europeans under title granted after that date. The Government now extended the right to lands held under title issued prior to 1873, on the payment of compensation for damage to 'surface rights'. Section 56 also declared:

46. Warden to Under-Secretary, Department of Justice, March 1892, BACL A 208/29
47. Northcroft to Under-Secretary of Mines, 29 September 1893, MD 1 93/1108
48. Cadman memo, 10 October 1893, MD 1 93/1108. See also MD 1 94/1598.
49. Sheridan to Native Minister, 21 June 1892, NLP 96/15, held with MD 1 97/1664
50. Sheridan to Eliott, 11 June 1896, NLP 96/15, held with MD 1 97/1664
51. Ibid
52. NZPD, 1896, vol 95, p 43

> Whereas in many cases aboriginal Natives, when ceding blocks of land to the Crown for mining purposes, have reserved certain areas used or intended to be used by them as residences, cultivations, burial grounds, or otherwise, and it is expedient that such areas should be available for mining purposes, provided that the use for which they were so reserved is not thereby prejudicially affected: . . . such areas shall . . . be available for mining purposes in like manner . . . as if they had been ceded . . . for those purposes . . .

Two contrasting opinions were expressed in the debates on the Mining Amendment Bill. The Government's position was that the right of the Crown to the Royal metals had been allowed to sleep, but had never been abandoned, and that, it was, therefore, also 'for the Crown to assert these rights in such a manner as [would] best conserve the interests of the colony'.[53] The Bill was, however, strongly opposed by Stout and other members who questioned the application of the common law assumptions of royal ownership of gold and silver to the New Zealand situation. While attention focused largely on the extension of resumptive powers, questions of native title and the status of the Treaty were intrinsic to the debate. Heke, in particular, stressed that the Treaty was still 'alive'. Citing article 2, he argued:

> I think that the rights of the Natives to their properties and to the gold and silver and other minerals thereon . . . were not conveyed to the Crown by the fact of the Natives signing the Treaty of Waitangi. I state this: that the fact of the Natives signing on the one hand and the Queen on the other hand agreeing upon a treaty, which confirms an obligation between two parties, shows completely that the land property and every other property contained thereon . . . belonged to the Natives.[54]

The Government, in the person of Seddon, counter-argued that, if the Treaty had any relevance, it lay in the transfer of sovereignty: 'by the rights ceded to the sovereignty of Her Majesty by the Natives in that treaty, per se, the right to Royal metals passes to Her Majesty'.[55] For most supporters of the Bill, however, the Treaty had no bearing; they felt that it had nothing to say on the specific question, no status in law, as had been confirmed by *Parata v Bishop of Wellington*, and no role in a progressive society.[56]

Even opponents of the measure were reluctant to deny the Crown's right to precious metals, their opposition being framed largely in terms of infringement of surface rights. Some, however, did see a doubt existing as to the operation of the royal prerogative in New Zealand. They pointed out that, in past dealings, the Government had obscured its prerogative claim to minerals: 'Whether from motives of expediency or sentiment, the colony [had] not deemed it necessary to declare what was implied'.[57] In the view of the Opposition, Maori could have had

53. Ibid, p 307
54. Ibid, p 312
55. Ibid
56. Ibid, pp 280, 305
57. Ibid, p 290

no idea, at the time of the Treaty-signing, that there was 'any such thing as a Royal prerogative to take away the precious metals lying under the surface of the soil'.[58] Heke saw the cession agreements negotiated by past governments as amounting to a recognition of Maori rights to mineral. He argued that 'since 1852 the right of the Natives to the metals and to the lands carrying those metals has been recognised. It was recognised by the then Governor and by the then Government, and up to the present day that right still exists'.[59] Heke and the Opposition pointed to the promises surrounding the Urewera Native Reserve Act as the most recent example of Government seeming to endorse Maori ownership of subsurface resources of their land. Stout, who led the attack, read out to the House, a memorandum written by Seddon to Tuhoe:

> I think, too, that should gold be found in your land the benefit accruing therefrom should be participated in by the hapus owning the land where the gold is discovered; and that before the goldfield is opened arrangements should be made between the Government and the Maoris upon which the field is to be worked either by payment of a royalty per pound or per ounce of the amount received from the working to the owners of the land, or that the balance after paying the expenses of administration of the goldfield, and that the balance on the issue of licenses and miners' rights . . . be paid to the owners of the land . . .[60]

The Government countered these accusations by reliance on common law precepts. Seddon pointed to the distinction in law between surface and mineral rights, stating 'What has been recognised in respect to the Thames has been this: that the right of the Natives has been recognised on account of them owning the lands, not on account of the gold in the lands'. Stout interjected, 'You gave them part of the gold', to which Seddon replied, 'Certainly not; we gave them no part of the gold: we gave them the miners' rights and the business licenses'.[61] He stressed, too, that gold duty had never been paid to Maori.[62]

Later that year, grantees of Waikawau reserves which had been specifically excepted from the original cession of the surrounding Hauraki goldfield, complained that the warden had issued claims which infringed on their property. Kensington of the Justice Department, which now had responsibility for Maori matters, acknowledged that the granting of mining claims over the blocks would have been regarded formerly as illegal, since they had been specifically excluded from the initial cession, and by the Auckland Proclamation Validation Act of 1869. The Amendment Act had, however, opened all Native Reserves for mining. The Government wiped its hands of the matter, arguing that the issue lay between

58. Ibid, p 303
59. Ibid, p 314
60. Ibid, p 285; see also pp 295, 303
61. Ibid, pp 307–308
62. Ibid, p 316

private parties – the owners and the mining grantee.[63] It is not known whether this matter was pursued through the courts.

63. 'Memo re Native Reserves . . .', 29 January 1897, MD 1 97/346