

CHAPTER 3. MAORI LEGAL AND CUSTOMARY RIGHTS IN FLORA AND FAUNA AT 1840

3.1 Introduction

This chapter is written tentatively with the author fully acknowledging the inevitable limitations of a lack of first hand knowledge of either the Maori language or Maori customary law and practice, and a reliance therefore on written English language sources. It is recognised that individual hapu and iwi will want, and are best placed, to inform the Tribunal of their own customs and practices with regard to flora and fauna, from their own districts and in their own ways. The intention of this chapter is to provide a brief overview of some main themes of Maori customary law and practice relevant to flora and fauna by 1840. 'Indigenous Customary law' has been described as the sum of a number of important relationships involving people, their religion, their natural environment and their social organisation and kinship.¹ It is hoped that a broad outline of how Maori historically held and exercised rights over natural resources and the essential differences between this and European views of the time will assist with the interpretation of events and developments discussed elsewhere in this report. In particular it might assist with understanding the possible significance and impact of the Crown's actions and policies in relation to Maori authority over indigenous flora and fauna.

Written language sources containing evidence of pre-1840 Maori customary law and practice obviously need to be treated with a great deal of care. It has been argued with some justification that they are likely to suffer from some degree of distortion as a result of the cultural perceptions and constructs of those Europeans who were recording them. In many cases by the time such traditions and customs were documented, as in the case of Native Land Court evidence, they may also have been considerably modified by contact with Europeans. Nevertheless, even taking these problems into account, a number of respected historians have still found that considerable valuable evidence remains that is sufficiently useful to at least offer broad insights into Maori customary law and practice with regard to resources such as flora and fauna.²

1. Rob McLaughlin, 'Some Problems and Issues in the Recognition of Indigenous Customary law', *Aboriginal Law Bulletin*, vol 3, no 82, 1996, pp 4–7 (citing R Berndt)

2. See for example, Angela Ballara, 'The origins of Ngati Kahungunu' PhD thesis, Victoria University of Wellington, 1991; Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c 1769 to c 1945*, Wellington, Victoria University Press, 1998; Anne Salmond, *Two Worlds: First Meetings between Maori and Europeans 1642-1772*, Auckland, Viking, 1991; Anne Salmond, *Between Two Worlds: Early Exchanges Between Maori and Europeans, 1773-1815*, Auckland, Viking, 1997; James Belich, *Making Peoples: A History of the New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane The Penguin Press, 1996; Suzanne Doig, 'Customary Maori Freshwater Fishing Rights: An exploration of Maori evidence and Pakeha Interpretations', PhD thesis, University of Canterbury, 1996. See also Manatu Maori, *Customary Maori Land and Sea Tenure/Nga Tikanga Tiaki Taonga o Nehera*, Wellington, Manatu Maori, 1991; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice, 1988

When the Treaty was signed in 1840, and for some time after, many European legal theorists and the majority of ordinary European settlers and officials tended to regard so-called 'primitive' societies as being unsophisticated in terms of law with little more than somewhat vague religious and ethical concepts. However, there is in fact a substantial body of western scholarship, backed by the sometimes more impartial reports of early travellers and explorers, that has long recognised that many tribal societies had quite clear and precise systems of rules backed by sanctions of various kinds.³ While these may have been based on quite different world-views from those of Europeans, they were still, properly speaking, systems of what is recognised as law. Like all forms of law, they reflected the values of the society that created them and even though regarded now as 'customary' or 'traditional', it is important to note, as the *Muriwhenua Fishing Report* has done, that they were not static.⁴ Like Western traditions, they were in a constant process of changing, adapting and responding to new needs, challenges and ideas, and these dynamics did not end in 1769 or for that matter in 1840. It is also a truism that within such societies, regional differences in customs and beliefs often develop as new circumstances are encountered. This also needs to be recognised and taken into account in identifying one 'Maori' law and custom concerning flora and fauna, rather than the views of particular hapu and iwi. It must be recognised that the idea of 'Maori' culture really only developed subsequent to contact with Pakeha. As a result, any broad generalisations about 'Maori' custom require a considerable degree of caution.

Nevertheless, as the Waitangi Tribunal investigation into the Muriwhenua claim found, iwi and hapu did share a common eastern Polynesian heritage and engaged in a continuing communication and exchange of ideas.⁵ Historian Angela Ballara has also noted that pre-contact Maori throughout the country shared many cultural elements, including defining themselves in terms of ancestry, using the concepts of iwi and hapu to delineate descent groups, and sharing some common protocols (even with regional variations) over issues such as encounters and resource control. They also shared underlying cultural concepts such as mana and tapu. With caution, it seems possible to identify a number of broad themes relevant to 'Maori' customary law and practice that might be useful to understanding the impact of Crown policies and actions on Maori authority over indigenous flora and fauna.

3. For example see Richard Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 8-9

4. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 31

5. *Ibid*, p 31

3.2 Development of complementary system of customary law and practice

It seems that by 1770 Maori had already created a diversity of local and regional economies that were largely related to the constraints and opportunities of the physical environment.⁶ There was also considerable communication between regional groups through the development of a variety of trade routes. Maori had therefore gained a broadly accurate knowledge of the whole country and a very detailed and intimate knowledge of the lifecycles and seasonal patterns of fish, birds plants and their overall environment including geographic features, minerals, the weather and the stars. This knowledge was preserved and passed down from generation to generation. In turn, this knowledge contributed to and was bound up with cultural and religious beliefs and practices and these also contributed to customary law and practices.

Maori systems of customary law and practice were initially based on concepts from their Polynesian heritage, modified and developed to meet the requirements of their new environment. This system of law and practice was backed by sanctions which, among other things, helped regulate access to and the use and management of resources. It is beyond the scope of this report and the expertise of this author to do more than attempt a brief outline of such customary laws and practices as were relevant to Maori authority over flora and fauna. While acknowledging that there were significant regional variations, it seems that overall Maori customary law and practice was based on a number of basic shared concepts. The Muriwhenua Tribunal noted that a dominant feature of the Maori worldview was the interdependence and relatedness of all living things, reflected in religious rites and attitudes of respect. The use of resources including those based on flora and fauna were then regulated and controlled by established practices or laws based on this worldview that were regularly observed.⁷

Anne Salmond has also explained that in Maori cosmology gods, people, land, sky, plants birds reptiles, fish, and mammals all shared in a unity of being that was expressed in a language of common descent.⁸ Whakapapa (genealogy) was therefore a central principle that ordered this universe and enabled the belief that all things shared in some common qualities of life.⁹ In Maori cosmology, the universe emerged in genealogical stages. Once the earth and sky were formed, the ancestor gods generated various forms of life including plants, animals and people. The

6. Alan Grey, *Aotearoa and New Zealand: A Historical Geography*, Christchurch, Canterbury University Press, 1994

7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 198

8. Salmond, *Two Worlds*, p 39

9. *Ibid*, p 42

gods could be remote ancestors who controlled whole areas of life, such as Tangaroa, god of the sea. They could also be family ancestors who looked after their direct descendants.¹⁰ The ancestors could collapse space and time to become co-present with their descendants, and rangatira and ariki through descent lines were believed to embody and provide a direct link to the ancestors.¹¹ The genealogical nets joined people to each other and to other kinds of beings in relationships of various kinds. This view regarded the social, natural and supernatural parts of life as being part of an interrelated and undivided whole, and various key concepts arose from this.

One such key concept was mana, which has variously been translated as prestige, or authority that could be inherited, acquired and lost by both individuals and groups.¹² Salmond has also described mana as the practical force of gods at work in everyday affairs.¹³ Mana could also be taken as a sign that relations with the ancestors were working well, allowing transactions with others to also succeed.¹⁴ The successful knowledge and use of ecosystems and the natural world contributed to the mana of a group and a number of customary practices such as giving koha developed from this.

Another concept was utu, described by Salmond as the principle of equal return or reciprocal exchange.¹⁵ This concept was also central to the Maori worldview where relationships were constantly being negotiated in terms of reciprocal exchanges. The reciprocity of relationships involved the return or exchange of gifts and hospitality as well as vengeance or warfare. Rules based on reciprocity were developed that enabled enemies to be turned into friends, the creation of new alliances and the enhancement or protection of mana. These involved for example, avoiding conflict through respecting mana, maintaining or enhancing mana through the use of utu, sharing with visitors and maintaining reciprocal relations with other groups, and ensuring resource use rights were maintained.

Salmond has described the concept of tapu as the power of the gods identifying those places, people and things where the ancestors were present in the world. Maori prized contact with their gods and safeguarded it by observing tapu where the gods were believed to be in communication with the human world.¹⁶ Tapu itself involved a system of sanctity, social constraint and sacred laws that were complemented by their opposite, noa, for those that were considered normal, ordinary and unrestricted.¹⁷

10. Ibid, p 43
 11. Salmond, *Between Two Worlds*, p 176
 12. Belich, *Making Peoples*, p 18
 13. Salmond, *Two Worlds*, p 44
 14. Salmond, *Between Two Worlds*, p 33
 15. Ibid, p 33
 16. Salmond, *Two Worlds*, p 43
 17. Belich, *Making Peoples*, p 18

A variety of sanctions backed up customary rules and practices, ranging from divine sanctions associated with breaking tapu, through the threat of human-initiated supernatural retaliation such as makutu (using incantations to invite ill effects on the well-being of the intended victim) to community sanctions such as muru (plunder of movable property), rahui (temporary prohibitions on taking resources) and utu. These systems of ordering and controlling relationships and the management and use of resources were applied to not only harvesting but also maintaining and where necessary expanding resources related to flora and fauna.

There are many documented examples of the application of these rules and practices to the use of flora and fauna, including in a range of Waitangi Tribunal reports. For instance, the *Muriwhenua Fishing Report* noted that with regard to fisheries, there were a variety of customs and practices adhered to by the Muriwhenua peoples. These included rules and practices aimed at appeasing the relevant gods to ensure the continued success of the fishery.¹⁸ Religious ceremonies were an essential part of every aspect of life including in areas such as resource harvesting. Rules for the Muriwhenua fisheries also involved the use of tapu, makutu and rahui to control human behaviour and to protect natural resources and the environment for sustaining fisheries.¹⁹ Rahui were used, for instance, to prevent fish from being taken out of season or to prohibit the use of areas or types of fish considered to be under pressure. Objects of importance such as canoes and nets attracted tapu to ensure the protection of equipment, as did important workers involved in making equipment such as nets, to ensure they concentrated their energies and were not distracted.²⁰ There were also strict rules for the maintenance of fisheries and other types of habitat. In terms of fisheries, evidence cited in both the Muriwhenua and Ngai Tahu reports stressed the importance of not gutting fish or disposing of excess bait in fishing grounds to avoid pollution and to avoid attracting predator fish who might upset the balance of the fishery. There were also prohibitions on dragging nets or baskets over shellfish beds or seabeds to avoid unnecessary destruction of breeding grounds and the conservation of what were known to be prime breeding fish.²¹

Similar rules were enforced when harvesting other types of resource. For example, only certain parts of plants were taken to ensure or promote the continued health of the plant. Ngati Koata oral traditions reveal that only the outer leaves of flax plants were taken, for example, to ensure the

18. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 24

19. *Ibid*, p 33

20. *Ibid*, p 33

21. *Ibid*, pp 24-25; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, Brooker and Friend Ltd, Wellington, 1991, p 879

continued health of the plant. Excess plant material was also always returned to the site to feed the remaining plants.²² With birds the prime time for trapping each species was known and only the plumpest were taken. A bird snaring area might also be subject to rahui and rested for a few years to ensure the recovery of bird stocks.²³ Many important resource areas such as fishing grounds, or important bird or berry areas were individually named, which is a measure of their importance.

Evidence now suggests that the traditional system of Maori customary rules and practices backed by various sanctions were a crucial element in the successful regulation and maintenance of resources. However this was not well understood by many early European settlers who appear to have allowed the apparent lushness of what looked to them like semi-tropical forests and rich fisheries and bird life to convince them that New Zealand's natural resources were richly abundant and easily taken. Instead, as the Muriwhenua Tribunal noted, once resources such as fisheries were indiscriminately plundered they were all but destroyed within a few decades.²⁴

3.3 Ownership and management of resources

The centrality of whakapapa or genealogy and descent is also evident in Maori customary rules and practices concerned with authority or 'ownership' of land and resources such as flora and fauna. By the eighteenth century Maori social structure was organised on kin-based descent groups, primarily whanau, hapu and iwi. Historians such as Ballara have shown that this social system was not static, rigid, or strictly hierarchical in pre-contact times. It seems that in the era before European contact the hapu was the largest effective corporate group that functioned to defend a territory or worked together in peaceful enterprises.²⁵ Whanau were smaller family groups, and if successful might separate off and create new hapu. Iwi were conceptually larger groups, often neighbouring clusters of related hapu all acknowledging descent from a common ancestor. According to Ballara, iwi were the widest social categories of Maori organisation in the eighteenth century whose members continued to acknowledge, and sometimes utilise, common origins.²⁶ At this time iwi did not generally function as political units, nor were they operative in terms of defence or common policy towards other groups, as many of the

22. Ngati Koata evidence, cited in Cathy Marr, 'Crown-Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', Treaty of Waitangi Research Unit, 1999, p 15

23. evidence cited in Marr, Te Tau Ihu, p 16

24. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 26

25. Ballara, *Iwi*, p 19

26. *Ibid.*, p 124

functions of the corporate group were taken over by hapu subdivisions. However members still continued to acknowledge descent from an original founder, thought of themselves as part of a wider people and in some circumstances, for example if facing a common threat, might choose to identify themselves by the name of the iwi. The structure of iwi and hapu were not rigid and static, however, and either might wax or wane according to fortunes. Ballara has noted that many kin groups, whether iwi or hapu were in transition in the eighteenth century, at different stages in the 'ongoing cycle of descent group development'.²⁷ Some were prospering with some hapu subdivisions on the verge of achieving iwi status themselves, while some iwi were in decline and in the process of becoming a minor part of another iwi.²⁸

The systems of 'ownership' within these social and economic structures were more flexible and more sophisticated than many later European officials and settlers assumed. The concept of 'ownership' itself differed from European ideas of exclusive, transferable, private property rights in many cases with ownership being more akin to having prior rights that were acknowledged and respected. However, as the Muriwhenua Tribunal has noted, customary law and practice with regard to natural resources did allow for a system of individual rights to personal property. For example, tools, weapons, clothing and ornaments could all be personally owned. This might also extend to personal interests in a whole range of smaller resources such as small gardens, a particular bird or berry tree, or a small fishing spot.²⁹ The issue of whanau 'ownership' seems more complicated, with some authorities allowing whanau ownership of some smaller resources or equipment, for example a dwelling house, stored food, small eel weirs, small canoes, small gardens and fishing grounds.³⁰ Others, for example Ballara, feel whanau ownership was not so clear.³¹ However, it does seem clear that larger groups such as hapu did have considerable acknowledged interests in resources. Individuals and small family groups were faced with considerable difficulties in surviving on their own. In contrast, hapu were often the most useful unit of productivity and security, and much economic activity required intensive production by a hapu group. Many of the richest flora and fauna resources required well-organised planning, organisation and combined group effort to successfully harvest, process and preserve them. Hapu rights therefore tended to reside in larger resources, and territorial land areas, including large cultivations, mudflats, large or abundant fisheries,

27. Ibid, p 124

28. Ibid, p 124

29. For example see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 35; Ballara, 'The origins of Ngati Kahungunu', p 346

30. For example, Belich cites the example of garden plot boundaries at Anauru Bay designed for nuclear families. Belich, p 83

31. For example, Ballara 'The Origins of Ngati Kahungunu', pp 356-359

forests, lakes and other areas where significantly large or abundant resources were found. As Belich has noted, 'Individualism and collectivism, rivalry and cooperation were harnessed to maximum production as appropriate'.³²

The system of customary law tended to reflect and support this layering of rights. In general, it appears that while individual rights existed and were recognised, they were subject to the oversight interests of the hapu in matters affecting the community as a whole.³³ Not least, in order to properly manage and use the most abundant resources, the community needed to be able to exercise overall control through sanctions or encouragement, including use of concepts such as mana, tapu and rahui. Ballara in her study of Ngati Kahungungu found that before the advent of land purchasing Europeans, 'the ownership of land and resources was not exclusively concentrated in any one category of person or group. The mana of great chiefs rested on stretches of territory but that constituted control rather than ownership. Living under the control of their chiefs, individuals 'owned' or had rights to small scattered pieces of land or resources, which could be inherited'.³⁴

Hapu knew their territories and resources in minute detail and exclusively maintained them. Important resources were often finely demarcated by some kind of marker. The Muriwhenua Tribunal noted examples of this for fisheries.³⁵ Early Europeans also often commented on the marker posts they found signifying authority over resources such as pig runs, bird hunting trees and rat runs. For instance, Donald McLean in his early travels through the Taupo area in 1845 noted seeing painted posts that he was told indicated pig runs and other boundaries.³⁶ However within overall hapu authority, individuals might claim rights through a variety of links to the hapu even if they did not normally live with the hapu group. As the Muriwhenua Tribunal noted, boundaries should not be overstressed as it was kinship, not survey definitions, that was the key to asserting rights in resources.³⁷

Individuals and groups could move widely about the resource areas where they had rights based on kinship and marriage. As individuals had the right to activate interests inherited from either parent or set of grandparents, individuals might also invoke different affiliations at different times to assert rights to various places or resources or to membership of a number of hapu. This meant that some rights in resources could belong to those who did not normally live nearby. For instance, children tended

32. Belich, p 74

33. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 36

34. Ballara, 'The Origins of Ngati Kahungungu', p 348

35. The Waitangi Tribunal, in its report on the Muriwhenua fishing claim, cites examples of stakes being used to demarcate hapu interests.

Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 37

36. Donald McLean journals, vol 1, 1844–46, ATL ms 1284, entry 16 May 1845, p 36

37. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 198

to live in one parent's district and identify primarily with that hapu, but they could still exercise their rights to take resources in the other parent's area. In this way many individuals could have rights scattered over a large area. However, these rights were limited by the ability of each individual to use a resource frequently enough to maintain their right. After several generations of non-use, such rights could be considered extinguished.³⁸ Evidence of continued occupation or use was therefore crucial to maintaining rights in resources, but this did not have to be in the style of permanent living places on nearby land, as was often the case in European terms. Instead it was the continued use of the resource, even if on a seasonal basis and making use of temporary camps, that was considered important.

Although mana or authority over land was often closely associated with mana over nearby resources such as waterways, forests or swamps, these types of resources were not, as already shown, considered as mere adjuncts to that land when considering customary rights to them. They could be considered at least as, or even more important than the land that surrounded them. This could happen for example where the land was swampy or infertile but the resource nearby was particularly abundant as, for example, in the case of the Wairarapa Lakes fishery or the Muriwhenua sea fishery. White notes Gilbert Mair's evidence that the Rotorua Lakes were far more important economically to Te Arawa than their surrounding land.³⁹ Where such non-land resources were particularly important it was also possible that mana or interests in them could be held separately from that in the land. Not only could non-residents activate rights in a resource through descent but it was possible under a variety of other circumstances. In her study of early Native Land Court evidence regarding inland fisheries, Suzanne Doig has found for instance that it was possible over time for different people to have rights in a resource than the people who controlled the surrounding land.⁴⁰ For instance, where resource rights had been gifted, then the descendants of the recipient could continue to exercise those resource rights, while control of the surrounding land would go to the descendants of the original grantor. The two groups often had strong links, but not always. For example, Doig cites the Otaupuaroro case in the Wairarapa where a claimant, Porou, was acknowledged to have rights in a particular pa tuna, but not in the surrounding land.⁴¹

38. Doig, p 236

39. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, pp 91-92

40. Doig, p 207

41. *Ibid*, p 263

It is not possible in this chapter to do more than indicate some of the varying and complex ways in which rights could be claimed in resources. Three of the three main sources of rights to land and resources were found in the concepts of 'take tupuna' (ancestral rights from a founding ancestor) 'take raupatu' (rights by conquest) and 'whenua tuku' (right by gift).⁴² These concepts were complementary with ideas of mana and reciprocity and continuing relationships, and did not fit easily with absolute and final alienations with no further interaction intended or implied, as had become the case with English systems of land transfer.⁴³ Rights in resources could also vary in extent, from a controlling right over the management of the resource, to simple use and harvest rights of differing kinds, exercised under the accepted overall control of those with management rights. With regard to inland fisheries, Doig describes the concept of 'take whanaunga', given in evidence to the Native Land Court, where rights were derived from personal relationships with the holders of direct rights. For example, an individual might gain use rights through a marriage partner or individuals whose direct rights had ceased through non-use of a resource could still be invited back, by the descendants of those with direct rights. In those cases the rights were not as strong as direct rights, through ancestry for example, and they could be revoked. Nevertheless they were still an accepted form of right.⁴⁴ Rights could also be overlapping, with some individuals maintaining use rights for a particular type or time of harvesting, or a particular species or growth stage of a species.

The methods of hapu resource use often left European observers under a false impression about the extent of 'waste' or 'unutilised' land. Hapu commonly worked various resource sites according to the premium time for harvesting, as Ballara has shown for Ngati Kahungungu.⁴⁵ Many seasonal or temporary camps were designed specifically for one type of economic purpose, for example for fern root digging, fisheries of various types, or for berry or bird harvesting. Some also seemed to be primarily used for activities such as canoe building or net making. Small groups or whole communities would move from site to site at the appropriate times. Often crops would be planted near the seasonal sites timed to be ready for harvest when the camps were in use. Although in most favoured areas large gardens enabled a more sedentary lifestyle, in general hapu were highly mobile with small groups or the whole hapu moving across the territory as seasonally required. This activity also maintained the impor-

42. See for example the principles derived from studies of Maori Land Court evidence in Manatu Maori, *Customary Maori Land and Sea Tenure*

43. Manatu Maori, *Customary Maori Land and Sea Tenure*, p 23

44. Doig, pp 238-9

45. Ballara, 'The Origins of Ngati Kahungungu', pp 342-345

tant principle that resources needed to be continually used and managed or claims to them could be considerably weakened. Europeans, however, often saw seasonal camps and cultivations that were not occupied as evidence of permanent abandonment or loss of rights, not as evidence of authority and active use rights. Europeans used to an English system of individual and absolute land ownership also often failed to understand that Maori individuals or hapu groups tended to have 'property' or rights in both land and resources that was widespread in scattered plots or sites.⁴⁶ These were also not necessarily contiguous with each other.

3.4 Maori utilisation of resources

When European settlers and officials began considering Maori customary law and practice in the mid-nineteenth century, many were strongly influenced by a popular strand of European thought concerning tribal societies. De Vattel and others had articulated this, as described in more detail in a separate chapter below on land policy.⁴⁷ This thinking emphasised the supposed superiority of European-style settled cultivations and permanent settlements, over the largely seasonal and nomadic lifestyles of many tribal societies. A major underlying assumption of this theory appears to have been that the 'superiority' of cultivated land and permanent settlements lay at least partly in the effort and skill that was required to win a living from the same land year after year. In contrast it seems to have been commonly assumed that the seasonal and nomadic lifestyle of many tribal societies Europeans encountered from around the seventeenth century, required little or no effort or skill. It was assumed that such a lifestyle involved no more than the easy plucking of fruit, birds or fish as required, from a kind of endlessly abundant tropical paradise. Maori and their economy and lifestyle appear to have been largely lumped under this assumption.

Not surprisingly, these assumptions were adopted with enthusiasm by those Europeans who supported large-scale European colonisation of New Zealand, as the view logically fed the assertion that those who used the land in 'superior' ways had a 'superior' claim to the ownership of it. For instance, in 1838 the Reverend Samuel Hinds, a supporter of immigration schemes to New Zealand, in evidence to the House of Lords Select Committee on New Zealand, stated his belief that 'civilized people

46. Ballara, 'The Origins of Ngati Kahungunu', p 352

47. For example, Emmerich de Vattel, *The Law of Nations; or Principles of Natural Law; Applied to the Conduct and Affairs of Nations and Sovereigns*, London, 1760

have a right, an inherent right, over countries that have not been subject to civilization, whether those countries are uninhabited, or partially inhabited by savages, who are never likely themselves to cultivate the country'.⁴⁸ Many of those who supported immigration also reported observations notably different from the somewhat more impartial views of earlier explorers and scientists. For example, in 1838, J B Montefiore, a trader who had visited New Zealand, gave the following evidence about Maori in support of European rights to emigrate: 'Nature has supplied them bountifully with everything. They are the most lazy, idle people I ever saw....They do not labour because Nature has provided them so abundantly'.⁴⁹

It seems clear however that these kinds of assumptions, if they were true anywhere, were quite inaccurate with respect to Maori use and management of resources in New Zealand. As historians such as James Belich have noted, one could rarely live off just plucking and eating in the New Zealand bush.⁵⁰ There seems to be clear evidence that surviving and thriving in the New Zealand environment throughout the year required a great deal of knowledge and skill, as many early European settlers trying to live 'off the bush' in New Zealand quickly found. Successful living required knowledge, planning and an immense amount of effort and organisation aimed at wide variety of resources. In turn, Maori developed a sophisticated system of law and practice to manage and control these efforts. The use and management of resources may have differed from what Europeans had become used to believing epitomised 'civilization' but the level of skill expertise and knowledge required was not any less.

Academics tend to agree that available evidence supports the idea that on first arrival the new Polynesian immigrants may well have treated many resources indiscriminately with adverse consequences. This may have caused, for example, the extinction by hunting or severe habitat modification of various types of bird including the moa, and the retreat of some resources such as coastal seal rookeries.⁵¹ Nevertheless it is also generally agreed that within a relatively short time, when it became clear the resources of their new world were not infinite, Maori moved to develop a more sustainable system of managing their economy. This does not mean that Maori would not modify their environment where this might offer a clear advantage. They were at times willing to sacrifice one type of resource to encourage another. For example, they deliberately burned some forest areas to clear ground for cultivations and to encour-

48. 'Reports from Select Committees on New Zealand, 1837–1840', BPP (IUP), vol 1, p 129

49. *Ibid*, p 57

50. Belich, p 69

51. For example, Belich, p 51; Salmond, *Two Worlds*, p 39

age the spread of bracken fern, whose root was a staple food. Some historians suggest that Maori may have modified over one quarter of the natural environment of Aotearoa through activities associated with hunting, harvesting and cultivations.⁵² In some areas, Maori were also quick to take part in felling bush and draining swamps when opportunities created by early contact with Europeans appeared to offer more than could be obtained from the natural resource. However in general, successful living depended on conserving and encouraging natural resources for another day. Wanton destruction or over-harvesting by contrast produced little long-term gain and could well result in economic disaster for communities. Practices and a corresponding system of customary law were developed that allowed for intensive economic production and management of resources.⁵³

There is ample evidence of the Maori move to a more intensive use of a wide variety of resources after their initial settlement period. It seems clear for instance that Maori developed methods of utilising some two to three thousand species of plants and animals in New Zealand.⁵⁴ In terms of plant material alone, a wide range of plants was known about and used for a variety of purposes such as for food, medicine, equipment, containers, building materials, clothing, transport, perfumes, chewing gum, and cosmetics. All parts of plants were also thoroughly known about and utilised where useful, including the fruits, berries, flowers, pollen, leaves, stems, piths and roots. In some cases plant material was subject to considerable processing to either make it more palatable or useful, for example fern root (aruhe) or flax, or to remove poison such as for karaka berries. Similarly a wide range of bird and fish life, as well as less common resources such as mammals and fungi, were known about and harvested at various stages of life cycles and at prime seasons.

Maori also utilised resources for more than simply pragmatic survival purposes. Resources were important to a rich cultural, spiritual, and social life. Evidence has been found, for instance, of plant materials used for a range of cosmetic purposes, chewing gum, hair and body oils and paints and perfumes. Materials such as red and white bird feathers were prized for decorative purposes and shell and bone for ornaments. Maori society was capable of supporting a degree of specialisation such as tohunga, and artisans in weaving and wood carving.⁵⁵ Maori society also developed economic systems capable of exploiting excess production through trade. The countrywide network of trade routes also enabled the

52. For example, Grey, p 1, fig 1.1

53. For example, Belich, p 34

54. Belich, p 69

55. For example, Belich, p 106

rapid spread of new ideas and introductions and enabled rapid communications between various groups. For example Cook noted in his diaries how quickly news of his visits spread.⁵⁶ In the early years of European settlement, a New Zealand Company surveyor, Samuel Stephens, also noted that living at Motueka in 1843, he received news of what was happening in the Wellington/Cook Strait/Cloudy Bay area much faster through Maori at the Pa, than from local settlers.⁵⁷

Resource knowledge extended not only to what to take and when, but how it might be best harvested or trapped and how any abundance might be preserved and stored for future use, whether for reserves for out of season use or for trading or gift giving. There are many reports from early travellers supported by later studies that show Maori were skilled at harvesting and trapping and a variety of methods of preservation, such as drying or packing fish or birds in their own fat or oils. These processes were often conducted on a very large scale with considerable community effort and organisation. Wakefield noted the very large fish drying sheds used by Maori in Golden Bay in 1839 for example.⁵⁸ The *Muriwhenua Fishing Report* also notes many examples of the knowledge and expertise of Muriwhenua people in catching, preserving and storing a variety of fish.⁵⁹ The report cites the accounts of many early travellers and explorers, noting the ability, skill and organisation of Maori fishing communities.⁶⁰

The intensive management and use of such resources involved a mixture of taking at the right season and also intensive management involving the conservation, modification and manipulation of the natural environment, practices that were much closer to the idea of cultivation that Europeans favoured. European perceptions were based on the experiences of European economic systems and resource use. Historian Anne Salmond has studied the impact of early European contact on Maori communities, including the various perceptions and experiences that influenced those involved in such contact. She notes that this produced quite different perceptions between Europeans and Maori as to such fundamental concepts as resource use and ownership, land ownership and attitudes to the environment. Europeans were influenced by developments in their economy and society that had led to the primacy of private landed property, settled intensive agriculture and the development of extensive trade and commerce.⁶¹ These developments were accompanied by changes in ideas and perceptions. A burgeoning interest in science,

56. cited in Grey, p 110

57. Samuel Stephens journal 1842–1845, ATL, ms 2053, entry of 1843, p 175

58. Marr, *Te Tau Ihu.*, p 13

59. For example, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 33

60. *Ibid*, p 42-43

61. Salmond, *Two Worlds*, pp 90-93

reason and controlling the natural world was accompanied by increasing individualism with an emphasis on the separation of the mind and the natural world. Along with this went the idea that the natural environment could be exploited and subjugated and that this in itself could be regarded as a measure of civilisation.⁶²

In Maori customary law and practice however, there was no particular inherent hierarchy of importance assigned to land and other resources. Non-land resources such as waterways, swamps, bush areas, fisheries, flax plantations and similar food and material resources could be at least or even more important than land in some areas. It was often the transition points between various ecosystems that were richest in resources; such as lake and river edges, swamps, estuaries, and coastal margins.⁶³ These were as likely to be waterways as land areas. The application of a legal hierarchy where land ownership was most important and other resources were considered mere incidents, did not fit well within Maori customary resource utilisation.

Maori customary systems also made no clear differentiation between the value of 'cultivation' and the so-called 'passive' harvesting of natural resources. As shown, seasonal exploitation of resources involved much more than simple 'taking' or 'plucking' requiring sophisticated conservation methods, with in many cases modification and manipulation of the environment such as eel husbandry and acclimatisation, and the cultivating of trees such karaka and ti kouka (cabbage tree) – activities based on considerable skill, enterprise and knowledge. In some areas settlements were virtually permanent and based on the intensive cultivation of large gardens which were developed and managed with considerable expertise, more readily recognised as skilled horticulture by Europeans. In other, less favourable areas, gardening was much more a supplement to seasonal harvesting of other resources and might be planted on sites used for temporary fishing camps for example, timed to come into production when the camp was being used for fishing.⁶⁴ Less recognised by early European settlers, but still important, Maori developed ways of harvesting wild plant groves such as flax that encouraged regrowth and maximised the health of what was effectively a wild 'crop'. Some activities concerning natural crops such as fern root collection required a great deal of team activity that was much more like gardening than simple 'taking'.

There is also evidence of Maori management and manipulation of the forest environment to encourage or conserve certain resources. For ex-

62. For example, Salmond, *Between Two Worlds*, p 509

63. Grey, p 94

64. for example, Grey, p 108

ample in the Nelson region, some areas were apparently traditionally burned off to encourage fernroot production, while close by stands of lowland bush, such as 'The Wood' were conserved because of the rich abundance of berry, birdlife and plant material they contained. It also seems that certain trees and plants, such as ti kouka (cabbage tree), flax, and karaka, were deliberately planted in many areas because of their value. Living plant material was also trained, pruned and pre-prepared for future use, even if this was some years later when the plant had matured.⁶⁵ Other resources such as eels and shellfish were also deliberately introduced and seeded in many areas.⁶⁶ There was a close interrelation between traditional 'gardening' or cultivations and other types of resource use. For example, plant materials such as gourds or flax were necessary for the preparation of food containers for preserved fish or bird produce. Food crops might also be grown to sustain seasonal fishing or trapping parties. Again, European distinctions between the importance of cultivating crops which was associated with hard work, skill and knowledge and the simple 'plucking' of berries and birds which was associated with seasonal and mobile resource use, did not fit well with the reality of traditional Maori resource use.

3.5 Maori response to early contact

As noted earlier, Maori society, like western and other societies, changed and adapted according to circumstance. 'Traditional' custom and practice was not static but in a constant state of modification and adaptation. For some seventy years before 1840 Maori communities had some form of contact with Europeans and absorbed many different ideas and perceptions as well as material introductions in the form of plant material, livestock, tools and equipment not to mention epidemics and disease.⁶⁷ Maori communities had different levels of contact and responded to these experiences with inevitable modifications, some conscious and others unconscious. These have been described by a number of historians such as Belich and Salmond and are addressed in more detail in other chapters in this report.

However, in brief, it seems that in the early contact period, even where contact was considerable, while Maori communities were enthusiastic about what they perceived to be the advantages of western contact, they

65. Belich, p 73

66. for example, Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 879; Doig, p 276; White, *Inland Waterways: Lakes*, p 64

67. Salmond, *Between Two Worlds*, p 511

retained considerable control over what ideas or materials were accepted or rejected. This process also took place largely within Maori cultural constructs. Chiefs and hapu might be more lenient on infringements of traditional laws by Europeans in an effort to maintain trade and other relationships, but they still retained ultimate control in enforcing law and Europeans for the most part abided by it, or suffered the consequences. Maori were, however, confident of participating in new opportunities and there is substantial evidence that by 1840 they welcomed an increase in European settlers and some degree of change. Evidence of this can be found in the discussions surrounding the signing of the Treaty of Waitangi. This is not to say, however, that Maori expected to completely abandon their traditional systems of law and practice with regard to resources such as flora and fauna and have them completely replaced by western systems, as many Europeans of the time assumed. The extent to which Maori were able to fulfil their expectations concerning authority over flora and fauna are major issues for this claim.

3.6 Conclusion

This chapter has attempted to briefly outline some broad themes relevant to Maori customary ownership and utilisation of natural resources that appear relevant to an understanding of later Crown and settler policies. It seems apparent that pre-1840, various Maori communities had developed a sophisticated system of law and practice backed by a range of sanctions and based on experiences and practices necessary for successful settlement in the New Zealand environment. As with most cultures, this system was flexible and capable of absorbing new experiences and developments. The very enthusiasm and success Maori communities showed in adapting to new opportunities resulting from European contact may well, however, have contributed to erroneous European beliefs that Maori were willing to entirely abandon old ways and replace them with 'superior' western systems.

In contrast, many recent studies have shown that while Maori communities did welcome new opportunities, they tended to selectively incorporate these within traditional constructs and systems. It also seems reasonable to consider Maori support for the Treaty of Waitangi within this context, even though many Europeans of the time tended to assume

it signalled a willing replacement of traditional authority systems with English legal concepts. As such, it also seems reasonable to consider that Maori may have anticipated a continuing effective role in decision making over how and to what extent traditional systems might be modified or incorporated into any new systems of management.