

CHAPTER 2

RESOURCE RIGHTS

2.1 THE WAI 262 CLAIM

In 1769 the mature kahikatea forests on the plains of Hauraki yielded to Maori a sustained harvest of berries and birds, timber, cordage, matting, clothing, materials for housebuilding, weapons, utensils, canoe construction, torches, cosmetics, and medicines.¹ Roche, examining colonial forest policy, concluded that from 1841 the Crown regarded New Zealand forests as a single valuable crop.² Forests which had recycled for the duration of Maori occupation, disappeared in less than 100 years. The Wai 262 claim is about control of indigenous resources for the harvests and the economic return they yield.

Among the concerns of the Wai 262 claimants, is the Crown's current policy of resource management. The statement of claim made in 1991 reads:

1. In 1840 the Iwi of the named claimants exercised manawhenua over all of the land in the following regions . . .

2. Within those regions they exercised te tino rangatiratanga to protect and ensure the economic, political, social and cultural welfare of their people, and to conserve and manage the resources which they controlled in their whenua and kainga.

3. Today they exercise very little effective authority in relation to the welfare and protection of their people, and they have been excluded from and denied access to, and control over, the resources of their whenua and kainga

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5. They have, in effect, been dispossessed of a major spiritual, cultural and scientific resource in te ao turoa, and alienated from an important economic and sustaining resource in their mahinga kai.³

Several philosophies of resource management are currently debated in New Zealand. A philosophy of preserving biodiversity, adopted by the Department of Conservation, aims to preserve New Zealand's ancient Gondwanaland flora and fauna as a bank of genetic resources. Indigenous flora and fauna are kept apart from

1. G Park, *Nga Uruora/Groves of Life: Ecology and History in a New Zealand Landscape*, Wellington, Victoria University Press, 1995, pp 27–31
2. M M Roche, *Forest Policy in New Zealand*, Palmerston North, Dunmore Press, 1987, p 23
3. From the statement of claim received by the Waitangi Tribunal, 9 October 1991.

human interaction on offshore refuges, and protected from interaction with acclimatised species.⁴

A philosophy of eco-system restoration has developed out of third world critiques of western resource management, and is a dialogue between ecologists and indigenous peoples. It aims to restore an indigenous character to the landscape, and implies restructuring of industrial societies, and limitations to the power of capital enterprises.⁵

A philosophy of kaitiakitanga proposed by Maori regards the natural world as part of the social universe; wildlife can be beneficially stimulated by human caretakership, and the abundance harvested.

2.2 Preserving Biodiversity

During the twentieth century, as collapses of ecosystems, sudden declines of populations, and extinctions of species, were observed globally, New Zealand scientists attempted to persuade government that preservation of habitat was a necessary strategy to secure the survival of indigenous flora and fauna. By the 1980s entomologists at the Department of Scientific and Industrial Research had estimated that New Zealand has 20 thousand species of native insects and terrestrial arthropods, with beetles comprising 50 percent of the known New Zealand insect fauna.⁶ Most indigenous beetles are confined strictly to native forest:

Before man began destroying the original vegetation, the Auckland area was clothed almost totally in forest . . . as Dr Kuschel has found in his Lynfield survey, over 94 percent of the 646 species of native beetles do not occur outside the forest. Apparently they cannot adapt even to gardens in which there are a substantial number of native trees and shrubs growing. The remaining 6 percent are mostly species such as tiger beetles (*Neocicindela tuberculata*) adapted to open country . . . These figures serve to emphasise the total dependence of most native beetles on forest cover for survival.⁷

Fisheries scientists had established that two of the whitebait species, koaro, *Galaxias brevipinnis*, and banded kokopu, *Galaxias fasciatus*, disappear from streams where ever indigenous rain forest has been cleared, but abound in streams where margins remain forested.⁸ The forest controls light quality and water quality; it provides nourishment for the insects and snails native fish feed on. When forest is cleared for pasture, the water warms from exposure to light; it becomes laden

4. For example, the Department of Conservation has asked people to remove their baches from Rangitoto Island. Department of Conservation scientists have won world attention for their vermin eradication techniques, and for recovery programmes such as the Chatham Islands black robin.

5. R E Grumbine, 'What is Ecosystem Management?' in *Conservation Biology*, vol 8, no 1, 1994, p 34

6. J C Watt, 'New Zealand Beetles' in *New Zealand Entomologist*, vol 7, no 3, 1982, p 216

7. J C Watt, 'Beetles (Coleoptera) of Auckland' in *Tane*, vol 29, 1983, pp 31, 32

8. R M McDowall, 'Designing reserves for freshwater fish in New Zealand', in *Journal of the Royal Society of New Zealand*, vol 14, no 1, 1984, pp 18–19

with silt and chemicals from farming practices; stock destroy overhanging plants along banks and break down the banks where koaro and kokopu hide and forage. When natural streams are turned into drains, culverted, and dredged, indigenous fish lose their habitat.

Forestry scientists had established that most North Island forest remnants were approaching sudden decline.⁹ Acclimatised stock (cattle, sheep, goats, pigs) had eaten out understories, destroying the future regeneration of the forests, and opening up the forests to draughts which dry out leaf litter, destroying the habitat of ground insects. Acclimatised animals – rats, stoats, ferrets, weasels, rabbits, deer, possums – were destroying flora and fauna faster than they could regenerate. Introduced birds and insects had penetrated the forests, and were out-competing native fauna for food resources. Wasps and possums were eating berries before they were ripe enough for native birds to eat; wasps were competing with birds for caterpillars and other insects.

In 1992 New Zealand signed the United Nations Convention on Biological Diversity. The convention became the statutory basis of resource management and conservation policies administered by the Department of Conservation. From this perspective, some New Zealand scientists felt that the fight to save mainland flora and fauna was already lost, and on this advice the Department of Conservation adopted a strategy of creating refuges on offshore islands, where indigenous vegetation is being restored and acclimatised species eradicated. This predator-free habitat will provide circumstances for survival of species, sub-species, and strains:

The near-shore and off-shore islands have become a critical element in conserving New Zealand's biodiversity . . . The concept of using islands as refuges for species that may otherwise be doomed . . . is a fundamental component of conservation in New Zealand.¹⁰

When the New Zealand Government restated its strategy of habitat preservation as a policy of preserving bio-genetic diversity, it allied with a global discourse. State science has its basis in philogenetic evolution: life forms are named and classified so as to record a search for the origins of life on the basis of genetically defined species. Alpha-systematics, using observed physical features, has been supplanted by molecular (DNA) determination of genetic blueprints, and on this basis the Crown has accorded legal protection to two species of tuatara, and to two strains in one of the species. In effect Crown policy maintains a bank of genetic resources:

In recent years concern has grown worldwide that the natural genetic variability and knowledge of traditional uses of plants be safeguarded to prevent their loss to humankind. Out of this has sprung the Commonwealth Science Council's Biological

9. K R Hackwell and D G Dawson, 'Designing forest reserves' in *Forest and Bird*, vol 13, no 8, 1980, pp 8–15

10. R Barker and P Simpson, *Developing a National Strategy for Ecological Restoration*, Wellington, Department of Conservation, Discussion paper, 1995, p 2

Diversity and Genetic Resources Project. In New Zealand/Aotearoa the DSIR has accepted the responsibility of implementing Project aims.¹¹

Expenditure on a policy of preserving biogenetic diversity is accounted for as a safeguard against future contingencies when new medical cures may be found in the genetic resources of plants and animals, when specialised breeds of commercial crops and livestock may be backbred to counter disease,¹² and when changes in climate may give advantage to species other than those currently selected for commercial use. Crown research institutes support research on genetic engineering, and participate in the copyrighting of genetic resources.

Indigenous peoples have challenged this account. As large tracts of colonised landscapes are cleared of species-rich forests and wetlands, a small range of domestic animals and plants has come to occupy a disproportionately large territory, in the interest of a western economic system which indigenous peoples describe as ‘selfish and destructive’.¹³ A policy of preserving biodiversity collaborates with, rather than challenges, the Government’s investment in its current economic policy.

Under Department of Conservation policy, wild native species are preserved for future use as a genetic resource, and removed from present use as a harvesting resource. The landscape is partitioned. The Department of Conservation creates off-shore refuges, while global markets and capital determine the development of the mainland landscape (such as drainage of swamps and conversion of scrubland to pasture on privately owned farmland, mining in the conservation estate).

Thus a resource management policy based on protecting biodiversity, supports the Government’s investment in particular systems of science and economy, and fulfils its commitments under the International Convention on Biodiversity, 1992. Maori however harvest natural resources for sustenance, commerce, trade, and presentation at ceremonial feasts.¹⁴ While preserving biodiversity retains flora and fauna which has its origins in Gondwanaland, 70 million years ago, the policy does not address achieving sustainable harvests for human society. Further, to Maori, the history of their landscapes is a history of interaction amongst themselves and all life forms in a changing world, *te ao hurihuri*. Hence Maori value specific localities as places of ancestral history and healing force (*marae*, *wahi tapu*, *urupa*), as places of abundant harvest (*mahingakai*), as places of economic resource (an eel-weir, a whitebait-run, a quarry, an ochre source, gardening soil), and so on. The land is partitioned by a different geographical paradigm.

11. D Scheele and G Walls, *Harakeke, the Rene Orchiston Collection*, Havelock North, Department of Scientific and Industrial Research, Botany Division, 1988, p 3

12. The genetic base and the number of species is currently so narrow that agricultural economies require back-up stocks of wild species to be viable, should they be challenged by climate change, disease, hybrid sterility, or resistance to pesticides. Agricultural scientists have outwitted nature by selective breeding, and outwitted time by genetic engineering.

13. World Ecology Summit, 1996

14. H Beattie, *Tikao Talks: Traditions and Tales told by Teone Taare Tikao to Herries Beattie*, Auckland, Penguin Books, 1990, pp 140–141

2.3 Eco-system Restoration

Eco-system restoration is based on a vision of the landscape as comprising eco-systems, each of which contains a different diversity of life forms: coastal forests, lowland forest-swamps, dunelands, natural shrublands, wetlands, lowland grasslands, alpine herbfields, off-shore islands, pasturelands of ryegrass and clover, and so on. The aims are to re-establish an indigenous character to the landscape, and to restore past ecological processes so the natural world again produces an abundant harvest.¹⁵

Grumbine has characterised the goals of ecosystem management as:

- (a) Maintaining viable populations of all native species in situ (protection of habitat, protection of biodiversity);
- (b) representing, within protected areas, all native eco-system types across their natural range of variation (ecological representativeness);
- (c) maintaining evolutionary and ecological processes such as nutrient cycles, and use of fire (ecological restoration);
- (d) recognising that pigeons and whales have evolutionary needs, such as viable populations and corridors to move through to reach seasonal resources, equally with humans; and
- (e) valuing eco-systems as living systems to which respect and admiration is due (stewardship).¹⁶

Under eco-system management, the state of the ecosystem determines what use may be made of natural resources for human goods and services. In Maori terms, a rahui may be placed on a locality until the habitat has been restored; stewardship (kaitiaki) of eco-systems may be translated as recognition of the mauri of the natural world, and so on.

Achieving self-sustaining habitat for indigenous flora and fauna possibly invites legislation for: reduction in the area allocated to pastoral farming; constraint of capital development and urban-industrial expansion onto good soils; cessation of cutting firewood (and other activities) on marginal lands; scrublands acting as nurseries for regenerating native vegetation and as refuges for surviving animals; cessation of indigenous forest felling; restricting stock to pasture lands; fencing of forest stands; fencing of the Queen's chain; coastal management; and pest management.

Many statutes protecting wildlife habitat have been drafted without consulting Maori; existing statutes are not being enforced. For example, the Fisheries Act 1983, requires freshwater fish to have uninterrupted passage along waterways, but farmers, regional councils, and hydro-electric companies have not been required to conform with the legislation. Private companies, representing Maori and Pakeha interests, are transforming extensive areas into pine plantation, a monocrop which creates an ecosystem antithetical to 90 percent of the indigenous flora and fauna.¹⁷

15. 'Where once we thought endangered species were the problem, we now face the loss of entire ecosystems' (R F Noss, E T Laroe, J M Scott, *Endangered Ecosystems of the United States*, Washington, United States Fish and Wildlife Service, 1994).

16. Grumbine, pp 31, 34

Further, Maori cosmology projects a different set of ecosystems: Tumatauenga, domain of human society and mastery of fire and stone-napping; Tanemahuta, domain of forest biota; Tangaroa, domain of aquatic biota; Rongomaraeroa, domain of cultivated and stored crops; Haumiatiketike, domain of staples (bracken fernroot, flax, koromiko, nikau, ponga, edible ferns); Tawhirimatea, domain of physical forces.¹⁸ Conventionally in the Pacific, politically inconvenient gods are dispatched to the underworld (the abode of gods whose work is finished), or are subjected to restructuring. The domain of Tane may encompass willow trees, peach trees, pine trees, chestnut trees, and valuable new tree crops; or it may be a zone of ecological inter-connectedness in which pine trees are intrusive, according to resource management philosophy. It is likely that tussocklands, flax swamps, and fernlands (domain of Haumiatiketike) were prevented from reverting to forest through periodic burning; Maori do not separate themselves from the natural world.

2.4 Manawhenua/Kaitiakitanga

In 1840 the whenua of each hapu provided resources which sustained its existence. Maori society, with its allocation of whenua amongst the many hapu, was itself a system of resource management. Each hapu had authority over its own whenua. Property rights were resource management rights:

Forests in the wildest part of the country have their claimants. Land apparently waste is highly valued by them. Forests are preserved for birds, swamps and streams for eel-weirs and fisheries . . . Over the uncultivated portions of territory held by a tribe in common every individual member has the right of fishing and shooting.¹⁹

It was a custom with the Maoris in ancient times to eat the rat – a rat indigenous to this country, and caught in traps set on the top of the mountain-ranges. This was a source of part of their daily food, and it was, therefore, with them a point of great importance to occupy every available portion of their lands with these traps, and as most of the tribal boundaries are along the range of the highest hills or mountains, and as these were the common resort of the rat, every New Zealand chief soon naturally became acquainted with the exact boundary of his land claims.²⁰

Resource management by hapu is sometimes described as an ethos of ‘kaitiakitanga’. Some aspects can be delineated. It is a practice of reciprocal resource management. Humans stimulate the intrinsic vitality (mauri) of life-forms, and receive in return abundant harvests: ‘We are all descended from Papatuanuku; she is our kaitiaki and we in turn are hers’.²¹ Tai Tokerau elders recall being taught

17. This encroachment into the last stands of North Island indigenous forest can be seen from the summit of the Coromandel (Te Paeroa) and Kaimai ranges, for example from Castle Rock.

18. J White, *Ancient History*, Wellington, Government Printer, 1887–1891, folding plate no 1(d), ‘Maori Mythology’ in volume 1, 1887

19. Swainson, 1859, in H H Turton, *Epitome of Official Documents relating to Native Affairs and Land Purchases of the North Island*, Appendix F, ‘On the Tenure of Native Lands’, p 23

20. John White, 1861, in Turton, p 50

when planting crops, to allocate the outside rows ‘for the rats and the insects to have their share’.²² Harvesting is sustainable: large captures of eels and lampreys are taken when the fish congregate to migrate, when many will escape predation. There is an order in which foods are harvested in succession, leaving life-forms unmolested for the remainder of the year: some hapu trap inanga not as whitebait, but as adults when they congregate in spawning migrations, when they are rich with roe.²³ When the resource needs respite from harvesting it is protected through rahui. The protection is placed and lifted according to circumstance. Protection is placed by an ariki, that is a person with descent from ancestors of sacred lineage and thereby inherently sacred, or by a tohunga, a person able to handle sacred forces. Sustaining the abundance of the natural world requires ariki and tohunga who have the power to propitiate the mauri of the forests and of the life forms: the Tohunga Suppression Act 1907 impacted on loss of knowledge, and loss of resources.

2.5 Claimant Contentions

Maori interests in flora and fauna are realised or compromised through statutes and through resource management. New Zealand’s participation in the International Convention on Biological Diversity, and the Department of Conservation’s resource management policy were effected without Maori advice and participation. In 1840 each hapu exercised a resource management policy based on accumulated experience of local ecology. Present statutes do not allow hapu to exercise independent management, appropriate to local resources; the statutes pre-empt rangatiratanga.²⁴

2.6 Hapu Autonomy

Records describe residential social groups engaged in constructing massive lamprey and eel weirs,²⁵ an entire village feasting on a harvest of lake-locked koaro,²⁶ two closely related hapu contesting their right to an eel weir,²⁷ canoe crews on Lake Taupo working cooperatively to net koaro.²⁸ There was concordance

21. M Roberts, et al, ‘Kaitiakitanga: Maori perspectives on conservation’, *Pacific Conservation Biology*, vol 2, 1995, p 13

22. However the reasons may be subtle. Economic entomologists advise planting shelter belts with species which will attract insects pests away from the main crop.

23. R M McDowall, *The New Zealand Whitebait Book*, Wellington, Reed, 1984, p 86

24. R Cooper, ‘Maori customary use of native birds, plants and other traditional materials’, report presented at the Annual Conference of the Australasian Wildlife Management Society, Christchurch, 1995. Concerns of the Wai 262 claimants include 1. the Crown’s alliance with market economy interests and not with Maori interests in flora and fauna; 2. the Crown’s exclusion of Maori practices and perspectives from resource management policy; and 3. the pre-emption of Maori property rights in flora and fauna.

25. T W Downes, ‘Notes on eels and eel-weirs (tuna and pa-tuna)’, in *Transactions and Proceedings of the New Zealand Institute*, vol 50, 1918, pp 296–316; H F Johnston, ‘Report of the Royal commission appointed to enquire into and report on claims made by certain Maoris in respect of the Wanganui Rover’, AJHR, 1950, G-2, pp 1–19

between the size of the harvest, and the size of the social group holding property rights in the technology of the harvest, and into the early twentieth century large harvests were sometimes still reaped.²⁹

As colonisation proceeded, statutes legislated European concepts of individual property rights. Land sales and land confiscations were accompanied by loss of authority over resources. Urban migration was accompanied by loss of leadership on rural marae. Harvests dwindled as the forests were cleared and burnt. So the social activity of harvesting became less frequent.

In 1996 intellectual property rights are vested in social groups which have formed in response to modern social life. For example, the National Body of Maori Traditional Healers views the country as divided into nine iwi, each of whom holds intellectual property rights over its own pharmacopoeia. The National Body is composed of representatives from the nine iwi, and speaks on behalf of all practitioners in matters relating to policy advice to Government.

The current importance of iwi may reflect a fragmentation of Maori authority and an effort by Maori to regroup in effective political bodies. Historical records strongly suggest that in 1840 hapu had greater autonomy.³⁰ Overall, control over the alienation of intellectual property rights may have been vested in an individual, or in whanau, hapu, and iwi. Practices differed from region to region, and altered with changing political circumstances.

In 1859 property rights in land were understood by the Attorney-General as follows:

Land is held by them either by the whole tribe, or by some family of it, or sometimes by an individual member of a tribe. Over the uncultivated portions of a territory held by a tribe in common every individual member has the right of fishing and shooting.³¹

Tribal negotiations were concluded as a compromise between customary practice and innovation to meet the contingencies of the immediate circumstance, and they differed in each district. Gore Brown reported, ‘We found that the Natives had no fixed rules applicable to all the tribes and to every locality, and we adopted as our guide in each district the customs that were in force among the people

26. C A Whitney, ‘Minnows and Inanga’ in *New Zealand Fishing and Shooting Gazette*, vol 14, no 5, 1941, p 10

27. J Cowan, *Tales of the Maori Bush*, Dunedin (etc.), Reed, 1934, pp 256–261

28. E Best, *Fishing Methods and Devices of the Maori*, Wellington, Government Printer, 1929, p 205, fig 80

29. In 1947 the Perano family caught 250 kilogram of whitebait in seven hours on the Wairau River (Blenheim) (McDowall, *The Whitebait Book*, p 123).

30. In 1883 H H Turton collected 15 documents written between 1843 and 1861 which describe codes of transfer of property rights, most written expressly for the information of the Crown. In the following discussion, it should be noted that nineteenth century commentators use the word ‘tribe’ for a land-holding group that was frequently a hapu: ‘in the Tainui District, on the Wairoa River, there has been located for a long time a little tribe called Ngatitai . . . this little hapu is related by marriage to the Ngatipaoa, Te Akitai, and Ngatimaru, which are adjoining hapus and *iwi* . . . in reference to the tribe which now reside at Orakei, called the Ngatiwhatua (which is a hapu of the great Kaipara Tribe, the Roroa), this hapu does not admit any tribal right to be exercised over it’ (John White, 1861, in Turton, p 58).

31. Swainson, 1859, in Turton, p 23

themselves'.³² Edward Shortland noted that 'each of the grand divisions into which the Natives of the Northern Island may be divided has its own characteristic dialect',³³ while an anonymous comment was, 'there was no tribunal, external or common to all the tribes, to which appeal could be made'.³⁴ Reverend Hamlin confirmed 'Each party or tribe seems to have been guided by existing circumstances in the management of their affairs',³⁵ and McLean was insistent that tribal convention 'varies so much in different parts of the country, I should wish to know what part of the country you refer to'.³⁶ In 1854 A S Thomson found that different medicinal remedies were used in different areas, and concluded there was no national pharmacopoeia.³⁷

2.7 The Original Possessors of the Land

Territory claimed by conquest frequently changed hands, yet in 1840 the North Island tribes recognised enduring historical divisions of the landscape; any change in tribal boundaries dispossessed people of their ancestral burial grounds, their placenames, their history: the keys to their songs, poetry, and oratory.³⁸

At what time the boundaries of the districts of the respective chiefs of the Island were defined as we now find them, it is impossible to ascertain . . . The Ngapuhi, notwithstanding their extensive conquests, obtained within the last twenty-five years, still confine themselves to their ancient territorial rights, and the Ngatiwhatua, although oftentimes defeated and almost annihilated, still assert their claim to the territorial possessions of their ancestors.

Several sales of land about the Kaipara belonging to the Ngatiwhatua were effected during the time [that Ngapuhi chiefs were sheltering Ngati Whatua who had been defeated by Hongi] but reference was always made to those who had placed themselves under protection, and their title as the original owners of the soil invariably acknowledged . . . Again, in gratitude for services performed, a piece of land might be presented . . . In the event of such cultivation being abandoned it would revert to the person who had granted it . . . Possession of land, even for a number of years, does not give a right to alienate such property . . . without consent of the original donor of the land; but it may be continued in the possession of the descendants of the grantee to the latest generation.³⁹

32. T Gore Browne, 1860, in Turton, p 46

33. Edward Shortland, 1843, in Turton, p 1

34. Anonymous, 1860, in Turton, p 11

35. Reverend F Hamlin, not dated, in Turton, p 20

36. Donald McLean, 1860, in Turton, p 17

37. L K Gluckman, *Tangiwai, a Medical History of Nineteenth Century New Zealand/Medical History of New Zealand Prior to 1860*, Auckland, L K Gluckman, 1974, p 157

38. When the Tongan 'eiki, Ma'atu Ngongo defeated the local chiefs of Niuatoputapu island around 1830, he secured his new territory by punishing with death any discussion of the land's former history (G A Rogers, 'Kai and Kava in Niuatoputapu', PhD thesis, University of Auckland, 1975).

39. George Clarke, 1843, in Turton, pp 3, 4, 5

According to Edward Shortland:

A chief when speaking of the title by which he holds his lands, never fails to make a distinction between those which he has inherited from his ancestors and those which he or his ancestors have obtained by conquest . . . The claim which he advances [for land claimed by conquest is] that they are the *utu*, or compensation for the death of his relatives who perished in the fight.⁴⁰

John White however, in 1861 described how Ngati Whatua ki Orakei do not conform:

Again, in reference to the tribe which now reside at Orakei, called the Ngatiwhatua (which is a hapu of the great Kaipara Tribe, the Roroa), this hapu does not admit any tribal right to be exercised over it by the Waikato, Tainui, or Ngatipaoa Tribes. This hapu took possession of this district by force of arms from the Tainui and Ngatipaoa Tribes. All the fishing-grounds on the Waitemata River belong to them, and none of the surrounding tribes would attempt to fish on them unless permission were granted by the Ngatiwhatua; nor do they pay any tribute of fish or other thing to the original owners of the district . . .⁴¹

Aperahama Taonui described a Ngati Whatua practice of making an offering to Hine Kui, the original possessor of the land, who manifests in the hump-backed tiger beetle grub (*Neocicindela tuberculata*): ‘that grass is sacred because it is food which is taken [to Hine Kui]. That is the true chief of the land’.⁴² In the 1980s, children of Tai Tokerau still ‘fished’ for Hine Kui by poking grass straws down the burrows of tiger beetle grubs.

As a hapu buried its members in its whenua, the land became filled with spiritual forces controlled by that hapu, beneficial to itself, and dangerous to others. The loss to a hapu of not being granted the boundaries it had designated can be read in a record left by the Commissioner for determining titles to land in 1846:

in the case of Native reserves great difficulty has been found in getting Natives belonging to one family to go on a reserve made within the boundary of the land belonging to another family, although it has been fully explained to them that the reserves were made for the benefit of the Natives generally, and not for any particular tribe or family . . . in several instance that have fallen under my notice they have positively refused to cultivate a Native reserve so situated, although at the time in actual want of a spot to grow their potatoes upon.⁴³

40. Edward Shortland, 1843, in Turton, p 1

41. John White, 1861, in Turton, p 58

42. D R Simmons, *The Great New Zealand Myth*, Wellington, Reed, 1976, p 29

43. Mr Spain, describing the Port Nicholson District, in Turton, pp 18–19. Polynesian people widely desire to live on the land where their ancestors, the original possessors, are buried. ‘My four main ancestors are resting here in Niuafou’ou and they are not transferable. My family lands are here and they are not transferable. This is my island and here I intend to stay’ (Ongoloka, 1967, in G A Rogers, *The Fire Has Jumped*, Fiji, University of the South Pacific, 1986, p 127).

Thus, a number of records suggest that when whenua (land with its flora and fauna) was transferred, the original possessors were acknowledged to have a continuing influence in its well-being (mauri). Contemporary claims by Maori that as the original possessors of the land, they are the kaitiaki of the whenua, its flora and fauna, are consonant with these records.

2.8 Boundaries

John White, Interpreter in the Native Office, in 1859 commented: ‘There is not an inch of land in the Islands which is not claimed, nor a hill nor valley, stream nor forest, which has not a name’.⁴⁴ However, Edward Shortland, Protector of Aborigines, noted in 1844 that some tracts of forest were left unclaimed: ‘there are large districts on the borders of different tribes which remain uncultivated. These *kainga tautohe* (debatable lands) are a never-failing cause of war till one party has lost its principal men’.⁴⁵

Many boundaries were demarcated by claims to floral and faunal resources:

Most of the tribal boundaries lay along the highest ridges; and, as these were the resort of the rat, every chief became acquainted with the exact boundaries of his land [through setting pit-fall traps]. Where a creek was the dividing boundary this was occupied with eel-dams, not made of wickerwork that might be carried away by a flood, but of such construction that generations might pass and each put the eel-baskets down by the carved and red-ochred post which its ancestors had placed there. Where the dividing boundary between two tribes ran along a valley, landmarks were erected, generally of cairns, to which names were given.⁴⁶

I will allude to the mode in which a tribe asserts and maintains its rights over a large district. It was a custom to go at certain times to the utmost limit of the land claimed, and partially clear and cultivate a portion here and there. This was called *uruuruwhenua*.⁴⁷

Ecologists have observed that the location of some pas suggests they were positioned to guard valuable resources.⁴⁸

Titles to land were given to specific food-producing resources, rather than to just the land itself,⁴⁹ and each member of a hapu held defined resource rights:

Because resources were so closely defined, a man usually held a number of different titles: one might be for a village space . . . another for a plot in a plantation, another for a specific tree in common land for bird snaring . . . The same tree could be subject to several different titles: one for fowling and another for the edible roots

44. Turton, p 25

45. Shortland, in Turton, p 24

46. John White, 1859, in Turton, p 25

47. John White, 1861, in Turton, p 52

48. Park, p

49. I H Kawharu, *Maori Land Tenure*, Oxford University Press, 1977, p 59

of the fern growing around it. Or if the tree bore a big crop of berries, attracting a lot of birds, it might carry a number of snares.⁵⁰

In the South Island, ‘Bird preserves were kept in families and trespassing was a grievous offence. Boundaries were called wakawaka and preserves rauiri, as were also eel reserves in the rivers’.⁵¹

Rights in an eel-weir, a pit-fall trap, a miro tree, a watering-place of pigeons, were transferred by genealogical succession: ‘With the exception of . . . cases of forfeiture they descend from father to son in regular succession.’⁵² Edwin Stanley Brookes, Government Surveyor, reported in the 1880s that along the Awakino River bank (Taranaki), the daughter of Te Wetere had sole right to the ‘farming’ of kiekie fruit.⁵³ Tai Tokerau who worked in the Ahipara gumfields during the 1930s recalled that harvesting forest resources sustained their livelihood. They would tie up the ripening kiekie heads (tawhara heads) to prevent the rats from eating them; each person knew their own ties and did not take a head tied by someone else.

During the hearing of the Muriwhenua claim in 1985, fishermen gave evidence of their rights in named fishing grounds, and the succession of fish they caught there. Much of this evidence was given in confidence. Hapu contend with each other for resources and prestige, and because rights can be usurped, the locations of resources are often kept secret. Ngati Hine had extensive kumara gardens along the Waiomio River banks, visible to the public, but they also planted smaller plots of early maturing kumara and special varieties in a warm, sheltered location which was kept secret.⁵⁴ In another instance, small preserves of banded kokopu near a pa were kept secret from Pakeha.⁵⁵ In 1988 a Ngati Whatua woman was criticised by members of her marae because she would not teach a weaving technique she alone has knowledge of.⁵⁶ She had a conventional right to guard a skill which was an exclusive prerogative of her lineage.

Land sales destroyed long-established hapu boundaries. Further actions by the Crown deprived hapu of their economic and social interests in flora and fauna resources:

Hapu lost treasured resources through the Crown denying their choice of boundaries when creating reserves. In 1852 hapu of Ngati Maniapoto negotiated with the Crown’s land purchase agent, George Cooper, to sell a block along the banks of the Manauira stream, notifying the sites they desired to retain; these included Te Kauri, the kainga of the chief Ngataua (Takerei); the mission station at Te Mahoe; and a stand of ancient kahikatea trees at Tauwhare which had become sacred. Cooper

50. Kawharu, pp 60–61

51. Beattie, p 136. The New Zealand Wildlife Service won world renown for its recovery of the Chatham’s black robin, but Tikao noted wryly that nowhere were there boundaries for woodhens and ordinary bush birds.

52. George Clarke, 1843, in Turton, p 3

53. E S Brookes, *Frontier Life: Taranaki, New Zealand*, Auckland, Brett, 1892, p 179. The fruit is tawhara, *Freycinetia banksii*.

54. Personal observation, 1988

55. W J Phillipps, *The Fishes of New Zealand*, New Plymouth, Avery, 1940

56. Personal observation, 1988

reported that the areas reserved by the hapu included ‘300 acres of the best cultivable land in the block’. The Colonial Secretary, Alfred Domett, instructed Cooper not to make any purchase until Ngati Pehi agreed ‘to dispose of the extent of the country required by the Government’. Ngati Pehi desired the settlement of Europeans at Mokau, and the Crown held exclusive right of purchase. The deed of sale negotiated at Mokau in 1854 between Ngati Pehi and the Chief Land Purchase Commissioner, Donald McLean, states: ‘There is no reserve whatever in this land now entirely given up by us . . .’.⁵⁷

Productive reserves became weakened by fragmentation, die-back,⁵⁸ illegal timber cutting and grazing, invasion by stock and acclimatised species, and so on, when the Crown pepper-potted Maori reserves amongst allocations made to Pakeha settlers for agricultural clearance.⁵⁹

Knowledge of the limits to title was the responsibility of elders and priests, and youths of senior families were usually given thorough instruction in boundary lore;⁶⁰ the Tohunga Suppression Act 1907 contributed to loss of knowledge of flora and fauna resources.

2.9 Commission: In Particular, Who Controlled the Transfer or Alienation of Rights to Flora and Fauna

Some nineteenth-century commentators described alienation of rights as an issue of sovereignty. ‘Attributes of sovereignty’ included administration of justice, the right of declaring war, the power of temporary alienation of land belonging to the tribe, and were ‘all vested in the tribe generally, and although often exercised by chiefs or *tohungas*, were so exercised with the consent, either express or tacit, of the whole tribe’.⁶¹ Thus each landholding group acted as a consultative body with respect to justice, war, alienation of land and resources, and projects requiring joint labour. Along with:

the right of the tribe to require service from all its members, the necessity of keeping up their own numbers, and of preventing strangers from acquiring landed property to be used to the injury of the tribe . . . rights of ownership, whether in one or many joint proprietors, were not alienable without the consent of the tribe.⁶²

57. Park, 1995, pp 132–137, citing Mokau District Land Survey records, box file, item no 12

58. When a stand of native forest is fragmented, species which grow in the heart of the forest become exposed along the new boundaries, where they are no longer protected by the species which thrive on forest edges. Inroads of wind and stock further debilitate the forest biota.

59. M K Watson and B R Patterson, *The White Man’s Right: Aquisition of Maori land by the Crown in Wellington provincial district of New Zealand, 1840–1876*, Wellington, Victoria University, Department of Geography, Working Paper No 3, 1985, p 523

60. Kawharu, p 60

61. Anonymous, 1860, in Turton, p 11

62. Bishop of New Zealand, 1860, in Turton, pp 17,18

George Clarke, Chief Protector of Aborigines, in 1843 concluded that principles determining rights in land applied to almost all other property: ‘This common right and title to property is not confined exclusively to land, but embraces almost every other description of property. A canoe generally belongs to a family, and sometimes to a hapu, in consequence of each individual assisting in its formation or advancing a portion of his property for its payment. A cow or horse may have twenty claimants’.⁶³ Clarke in 1843 described how alienation of property rights was controlled by the hapu:

The families have in common with the chiefs, the right of keeping pigs, gathering flax, shooting or snaring pigeons, catching rats, ducks, kiwi, digging fern-root, etc., or of gathering the natural productions of the woods and open country for the purpose of food, etc.; every individual of the tribe having and exercising these privileges in common, but still acknowledging the rights of some family or individual member of a family to dispose of such property – that is, as president, head of the family, or chief of the tribe or hapu, to make the first proposal for such alienation – yet they would not consider the purchase valid without the consent of the majority of the principal men of the tribe, and of the payment for the same every individual would expect to receive his appropriate share.⁶⁴

In 1856 a Board of Inquiry examined evidence dating back to 1822, and confirmed the autonomy of land-holding groups:

Each Native has a right, in common with the whole tribe, over the disposal of the land of the tribe, and has an individual right to such portions as he or his parents may have regularly used for cultivations, for dwellings, for gathering edible berries, for snaring birds and rats, or as pig runs . . . Generally there is no such thing as an individual claim, clear and independent of the tribal right. The chiefs exercise an influence in the disposal of the land, but have only an individual claim like the rest of the people to particular portions.⁶⁵

Within the territory of a hapu, members of other tribes often had claims:

it frequently happened that one tribe gave land within their own limits to the members of another tribe for assistance rendered in times of danger, which gifts were held most sacred . . . claims to land were made by one tribe and admitted by another as compensation for the murder of a chief thereon, or another injury . . . an accidental death of a chief on the land of another tribe gave his family a claim to it⁶⁶ . . . a tribe will give a spot of land to another, either as a marriage portion or to induce them to reside, etc. The former are still *take* [‘root’, the original possessors of the land], but the latter may, if they like, sell; only they generally hand over the payment to the former, reserving to themselves the honour attendant on the transfer.⁶⁷

63. George Clarke, 1843, in Turton, p 3

64. George Clarke, 1843, in Turton, p 3

65. Turton, p 19. Best expressed reservations about Maori holding land in common, but did not give examples that would challenge the generalisation (Elsdon Best, *The Maori*, Wellington, Board of Maori Ethnological Research, 1924, p 394).

66. Board of Inquiry, 1856, in Turton, p 19

In many districts a chief could not alienate a tract or a resource claimed by another member of the hapu:

The . . . chief, Hongi, was urged to give up a small piece of cultivated ground to a Mr. Stack . . . but, though he wished much to oblige his friends the missionaries, and was . . . by far the most influential chief of the northern portion of the Island, he distinctly stated that he could not do it: if the missionaries wanted the land they must treat with the people who cultivated it, to whom alone it belonged.⁶⁸

An ariki did not have ‘any beneficial rights or any power of disposal or control over the property in the land without, or contrary to, the assent, expressed or implied, of the body of the tribe. The customs about this . . . were by no means uniformly the same in all tribes’.⁶⁹ However, Reverend Hamlin understood that the person from whom a land-holding group traced its descent, could sell the tract: ‘this person can sell if he likes without the consent of his party; the party selling without his consent would be a *hoko tahae*’.⁷⁰ Archdeacon Hadfield understood that while a chief could not alienate ‘any land which has become vested in the tribe by long possession’ he could ‘deal with lands obtained by conquest’.⁷¹

Edward Shortland, Protector of Aborigines, in 1844 commented on the settlement of disputes:

When a dispute arises between members of the same tribe as to who is the rightful owner of a piece of land, the principal persons on both sides meet together to discuss the affair: their pedigrees are traced, and the ancestor from whom either party claims is declared; and proof that any act of ownership (such as cultivating, building a house, setting pit-falls for rats, or making eel-weirs) was once exercised without opposition by one of their ancestors, is considered sufficient evidence of the right of his descendants to the land.⁷²

Hapu at times invaded each other’s resources. In 1847 A S Thomson observed counter-claims to tracts of fern-root:

The Waipa County is noted for its fine fern root (*aruhe*), which is generally found in rich alluvial soil on the banks of rivers, or in deep valleys. Some of the choicest spots are made tapu to ensure a supply, and fierce quarrels have happened between different tribes from the spots having been set on fire.⁷³

Lineages contest resources in many Polynesian societies. A group whose claim rested on historical precedence might lose out to a group who demonstrated brilliance of oratory, or political force, or cunning manipulation; a feat of surpassing skill confirms the favour of the gods. Edwin Stanley Brookes,

67. Archdeacon Maunsell, 1840, in Turton, p 19

68. George Clarke, 1843, in Turton, p 5

69. Anonymous, 1860, in Turton, p 12

70. Reverend J Hamlin, n.d., in Turton, p 20

71. Archdeacon Hadfield, 1860, in Turton, p 23

72. Turton, pp 24–25

73. Christine McDonald, *Medicines of the Maori*, Collins, Auckland, 1973, p 108

2.9.1 The Land with All Woods and Waters

government surveyor in Taranaki during the 1880s, noted that ‘any marked skill would be fully appreciated’.⁷⁴ Reverend Benjamin Yate Ashwell witnessed a challenge between two hapu contesting rights to the eel harvest at Lake Whangape, on the Waikato River near Maunga Taupiri. Lake outlets are points of congregation for migrating fish, and this is where the contested weir was sited. Ngati Pou led by the chief Uira had the strongest claim to the harvest, but were challenged by their kin, the related hapu Ngati Mahuta led by the chief Kepa, brother of Te Wherowhero (Potatau). Both sides were armed with muskets, tomahawks, and stone clubs, and war challenges were issued. Then a Ngati Pou warrior broke out into the verse of a psalm. A Ngati Mahuta warrior answered him with the second verse; each side responded with successive verses, and a peaceful resolution was agreed to.⁷⁵

Political relationships were encoded in presentations by hapu of the resources they conventionally controlled. During the nineteenth century, the Banks Peninsula chiefs sent an annual presentation of marine products to Kaiapoi. Kaiapoi contended that the Banks Peninsula chiefs were in a state of vassalage to their chief, Maiharanui (the upoko-ariki of Ngai Tahu at Kaiapoi), and received the presentation as tamatama, that is as tribute. Kaiapoi then sent back a presentation of kauru,⁷⁶ saying it was done as a gesture of courtesy. Tikao however, a chief of Banks Peninsula, contended that the return presentation of kauru signified an exchange between equals.⁷⁷

2.9.1 Summary

Writers in the period 1843 to 1861 commented on ‘how very tenaciously [Maori] maintain their customs and usages on all subjects connected with their lands’.⁷⁸ Land-holding groups had a strong sense of property rights over the resources of their rohe. Transfer of rights to flora and fauna within the hapu was by genealogical succession or by exchange; where the rights were alienated outside the hapu, the hapu controlled the transfer. Contemporary iwi claims for the return of rangatiratanga to the land-holding group in respect to resource management, are supported by these records.

Individual rights were established by accepted conventions: the first discovery of a tree, the shooting of a pigeon, constructing an eel-weir, digging fern root, making a path, the accidental loss of a friend at a place, receiving a wound there, recovering from sickness there, and so on.⁷⁹ Maori claims to intellectual and material property

74. Brookes, p 178

75. Cowan, pp 256–261

76. Kauru is a preserved food, produced by steaming the stems of young cabbage trees (*Cordyline* spp) in an umu ti (P Simpson, ‘Relating ecological and human values in the cabbage tree, ti kouka’, *New Zealand Studies*, v 1, 1997, in press)

77. Beattie, pp 140–141

78. George Clarke, 1843, in Turton, p 5

79. George Clarke, 1843, in Turton, p 4

rights in indigenous flora and fauna are consonant with these conventions: Maori are the original possessors and users of the resource.

2.10 Commission: In Particular, Whether the Interests Were Held by the Groups and Individuals who Possessed the Rights to the Land on which the Flora and Fauna Were Located

As noted, Attorney-General Swainson described in 1859 how interests in flora and fauna are synonymous with land-holding, where the group is a tribe or hapu, and the individual land-holder a member of a hapu:

Their territorial claims are not confined to the land they may have brought into cultivation . . . Forests in the wildest part of the country have their claimants. Land apparently waste is highly valued by them. Forests are preserved for birds, swamps and streams for eel-weirs and fisheries . . . Land is held by them either by the whole tribe, or by some family of it, or sometimes by an individual member of a tribe. Over the uncultivated portions of territory held by a tribe in common every individual member has the right of fishing and shooting. When any member of a tribe cultivates a portion of the common waste he acquires an individual right to what he has subdued by his labour; and in case of sale he is recognised by the tribe as the sole proprietor. If undisposed by sale it generally descends from father to son.⁸⁰

However, White in 1861 described specific instances where one group of people held interests in flora or fauna, while another group retained possession of the land:

There are . . . lands which are ceded to a tribe for a specific purpose with certain restrictions, and the tenure of such lands depends on the conditions being fulfilled . . . sometimes only the right of fishing or hunting was granted, and, in order that the owners of the district might keep the mana or right to the land, the tribe who had received permission to fish or hunt had to render the proceeds of their first day's sport to the owners of the land. Nor was the time for this acknowledgement optional with the giver; for on the morning of the day after the first fishing or hunting excursion certain men of the tribe were obliged to take the fish or game to the owners of the land, and the rest of the tribe were not to fish or hunt again until the present so sent was acknowledged by the return of the messenger. There are lands held on these conditions to this day.

. . . Sometimes, also, a permission was given to cultivate in consideration of a few of the best kumaras or taros being sent immediately on the crops being gathered. Lands have been used in this way by father and son for many generations.

. . . As a general law it was not allowed to bury the dead of the occupying tribe on land held by such tenure.⁸¹

80. Swainson, 1859, in Turton, p 23

81. John White, 1861, in Turton, p 55. White advised, 'it must be borne in mind that I have spoken of the Maoris of the past'.

2.10.1 The Land with All Woods and Waters

White did not record the intense interest and pleasure of the participants in these arrangements, nor the sacredness inherent in the presentation of first fruits to the possessors of the land; but he did describe a festival that finalised the fulfilment of a contract:

if a chief is drowned, his surviving relatives demand from the owners of that part of the river or coast where his body may be found that for a certain period no fish or shell-fish shall be collected from it. This proceeding is called a *rahui*, and continues until the next shark-fishing season. The owners of the shark-fisheries then collect all the sharks taken at that season and dry them, when the tribe of the drowned chief are sent for and entertained with a feast at which the sharks are given to them. By this act the *rahui* is taken off, and the fish or shell-fish can thereupon be again taken from any part of the river or coast. Should the *rahui* be broken by the resident tribes, the relatives of the drowned chief then claim an equal right to the land.⁸²

Where an outside group held interests, they suffered a loss when the land was sold. The interest of these outsiders was sometimes recognised:

A chieftainess, who was taken slave from the South by the Ngapuhi and other northern tribes, became the wife of a Ngapuhi chief; her claim stood in the way of completing a sale of the land, and it was not until the consent of her son by the Ngapuhi chief was gained that the land could be disposed of by the Natives residing on it; and to him, in the due course of time, a portion of the payment was transmitted. . . . a chief, who had lost his canoe by drifting to sea, went along the coast to the settlement of a tribe who had been at variance with his tribe for many years, and found his canoe there, but was murdered by them. His tribe collected a war party, proceeded to the settlement, and brought away the body of the deceased chief, and in the following year went and cultivated the land. The block whereof this cultivation formed part was afterwards sold by the original owners, and the relatives of the murdered chief received payment for the portion they had cultivated.⁸³

2.10.1 Summary

There are Pacific societies where it is also customary practice for possessors of the land to grant rights to the harvesting of the land's produce to another group.⁸⁴ In the New Zealand records cited, the group receiving these rights was bound by sacred protocol to return a presentation of produce. The fulfilment of the contract was marked by a festival.

82. John White, 1861, in Turton, pp 53–54

83. John White, 1861, in Turton, p 53

84. Descriptions by Pacific researchers confirm that the practice of separating ownership from use rights is well established in Polynesian land tenure. Residents of Falehau village on Niuaotuputu island (Tonga) each year create communal yam gardens on the best land available; the land owner receives a share of the first harvest of the crop; the presentation is an occasion of feasting and festival when allocations are also made to the 'eiki and church ministers (G A Rogers, 'Kai and Kava in Niuaotuputu', PhD thesis, University of Auckland, 1975).

2.11 Commission: In Particular, Whether or Not the Crown Regarded Rights to Trees (Timber) and other Flora And Fauna as Transferring with the Land when Title to the Land Was Transferred

Under New Zealand Statutes a block of land was freeholded as the entire area contained within a fixed boundary. From 1867 on, the Animals Protection Acts and the Fish Protection Acts (initially the Propagation of Salmon and Trout Act 1867) enforced Pakeha concepts of private possession of the land and its forests, fisheries, and wildlife. An individual property owner was granted rights to all fauna within the boundaries, and the right to prohibit any person or animal from entering the property or crossing the land. Land-holders could appeal to the Minister for the eradication of protected flora and fauna within their boundaries when it impinged on economic interests.

The Fisheries Conservation Act 1884 stated: ‘3. Nothing contained in this Act shall apply to . . . (2.) Any person taking fish in water of which he is the owner . . .’. Section 14 of the Animals Protection and Game Act 1921–22 stated:

–(1.) No person shall take or kill any imported game or native game during an open season in any district unless he is the holder of a license under this Act to take or kill imported game or native game in such district during that season . . .

.

–(3.) Notwithstanding any thing in the foregoing provisions of this section, any person in *bona fide* occupation of any land, and any one son or daughter of such person, may during an open season take or kill on that land without a license . . .

Section 32 says:

The Minister, on being satisfied that injury or damage to any land has arisen or is likely to arise through the presence on such land of any animal, whether such animal is absolutely protected under this Act or is imported game or native game, and whether or not such land is a sanctuary, may in writing authorise the owner or occupier of such land, or the acclimatisation society of the district, to take or kill, or cause to be taken or killed, such animals thereon . . .

Section 34 goes on to say:

–(1.) Every person in pursuit or in possession of imported game or native game shall produce his license to any authorised person . . .

–(2.) For the purposes of this section ‘authorised person’ includes . . . the owner or occupier of the land on which any person may be found in possession or in pursuit of imported game or native game, and all holders of licenses to kill any such game issued under this Act . . .

Section 38 then says:

2.11 The Land with All Woods and Waters

38. Every person commits an offence, and is liable to a fine of five pounds, who commits any trespass by entering or being on private land in search or pursuit of imported game or native game . . .

And section 39 reads:

39. . . . nothing in any license or other authority under this Act shall entitle the holder thereof to enter upon any private land without the consent of the owner or occupier thereof, or upon any State forest or provisional State forest.

From 1840 to 1861 settlers were unrestricted by statute with regard to introductions of foreign flora and fauna (stock, game, garden plants, and so on). From 1861 to 1990 the Crown developed statutes designed to protect the assets of Acclimatisation Societies and Fish and Game Councils.⁸⁵ These regulations were intended to ensure that ‘rights to exploit the resource were to be available to and controlled by the individuals or organisations responsible for their release’ and that ‘the costs of ongoing management and maintenance were to be recovered’.⁸⁶

From 1861 Crown statutes set a precedent for property rights in flora and fauna, and for the property owners of wildlife to sell hunting licences. The Animals Protection Act 1907 stated that ‘the property in all animals and birds in the possession . . . of any registered acclimatisation society shall be deemed to be absolutely vested in such society’ and ‘in any district administered by the Department of Tourist and Health Resorts the property in all animals and birds . . . shall be deemed to be vested in the Minister’ (section 55). Thus species of fish released by the acclimatisation societies into New Zealand streams were ‘in the possession’ of the societies.

Under the Animals Protection and Game Act 1921 acclimatisation societies were again accorded property rights in the fauna they had introduced: ‘For the purposes of this Act the property in all animals in the possession or under the control of any registered acclimatisation society shall be deemed to be absolutely vested in such society . . . Provided that in any district administered by the Department of Tourist and Health Resorts the property in all animals in the possession of or under the control of the said Department in that district shall be deemed to be vested in the Minister . . .’ (Part 4, section 28). In 1970 the Wildlife Service, Department of Internal Affairs, prosecuted Taupo hapu for harvesting smelt in Lake Taupo. The court ruled that the interests of the acclimatisation societies prevailed, as they had introduced the smelt into the lake.⁸⁷

No statutes have granted property rights in flora and fauna to Maori per se. With the introduction of game licences in the 1860s, and with the scheduling of species from 1907, management of indigenous flora and fauna was transferred to the

85. Colonial Animals Protection Act 1861; Animals Protection Acts 1867–1908; Animals Protection and Game Act 1921–1922; Wildlife Act 1953; Conservation Law Reform Act 1990.

86. R M McDowall, *Gamekeepers for the Nation*, Christchurch, Canterbury University Press, 1994, p 54

87. P J Burstall, ‘The introduction of freshwater fish into Rotorua lakes’ in D Stafford, R Steele, and J Boyd (eds), *Rotorua 1880–1980*, Rotorua, Rotorua and District Historical Society, 1980

Crown. The seasons imposed did not correspond with Maori practices of successional harvesting. Section 3 of the Animals Protection Act 1907, stated:

3. (1.) The season for taking and killing native and imported game (except deer and godwits) throughout New Zealand shall begin at six o'clock in the morning of the first day of May and close at seven o'clock in the evening of the thirty-first day of July in each year . . .

Section 26 says:

The year one thousand nine hundred and ten and every third year thereafter shall be a closed season for imported game (other than deer) and native game: Provided that the Governor may, on the recommendation of the Minister, by notification exclude the Urewera country and other Native districts in New Zealand from the operation of this section so far as the same relates to native game . . .

And section 27 reads:

Until otherwise provided by regulations made under this Act, it shall be lawful to kill or take the godwit – known by the native name kuaka or hakakao – during the months of February, March, and April; but no person shall kill or take any such bird at any other time.

Maori practices of tenure are based on a different ethos, which recognises the hereditary rights of individuals and groups to particular resources, and accords control over the alienation of property and resources to kin and tribal groups. Turton's collection of documents written between 1843 and 1861 had informed the Crown of principles of Maori land tenure. The Protection Acts, dating from 1867, did not accommodate Maori concepts of property rights. The legislation went against advice given by Governor Gore Browne in 1860:

I can only, therefore, in conclusion, express my conviction that the proper course for Her Majesty's government to pursue in the future is that which has been steadily followed in the past – namely, to continue to deal with the chiefs or the proprietors of the soil according to the custom existing among the Natives themselves in each particular district in which cession of territory may be in contemplation, and in the manner which best accords with the rights of property actually in force among them.⁸⁸

C W Richmond, member of Parliament, had justified the Crown's decision to over-ride Maori codes of land and resource rights in 1858: 'The subject has two aspects: the one relating to the civilization of the Natives, the other to the promotion of the settlement of the country by Europeans'.⁸⁹

88. T Gore Browne, 1860, in Turton, p 46

89. C W Richmond, 1858, in Turton, pp 7, 8

2.11.1 Summary

From 1867 the Crown's position was:

- (a) Property rights to indigenous fauna transferred with the land.
- (b) Property rights in introduced fauna released into the wild remained with the original owners where the owners were acclimatisation societies.
- (c) Resource management was vested in the Crown.

That is, various indigenous species scheduled in the statutes as 'absolutely protected', 'native game', and 'imported game', were subject to restrictions imposed by statute and rescinded on the recommendation of the minister. Indigenous fauna scheduled as game (godwit, wild duck, native pigeon, and so on) were subject to hunting licences and closed seasons. Indigenous fauna not scheduled (harrier hawk, black shag, longfin eel, shortfin eel, and so on) were subject to extermination campaigns in the interests of introduced species. The statutes pre-empted the rangatiratanga of hapu over the floral and faunal resources of their whenua. (The statutes through which the Crown assumed control of indigenous flora and fauna are chronicled in chapter 5.)

2.12 Commission: In Particular, Who Controlled Knowledge about Flora and Fauna such as the Medicinal Properties of Various Plants

Tohunga were learned and expert in Rongoa Maori. During the debate on the Tohunga Suppression Act in 1907, Wilford read to the House an extract from Edward Shortland: 'The *matakite* and tohunga must both be members of the same hapu or subdivision of the tribe to which the sick man belongs, every hapu containing at least one *matakite* and several tohungas.'⁹⁰

Several factors combine to suggest that at 1840 medicinal materials would have been gathered from within a hapu's own whenua. The harvesting of medicinal materials may be subject to rotation and other carefully controlled practices instigated by the kuia and kaumatua. Karakia uttered during the collection of medicinal materials are directed to the ancestors who guard the land, and in sickness it is one's own ancestors who are appealed to.⁹¹ In 1854 A S Thomson reported there was no national pharmacopoeia;⁹² New Zealand is a landscape of local diversity, and contemporary practitioners confirm that while they share an understanding of the principles of rongoa, they do devise a pharmacopoeia from their local resources.⁹³

In the 1980s, amongst rural Tai Tokerau in Northland, kuia with knowledge of rongoa treated members of their whanau.⁹⁴ However, the great repositories of

90. NZPD, 29 July 1907, pp 516–517, citing Edward Shortland, *Traditions and Superstitions of the New Zealanders*, London, Longman, Brown, Green, Longmans & Roberts, p 127

91. University of Waikato, Rongoa Maori workshop, Waitaia Lodge, 1996

92. Gluckman, p 157

93. University of Waikato, Rongoa Maori workshop, Waitaia Lodge, 1996

94. Pond, papers, 1988

knowledge of Rongoa are the tohunga. Healing practices are passed down lines of teacher-practitioners, so that each tohunga practices and develops a particular inherited tradition. These knowledge-traditions are not necessarily lines of direct genealogical descent, but tohunga are usually politically aligned with their hapu and iwi.

Nga Ringa Whakahaere O Te Iwi Maori, The National Body for Maori Traditional Healing states:

Maori traditional healers are the guardians and gatekeepers of the intellectual properties of Maori traditional healing pertaining to rongoa rakau (medicinal plants), rakau rongoa (medicines derived from these plants), and tikanga rongoa (the customs and practices associated with healing in these traditional terms). The control of all these taonga is inherently with each iwi whose voices are heard through the national body, Nga Ringa Whakahaere O Te Iwi Maori.⁹⁵

Maori social organisation is resilient and traditional healers have met contemporary circumstances:

We readily acknowledge that we are all 'kaitiaki' but individually we are ignored whereas, collectively, under the National Body, we can speak as one, yet the mana and the mauri still remains with each iwi and hapu.⁹⁶

2.13 Conclusion

Maori have regrouped to meet the challenges of international legislation and retrieve what is appropriately valued from the circumstances of 1840. In determining property rights on the basis of nineteenth century records, a distinction should possibly be made between actions that met the circumstances of the day, and the prevailing ethos of a social group. People engaged in fighting campaigns, lamented the neglect of their cultivations:

E tangi ana ki tona whenua
Ka tipuria nei e te maheuheu.⁹⁷

95. Chairman (A Clark), Nga Ringa Whakahaere O Te Iwi Maori, personal communication, 1996

96. Apera Clark, personal comment, 1996

97. 'He matakite mo te pou o urutake', in AT Ngata, *Nga Moteatea*, Wellington, The Polynesian Society, 1959, Part I, p 70

