

## CHAPTER 5

# EXPANDING CLASSIFICATIONS OF MINERALS

### 5.1 SILVER AND OTHER METALS

While the Government strengthened its powers of access to, and claim to ownership, of gold and silver, it also expanded the categories of minerals which fell within its purview. Initially, the focus of the Crown's claim had been solely on gold. Coal and copper were regarded as belonging to the owners of the land. The position of silver was more ambivalent. In theory, silver fell within the Crown's right of ownership being considered a 'royal metal', but the first mining statutes were limited in their application to mining for gold. Under the Gold Fields Act 1858, the word 'mining' connoted mining for gold and nothing else. The Act defined 'mine' as being 'for the purpose of obtaining gold', 'gold mine' and 'gold field' to mean waste lands of the Crown on which persons were 'engaged in mining for Gold', and following common law tradition, 'gold' as including 'any earth, clay, quartz, stone, mineral, or other substance containing Gold'. These definitions were repeated in the legislation of the 1860s under which the Taitapu and most of the Hauraki goldfields were opened.

Silver was not included in the agreements negotiated at Coromandel, and by James Mackay in Golden Bay and the Thames, in the 1860s. The mining agreements signed in 1867 with reference to Thames, where silver was to become an important component of production, concerned gold solely. The signatories agreed to 'release' or 'tukua' their lands 'for gold mining purposes'; land within the boundaries described, was open 'for gold mining'; holders of miners' rights were 'entitled to mine for gold'.<sup>1</sup> That understanding was confirmed by the Auckland Gold Fields Proclamations Validation Act 1869 which authorised goldmining on the land affected by the 1867 agreement, and declared that such land should be deemed 'for all the purposes of the Gold Fields Act 1866 so far as mining purposes for gold is concerned but not further or otherwise to be Crown Lands and not private lands'.

Despite this supposed limitation on mining activity, there are indications that silver production began as soon as the Thames was opened. Later records give 1869 as the year in which silver was first mined in the country.<sup>2</sup> If, in fact, silver was taken from the Thames field in these years, it is far from clear upon what authority,

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1. See deeds in AJHR, 1869, A-17, pp 18–23

2. See AJHR, 1901, C-2, p 12

that mining was carried out. In subsequent agreements, imposed on Maori right-holders at Ohinemuri, in 1875, and at Te Aroha in 1881, the Government ensured that it gained the right to all subsurface properties. In the case of Ohinemuri, this included even kauri gum. Statutory definitions were not expanded until 1877, when the Mines Act first brought other minerals within the compass of the general legislation. 'Mining purposes' now meant, for 'obtaining gold, or any metal or mineral other than gold'. The 1877 Act did not, however, provide for the issue of mineral licences pertaining to minerals other than gold, and did not, in any case, apply to Hauraki district. In 1880, the warden complained that he had to refuse applications to mine hematite and silver, and recommended an alteration of the original agreements:

The discovery of valuable hematite ore within the proclaimed gold field has brought prominently to the front the nature of the existing agreement between the Natives and the Government. By that agreement permission was given to mine on Native lands for gold only. Applications for leases for the purpose of mining for hematite and silver-lead ore (also known to exist in considerable quantities) have necessarily been refused. Unless, therefore, arrangements can be made directly with the Natives by the discoverers, they will fail to reap the fruit of their enterprise, and the district will suffer materially through the non-development of these deposits of valuable minerals. I would submit that it is certainly advisable, and might be found practicable, to revise the existing agreements under which the gold field is worked. The agreements in question were evidently entered into at a time when the one paramount object was to obtain the consent of the Natives to the opening of their lands for the purpose of mining for gold. Many questions of importance naturally were left unsettled at the time, and others not provided for, the necessity for so doing not being apparent or urgent. Experience has, I believe, shown the necessity for some modification or extension of these agreements – notably in the direction of permitting mining for other minerals than gold.<sup>3</sup>

The Government decided to purchase the block in which the discovery had been made, and at the same time, moved to incorporate silver and other minerals within its legislative framework of powers. The Governor in Council exercising powers under the Gold-Mining Districts Act 1873 Amendment Act 1885, proclaimed that all the provisions in the 1873 Act should also apply to 'mining for silver and any other metals and minerals as well as to gold-mining' in the districts, such as Hauraki, which had been constituted under the 1873 legislation.<sup>4</sup> In 1886, section 130 of the consolidating Mining Act extended the warden's jurisdiction to include the issue of a general mineral licence to prospect Crown land for any metal other than silver and gold.

Maori revenues were not linked directly to the value of the field, and there is no record of changes being brought to their attention, even though their consent at Thames had encompassed gold only. Nor is it clear how widely the warden utilised powers with regard to other subsurface resources in the Hauraki district, where the cession agreements were preserved by successive statutes. The records of the

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3. Kenrick to Under-Secretary for Gold Fields, 30 April 1880, AJHR, 1880, H-26, p 7

4. *New Zealand Gazette*, 1885, vol 1, p 1219

Mines Department do not appear to contain reference to the matter in the nineteenth-century. As in the case of residence sites, a problem surfaced in the twentieth century when the warden attempted to grant a licence in a way which blatantly transgressed both the understandings held by Maori. At Moehau, in 1943, the warden acting under section 169(y)(ii) of the Mining Act 1926, recommended that ministerial consent be given for a 42-year licence to mine limestone over 9½ acres in Moehau 4A2 – Maori-owned land. Having ascertained that the block fell within the definition of ‘native ceded land’ as required by the Mining Act, he consented to the grant of the application. The owners when they found out, three years later, were interested in working the limestone for themselves, and complained to the Native Minister that they had not consented to such a grant and that the warden had acted beyond his jurisdiction. The Crown solicitor, looking at the wording of the cessions which had been preserved under the Mining Act 1926, supported that contention, informing the under-secretary that the grant was ultra vires.<sup>5</sup> The Minister of Mines wished to leave the quashing of the licence to the Maori owners – an intention criticised by the Native Department as meaning that they would have to go the expense of a Supreme Court action to rectify a mistake in a transaction of which they had no knowledge. The matter was settled subsequently, by negotiation.<sup>6</sup>

## **5.2 PETROLEUM**

The trend during the twentieth century was for Governments to bypass provisions under the general mining statutes, and to introduce, instead, special legislation to provide for the mining of valuable minerals deemed to be of national benefit. In 1937, the Petroleum Act was passed. In 1959, the Iron and Steel Industry Act empowered the Minister of Mines to authorise persons to prospect within iron sand areas while providing for the payment of compensation to owners. The passage of that Act supervened the Minister’s application under the Mining Act 1926, to bring the Taharoa iron sand area near Kawhia into the Maori Land Court so that an order could be made declaring it open for prospecting, and actually interrupted negotiations with the Maori owners for a cession of mining rights in their land. Other statutes designed to promote new mineral projects and to provide mechanisms for the compulsory opening of land for development, include the Atomic Energy Act 1945, the Geothermal Energy Act 1953, and the Bauxite Act 1959. This legislation provides for Crown ownership (in the case of uranium and oil), or sole right of access (in the case of geothermal and iron sands), or the right to prospect and take land on payment of compensation (in the instance of bauxite).

Petroleum was brought explicitly within the Government’s ownership in 1937, sparking a debate about Maori rights to subsurface resources in their land. Given the significance of petroleum as a strategic resource in the immediate build-up to World War II, the Government was anxious to remove any obstacle to exploration

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5. MA 1 19/1/650

6. Memo for Minister of Native Affairs, 16 July 1947, MA 1 19/1/650

and development which might discourage overseas capital. The greatest deterrent to investment was perceived to be the necessity of negotiating with a large number of private landowners.<sup>7</sup> Following the British example, the Labour Government decided that oil rights should vest in the Crown, while owners of the land would be compensated for surface damage only. The rationales for the separation of those rights were the interests of defence, and the migratory character of oil deposits which could lie under one person's land yet be tapped on the property of another. Ultimately, the Government's claim was based in the right of eminent domain (the right of the State to take private property for public use), which was carried with sovereignty. That right was not seen as inhibited by the Treaty. Whereas Maori proposed an arrangement based on partnership under the Treaty, the Government model stressed equal treatment along with equal benefit for the two races, both in the operation of society generally, and under article 3 of the Treaty itself.

Under section 3(1) the legislation stated that:

Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, all petroleum existing in its natural condition on or below the surface of any land within the territorial limits of New Zealand, whether the land has been alienated from the Crown or not, is hereby declared to be property of the Crown. . . .

And under section 29(4) that:

Compensation shall not be payable under this Act or any other Act in respect of any petroleum existing in its natural condition on or below the surface of any land.

Further sections provided for a 5 percent royalty to be paid to the Crown, and for conditions of access. Licencees did not require consent of either owners or occupiers, provided due care was taken to minimise damage to the surface, and compensation was to be paid in the case of legitimate claims. Owners had to be given 14 days' notice of the intention to enter their property, except in the case of Maori land which fell under section 24(1), requiring instead that notice be given to the registrar of the Maori Land Court and to any non-Maori occupiers. Section 26 provided for lands to be taken under public works legislation, 'for the purpose of facilitating the carrying on of any mining operations'.

In November 1937, Ngati Porou petitioned against the proposed legislation on the grounds that it took away rights which they had formerly wielded. The tribe had long been aware of the presence of oil in the region, and had been in 'treaty' with Europeans since 1881 when the first agreement had been signed with the Southern Cross Petroleum Company whereby Ngati Porou had agreed that their lands might be prospected in exchange for a 5 percent royalty on any crude oil discovered. This deal had been followed by others, with the result that options were currently secured over practically all land in the district, whether in Maori or European hands, including Matakaoa, Waiapu, Uaiwa and Cook Counties as well as part of Wairoa.<sup>8</sup> Ngati Porou representatives argued that a proportion of the royalty should

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7. NZPD, 1937, vol 249, p 1036

8. A E Edwards memo, 4 September 1861, MA 1 19/10/2

be set aside, either as a general fund for all Maori, or to go to the tribes owning the land in the district, or to individual owners as adjudged by the land court. The tribe favoured the latter option and made that recommendation to the Native Affairs Committee. All amendments proposed by Ngata (clause 2 to was remove the application to native land, clause 3 was to provide for prior agreement with Maori beneficial owners, and clause 12 was to give 50 percent of royalties to them) were supported by other Maori members on the committee, but rejected by the majority.<sup>9</sup>

In the meantime, the opinion of the Solicitor General was sought by the Gold Field and Mines Committee which was also examining the Bill. H H Cornish supported the Bill, founding his argument first on Right of Eminent Domain. He stressed that the Act would not ‘take from any Native a single foot of land . . . without compensation’ but only ‘something it [would] take equally from the European owner – a something that was never thought of . . . when the Treaty of Waitangi was signed’. Citing other instances when Treaty guarantees had been put aside, Cornish argued that there could not be two sets of laws: ‘In New Zealand we may have two races, but we have only one people, all of whose members enjoy the same essential rights and are subject to the same obligations’. Because the Bill proposed to take no more from the Maori landowners than from the European, it did ‘no violence to the spirit of the Treaty of Waitangi’.<sup>10</sup>

In the House, Ngata protested the royalty provisions rather than those pertaining to access, arguing that the measure amounted to an appropriation of property that would otherwise belong to private landowners. He believed that this was the view of all tribes, and dismissed objections raised by the Attorney-General that Maori had no claim to resources of which they had been ignorant at the time of transfer of sovereignty:

‘Did the Maoris know that there was oil under their lands when they signed the Treaty of Waitangi in 1840?’ No. Nor did they know that there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses . . . Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no advantage from them today?<sup>11</sup>

He pointed to the American example as showing that the course intended by the New Zealand Government amounted to theft and argued that if oil should be found, the legislature would find itself besieged with Maori petitions ‘for compensation for rights confiscated’:

They have been doing that for the last seventy years with respect to other rights, and in regard to oil rights they will come down session after session and ask for some recognition of the rights that have been taken away by the Crown.<sup>12</sup>

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9. ‘Native Affairs Committee Minute Book’, 24 November 1937, Le 1/1937/15

10. Solicitor General to Minister of Mines, 26 November 1937, Le 1/1937/4

11. NZPD, 1937, vol 249, p 1044

12. Ibid

He proposed a model of partnership; that the Government share equally with Maori in the royalty when oil was found on their land.

The Government countered with the argument which had been used in justification of public works takings since the 1870s, that Maori were being treated no differently from Pakeha. The introductory speech by the Minister of Mines (Webb), drawing on the Solicitor-General's comments, was strongly flavoured by a rhetoric of equality between the two races. Webb emphasised that there could not be two measures because this would be contrary to the growing national character of all the peoples of New Zealand:

I want our Maori friends to feel that we are not going to place them on a different footing than the Pakeha. The whole spirit of Article Three of the Treaty of Waitangi is one of equality and equity. The people of that day pledged themselves to give equity, justice, and liberty to their Maori brothers, and we do the same in this Bill. We are making no distinctions . . . As long as this Government is in power I am sure we will insist upon the Maoris being given the fullest rights.<sup>13</sup>

The Government stressed that 'Maori would benefit equally with the pakeha' should oil be discovered in payable quantities.<sup>14</sup> Thorn, the member for Thames, also reassured the House, 'we are not taking from the Maoris any rights which we are not also taking from the whites'. He welcomed a new order in which old feudal usages that maintained when an individual held land 'he also held everything beneath it to the centre of the earth and everything above it' would be swept away. In his view, valuable resources such as petroleum and coal, should belong to the nation, not the individual:

It raises the moral issue as to who owns the natural resources that happen to be deposited in the soil of New Zealand. Certainly not the individual pakeha; certainly not the individual Maori; certainly not this Maori tribe or the other. They are owned by the whole of the people.<sup>15</sup>

The Bill was given urgency in December and was passed without a Division on the understanding that there would be opportunity to discuss the issue of royalties later in the session. On the invitation of Ngata, Webb agreed to meet Ngati Porou but was prevented from doing so. In March 1938, the question of royalties was discussed further, but no amendment passed. From the debates, it is clear that Maori did not completely reject the ethos of equal participation, supporting the Government in legislation to set up machinery to ensure the complete survey and development of the oil fields of the country. But, since the Act affirmed that a royalty had to be paid, it was claimed (by Bodkin), that any attempt to take that royalty away from Maori was 'a direct infringement of the Treaty of Waitangi'. Ngata recited the haka, prepared by Ngati Porou for Webb's visit, which expressed the depth of their feelings on the subject:

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13. Ibid, p 1039

14. Ibid

15. Ibid, p 1047

*Expanding Classifications of Minerals*

Let me move, let me travel,  
That I may see the western sea.  
That I may see the seas of Poneke  
Whose roaring I hear. Hei!

Mr Webb, Sir!  
It has fallen, it has collapsed,  
The Treaty of Waitangi!  
It is perhaps the work of the Labour Government  
Which has altered the Laws  
Which has absorbed all our money,  
Which is confiscating our lands!  
And so I weep. Au! Alas!

The disturbing news of the measure for developing petroleum penetrated to the remote East Coast.

I was repelled from Wellington!  
I was rejected from Wellington!  
And I sat me down in bewilderment  
And I stood and gazed in pained wonder  
And asked 'Has the Prime Minister of New Zealand broken his word?

And where is he now?'  
Mr Webb, Sir, with your followers and your sham companies  
You have kicked over the Treaty of Waitangi  
You have lifted your foot against the Treaty of Waitangi  
And thrust it from the lions' den at Wellington  
Or maybe suspended it on the House of Laws as  
a bandage for bloodstained brows!  
Thou boiled head!

At this point, the Speaker ruled that such an expression could not be used in connection with a Member of the House, and Ngata continued with the final verse:

Is it that you Mr Webb  
Will say to the Maori  
Go back empty handed!  
Ask and you shall not receive!  
Knock and I shall turn my back on you!  
Alas! Alas!

