

CHAPTER 8. THE NATIVE LAND COURT

The Native Lands Acts of 1862 and 1865 established the Native Land Court to investigate customary Maori rights and convert them into individual Crown-derived shares in land, which Maori could then sell or lease directly to Pakeha settlers or to the Crown. A Native Land Court was first established under the Native Lands Act 1862 but although that Act established some important principles that were continued in subsequent legislation, hearings under it did not begin until 1864 and were limited to the Bay of Islands and Kaipara districts. The Court then became fully operational under the Native Lands Act 1865 and has continued to operate under numerous subsequent legislative provisions since that time.

It is beyond the scope of this chapter to report fully on the Native Land Court process. However, a number of investigations have shown that the Native Land Court was established and operated overwhelmingly to meet settler needs and interests.¹ Its primary purpose in the years from 1862 to 1912 was to facilitate large-scale colonisation by transforming customary Maori title into a form of land title that could easily be sold. The new form of title and the Court system itself were intended primarily to facilitate the alienation of Maori land, rather than its development by Maori owners. As part of its role in facilitating the alienation of Maori land, the Native Land Court also proved to be an important mechanism in undermining Maori authority over indigenous flora and fauna.

The Native Land Court had a number of important consequences for Maori authority over indigenous flora and fauna. Perhaps the most obvious was that the sheer effectiveness of the Court in facilitating the alienation of large areas of remaining Maori land, also ensured that large areas of indigenous flora and fauna were alienated from Maori along with the land. The new form of freehold title created by the Native Land Court also established an absolute land ownership that cut out many previous right holders from legal recognition, including those with traditional rights to flora and fauna. The title reflected the system of property ownership favoured by European settlers in New Zealand that placed primary emphasis on exclusive individual title to land, and that made no accommodation of the historic use rights of Maori. This was so even though in England, as has been shown above in chapter 5, common law accommodated wider community use rights in freehold titles in the form of rights of common. In addition, in facilitating the alienation of so much land and

1. For example, Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, Bridget Williams Books, Wellington, 1999, p 125; David Williams, *Te Kooti Tango Whenua: The Native Land Court 1864–1909*, Wellington, Huia Publishers, 1999, p 157

resources, and creating new forms of title that proved to be unsuited to new economic opportunities, the Native Land Court process contributed significantly to the marginalisation of Maori, both in terms of economic viability and in participating effectively in new forms of management and use of indigenous flora and fauna.

The idea of some kind of Native Land Court might well have been acceptable to Maori as there was considerable support within Maori communities by 1860 for some kind of facility that might enable selected Maori land to gain a form of title more suited to the market economy. Some chiefs were interested in setting aside blocks of land for lease or sale to Pakeha settlers, although leases were generally preferred. There were also moves to set aside land that might be developed by Maori as family farms. Chiefs had made it clear to the Government for some time however that they wanted to retain control of the process and they wanted to be able to manage land more rationally, without the disruption of the large Crown 'blanket' land purchases. At hui like the Kohimarama Conference of 1860, Chiefs told Crown representatives they wanted to be able to deal over land directly with Pakeha. They did however want reasonable safeguards for this, so they could maintain control over the process of decision making over customary lands, deciding what lands to retain and what might be available for disposal through sale or lease. The chiefs needed a legal process that recognised their decisions and was capable of giving effect to them, so they were able to authoritatively lease certain land and have this legally recognised for purposes such as enforcing payment of rental monies or setting rental terms. They also wanted legal protections to ensure there was sufficient opportunity for considered discussion among hapu before negotiations took place over possible land disposals, and that any negotiations were known to all with interests in the area. Chiefs also preferred a public system of tendering or auctioning Maori land for disposal to ensure true market prices were established.²

The settler government and the Colonial Office also wanted a new system of obtaining access to Maori land, preferably by direct purchase of individual titles in land that had been, 'assimilated as nearly as possible to the ownership of land according to British law'.³ The Crown already claimed to have extinguished Maori customary title over most of New Zealand by 1865, through Crown purchases, validated old land claims, and confiscations as the result of the wars. This had resulted in most of the South Island and roughly one third of the North Island being de-

2. Alan Ward, *National Overview*, vol 2, Waitangi Tribunal Rangahaua Whanui Series, Wellington, GP Publications, 1997, pp 126–127

3. Preamble to Native Lands Act 1862

clared 'free' of Maori customary title.⁴ However, as Williams has noted, there still remained 'an enormous area of the North Island which was tribal land, governed by the principles and rules of tikanga Maori, and which remained beyond the pale of colonisation and settlement'.⁵ This North Island heartland was to be the focus of the new Native Land Court's work, not just in order to facilitate the alienation of more Maori land for settlement purposes, but to assist in undermining iwi authority and so ensure, as one settler politician explained, that Pakeha would become 'the masters of the country'.⁶ For this reason there was a distinct lack of settler enthusiasm for establishing the kind of tribunal that might have enabled Maori to have some significant role in decision making over customary land, such as Governor Grey's short-lived experiment in Maori 'local government' through district runanga. Instead, settler politicians chose to establish a new Native Land Court that was overwhelmingly designed to meet settler needs.

The Native Lands Acts 1862 and 1865 recognised that Maori were the rightful owners of all customary land in New Zealand, even their so-called 'surplus' lands. However the Acts were predicated on the concept that the Crown, through the transfer of sovereignty, had gained 'radical' title over all land in New Zealand, 'subject' to the customary rights of Maori. Maori now had to prove 'entitlement' to their own ancestral lands by evidence of customary associations with that land. The preamble to the 1865 Act, for example, stated that the purpose of the Court was to properly identify the 'owners' of Maori customary land according to Maori 'proprietary customs'. The Court was then to go on to transform customary title into Crown granted titles, or as the preamble stated, to encourage 'the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown'. The Act also sought to ensure there was no possible reversion to tribal title, by controlling succession rights in Maori land.⁷

In transforming customary tenure, the Native Land Court was expected to assimilate Maori customary systems of authority over land and associated resources, as closely as possible to land ownership concepts of British law. As such, there was to be no legal recognition of 'ownership' until it was defined in a freehold certificate of title that carried with it all the implications of British-based property law. Section 48 of the 1865 Act, for example, barred the recognition all other interests in the land, except the freehold interests created in favour of those named in the certificate

4. Ward, *An Unsettled History*, p 126

5. Williams, p 52

6. Colonel Kenny, Member of the Legislative Council, describing the purpose underlying the Native Lands Act 1862, NZPD, 1861-3, p 716, cited in Ward, *An Unsettled History*, p 131

7. Ward, *National Overview*, vol 2, p 221

of title. The new Crown-derived titles were to be fully transferable, fee simple titles. In the process, the complex and overlapping system of Maori customary rights in land and resources such as waters, flora and fauna, was to be greatly over-simplified and in some cases lost, by conversion into a freehold title based on the primacy of exclusive rights in land.

The Native Lands Acts were also intended to undermine chiefly and hapu authority. This was even more apparent in the Native Lands Act 1865 than the Act of 1862.⁸ The 1862 Act had originally provided for some chiefly input into Court decisions. The Native Lands Act 1865 however, greatly reduced this, providing for Pakeha judges to hear cases, with the assistance of Maori assessors who in terms of their legal powers, were of a much lower status and authority than the judges. The certificates of title that were issued subsequent to a Native Land Court investigation further undermined hapu authority as they created new absolute, transferable, rights of ownership (and alienation) that were outside traditional hapu control.⁹ The Acts also established a system whereby just one individual Maori, making even a specious claim and without the backing or even knowledge of his or her hapu, could force a whole community with interests in a land block into the Native Land Court. Otherwise they risked being completely excluded from having their rights legally recognised. Thus as David Williams has noted, 'the lack of formal legal compulsion cannot disguise the fact of practical compulsion'.¹⁰ The Court interpretation of succession created a system of continually fragmenting multiple ownership that encouraged the sale of small shares and worked against hapu or chiefly management or control of land or resources. In addition, there were few effective legislative safeguards to protect individual Maori named in the title from pressure from land purchase agents and speculators even before title was determined.¹¹

The Land Court judges and a variety of subsequent Native Land Acts and amendments developed a system of rules, norms and procedures under which proof of entitlement to customary land was to be determined. These developments further tended to facilitate the alienation of remaining Maori land into Pakeha control and to downgrade hapu authority.¹² Procedures were established along formal Court lines, rather than allowing the development of procedures more suited to an investigative commission of inquiry. These included the Court insistence that it would only consider evidence placed before it, even though it might be well known that some of those with widely acknowledged interests were

8. Ward, *An Unsettled History*, p 128

9. *Ibid*, p 133

10. Williams, p 85

11. Ward, *An Unsettled History*,

p 131

12. Ward, *National Overview*, vol 2
p 219

unable to attend a hearing. Through this rule, the Court could also refuse to accept decisions previously made by tribal committees on the grounds that all evidence had to be heard by the Court.¹³ When a right of appeal became available, the Court also moved to simplify and shorten the process by imposing time limits and accepting only limited grounds upon which appeals could be made. The legislation under which the Court operated also required that the customary title to all the land brought before it be extinguished, including those parts Maori might want to retain.¹⁴

Many of the processes associated with the Court system also had the effect of forcing further land alienations. The costs associated with the Native Land Court process once Maori land became caught up in the Native Land Court system are a prime example of this. Heavy expenses were commonly incurred with survey fees, especially when numerous partitions were involved. Court costs were also imposed for each day of a hearing, and further expenses were often incurred in travelling to and from hearings and in staying in areas where the hearings were held. All the costs required cash Maori often did not have unless they sold further land. Once a block of land came before the Native Land Court, a list of all those claiming interests was widely circulated and every individual on it became a likely target for land purchase agents, often seeking to trap them into further debt to pressure them to sell their shares. As part of investigating title, the Court could also order some land taken for roading. As a result, Maori were required to contribute significantly to the cost of improving land for Pakeha settlement as well as paying dearly to secure Crown recognition of titles to their own land.¹⁵ These factors can all be seen as contributing to pressure upon Maori to sell more land which in turn saw them lose authority and access to the flora and fauna upon it.

The original Native Lands Acts were followed by a huge mass of subsequent Acts and amendments concerned with Native Land Court powers and operations. There were a very large number of legislative provisions relating to the Native Land Court in the years to 1912, with significant amendments virtually every year. The peak years, for sheer numbers of amendments were 1888 and 1889, which had eight and nine separate enactments respectively, dealing primarily with Native Land Court activities.¹⁶ Most of the amendments were aimed at extending or modifying the Court process to facilitate providing Maori land for settlement. The

13. Williams, p 160

14. Ibid, p 178

15. Ward, *An Unsettled History*,

p 129

16. Williams, pp 141–142

various Native Land Acts did not facilitate controlled selling, or the subdivision of Maori land into economically viable holdings, deliberately making it much easier to sell rather than retain land.¹⁷

There were some measures intended to be protective of Maori interests among the many legislative provisions, but historians have shown these were generally weak, ineffective or largely ignored by Native Land Court judges in the interests of facilitating settlement. For example, judges clearly preferred awarding title to named individuals, largely ignoring provisions that enabled them to award title to hapu instead. Judges also tended to interpret the notorious 'ten-owner rule' strictly as an absolute right, rather than accommodating some idea of trusteeship as well. This rule was apparently originally intended to promote individual or family farm holdings by awarding title to suitably sized blocks and limiting owners to ten for each title. However this was subverted by the practice of awarding title to much larger blocks but still limiting owners to ten, thus cutting out large numbers of owners with customary rights.¹⁸

Legislation such as the Native Lands Act 1867, the Native Lands Frauds Prevention Act 1870 and the Native Land Act 1873 all contained some intended protections for Maori interests. These included powers for Native Land Court judges to create reserves with restrictions on alienations, requirements for all Maori owners to be recorded by the Court and provision for Trust Commissioners to inquire into whether Maori had sufficient remaining land. As time went by, however, protective provisions were generally weakened or removed altogether by subsequent legislation.¹⁹ As protections were weakened, legislative measures also became more overtly compulsory. For example, the Maori Land Settlement Act 1905 provided that the Native Minister could initiate Native Land Court investigations into Maori customary land regardless of the wishes of the owners.²⁰ Brief investigations suggest that legislative protections were even more ineffective for resources such as flora and fauna, than for land. Protections concerning reserves, for example, were often stated in terms of area of land per person or suitability for agriculture, rather than on whether they contained resources important for Maori. Where resources happened to be associated with reserved land, there were also few mechanisms available to ensure their continued protection from the impact of settlement. The Native Land Court sometimes awarded reserves itself. In 1868, for instance, it was empowered by an order of reference signed by a

17. Ward, *An Unsettled History*, p 129

18. Ward, *An Unsettled History*, pp 139–141; Williams, pp 157–186

19. Williams, pp 210–211

20. *Ibid*, p 85

member of the Executive Council to determine and award reserves that should have been made as a consequence of the 1848 Crown purchase of Canterbury and Westland from Ngai Tahu. This resulted in 5,000 acres of new reserves being awarded. This total included a number of fishing reserves – generally blocks of land adjacent to a river or lake. As the Ngai Tahu Tribunal observed, however, over the next 15 years, the fisheries attached to these reserves were destroyed, largely by the drainage of lakes and wetlands.²¹ Another example of the Native Land Court making fishing reserves was in 1896 when it made a fishing easements over Lake Horowhenua and its outlet, Hokio Stream, vesting these in trustees on behalf of the Muaupoko owners of the land adjacent to the lake.²²

As well as investigating the customary ownership of land, the Native Land Court also undertook investigations into the extent and nature of Maori rights in the foreshore, rivers and lakes. In the case of waterways, the issue for the Native Land Court was the ownership of the bed – common law treating rivers and lakes as simply being land covered with water. However, in the period from the Court's inception to 1912, it did not investigate the title of any major inland waterways other than the Wairarapa lakes (see chapter 13). The key case in relation to the foreshore was Chief Judge Fenton's 1870 decision concerning the foreshore at Kauwaeranga near present-day Thames. Rather than awarding a title to the soil of the foreshore to which the applications pertained, Fenton held that the interests held by Maori were only exclusive rights of fishery. The effect of those orders was that the affected foreshore was divided into parcels, and the owners of sections that abutted the coast had exclusive fishing rights in the corresponding part of the foreshore.²³ In evidence Fenton later presented to the Native Affairs Committee in 1880, he was at pains to stress that it was a title to a fishing rights easement that had been awarded, not a recognition of any rights below the surface.²⁴ Between the Kauwaeranga decision and the end of the period that this report is concerned with there appear to have been only a few more cases in respect of the foreshore brought before the Native Land Court.²⁵ Legal historian Fergus Sinclair has observed that Fenton's test for awarding a fishing easement was evidence of exclusive use of the fishery in question. Sinclair is of the view that this test finds support in evidence from the nineteenth century where a distinction between casual public use and the use of jealously guarded exclusive resources is apparent. He therefore concludes

21. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, Brooker and Friend Ltd, Wellington, 1991, p 508; Waitangi Tribunal, *Ngai Tahu Report*, vol 3, pp 903, 908

22. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, p 67

23. Fergus Sinclair, 'Kauwaeranga in context', *Indigenous Peoples and the Law*, October 1999, p 6 (available online at <http://www.kennett.co.nz/law/indigenous/1999/34.html>)

24. *Ibid*, pp 13–14

25. *Ibid*, p 15

that Fenton's criteria of exclusivity 'had some parallels in custom, and cannot be easily dismissed as an application of Dr [Thomas] Arnold's doctrines to marine property.'²⁶

The Native Land Court, in seeking to investigate customary interests in land also became involved in attempts to codify Maori custom in a manner that facilitated its transfer into an absolute freehold interest. This inevitably distorted and simplified the Maori system of customary rights and interests in both lands and resources such as flora and fauna. Some kind of change or simplification may well have been inevitable, given that Maori wished to participate in new economic opportunities and in a market economy. However the Native Land Court system undermined Maori efforts to effectively participate in controlling this kind of change and sought to exclude customary interests that could not easily be transformed into an English-style land title. The need to provide a freehold, transferable title for the purposes of large-scale settlement took precedence over Maori requirements to manage change to meet their own needs and interests. Judges had full authority to decide Maori custom for their purposes. They therefore tended to favour grounds for rights that most closely aligned with their own prejudices or most easily simplified title for alienation. It has been noted that Land Court judges tended to favour claims based on conquest and ancestry along with continuing occupation (*ahi ka*).²⁷ These grounds aligned most closely with European concepts of land rights, especially the superiority of permanent cultivations over seasonal harvesting. They also sought to determine those with the 'best' entitlement to land, in the process distorting or ignoring other overlapping interests and excluding or effectively dispossessing those with acknowledged, although 'weaker' interests. This had major consequences for Maori interests in land associated with seasonally harvested resources such as flora and fauna.

The Native Land Court proved very effective in achieving the purposes of settler government and large areas of remaining Maori land in the North Island were alienated following Court investigations. In the period between 1865 and 1911 the Native Land Court investigated almost all Maori customary land and much of this was then rapidly alienated, passing into Pakeha control.²⁸ When the Native Land Court began operating, roughly two thirds of the North Island was still held under Maori customary tenure – about 18 million acres. By 1909, over half of this had passed through the Native Land Court and had been alienated by pur-

26. *Ibid*, p 14–15

27. For example, Williams, pp 187-188

28. Ward, *National Overview*, vol 2, p 248

chase, in total over 10 million acres. A further three million acres were alienated by lease. Generally leases were administered in such a way that Maori effectively lost control of the land. For example, some legislative provisions made leases perpetual at low rentals, while the value of improvements on other leased land meant Maori were unable to prevent the leases from being rolled over. In many cases Pakeha settlers simply regarded leasing Maori land as a preliminary step to acquiring the freehold and agitated, often successfully, for the Government to assist with this. For example the Government undertook a number of campaigns to acquire the freehold of Native Township lands on behalf of Pakeha lessees.²⁹ The loss of such large areas of land as the result of the Native Land Court process was perhaps the single biggest factor in the loss of Maori access to indigenous flora and fauna.

To facilitate sales, the legislation under which the Native Land Court operated insisted that the Court created Maori freehold title to all land that came before it – even land Maori wished to retain. As a result, it has been estimated that by 1911, the amount of remaining Maori customary land was just under 200,000 acres.³⁰ The creation of Maori freehold title had important consequences for Maori authority over indigenous flora and fauna. Maori freehold title created a form of ownership that favoured rights based in land rather than resources. In fact the Native Land Court was required to investigate customary rights to land, rather than other types of customary interests. The general practice of the Native Land Court in making freehold orders therefore was to focus on land and exclude traditional ‘incidents’ of customary title, such as rights in flora and fauna, from the order. More recently as more consideration has been given to the possibility that the aboriginal title might be recognised as part of Common Law, it has been argued that the freehold orders of the Court may in fact have produced no more than a partial extinguishment of aboriginal title. Paul McHugh, for example, has put forward a case that the legislation creating Maori freehold title was ‘incomplete’ as it purported to bring traditional tenure into the English Crown-derived system, and as a result ‘traditional incidents’ still survive as non-territorial aboriginal title. As part of this, he has pointed out that it is possible to distinguish the owners of common law non-territorial aboriginal title (such as in flora and fauna) from the owners of Maori freehold land, the former being likely to comprise a much larger group.³¹ In addition he takes the logic further by concluding that if the doctrine of aboriginal

29. Cathy Marr, *The Alienation of Maori land in the Rohe Potae (Aotea block)*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), vol 1 1996, vol 2 1999

30. Williams, p 59

31. P G McHugh, ‘Aboriginal Servitudes and the Land Transfer Act 1952’, *Victoria University of Wellington Law Review*, vol 16, 1986, pp 324–325

title is accepted, then it follows that a grant from the Crown does not of itself extinguish aboriginal title. Instead it is possible that native title continues to exist independent of a title from the Crown, unless it has been extinguished by legislation or voluntary relinquishment.³² In the period under review, however, it was officially assumed that the Native Land Court investigations and orders completely assimilated all forms of traditional customary interests into the English legal form of land ownership. As a result, with Maori freehold land, traditional owners were recognised as having no rights of title (such as in flora and fauna) above and beyond the rights any non-Maori landowner enjoyed.

Many of the Native Land Court processes outlined above that effectively limited the numbers of traditional right holders recognised as having interests in land also excluded many from continuing interests in flora and fauna associated with the land. For example, the same exclusionary principles of finding those with 'best' rights to land also excluded those who lost out from continued access and control over flora and fauna associated with the land. Rules such as the ten-owner rule also enabled the small number of owners named in a title to not only alienate land but also important resources associated with that land. Similarly, Court procedures such as partitioning of land, which was used extensively to assist with purchasing, could often result in the Court partitioning off important resources. Ward has described how as a result of Court applied provisions, 'many customary owners, perhaps hundreds in each instance, were shut out of the titles of many blocks issued by the courts'.³³ This is just as applicable to the interests in resources associated with the land blocks for which title was issued.

The Native Land Court system had a further impact on Maori authority over flora and fauna in the sense that it purported to totally assimilate Maori customary interests into English-style land ownership where interests in land were of primary importance. This did not allow for the possibility of non-territorial customary interests such as fishing, birding or plant-gathering rights separate from rights in land. As its name indicates, the Native Land Court was required to be primarily concerned with land, and whatever the weaknesses with regard to its investigations of customary interests in land, these types of interests were still given precedence over customary interests in resources such as vegetation, fisheries or bird habitats. This, in part, reflected the preoccupation of Pakeha settlers for obtaining land for agricultural and pastoral purposes. The settler

32. *Ibid.*, pp 319-320

33. Ward, *National Overview*, vol 2, p 220

vision involved the destruction of large areas of indigenous habitat and its transformation into farmland. Indigenous flora and fauna were only valued as they assisted with this process, such as timber required for construction purposes, or native grasses for pasture. Much indigenous flora and fauna was not considered economically valuable at all, including most inland fisheries, indigenous birds and bush land. Resources associated with these were likewise considered to have little value and were considered to be very much a secondary consideration to the primary importance of land.

The preoccupation with land was reflected in imported British legal concepts concerning landed property rights. Resources associated with land were generally considered part of the bundle of rights associated with land ownership. The ownership of resources such as small inland waterways, forests and swamps containing flora and fauna, located within a block of land, were considered incidental to the ownership of that land. The Native Land Court heard a great deal of evidence on customary resource rights and usages of flora and fauna but considered them important only insofar as they assisted with determining the primary question of land ownership. Rights of management and use of flora and fauna were therefore recognised as important in that they helped establish land ownership, but it was not generally considered necessary to investigate them in their own right, nor were they given any separate Crown derived legal recognition. The Native Land Court was also concerned with determining who had the 'best' rights to a discrete, transferable, piece of land, not in attempting to accommodate overlapping or seasonal interests. Nor was it willing to 'complicate' title by granting use or access rights (in the form of easements), separate from the ownership of surrounding land, which it could have done.

A number of official inquiries were established in response to Maori criticisms of the Native Land Court process and the impact it was having on their customary interests. One such inquiry was the Hawkes Bay Native Lands Alienation Commission, which in 1873 published a report on Native Land Court operations and disputed purchases in the Hawkes Bay district. In his report, Commissioner Maning reflected the settler and Native Land Court view that it was necessary to disregard or devalue Maori customary interests in resources other than land, in the interests of promoting settlement. In his view, the 'whole value and utility of the Native Lands Acts' depended on the Native Land Court making a final and

decisive decision on land ownership and ‘conferring a perfectly exclusive title on the grantees’. In Maning’s opinion:

any other theory than this, which would acknowledge the possibility of any rights of ownership founded on Maori custom remaining unextinguished, and vested in any persons other than the grantees, would not only encourage, but create, a general attack on the validity of the titles to all lands which have been purchased by Europeans from Native grant-holders, and finally against all titles to all lands held by Europeans all over the North Island.³⁴

Maning acknowledged that when land was sold, there were ‘not infrequently’ some Maori who may not have had rights to either sell or stop the sale of land, but who nevertheless had ‘certain minor advantages’ they had exercised by long custom and without opposition. These advantages would be lost when the land was sold. Maning was somewhat ambivalent about the extent of these advantages. He claimed they would ‘seldom amount to more than the taking of material for building houses, running pigs on the land, or taking shell-fish from the beaches’ and were ‘in general of no great importance’ although he did admit they were sometimes ‘of more considerable value’. Maning believed that such ‘advantages’ were generally lost when the land was sold and might be compensated by the receipt of a small amount of purchase money from the sellers, although he admitted this did not always happen. A long list of complaints on this issue had been made in the Hawkes Bay district. However, Maning rejected the idea that they could ever amount to a claim of ownership that might invalidate or weaken a European title, because the holders of such advantages had never been acknowledged to have any right of land ownership.³⁵

Maning’s view of Maori resource rights as being easily lost ‘advantages’ that were not comparable with land rights prevailed in the Native Land Court, even though it was provided with a great deal of evidence showing the complexity and importance of resource rights to Maori.³⁶ A more detailed coverage of Maori customary rights in resources and systems of authority over flora and fauna is provided in other chapters of this report. For the purposes of this chapter it seems clear that in general while resources themselves such as fisheries or plant harvesting areas were often clearly and finely demarcated, rights to use and manage the resources were often communally-based, overlapping, and recognised to exist

34. ‘Report by Mr Commissioner Maning, Hawke’s Bay Native Lands Alienation Commission’, AJHR, 1873, G-7, p 43

35. *Ibid*, pp 43-44

36. For example, Suzanne Doig, ‘Customary Maori Freshwater Fishing Rights: An exploration of Maori evidence and Pakeha interpretations’, PhD thesis, University of Canterbury, 1996

through a variety of interlocking alliances and kin ties. Hapu groups generally maintained overall controlling rights in such resources, and within this, personal or family rights could be recognised in various parts of a resource. When the Native Land Court considered how customary interests in resources might help with determining land interests, it commonly distorted those interests as they were presented in order to make them align more closely, as it did with land, to what might be considered the 'best', exclusive, individual interests.

In addition the Native Land Court tended not to recognise that customary interests in flora and fauna could be considered as separate, or more important than, interests in surrounding land, even when presented with evidence to the contrary. In the case of evidence concerning inland fisheries, Suzanne Doig has shown that such were of considerable importance to Maori with well established systems of management and use rights.³⁷ While it seems clear that traditionally there was a strong link between residence on land and control of its resources, rights could also be held by those not normally living in an area.³⁸ There were a variety of ways in which non-territorial rights could be held. It was possible, for example, for children to inherit rights in a resource from either parent. They might 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, all derived from different ancestors of different hapu. 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.³⁹ Doig has shown through investigations of Native Land Court evidence on fisheries resources, that rights could also be obtained as the result of *utu* as compensation for damage, to repair relationships, and as gifts – for example on the occasion of a marriage or to cement alliances. Rights could also derive from horizontal rather than vertical family ties, that is not only through parents, but also through cousins and half-siblings, even where the rights derived from a different set of parents or grandparents.⁴⁰

Although those holding non-residential rights often had close links to those holding surrounding land, even this was not always necessary. Doig has found that it was also possible over time for different people to have rights in a resource than the people who controlled the surrounding land.

37. For example see, Doig

38. *Ibid*, p 207

39. *Ibid*, p 236

40. *Ibid*, p 240

In cases such as 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

In some cases the land surrounding a flora or fauna based resource was not considered to have any importance for residence but the resource itself was of considerable value. Wetlands, an exposed sandspit or a remote forest area might be abundant with resources such as birds, plants or fish but the land itself might not even be considered habitable. The only habitations in these areas might be seasonal camps, or resources might be harvested and then removed to more permanent and hospitable sites some distance away before consumption or further processing took place. The use and control of the resource was therefore more important than residence, and regarded as the important indicator that customary rights were being exercised and maintained.⁴²

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. Doig describes the concept of take whanaunga, given in evidence to the Native Land Court, in the case of inland fisheries 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.⁴³ Rights could also be overlapping with some use rights relating to a particular type or time of harvesting, or a particular species or growth stage of a species. Reflecting this pattern of inclusive, overlapping networks of rights, Maori evidence of ownership patterns of resources presented to the Native Land Court, tended to follow a radial pattern, with significant outer points given, rather than being based on a lineal boundary encompassing a whole discrete area.⁴⁴

41. *Ibid*, p 263

42. *Ibid*, pp 259-260

43. *Ibid*, pp 238-9

44. *Ibid*, p 266 (citing Angela Ballara, 'The Origins of Ngati Kahungunu, PhD thesis, Victoria University of Wellington, 1991, pp 29–30)

There was a tendency on the part of Native Land Court judges to codify this system of rights in resources, favouring or adopting interpretations that aligned most closely to their own beliefs and prejudices; often simplifying them to facilitate the creation of freehold title in land. Doig has found that where hearings involved land that might have an important freshwater fishery attached, judges tended to favour the evidence that proved entitlement to land through ancestry and conquest, backed by ongoing residence and cultivation. This reflected the European ideology that held that the strongest moral claim to land emanated from being settled on it and practising agriculture. The judges tended to downplay other factors that might be used to prove entitlement, such as rights to the fishery within the land block, even if there was clearly little value in the land other than the importance of the resource on it. For example, in cases concerning land adjoining Lake Taupo, Doig found there was very little discussion of fisheries evidence in the Court judgements, even though a 'wealth of evidence' had been presented to the Court concerning rights to the fisheries associated with those areas.⁴⁵

The Native Land Court judges tended to regard seasonal occupations such as bird snaring, berry and flax gathering and fishing as inferior sort of claims to possession, not equal to rights generated by permanent physical occupation. Doig cites Alexander Mackay's judgment in the Otaupuaroro block case in the Wairarapa in 1890, which dealt with swamp land only suitable for fishing, but where he still sought evidence of residence to strengthen rights to land.⁴⁶ Similarly in his judgment on the Tipua Mapunatea block, Judge Mackay gave little weight to evidence concerning 'the kind of undefined rights obtained by roaming over the land and occasionally fishing in the lagoons'.⁴⁷ When the Court judges did accept evidence of interests in resources, this was also regarded as assisting with determining land entitlements, not as establishing entitlements in a resource in its own right.

The insistence of Native Land Court judges on the primacy of land, the need to find those with the 'best' entitlement and the focus on absolute title, denied the existence of a variety of other rights – even where features such as overlapping rights were widely acknowledged by claimants. This meant that Court judgements often seemed to contradict the evidence given. Doig has noted that judges often seemed to struggle 'to reconcile Pakeha views on the primacy of physical occupation and land

45. Doig, p 292

46. *Ibid*, p 295

47. *Ibid*, p 295

occupation as signs of ownership with contrary evidence given to them by Maori'.⁴⁸

Doig and other historians have noted that Maori adapted to the Native Land Court process by often tailoring their evidence to meet known Court preferences. The competitive Court system also became a forum in which Maori sought to enhance their mana. Court determinations were intended to decide customary ownership irrevocably. Losing a case could mean not only material loss in terms of land and associated resources such as flora and fauna, but in many cases loss of mana and an important source of cultural and religious sustenance. Because so much could be at stake, the process encouraged Maori to adapt their traditional modes of expressing relationships with land, waters and other resources in order to present cases in a format and with an emphasis that would find favour with the presiding judge.⁴⁹ This adaptation, however, was often destructive to Maori authority over flora and fauna in that it forced Western concepts of land upon Maori, and often obliged them to subordinate interests in flora and fauna to meet the primary need to establish entitlements to land.

As with land, the Native Land Court process also undermined opportunities for Maori to participate effectively in new forms of management and economic uses of flora and fauna. Systems such as the process of individualising title into easily saleable shares, and the creation of numerous partitions of land, assisted with land alienation but had severe consequences for Maori wishing to retain authority over remaining land either for traditional purposes or for new economic uses. Unlike Pakeha settlers, Maori found their form of freehold title was considered inadequate to gain access to reasonable credit for development purposes. Maori were constantly placed in the position of being left with scattered remnants of land, often with associated resources split up or subject to modification as the result of the loss of adjoining land. The scattered nature of shares also made it very difficult for families to obtain enough adjoining land to create viable farms or forestry enterprises. Meanwhile legislative encouragement for Maori incorporations was very slow in developing in the period up to 1912. Other Court processes such as insisting on individual title also resulted in partitions of a size or shape that made them unviable economically for either farming or industries such as forestry. For example the Wairau Reserve in Marlborough was partitioned by the Native Land Court into long narrow 'fiddle string' sections that

48. *Ibid*, p 230

49. *Ibid*, pp 111-112

were quite uneconomic as separate farms.⁵⁰ Ironically, these strange shaped partitions sometimes appear to have sometimes been made to give each individual a legal frontage to a resource sustaining important flora and fauna such as a waterway. However, the results effectively limited Maori in their use of the land and if the resource was lost through diversion or drainage, the partitions were then of little use for any alternative economic activity. All these factors contributed in large measure to the enormous difficulties Maori had in attempting to develop their own land or resources for industries such as farming. In the process, they also contributed to the exclusion of Maori from new forms of management of land and flora and fauna through local government systems based on ratepayer qualifications. The frequent Court partitions of land between 'sellers' and 'non-sellers' also interrupted traditional alliances and at times created rifts between those who sold and those who remained concerned to exercise rights in flora and fauna associated with the land.

The Native Land Court also tended to undermine continued Maori management of flora and fauna through its role in often being required to 'stand in' for Maori, in administrative and management matters. In many cases it was another consequence of fragmented title. The Crown simply considered it easier to go through the Court and later the relevant Maori Land Board, rather than try and get a decision from a multitude of owners. This increasingly undermined Maori authority and decision making however. More research is required on this, but for example, in terms of flora and fauna, the Native Land Court was given powers to adjudicate in matters such as flax and timber cutting licences. Increasingly the judges of the Court also effectively became the management of Maori Land Boards, controlling the leasing and sales and economic use of much Maori land and its associated resources.

The Native Land Court was also given authority for determining such matters as compensation for land taken for public works, an arrangement that had some impact on flora and fauna. The Public Works Act 1882 gave the Native Land Court the powers of a Compensation Court for public works takings of Maori land. In the case of customary land it was up to the Native Minister, not Maori, to apply to the Court to determine who compensation should be paid to.⁵¹ From 1887 the Native Land Court itself determined compensation, and in practice for the period up to 1911, the Court took the advice of land taking agencies in determining compensation.⁵² This had an important consequence for flora and fauna, be-

50. Official reports in MA1, w2490 67/3/1 pt 2, 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 108

51. Cathy Marr, *Public Works Takings of Maori Land, 1840-1981*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1997, pp 108-109

52. *Ibid*, p 128

cause although the Court had access to evidence revealing the importance of such resources to Maori, it generally took the view during this time that land values were determined by the usefulness of land for farming and agricultural purposes. An example of the value of flora and fauna being overlooked when the Native Land Court assessed compensation concerns the Crown's compulsory acquisition of Takapourewa (Stephens Island) from its Ngati Koata owners around 1894 for the purposes of building a lighthouse. After Ngati Koata refused the Government's offer of 5s per acre, the Public Works Department applied to the Native Land Court to have it determine the compensation. In the hearing Ngati Koata drew attention to the fact that the island was an important source of birds that were used for food and traded with other Maori communities. However, the judge assessed the compensation purely in terms of the land's unimproved value and its suitability for pastoral farming and ordered the Department to pay 7s 6d per acre to the island's owners.⁵³

As Pakeha became more interested in land for scenic purposes, legislative provisions increasingly enabled Maori land to be taken for such purposes. Sometimes negotiations were specifically required over takings but the negotiations had to take place with the Court or a relevant Maori Land Board not directly with the Maori owners. For example, the Maori Land Claims Adjustment and Laws Amendment Act 1907 enabled Maori reserves to be taken for scenic purposes, except for papakainga reserves, by agreement with the Minister and the relevant Maori Land Board.⁵⁴ Another consequence was that in following Pakeha perceptions of value, the Native Land Court could award compensation for land, but not for resources or important equipment such as eel weirs that might be damaged or destroyed when river works were undertaken. The fragmentation of title through the Court system also had an impact on the payment of compensation due to owners. The difficulties in establishing who needed to be paid and in dividing up small amounts of compensation over large numbers of owners contributed to long delays or non-payments, while Maori could be left unaware of the taking. This again contributed to difficulties in preventing or gaining adequate compensation for takings involving flora and fauna.

In conclusion, while more research is required on much of the detail of the impact of the Native Land Court system on Maori authority over indigenous flora and fauna, existing evidence suggests that the Court system

53. Grant Phillipson, *The Northern South Island*, vol 1, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1995, p 221

54. Marr, *Public Works Takings*, p 116

and processes in general had considerable significance in undermining such authority. This occurred most obviously in the process whereby the Native Land Court in facilitating the alienation of much remaining Maori land, was also instrumental in facilitating the loss of large areas of associated indigenous flora and fauna from Maori control. The Native Land Court was also significant in excluding, downgrading or severely limiting many types of Maori customary interests, especially in flora and fauna, through the process of transforming those interests into a form of Crown-derived freehold title in which land interests were given primacy over other types of resource interests. Finally, the Native Land Court played a substantial role in undermining hapu authority in general, including over flora and fauna. This included the process of individualisation of title and the exclusion of chiefs, hapu and runanga from significant decision making powers over customary interests. In addition, by concentrating on systems that facilitated the alienation of land, the Native Land Court contributed significantly to the marginalisation of Maori from new forms of economic opportunity and management involving flora and fauna.

