

CHAPTER 15. CONCLUSION

15.1 Introduction

The main purpose of this report is to provide an account of Crown actions and policies in relation to indigenous flora and fauna in New Zealand in the period 1840 to 1912. The period starts with the signing of the Treaty of Waitangi – the beginning of the Crown's official presence in New Zealand, and runs through to the fall of the Liberal Government in the early twentieth century. In this time Maori went from being politically, demographically and economically ascendant, in possession of almost the entire country, to being outnumbered by Pakeha and in an economically parlous condition in 1912. A major factor in this was that by the end of the period Maori owned only around 25 percent of New Zealand's lands. The period can also be characterised by Maori going from having full authority over New Zealand's flora and fauna in 1840, to being in a much weakened position in 1912. It is the decline of this authority that is the primary focus of this report. In relation to this, key questions that this chapter seeks to provide insight into are the degree to which this decline in authority was directly attributable to Crown actions and policies, and the extent to which Maori knowingly and willingly ceded their authority.

This chapter brings together the findings and key arguments developed in the report's substantive chapters. Firstly, the ecological changes that transpired between 1840 and 1912, set out and discussed in chapter 2, are summarised. The next section brings together the key findings of chapters 3, 4 and 5 that respectively dealt with Maori customary law, Western attitudes to and experiences of nature, and English legal traditions relating to flora and fauna. The conclusions drawn in chapters 6, 7 and 8 – chapters that dealt with how the Crown's land policies and practices impacted upon flora and fauna and Maori access to it – are discussed in the following section. The subsequent five sections summarise the findings of chapters 10 to 13: topical chapters concerned with acclimatisation and wildlife management; scenery preservation and protected areas; forestry, flax and gum; and inland waterways. The ensuing section combines the findings of chapter 9 that addresses Maori participation and opposition to habitat change, and the analysis of Maori petitions to

Parliament that concern flora and fauna contained in chapter 15. The final section is a general narrative on Crown policies in relation to flora and fauna that synthesises the findings of the report's constituent chapters. As such it seeks to advance some answers to key questions surrounding the decline of Maori authority over flora and fauna as set out above.

15.2 Phases of ecological change

Chapter 2 outlined the broad phases and the character of ecological change that occurred in New Zealand since European contact. These phases give context to, and allow understanding of Crown actions in relation to the environment, and flora and fauna. Four phases were identified and outlined which, to some extent, prefigure discussion in later chapters.

The first phase, from 1769 to 1840, was characterised by the impact of global market forces on indigenous flora and fauna. By 1840 the most obvious ecological changes encompassed the decimation of seals and whales, and the felling of coastal forest in northern New Zealand. During the period horticulture accelerated in the north and was established in southern areas. Domesticated livestock breeds were introduced, as were exotic plants for use and ornament. Other changes, like rat predation of indigenous birds and the kiore, and the taking of indigenous species for European taxonomic classification and collections, were less visible.

The second phase, 1840 to 1870, was defined by early Crown purchases and the establishment of pastoralism. Ecological changes in this period were considerable. Perhaps some 23 percent of New Zealand's forests were felled between 1830 and 1868. This reduction in forest cover had important ecological consequences. Along with the destruction of native grasslands, it was a major cause in the decline of indigenous bird populations. Soil runoff from deforested hillsides increased sedimentation in waterways, coastal littorals and shallow harbours. This led to declines in populations of indigenous fish and shellfish. In this period tussock lands in eastern New Zealand from Gisborne to Otago became populated by English grasses, sheep and cattle. The beginnings of land degradation became apparent in bare patches and the growth of 'weeds'. Concomitant with this was the explosion of sheep and cattle numbers.

Around towns and cities throughout the country, small swamps were drained and fern-lands converted to pasture. Consequently raupo, flax, fern and eels were superseded by English grasses, agricultural grains, vegetables, fruit and ornamental trees, and introduced domestic livestock. These changes led to further declines in indigenous bird, insect and animal populations like tuatara, kiore and kuri.

The third phase, spanning roughly twenty years from around 1870 to 1890, saw the intensification of agricultural settlement. Ecological changes that had begun in earlier periods intensified. Logging, with its methods of log transportation – flotation and tramways – had ecological effects on remaining bush and swamp areas. Indigenous bird and fish populations were reduced. There were also changes to insect populations and in soil composition. Introduced animals damaged the indigenous flora and fauna of waterways, and contributed to a decline in their water quality. Streams and rivers became silted up. Areas of bush that remained unfelled but unfenced, were damaged by stock grazing the margins, thus preventing regeneration, and allowing wind to effect further damage. Deer destroyed forest and alpine ecosystems. Digging for kauri gum destroyed northern soils.

Sheep and cattle numbers continued to increase, as did introduced fish and game which were released into the wild. As tussock and forest habitats were changed to enable the farming of sheep and cattle, so too were waterways altered to ensure the protection of introduced fish. There were attempts to exterminate certain species of indigenous fish, while other indigenous fish were relocated to provide food for trout. However, around this time a few indigenous birds received protection either as native game or as absolutely protected wildlife.

The fourth phase, running from 1890 to 1912 or thereabouts, was characterised by a more scientific and intensive approach to farming, and extensive landscape engineering. Ecologically, deforestation occurred on higher, steeper and more unstable slopes. Destruction of the forest canopy and root system prevented rain from percolating slowly into the ground. On bare slopes it ran off rapidly, carrying away soil and rocks which, in turn, caused siltation and flooding in lower reaches of streams and rivers. Large areas of swamp and wetlands were cleared and drained, while flax was constantly harvested for the flax industry. These activities caused further destruction, damage or pollution to indigenous habitats and therefore further declines in indigenous bird and fish populations.

However, as the conservation movement gained strength, national parks, island bird sanctuaries, and areas of scenic beauty were reserved permanently. More indigenous birds received absolute protection in this period.

15.3 Legal and customary law, rights and practices in relation to flora and fauna

Chapters 3, 4 and 5 broadly established the contexts and traditions that historical actors in New Zealand were grounded in at 1840. In order to make sense of Crown actions and policies in relation to flora and fauna, and Maori responses to them, an understanding of the customary, legal and cultural milieu in which Crown actions and policies existed must be broadly established. In particular, these chapters, when read together, illustrate points of difference between Maori and European systems of law and wider attitudes to the natural environment that could have put Maori and the Crown at cross-purposes in matters relating to flora and fauna.

By 1840 Maori had developed a sophisticated system of customary law and practice in relation to flora and fauna that was backed by a range of sanctions. It is apparent that for a neolithic culture such as Maori, surviving in the New Zealand environment required a great deal of knowledge, skill, effort and organisation. To control their economic enterprise, Maori developed complex systems of law and practice. These systems had their origin in a shared Polynesian heritage, but evolved in response to the many challenges of settlement in the New Zealand environment. Although there were regional variations throughout New Zealand, certain broad themes can be identified relevant to the management and use of flora and fauna across the country. The system was also flexible enough to adapt to and accommodate changing opportunities, including those offered by early contact with Europeans.

The enthusiasm with which Maori communities engaged with European trade may well have led many contemporary European observers to believe Maori were willing to abandon customary systems. However, more recent research suggests that instead Maori were continuing a long tradition of selectively adopting and absorbing certain new technologies, resources, and practices, largely within traditional cultural constructs. This raises issues of how far in 1840, Maori intended to retain or were willing to modify customary law and practice with regard to flora and

fauna, and to what extent Maori communities expected to participate in decision making and management of this process.

In order to survive, Maori developed an in-depth knowledge of the resources upon which they were dependant. In particular they had a sophisticated understanding of the life cycles of the biota they used, as well as the habitats in which this flora and fauna existed. This knowledge was bound up with cultural and religious beliefs – there being a dialectical relationship between the two with the former contributing to the latter and vice versa. An essential feature of how understandings of flora and fauna were integrated into wider world views was the perceived interdependence of all things. In Maori cosmology gods and people, the earth and sky, and all biota were considered to have the same origin and share a unity of being expressed in a language of common descent. In this way whakapapa was a central organising principle of the universe that reinforced the interconnections between people and their environment. Other key concepts that codified the ways in which flora and fauna and other resources were used included mana and tapu. These concepts in turn underpinned institutions such as rahui, utu and makutu – the latter two important sanctions used against people who breached customary law. In general, customary law as it applied to flora and fauna could be invoked to control behaviour and protect resources.

There is agreement amongst scholars that upon arrival in New Zealand, Maori treated particular resources indiscriminately. In some instances this had serious long term ecological consequences, including certain species being driven to extinction. However, it is apparent that over time Maori developed more sustainable practices. That is not to say though, that Maori would not modify their environment when they considered that a net advantage could result; sacrificing one species or habitat in order to promote the growth of another. An example of this is the way in which vegetation would be burnt so as to promote the growth of ferns, the roots of which were a prized source of food. The overall picture of resource use that emerges from the secondary sources available is one where Maori travelled widely to exploit different resources at different times. It is also apparent that Maori engaged in the husbandry of various plants and animals. In total it is thought that Maori used between 2,000 and 3,000 species of plants and animals.¹

The ways in which rights to flora and fauna were customarily held is an important consideration in seeking to understand Crown actions in rela-

1. 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, p 74

tion to flora and fauna. Certainly the systems of rights that existed were more complex and extensive than many early European settlers and officials assumed. Rights to resources generally resided at the level of whanau and hapu, but Maori customary law did allow for individual rights in respect of certain things; generally moveable property and small, discrete resources. However, such individual rights appear to have been subject to the over-right interests of the hapu. As Belich has observed: 'Individualism and collectivism, rivalry and cooperation were harnessed to maximum production as appropriate'.² The relationship between rights in land and those to resources is also important. It was not always the case that rights to resources such as waterways, forests and swamps were necessarily a corollary of holding rights in the land upon or beside which the resources existed. Indeed in some cases rights to certain resources were held by groups who did not reside in the vicinity. Another important point is that such resources were sometimes considered to be more valuable than land.

In considering the values, assumptions and legal principles that Pakeha brought with them to New Zealand, stark contrasts emerge between this milieu and the Maori context. Under the paradigm of mechanism and materialism that prevailed in eighteenth-century Europe, the physical world was seen to function as an automaton. Using Francis Bacon's method of observation and experimentation, scientists developed a body of general law which, they argued, was rational, objective and universally 'true'. This cosmology and epistemology emerged at a time of immense social and economic change. The rise of classical science, accompanied by technological change, became allied to the rising middle classes who desired knowledge of the natural world (and the 'new' races whom they 'discovered' in global explorations) so that they might control and exploit them. These doctrines had a moral imperative in that the British believed through knowledge and order, would come material progress, moral improvement, and civilisation. Human beings thus had a duty to improve both themselves and their natural environment to the fullest extent.³

An important manifestation of this ideology was the view that land that was not cultivated or in pasture, was deemed 'waste'. This thinking, developed as a doctrine by the likes of de Vattel in the eighteenth century, emphasised the supposed superiority of European-style cultivation and permanent settlements, over the largely seasonal and nomadic lifestyles of many tribal societies. A major assumption appears to have been that

2. Ibid, p 74

3. There were alternative views of the world that enjoyed currency in Europe at the time of the British colonisation of New Zealand, most notably the doctrine of Romanticism. In its application to the natural world, its proponents rejected the lifelessness of the mechanist paradigm and called for a reappraisal of humanity's relationship with wild nature. Partly under the tenets of Romanticism, and partly because detrimental effects could be seen in the environment of the doctrines of progress and development, ideas of forest retention and reforestation came to be admitted in the nineteenth century.

the effort and skill required to make a living from the same land year after year made the European settled mode of economy superior to one typified by seasonal migrations and hunting and gathering. The economy and lifestyle of Maori thus appears to have been regarded as inferior, and consequently many Pakeha considered Maori to have had a weak moral right to the lands and flora and fauna of New Zealand.

As is outlined in chapter 5 dealing with English legal traditions, most commentators agree that upon Britain acquiring sovereignty in New Zealand in 1840, English statute law and common law applied insofar as it was appropriate to the circumstances of the colony. Therefore when Crown government began in New Zealand, the precepts of common law as they applied to flora and fauna would have been what guided Crown officials. It needs to be remembered though that given that the balance of power was so in favour of Maori in the 1840s and early 1850s, in all likelihood Crown officials would have had little choice but to adopt a more pragmatic approach that meant affairs were conducted more in accordance with Maori values.

But irrespective of the initial ascendancy of Maori, important differences emerge when the ways in which rights to flora and fauna are held under English common law, are contrasted with Maori customary law. Generally, under common law there is a consonance between the ownership of land and rights to flora and fauna upon it. In this way landowners have exclusive rights to plants and trees upon their land, and although there is no absolute property in wild animals or fish, landowners have the exclusive right to reduce such fauna into their possession. The major exceptions to the principle of rights to biota accruing to landowners are where the occupation of certain species and habitat are prevented by Royal prerogative. In this manner the foreshore and seabed, swans, deer, whales, dolphins, porpoises and sturgeon are vested in the Crown. Whereas in New Zealand the Crown has historically asserted its prerogative rights in respect of the foreshore and the seabed, it appears not to have in relation to swans, deer and the abovementioned species of marine mammal.

Another class of common law right relevant to flora and fauna were rights of common. These are rights that exist over privately-owned lands that allow certain persons to do such things as gather firewood, collect peat, graze stock, and catch fish. The origin of these rights predates the advent of freehold title in England and Wales. When the Crown vested the

fee simple of lands in certain individuals and ecclesiastical bodies, creating the manors that survive to this day, rights that commoners had previously enjoyed over 'waste lands' were preserved by common law. Although this body of law was obviously not applicable to New Zealand, it shows that there was a precedent under common law for the Crown accommodating pre-existing use rights in the freehold title of a landowner. This suggests a way in which Maori use rights to flora and fauna could have been afforded some recognition and protection after they had sold their land. It is interesting to note that in his evidence to the 1838 Select Committee on New Zealand, the future Governor of the colony, Robert FitzRoy, stated that Maori who sold land to missionaries were not prevented from continuing to use it, enjoying 'the Right of Common as it were'.⁴

Another aspect of the British legal system that needs to be considered in relation to the development of Crown law affecting flora and fauna, is the body of English statute law pertaining to game and other wildlife.⁵ In England there is a long history of legislation that vested in small elites the exclusive right to hunt wildlife. The first such laws were known as the forest laws and were instituted by William the Conqueror after the Norman invasion in 1066. These laws prevented the public from hunting in royal forests unless the monarch expressly granted permission to do so. From the beginning of the seventeenth century a series of acts known as the 'game laws' were enacted. These vested the exclusive right to hunt game persons who met a minimum property qualification. This had the effect that only the landed gentry were free to hunt game; a disenfranchisement that was made all the more unjust given that it was the gentry themselves, in their roles as Justices of the Peace, that enforced the laws. In this way responsibility for the preservation of game, other than that that existed on Royal estates, was transferred from the Crown to the landed gentry.

The severity of the game laws, and the legislation that succeeded them, can be seen as having influenced some rural landless labourers to emigrate to New World colonies such as New Zealand in the nineteenth century. Certainly there is anecdotal evidence of settlers celebrating both the plenitude of (introduced) game in New Zealand and the fact that they were free to shoot it.⁶ However, it seems unlikely that the laws relating to game and hunting were in themselves the primary factor in the decision of many to emigrate to New Zealand. Rather it appears likely that the

4. Evidence of Captain R FitzRoy, 11 May 1838, 'Report and Evidence of 1838 Select Committee on New Zealand'; BPP, vol 1, p 174

5. As is discussed in chapter 5, English statute law had effect in New Zealand insofar as it was applicable to the circumstances of the new colony.

6. See Rollo Arnold, *The Farthest Promised Land: English Villagers and New Zealand Immigrants of the 1870s*, Wellington, VUP, 1981

general oligarchical nature of British society, of which the game laws were an integral part, was the more general phenomenon that emigrants were seeking to escape. Another factor was the enclosure of the commons which saw the common resource rights of such people – who did not own land or have any real prospects of ever doing so – greatly eroded.

Undoubtedly the experience of many settlers of being unable to legally hunt game, influenced the laws, regulations and policies that evolved in New Zealand in relation to flora and fauna. Certainly the legislative regime that governed access to wildlife in New Zealand was very democratic by comparison to what had historically pertained in Britain. But in all likelihood it was the opportunity of owning land that was the single biggest factor in the decision of many to emigrate to New Zealand. Consequently freehold title has taken on a more inviolable and sacrosanct quality in New Zealand than in Britain – an attitude that has also had a bearing on access to flora and fauna. For instance in New Zealand no tradition has developed of titles being encumbered by such things as rights of common. Rather, the holder of fee simple title generally has more absolute rights in respect of their land than their counterparts do in Britain. But the fact that many settlers were motivated by the prospect of owning their own land, and to a lesser extent, enjoying more democratic access to game and the environment more generally, did not bode well for the recognition of Maori customary rights over flora and fauna in nineteenth century New Zealand.

From this consideration of the different legal and cultural contexts in which Maori and Pakeha were situated in the early nineteenth century, some clear point of difference are apparent. Without wanting to oversimplify the matter, a broad contrast between the mechanistic, materialistic and atomistic world view of the British, and the more holistic way in which Maori conceived of the universe, is evident. This divergence gave rise to differences in the ways that rights were held in land and natural resources. Whereas in the Maori world such rights were community-based – generally residing at the level of whanau or hapu, English law had evolved so as that primacy was afforded to exclusive individual property rights. Importantly though, the system of English property law that existed at the beginning of the nineteenth century, had evolved from a time before fee simple titles existed when lands not under cultivation were used by all members of the community for such things as grazing animals and gathering firewood. When the Crown created fee simple titles, the

commoners' rights they had previously enjoyed were protected by the common law. In this way historical community-use rights are accommodated in the title of many private landowners in the form of rights of common. Thus the history of land tenure in England clearly shows that the common law was capable of accommodating customary rights within freehold titles, and that their were legal alternatives to the Crown's policy of fully extinguishing customary rights in Maori land when purchasing it.

15.4 Land issues

This report has demonstrated that there is an acute nexus between land ownership and access to flora and fauna. As chapter 5 established, under English common law, above all else it is by holding title to a piece of land that people gain access to the flora and fauna upon it. In this way Crown policies and actions concerning land in New Zealand, as the habitat that supports indigenous flora and fauna, are central to any consideration of how Maori rights to use and access flora and fauna have historically been affected by Crown actions. And because wetlands and other inland waterways are generally treated under common law as simply being land covered by water, the relationship between land policies and access to flora and fauna, is even more pronounced. It is this logic that gave rise to the inclusion of chapters 6, 7 and 8 of this report that respectively deal with general land policy, crown land purchases, and the Native Land Court.

The main economic concern of settlers and the Crown during the period 1840 to 1912 was to acquire land and develop it for profitable purposes – predominantly agriculture. According to presumptions of English law, associated resources were considered 'incidental' to the ownership of land. This was to have important, often indirect, consequences for the legal recognition of Maori authority over flora and fauna. The Crown adopted a policy of completely extinguishing Maori customary title when it purchased Maori land so that the title it acquired was not encumbered by servitudes or vestigial rights to such things as flora and fauna. Yet under English common law, such encumbrances were easily accommodated. Settlers and officials alike were keen to avoid the complexities that attached to land titles in Britain.

By around 1912 almost 75 percent of New Zealand had passed out of Maori ownership. And as a consequence of the Crown's policy of extinguishment, the vendors generally enjoyed no continuing use rights to the flora and fauna upon it (though in many cases they were allowed to continue using the land in the years immediately after the sales). The central question that was addressed in chapter 7, in which this purchase activity was discussed in relation to rights to flora and fauna, was whether Maori understood that by selling their land, they would cease to have any rights in respect of it. The chapter also pointed to the implicit tensions between the Crown's need for land to fund the colony (by on-selling land at a profit to settlers) and enable an agricultural economy to be established, the constitutional recognition of Maori tenure, and the obligation of Crown officials (expressed both in Hobson's formal instructions and the Treaty itself) to protect Maori interests.

In considering the extent to which Maori understood the Crown's intentions when it purchased Maori land, attention must be paid to the cultural contexts in which the two parties were located. Perhaps most important was that whereas one culture was oral, the other was a literate culture. This meant that whereas the deed encapsulated the Crown's objective and understanding of a land transaction, the oral contract would have primacy to Maori. Based upon a review of some secondary literature, including the Waitangi Tribunal's *Muriwhenua Land Report*, the tentative conclusion drawn in chapter 7 was that especially in the period prior to 1865, Maori did not consider that they were relinquishing all rights in the land that they were selling. Factors that may have contributed to this impression were that in many instances Maori were initially allowed to continue using land that the Crown had purchased, that in some cases the Crown reserved rights to mahinga kai to the vendors, and that Crown officials in some instances made verbal promises to the vendors that they would enjoy continued rights to flora and fauna upon land that they sold.

In connection with the issue of what Maori understood the purchase of their lands to mean, we undertook a systematic analysis of Crown purchase deeds to establish the ways in which rights to flora and fauna were dealt with when the Crown purchased Maori land. Of the 923 deeds examined, just under 80 percent included a common law phrase that made it clear that all incidents of land ownership were passing with the land in question.⁷ Although such qualifiers would have been clear to a

7. For example, 'all appertaining to' and 'all appurtenances thereto belonging'.

common law mind, more tangible to Maori would have been specific references to categories of flora and fauna upon the land to which Maori were surrendering their rights. In total, just over half of the deeds included such a clause, often in conjunction with a common law phrase. But when these flora and fauna qualifiers are broken down by category, it is the resources of most importance to the settler economy – timber, minerals and water – that appear more than any other. That biota of huge traditional significance to Maori such as flax, birds and fish, appear in fewer than 5 percent of the deeds analysed, gives rise to the possibility that Maori signatories to deeds were under the impression that they were not losing rights to such important resources.

From the 1860s onwards the direction of the settler economy changed with land use becoming more intensive. This increasingly meant that Maori were prevented from using the flora and fauna upon land they had sold. The intensification of land use was essential if the large-scale settlement and colonisation of New Zealand was to be sustained, but it brought Crown land policies into clearer conflict with Maori interests regarding indigenous flora and fauna. The much more intensive development of land for farming and the very large increases in the growth of the Pakeha population from the 1870s relied on supporting land policies that could no longer accommodate traditional uses and management of flora and fauna. Even the previous balance between traditional authority and uses of resources and modern economic activities employed by many Maori communities was threatened by such intensive development.

The Crown responded to Pakeha electoral pressure to have all possible land 'properly utilised' in the 'national' interest with policies that included the continuation of land purchasing from Maori, and the encouragement of immigration and farming development even on land of quite marginal quality. Assisted immigration initiatives often had direct and major impacts upon indigenous flora and fauna. For example in the 1870s immigrants were sought from Scandinavia because of their skills at wood chopping, and settled in the southern central North Island where they were employed felling trees to make way for roads and railways. At the same time, considerable pressure was placed on Maori to conform to Pakeha perceptions that indigenous flora and fauna were generally no more than an impediment to proper land use. As land use became more intensive, the full legal implications of the transfer of land ownership and the impact of this on authority over flora and fauna became much clearer.

This provoked increasing concern and protest from Maori. The loss of land ownership in the new economy also resulted in increasing economic marginalisation for Maori and an exclusion from new economic opportunities involving flora and fauna.

The primary legal importance given to land ownership also had implications for future Maori participation in decision making concerning flora and fauna. It seems to have been assumed that land transfer from Maori ownership signified the end of any future recognised Maori interest in not only the land, but also in its associated flora and fauna. New forms of settler government were often based on land ownership and favoured individual title rather than the system of multiple, fragmented ownership created for Maori. For example, only rate payers were eligible to vote to elect the boards that were constituted to manage rivers, roads and harbours. This increasingly excluded Maori from effective participation in such new forms of management that were to have a crucial impact on flora and fauna. At the same time, the Crown increasingly delegated responsibility and governance of flora and fauna to these agencies and to settler-dominated interest groups such as acclimatisation societies and park boards. The result was that within seventy years from 1840, Maori had been effectively economically and politically marginalised. Not only had their traditional authority been greatly eroded but they were in many instances effectively excluded from participating in new management arrangements for land and catchments that had a bearing on indigenous flora and fauna.

A specific instrument of land policy that is examined in this report in terms of its impact upon flora and fauna is the Native Land Court. Although more detailed research is required, existing research suggests that the Native Land Court system and policies in the years 1860 to 1912 had considerable influence in undermining Maori authority over indigenous flora and fauna. The ways in which this occurred raise a number of issues. Most obviously, from the mid-1860s, the Native Land Court was crucial in facilitating the transformation of customary forms of Maori interests in land into a form of individualised shares. This made it much easier to alienate land holdings than to retain or use them. A number of crucial issues arise from this process of transformation. These include the distortion of customary interests so that primary importance was given to interests in land at the expense of interests based on flora and fauna. The process also often involved the limitation of the traditionally wide range

of customary right-holding into a very narrow focus on who was considered to have the 'best' or ascendant interest. Although the Land Court received huge amounts of evidence about the ways in which Maori used flora and fauna, this was simply used to establish who should be awarded title to a particular piece of land. Otherwise it was ignored. In the report of the Hawkes Bay Native Lands Alienation Commission, Commissioner Maning stated that in the interests of promoting settlement and awarding Maori an exclusive title, it was necessary to disregard Maori customary interests. He acknowledged that there was a class of interest in land that afforded the holder the right to take such things as plants, timber, pigs and fish, but that these rights did not amount to a claim to ownership, even though by his own admission these rights were sometimes of considerable value. He went on to note that when land was sold, the holders of such rights sometimes received a payment from those to whom the Land Court had awarded the title, but that sometimes they did not.⁸ It is therefore evident that the Land Court was fully aware that such resource rights existed, and that by awarding an absolute title to only the major claimants, it was extinguishing this class of right without any provision for compensation to be paid. The manner in which these 'lesser' resource rights were dealt with and the creation of absolute, transferrable individual interests in land and associated resources, can be seen as abrogating hapu authority and traditional management regimes over such resources.

The massive alienation of land from Maori ownership facilitated by the Native Land Court raises important issues because when the land was transferred, all legal rights of control and management of associated resources were also considered to have transferred. Alienation of land was probably the single biggest means by which Maori lost recognised authority over considerable areas of flora and fauna. However, all of the issues that are commonly associated with Maori land and the Native Land Court remain relevant in considering the increasing loss of Maori authority over indigenous flora and fauna. This is because interests in flora and fauna were legally regarded as 'incidental' to and therefore reliant upon land ownership. For instance, the form of title the Native Land Court created for Maori land, involving multiple, fragmented, individualised shares in land, hindered Maori from creating and developing new forms of resource use such as family farms, or from obtaining the capital credit necessary for ventures such as timber milling. The same title sys-

8. 'Report by Commissioner Maning, Hawke's Bay Native Land Alienation Commission', AJHR, 1873, G-7, pp 43–44

tem proved unsuitable for engaging with new forms of settler government encouraged by the Crown, effectively excluding Maori from participating in the management of flora and fauna on Crown land, through such agencies as road and river boards.

The Court process also contributed significantly to the political and economic marginalisation of Maori. This was partly in the massive amounts of land the Court helped to alienate which left many Maori communities without a sufficient asset base to become involved in new economic opportunities, or in some cases, to continue supporting themselves. In addition, many of the Court processes involved significant expenses, delays and further litigation, adding significantly to economic pressures for Maori owners that often resulted in the sale of further land and associated resources. This in turn further undermined opportunities for Maori to participate in new economic opportunities based on flora and fauna.

15.5 Acclimatisation and wildlife management

Chapter 10 examined ideas and legislation surrounding animal protection, charting the evolution from protection of the introduced to that of the indigenous. When animal protection policy was first developed in the 1860s its focus was the protection of species of fish, birds and animals that had been introduced to New Zealand for sporting purposes. A few indigenous birds – kereru and wild duck species – were classified as native game and also received protection outside of the hunting season. By 1912, however, many indigenous birds and the tuatara were absolutely protected for conservation reasons.

The protection policies were effected by the acclimatisation societies. While plants and animals had been transported around the world for millennia, acclimatisation as a self-conscious movement began in France in 1854 and moved to other European countries including Britain. Although it quickly faded there, acclimatisation expanded rapidly in some of the colonies of the British empire, especially New Zealand. The form it took here was the acclimatisation of game species because influential British settlers who had been accustomed to hunting, shooting and fishing in Britain, wanted to continue these pastimes here. They believed most indigenous fish and birds were not 'sporting' species.

From the early 1860s, settlers formed acclimatisation societies throughout New Zealand. Under the 1867 Animals Protection Act the acclimatisation societies were given statutory recognition for their work in the introduction, acclimatisation, and management of game species. Apart from this acknowledgement in statute, they were linked to the Crown through their membership which included Governors, Ministers of the Crown, and Members of Parliament. The acclimatisation societies received considerable grants of money and land from both Provincial and Central Government. Under the 1867 Act they also received revenue collected from licence fees and fines to defray the salaries of their rangers. The societies were later given exclusive authority for the absolute protection of indigenous fauna. Some members of acclimatisation societies were also key figures in the nascent conservation movement that emerged in the 1880s.

The 1867 Animals Protection Act established not only the statutory role of the acclimatisation societies but also a framework for the introduction, acclimatisation and subsequent management of protected game species in the following decades. A companion law, the 1867 Salmon and Trout Act, covered introduced game fish. While many laws followed that related to the protection of game fauna, the basic framework established by the 1867 Act remained. From the 1880s provisions for the absolute protection of indigenous fauna were inserted into the animals protection legislation. Under the 1907 Animals Protection Act, 25 species of indigenous bird and the tuatara were protected. While legislation also made provision for Maori districts to be exempted from the workings of the protection acts, this rarely happened despite requests from Maori. By this legislation the Crown can be seen to have assumed authority and then to have asserted control over both introduced and indigenous wild fauna. There is no evidence that Maori ever consented to having their rights to the fauna in question extinguished.

The provisions in these laws and the introduced species they protected naturally impacted on indigenous fish and birds. Once trout became established they preyed on indigenous fish.⁹ To ensure trout became established, acclimatisation society members killed eels which preyed on trout. Shags and hawks were also killed in vast numbers to ensure the acclimatisation of fish and game bird species. Unprotected indigenous birds were shot in vast numbers for sport.

9. See R M McDowall, *Gamekeepers for the Nation: The Story of New Zealand's Acclimatisation Societies, 1861-1900*, Christchurch, Canterbury University Press, 1994, pp 120–121

The Crown's assumption of authority and assertion of control over wildlife had considerable consequences for Maori. Stocks of indigenous fish and birds, which they continued to hunt for food, were reduced, restricted or eventually prohibited. This occurred through the physical destruction of birds by Pakeha for sport, food or sale; and deliberate destruction by acclimatisation societies to protect introduced species. It also occurred because introduced species preyed on indigenous species. Restrictions upon peoples' ability to take indigenous species came in to force when certain species were gazetted as native game. This meant they became subject to hunting seasons and could not be hunted outside of those times. Once a species was permanently accorded absolute protection, legal access to that species was prohibited irrespective of whether it was on customary, freehold or Crown-owned land. Permanent protection was also accorded by default if an open season for it was not gazetted each year. Therefore access to it remained closed. The kereru is the prime example of a species that was affected in this way.

Maori access was also affected in other ways. The timing of annual hunting seasons for birds, as gazetted by the Crown, did not necessarily concur with traditional Maori hunting seasons. This was because Pakeha and Maori hunted for different reasons. Generally Pakeha hunted for sport. Therefore the season was timed, sometimes to coincide with holiday periods, but usually before the bird was too fat (when its chances of getting away were much reduced), thus affording it a 'sporting chance'. This was part of the accepted international hunting code which developed from the mid-nineteenth century. Maori, on the other hand, hunted for food and wanted the bird to be plump. Its condition depended on wider environmental conditions and so hunting seasons needed to be flexible from year to year. The different purposes to which Maori and Pakeha put birds meant that the seasons would not coincide, although they may have partly overlapped.

In hunting, the law prohibited Maori from using traditional snares; guns being the only legal weapon. Pakeha hunting codes considered snares 'unsporting', but Maori desired to use traditional methods. Fishing nets and other devices customarily used by Maori were prohibited in waterways where trout and salmon had been released.

Legislation may not have curtailed Maori access entirely since acclimatisation society districts were large, parts of them very remote, and rangers few. But the many amendments made to animals protection

legislation appear to have been very confusing. This sometimes acted as a deterrent to Maori action that may have been legal. Evidence shows that Maori consistently and vigorously protested in various fora against the Crown's assumption and assertion of power over indigenous fish and birds. They demanded the right, which they argued was conferred by the Treaty of Waitangi, to manage indigenous fish and birds as sustainable food stocks themselves. For example in 1889, Hirini Taiwhanga, Member of Parliament for Northern Maori, wanted control of native game on Maori-owned land to be vested in the owners. He believed that the institution of rahui, which amongst other things restricted access to an endangered resource, was quite sufficient to protect the game. As the conservation movement grew and more species became absolutely protected, these protests, particularly by the four Members of Parliament from Maori electorates, also grew. But save for an exemption granted to Maori that allowed them to possess hua hua beyond the time allowed in the 1910 Amendment to the Animals Protection Act, protest against the animals protection regime was to no avail and the main tenets of the legislation remained in force. The Crown's assumption of authority and assertion of control, begun in the 1860s, remained in 1912 and beyond, culminating in the Wildlife Act 1953 which vested all wildlife in the Crown.¹⁰

15.6 Scenery preservation and protected areas

Another aspect of the protection of the indigenous – that of areas set aside for the permanent preservation of scenery and flora and fauna – was examined in chapter 11. These protected areas included national parks, scenic reserves, and offshore island sanctuaries for birds. These reserves came about to a large extent through the lobbying of scenery preservation societies; the ideals, membership and work of which were analysed. The chapter focussed on the creation of New Zealand's first national park, Tongariro; the establishment of Little Barrier Island, or Hauturu, as a bird sanctuary; and on scenery preservation legislation in the first decade of the twentieth century. The acquisition by the Crown of these reserved areas had a major effect on Maori. Although Ngati Tuwharetoa initiated Tongariro National Park, Maori owners of other

10. s 57(3), Wildlife Act 1953

lands, which were compulsorily taken by the Crown, had far less agency. The consequences for Maori formed a considerable part of the chapter.

The movement to gain preservation of indigenous scenery and flora and fauna gathered strength in New Zealand from the late 1880s as part of the conservation movement that developed around this time. It comprised leading Pakeha figures in public life, business and science who can be seen as part of the Western Romantic movement that revered wilderness areas. Also imbued with 'New World' nationalist ideals, they saw the preservation of indigenous scenery and flora and fauna as a tangible expression of their New Zealand identity. Groups of scenery preservationists formed throughout New Zealand. While they lacked the statutory role of the acclimatisation societies, they were acknowledged as having a quasi-official position. Apart from suburban amenities like public parks, they concentrated on acquiring areas of mountain, riverine, coastal and forest scenery. This was partly motivated by the desire to preserve New Zealand's physical environment as heritage, but also as an attraction for New Zealand's developing tourism industry. Another aim of scenery preservationists was practical. Bush preservation, especially on the higher, steeper slopes, helped prevent soil erosion. It is clear though that scenery preservationists lobbied only for areas unwanted for settlement.¹¹

Prior to 1903 the work of the scenery preservation groups had been unofficial. In the 1890s, for example, the Taranaki Scenery Preservation Society obtained protection for a considerable amount of land, most of which was owned by Maori. These reserves included what is now the Kaitake Range within the forest reserve of Egmont/Taranaki, the Manganui River, and an area at the headwaters of the Onaero river. In 1903, however, the Scenery Preservation Act was passed, establishing a commission of up to five members to inspect, investigate and recommend to the Governor for proclamation of any Crown, private or Native land considered worthy of preservation for its scenic, thermal or historical values. The Government set up a fund of £100,000 to be spent over four years for the acquisition and maintenance of these sites. In 1906, the Scenery Preservation Amendment Act replaced the commission with a board of three senior public servants. By 1912, the Government had spent approximately £43,000 of the £100,000 it had allotted. Lists of scenic reserves, compiled in the 1970s and 1980s, show that approximately 44,000 hectares were gazetted as scenic reserves up until 1912 in the provinces of

11. This is discussed in more detail in chapter 12 on forestry.

claimants, namely in Northland, Hawkes Bay and Nelson. However, these records do not show whether the land taken was Maori-owned or not.

The 1903 Scenery Preservation Act established a framework for the investigation and demarcation of scenic reserves after the process had been ad hoc for twenty years. Land, not already owned by the Crown, could be taken under the 1894 Public Works Act. With Maori land, compensation was then ascertained and paid to the Public Trustee for investment on the owners' behalf. Scenic reserves could be fenced and conserved but could not be alienated. Local boards could be established to manage them and financial penalties imposed on persons who damaged the reserves by cutting timber or lighting fires. The 1906 Scenery Preservation Amendment Act inadvertently removed the Crown's power to acquire Native land for scenery preservation by compulsion under the Public Works Acts. Seemingly this was because the Government did not want the expense, delay, or trouble of having the Bill translated into Maori, and therefore all references to Native land were omitted, obviating the need to do so. While the Scenery Preservation consolidating Act was passed in 1908, it was not until the 1910 Scenery Preservation Amendment Act that the Crown regained the power to acquire Native land for scenery preservation. Under the 1910 Act, Maori could hunt birds not protected by animals protection legislation on scenic reserves that they had previously owned, and bury their dead in reserves which contained urupa. It also provided for the Under Secretary of Native Affairs to sit on the Scenery Preservation Board. Provision was also made for reserves to be replanted if necessary, or to be alienated if they were no longer considered suitable for scenic purposes.

By the 1890s much of the desirable mainland scenic areas and islands suitable as protected areas were owned by Maori since most accessible lands had been cleared for settler farms. From the Parliamentary debates on scenery preservation legislation, the four Maori MPs did not disapprove of scenery preservation per se, but held other reasons, also, for land reserves. In gifting the three peaks in 1887 that form the core of New Zealand's first national park – Tongariro – Horonuku Te Heuheu Tukino wanted to prevent the fragmentation of tribal homelands of immeasurable spiritual and cultural value. In fighting to retain their lands on Kapiti in the 1890s, the Parata-Matenga-Webber whanau were preserving links to their ancestors, and the spirit and vision which had motivated their move from Kawhia. In each case the objective of preservation was thus

paramount for both Maori and the scenery preservationists. What differed was their reasons.

The initial gift of Tongariro was a Tuwharetoa initiative, but Maori who owned other areas coveted by preservationists had much less agency. And it seemed that a minority of Tuwharetoa did not agree with the final settlement price. When negotiations broke down, the Government had the power under various Public Works Acts to compulsorily take the lands, have compensation adjudicated, and pay the amount awarded. The case of Hauturu, or Little Barrier Island, which was owned by Ngati Wai, is an example of this. Although Ngati Wai had initially been willing to sell, the Government was not prepared to pay the price they asked, especially when it increased because the value of the kauri upon the island went up in the late 1880s. But the Government was under pressure from conservationists and scientists to acquire the island as a bird sanctuary. Gradually it bought the interests of most of the owners but two, Rahui Te Kiri and her daughter, held out against the sale. The final owner, Rini Tenetahi, the husband of Rahui Te Kiri, signed the sale agreement under particular conditions. Because he subsequently considered that the Government had broken these, he repudiated his sale agreement. Eventually, in 1894, Parliament passed the Little Barrier Island Purchase Act to allow the compulsory acquisition of the island. Tenetahi and Te Kiri were evicted by a bailiff and soldiers two years later. Tenetahi continued to protest through correspondence and a petition to Parliament until at least 1910.

There was also the suggestion that Ngati Wai had lit fires in the forests on Little Barrier as a protest. Maori protested about aspects of the scenery preservation acquisition process by destroying bush in other parts of New Zealand. Whanganui River bank forests were attacked from time to time in the early twentieth century but the exact reason for these actions is unknown. Further research would possibly shed light on this matter. Scenic spots in the Rotorua and East Coast areas were also deliberately destroyed. In 1906 Apirana Ngata offered reasons for these protests in the workings of the 1903 Commission. Many Maori, he said, were greatly dissatisfied that the Commissioners held their meetings hundreds of miles from the lands proposed to be taken; that they made their recommendations without viewing the areas; and that they did not consult Maori.

The process of ascertaining compensation for Maori-owned land appears to have been different than it was for land owned by Pakeha. Maori

also appear to have received less compensation. For Pakeha, the value was determined by an independent tribunal, while for Maori, the Native Land Court assessed the amount of compensation. Ngata believed that there was an unconscious bias in the minds of Native Land Court judges, which caused a distinction to be set up between the value of land owned and occupied by Maoris and that of Europeans. The Kapiti assessments are specific proof that Maori owners were not treated equitably with Pakeha. Evidence also exists in connection with the Native Land Court's assessment of compensation for the compulsory acquisition of Takapourewa (Stephens Island) that the Court attached little importance to traditional land uses such as birding, being primarily concerned with the land's actual and potential value for farming.¹²

15.7 Forestry, gum and flax

The history of the Crown's involvement in the forestry, kauri gum and flax industries was examined in chapter 12. In the period 1840 to 1912, forestry – that is the science or management of trees – was concerned mainly with the felling of indigenous forest. However, the Crown also began the reservation of indigenous forest, and afforestation with introduced trees. Forestry policy must be seen in the context of European settlement which required land suitable for grazing livestock, growing crops, and urban settlement. These imperatives meant that indigenous forest was seen as a hindrance to European settlement, although by the end of the period under review, the preservation of indigenous forest was favoured by some Pakeha for aesthetic and ecological reasons, and as an attraction for tourists.

In the early 1840s a licensing system was established whereby saw millers paid an annual fee of ,5 to fell, remove and sell timber on Crown land. Regional modifications were introduced to the system when Crown Waste Lands came under Provincial Government control after the 1852 Constitution Act. In the later part of the nineteenth century the timber industry became concerned for its future as indigenous forest disappeared. This concern led to various measures being adopted to conserve what trees remained. These included the change to a royalty system for sawn output in 1885.

12. See chapter 8 of this report.

Conservationist measures (here meaning conserving for future use) also saw the beginnings of another form of forest management – that of the reservation of indigenous forests. The provinces of Canterbury and Otago, because they were relatively treeless, had instituted conservationist policies which included the setting aside of forest reserves for future use in the 1860s. In 1874 central Government passed the New Zealand Forests Act, the initiative of Julius Vogel who envisaged that a publicly-owned forest estate would contribute to national development and Government revenue as another plank in his public works and immigration programme. The Act provided for the establishment of a ministry of State Forests and for the acquisition, reservation, and scientific management of indigenous forests. Scientific forestry methods, which had been developed in Europe and practised in British colonial India, involved the conversion of tracts of natural forest into blocks of quality timber trees of similar ages capable of being milled in rotation. The 1874 Act operated for only two years, foundering on antipathy to forest reservation, uncertain economic times, and the abolition of Provincial Government in 1876. A similar act in 1885 also faltered quickly.

Reservation of indigenous forest was not considered practical for several reasons. Pakeha generally believed the trees to be too slow-growing, difficult to propagate, and doomed to extinction. However a few, like Parliamentarians T H Potts and H G Ell, wanted indigenous forest preserved to prevent soil erosion, as well as for aesthetic, ecological and climatic reasons. At that time it was also thought that forest attracted rain clouds and so could moderate the climate. Afforestation with introduced tree species was seen as the only solution to providing a sustainable timber industry. Under several Acts passed in the 1870s to encourage tree planting, individuals and local bodies took advantage of incentive schemes offered by Government to begin plantations using introduced tree species. In 1897 a forestry branch, established in the Lands and Survey Department, began to plant exotic species more intensively in treeless areas, or where there was little indigenous forest.

Maori were involved in the timber industry virtually from the time of European arrival in New Zealand. Prior to 1840, Maori were needed by Europeans for their knowledge of stands and of the different characteristics of trees like kauri and kahikatea; and for their labour in felling, moving the logs and loading them into ships. Contracts with Maori chiefs were for trees for masts and spars and were paid in axes, guns and ammu-

nitiation, iron tools, and other trade goods. Later, timber was required for building and other construction in New Zealand and overseas. Maori became skilled at new technologies, especially at driving kauri through flooded streams, or freshets, to the coast. But in the 1870s and 1880s, when this method of transport was intensified through the use of dams and booms in much larger commercial operations, Maori protested about the damage caused to their eel weirs and other properties by such constructions.

The driving of kauri, assisted by dams and booms, was permitted by the Crown under the Timber Floating Acts of 1873 and 1884. Such was Maori concern that the 1873 Act was the only Act specific to forestry on which Maori MPs spoke in the period that is the subject of this report. Their speeches were based on evidence in the petitions of their constituents which reported a wide variety of damage. Ancestral bones were exposed as logs demolished river banks. Damage was done to houses, gardens and other property as the flood water and logs, released when the dam was tripped, sped past. Eel weirs were destroyed. River and coastal navigation was stopped during the freshets and impeded in the long-term by the build up of silt and log debris. Even though some Pakeha MPs also complained about these problems, and the Acts provided for restitution for damage, little was actually done as the kauri timber industry was considered of great importance to New Zealand's economy – an example of Maori interests in flora and fauna having to give way to 'national' interest.

Maori continued to be involved in various ways in the timber industry as it moved into the podocarp forests of the central North Island in the 1870s and 1880s. The most prevalent was the sale of cutting rights through the lease of a specified area and often with royalties paid to forest owners for particular types and grades of timber. Maori were also employed as cutters, in the sawmills (on occasion under the Auckland Sawmillers' Award), and in transportation. The Ngati Tuwharetoa chief, Tureiti Te Heuheu Tukino, formed the Pungapunga Timber Company in 1903 but it failed six years later for lack of capital.

Whether Maori received appropriate value for their trees is doubtful. The Pungapunga Company offered the best terms to Maori landowners for their trees. But the big companies, which were often overseas-owned and beset by heavy debt, paid what historian Russel Stone calls 'niggardly' prices.¹³ The timber companies drove hard bargains. There is evidence

13. R C J Stone, *The Economic Impoverishment of Hauraki Maori Through Colonisation, 1830-1930*, Paeroa, Hauraki Maori Trust Board, 1997, pp 33–35

that the Crown received more for its forests than did Maori owners of forest. Maori, though, had differing opinions on Crown intervention in the timber market. These were revealed during Parliamentary debate on clause 31 of the 1903 Maori Land Laws Amendment Bill. This clause proposed to invalidate all existing agreements for access to timber on Maori land and have them reviewed by the Maori Land Council. The clause, however, was investigated by Parliament's Native Affairs Committee and struck out. Maori who had signed contracts with sawmillers, wanted them to proceed and lobbied against Clause 31. Hone Heke, the Member for Northern Maori, though, argued for some legislative restrictions. He deplored saw milling companies acquiring large areas of forest. He considered this to be detrimental to both bona fide sawmillers and to Maori who received lower royalties than the Government. Heke also wanted restrictions applied so that forest on customary land could not be sold, as some Maori were doing, until title was ascertained.

Maori thus continued to be involved with the timber industry in diverse ways. Seemingly, though, it was only with the felling of indigenous forest, although further research might reveal plantation initiatives similar to Ngati Porou farming endeavours. The whole situation of Maori forestry, which involved multiple Maori ownership, likewise requires further investigation in the way that the sale of Maori land has been rigorously analysed. In selling so much forest, it appears that Maori were less concerned to retain it for the traditional values associated with it than for the cash it attracted. But that would be a simplistic assessment. Other pressures to sell, such as the nibbling at individuals by sawmillers and local body rates demands, need to be taken into account.

Gum from kauri trees was exported from about 1829 for high-quality varnish. The industry was a private enterprise until the market expanded in the 1890s, at which point the Government became involved. This was partly due to criticism of the communal, intensive methods of extraction that considerable numbers of Croatians were employing. These methods led diggers of British extraction to fear that the gum fields would soon be exhausted. The British diggers blamed the low prices paid for gum on the Croatians' excessive production and formed a gum diggers' union to agitate for Government action. Government involvement was also motivated by its perceived need to derive some income for the restoration of land from which gum had been extracted, improve road access to the gum fields, and to conserve the gum to ensure the longer term viability of

the industry. This led to the 1898 Kauri Gum Industry Act and a number of amending acts in the early twentieth century. Licensing for gum diggers was first introduced under the 1898 Act.

For the first twenty years of the kauri gum industry in the mid-nineteenth century, Maori were almost the only collectors. Over the decades they may have made considerable amounts of money but they appear to have been disadvantaged, like other diggers, from the monopolistic practices of gum traders. The 1898 Kauri Gum Industry Act recognised the value of the work to Maori and gave them a concession on licence fees. The Act also attempted to curb monopolistic trading, but further research on this is necessary to determine its benefit to Maori.

Maori skill in dressing flax by hand was required in the very early days of Maori-European contact. It continued to be in demand until flax mills were established and machines invented to strip out the inner fibre in the late 1860s. But even then Maori hand-dressing was admired because machines could not produce as fine a product. The fibres were exported principally as a raw material for the manufacture of rope and cord. The industry was a private enterprise, but the Government, anxious to develop it, provided incentives, encouragement, scientific research, and marketing proposals.

15.8 Inland Waterways

Inland waterways were of huge importance to traditional Maori culture and economy. They not only sustained many important resources such as fish, birds and plants, but were also important transport and trade routes. Larger waterways could also be important spiritual and cultural resources. Moreover, the importance of inland waterways appears to have been recognised in Treaty protections – generally as taonga in the Maori version, and as fisheries in the English. There is evidence, however, that Maori were eager for the new opportunities they expected from increased European settlement, and were prepared to accept some changes as a result of this. Other issues surround the extent to which new legal systems might accommodate traditional authority where Maori wanted to retain this, and to what extent Maori expected to participate in decision-making processes concerning modifications and new uses for inland waterways.

There are many examples of Maori continuing traditional uses and exercising authority over inland waterways after 1840, even after they had sold large areas of land. This seems to indicate a desire to maintain some form of traditional authority in respect of at least some waterways. There is also evidence of determined Maori opposition or resistance to developments that threatened to destroy the balance between traditional usages for waterways and modern developments. Some of these have already been reported on by the Waitangi Tribunal, for example in its *Whanganui River Report*. The contests between Maori and settlers for the control of the Wairarapa and Rotorua lakes are other examples where Maori sought to maintain their traditional authority over inland waterways and associated flora and fauna.

A brief analysis of Crown policies and actions in the period 1840 to 1912 reveals that the Crown increasingly acted to facilitate the interests of large-scale European colonisation of New Zealand with regard to inland waterways, even when it was clear this conflicted with Maori interests. Three main strands of Crown policy can be identified by which the Crown sought to secure control over inland waterways. In practice these policies were applied selectively to individual waterways as circumstances dictated, depending on what the Government at the time considered would be most effective in realising its objective. The most common policy was for the Crown to acquire riparian rights from Maori by purchasing large areas of land adjoining or surrounding inland waterways. This was based on the Crown assumption of the complete application of the principles of English common law to inland waterways. The Crown also increasingly began to claim prerogative rights in large or navigable waterways in the 'national' interest. This was based on the assumption that the Crown could rebut general common law presumptions that vested ownership of the beds of waterways in riparian landowners when there was a supposed greater 'national interest' at stake. The third strand of policy was for the Crown to simply assume management rights over waterways, again in the national interest for the purposes of development and settlement, often in direct contravention of the principles of common law. The Crown also increasingly began to delegate these assumed rights and responsibilities to local authorities that were generally dominated by settler interests. It appears that the Crown made no efforts to ensure that these agencies would make provision for effective Maori participation in their decision making processes. The result was that by 1912,

these developments were effectively threatening Maori authority and participation in decision making over inland waterways.

15.9 Maori participation in and opposition to habitat change

By 1840, based on previous experience of contact with Europeans and the significant new economic opportunities this offered, many Maori communities appeared willing to welcome European settlement in their communities. Many of these new opportunities involved the significant modification of localised indigenous habitats, some in ways that could not have been foreseen. However, Maori do appear to have foreseen some change, and appear to have accepted the modification of certain indigenous habitat for what they perceived as overall greater benefits. It is not clear, however, that this acceptance can be interpreted as a general willingness to completely replace traditional modes of resource use and management with new forms of economic activity. Instead, Maori appear to have anticipated some kind of balance between traditional resources and the new settler economy, in which they would retain authority over much indigenous flora and fauna and its habitat.

It seems that this balance occurred much as Maori had anticipated in the first years after 1840. During this time, even though Maori were very competitive in the new economy supplying settler markets with potatoes, wheat and pork, traditional resource use and management appears to have remained important also. But as the direction of the settler economy changed from the 1860s, Maori and settler interests came into more obvious conflict, and the possibility of Maori controlling the balance between traditional and new forms of resource use began to recede. While more research is required on the extent and nature of habitat change effected by iwi and hapu in this period, preliminary evidence suggests a range of responses from Maori communities, ranging from enthusiastic participation to considerable disengagement with the new economy. It does seem, however, that regardless of the level of enthusiasm for new economic opportunities, there was also a clear wish to retain some level of traditional resource use and management for a variety of cultural, economic and spiritual reasons. In addition, as Maori became increasingly economically marginalised from the 1870s, traditional resource use often became critical in subsidising the meagre incomes Maori earned – pre-

dominantly from agricultural and rural labouring work. This indicates that authority over flora and fauna and some means of effective participation in decision making regarding habitat modification remained important for Maori right through the period under review.

The importance to Maori of retaining authority over indigenous flora and fauna is clearly evident in the various modes of protest Maori engaged in. In the various topical chapters of this report there is evidence of a wide variety of types of protest being employed by Maori. On a general level, resistance to further land sales and the repudiation movement whereby Maori sought to annul land transactions, can be seen as resisting the loss of access to and authority over flora and fauna through land passing out of their ownership. Similar action was evident in the Wairarapa when chiefs opposed to the sale of the Wairarapa lakes lobbied other owners not to sell. And when the Crown tried to lower the lakes by opening the outlet, local Maori employed physical resistance, obstructing those persons attempting to dig a channel. Similar direct action is evident when Whanganui Maori took action to stop works upon the river. Another example of direct action was when Maori destroyed forests upon their land so that the Crown would not acquire it for the purposes of scenery preservation or in the case of Hauturu, creating a wildlife sanctuary.

More common than such direct actions were instances where Maori employed means of protest sanctioned by the system of government that had been established in New Zealand in 1840 – protest by way of letter and verbal submissions to officials and politicians. It appears that

Maori voicing their disapproval of Crown policies and actions in meetings with Ministers of the Crown, departmental officials, and politicians was commonplace. Such instances recorded in this report include meetings in relation to the Government's attempts to acquire the Wairarapa lakes, and Maori opposition to Crown-sanctioned activities on the Whanganui river that were interfering with Maori fisheries. Possibly more common though were modes of protest in which Maori employed their literacy as a weapon. Since the 1840s, a feature of Crown-Maori relations had been the petitioning of Crown officials and Parliament by letter. In the various chapters above there are numerous instances in which Maori wrote to Departmental officials, Ministers of the Crown, and other Members of Parliament – especially the members that held the four Maori seats. In the case of the latter this lobbying often

lay behind speeches they made in Parliament opposing the erosion of Maori authority over certain habitats and species of flora and fauna. Letters from Maori to Crown officials and members of Parliament concerned such things as the effect upon indigenous flora and fauna of the introduction of exotic fish to inland waterways, the ecological impacts of timber floating, and the animals protection legislation. There is also evidence that in the case of the Crown's intention to compulsorily acquire Hauturu, Maori wrote at least one letter to the editor of a major daily newspaper.

A major category of written protest in relation to flora and fauna was petitioning Parliament. All petitions concerning flora and fauna that were received by Parliament between 1840 and 1912 were analysed in chapter 14, and afford some insight into Maori attitudes towards Crown actions and policies that affected flora and fauna. Of the 101 petitions identified that related in whole or in part to flora and fauna, around 20 percent can be seen as being a direct assertion of authority over certain flora and fauna. Examples included petitioners asking that they be free to use their forests or fisheries as they wished and that their rights not be constrained by Crown laws and regulations, and complaints that Pakeha were taking Maori-owned shellfish and other wildlife. The most overt statement of the desire to be free to use flora and fauna as Maori wished was contained in the 1886 petition of Te Oti Pitama and others. This petition asked that 'no obstacles be placed in their way in obtaining fish, &c., from the sea, rivers and lakes, and birds and animals from the earth; which produce is their chief means of subsistence.'¹⁴ Several other petitions articulated a similar position in relation to fisheries.

Interestingly, whereas some Maori petitioners asked to be free to use their flora and fauna as they wished and not be subject to legislation and regulation, others asked that their rights be protected via specific legislative intervention. Examples of this included petitions where Maori asked to have their fishing rights protected by legislation, that the exclusive right to use particular fish and bird resources be vested in them, and that certain areas be made fishing reserves.

Although the Treaty of Waitangi was only referred to in four petitions, each concerning fisheries and the foreshore, in these cases the Treaty was clearly considered to be a source of rights in relation to indigenous flora and fauna. One of these petitions, dating from 1888, asked that the petitioners' fisheries be protected in accordance with the Treaty of Waitangi –

14. Petition of Te Oti Pitama and others, petition no. 299/1885, AJHR, 1886, I-2, p 11

suggesting that some Maori had a sense that as well as confirming their proprietary interests in flora and fauna, the Treaty obliged the Crown to protect these resources and Maori interests in them.

Another theme of protest that emerges from the petitions analysed is instances where Maori challenged certain precepts of English common law relating to flora and fauna (or their habitat) that the Crown sought to impose in New Zealand. Examples are where the Crown claimed title to the bed of a waterway as a consequence of having acquired title to contiguous lands, that the foreshore and seabed is by prerogative right part of the Crown's demesne, and that there is a public right of fishing in tidal waters and the foreshore. Petitions in which Maori asserted that particular waterways or parts of the foreshore were (or should be) their exclusive property, and that they should have exclusive rights to certain sea fisheries, can be seen as indirect challenges to the principles of English common law that the Crown imposed upon its acquisition of sovereignty in New Zealand.

Maori also complained by way of petition of environmental degradation caused by such activities as timber floating, foreshore reclamations (one petition in relation to this being signed by over 10,000 people), gravel extraction, and mining. In most of these cases it was the impact that these activities were having upon the fisheries that the waterways supported that appears to have been the central issue for the petitioners. But of the 100 or so petitions identified concerning flora and fauna in the period 1840 to 1912, none complained of terrestrial habitat transformation or degradation. For example, although by the later nineteenth century there was growing awareness that the destruction of forest habitat was a major cause of the decline in bird numbers, no petitions complained of this or asked the Government to cease promoting forest clearance. Maori MPs, on the other hand, did make such complaints and protests in Parliament.¹⁵

There is clear evidence that some Maori willingly surrendered at least some of their rights to indigenous flora and fauna and its habitat – most especially through land sales, but also through such things as selling cutting rights to forests upon their lands. Often such actions appear to have been in order to raise capital so as to be able to participate in the new cash economy that developed consequent to the European settlement of New Zealand. Similar economic motives underpinned other actions such as clearing land so as to be able to grow European crops and raise livestock.

15. See for example the statements of Hone Heke, MP for Northern Maori, in the Parliamentary debates concerning the Animals Protection Acts of 1907, NZPD, 1907, vol 142, p 790, cited in James Feldman, 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864-1960', report commissioned by the Waitangi Tribunal (Wai 262 record of documents, doc B8), 1998, p 44

Importantly though, such actions did not necessarily preclude the continuation of traditional modes of economy such as the hunting and gathering of indigenous flora and fauna, and as such, were not necessarily an abandonment of these traditional rights and practices. Unfortunately the extent of the research undertaken for this project is insufficient to conclude much in this regard. But consideration must be had of the possibility that at least some groups, in selling their land, did not appreciate that under English common law, they would ultimately lose all rights to the flora and fauna upon the land. An important principle, that is developed further below, is that the Treaty afforded Maori the right to at once engage in new economic practices and continue with their old modes of production. And clearly this is what many Maori did. The large body of material discussed above that shows Maori protesting against Crown policies and actions in relation to indigenous flora and fauna and its habitat, evidences Maori asserting their authority over those ecosystems and their constituent biota.

15.10 Analytical narrative

Developing an analytical narrative of Crown actions and policies in relation to indigenous flora and fauna in the period 1840 to 1912, as we have been commissioned to do, is no easy task. The Crown has never had a single policy stream that deals with indigenous flora and fauna, nor is there a single agency that has been solely responsible for indigenous flora and fauna in New Zealand. Rather there were a multiplicity of Crown agencies whose jurisdictions had a bearing on the indigenous flora and fauna of New Zealand, and either directly or indirectly, upon Maori access to the same. A similarly plural situation emerges when Maori attitudes and responses are considered, as is also required by our commission. There was of course no single Maori response or attitude to anything, and even at the level of iwi and hapu, one would expect to find a variety of responses to particular policies within one descent group.

Notwithstanding the multiplicity of the Crown's policies and actions in relation to flora and fauna, when it is considered what it was that the Crown, at the most general level, sought to achieve in its New Zealand colonial project, some clear patterns emerge. If it is accepted that on a practical level at least, colonialism is ultimately a struggle for the control

and ownership of natural resources, then Crown actions and policies in New Zealand affecting indigenous flora and fauna appear more coherent. In this analysis Crown actions are less autonomous and contained, but are more an incident of wider and more general objectives. It is these general objectives that emerge from this study as being of central importance to the period under review, especially the first two or three decades.

When the Treaty of Waitangi was signed in 1840 and the Crown's sovereignty was established, Maori with very few exceptions were fully in control of New Zealand's natural resources. And although there had by 1840 been some significant ecological changes brought about by the introduction – both intentional and accidental – of exotic flora and fauna, the indigenous flora and fauna and its attendant ecosystems, were still very much ascendant. There was of course by 1840 a history of several decades of exploitation of indigenous flora and fauna by Pakeha in New Zealand – namely seals, whales, flax and timber. But those enterprises were undertaken with the consent and cooperation of Maori – indeed it would have been impossible for Pakeha to have done so without the acquiescence of the economically, politically and demographically dominant indigenous population. And so it was, with Maori being fully in control of their territory and resources – a situation that was recognised both in Crown policy and the Treaty of Waitangi – that the European colonisation of the country began. Indeed it has been observed that without such an assurance Maori would never have signed the Treaty of Waitangi.¹⁶

But these assurances sit somewhat uncomfortably with what Crown officials must have been aware of in 1840: that the successful colonisation of New Zealand was dependent upon Maori being divested of a large part of their estates. The transfer of land and resources from Maori to the Crown was necessary so that settlers could take up land, convert it to pasture, and develop a national economy based on the production of agricultural commodities. This vision clearly involved the displacement of the indigenous flora and fauna upon which traditional Maori economies were based. And the most valued landscapes in terms of agricultural potential were the same ecosystems that were the most productive in terms of Maori economy – the coastal plains.¹⁷ However, aside from native grasslands, upon which sheep could simply be grazed without any deliberate modification of the habitat, making the coastal plains suitable for farming required the clearing of forests and draining of wetlands. The

16. See for example Judge Acheson's decision on the ownership of Lake Omapere, Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 20–21, cited in Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), March 1998, p 237

17. See Geoff Park, *Nga Uruora – The Groves of Life: Ecology and History in a New Zealand Landscape*, Wellington, Victoria University Press, 1995

extent of the effort required to convert New Zealand into the pastoral Arcadia and bucolic paradise that so many settlers appear to have aspired to, or if the publicity of private settlement companies was believed, thought it to already have been, suggests New Zealand was in many respects eminently unsuitable as a colony.

Despite the magnitude of the task, the settlers and the Crown, inspired by a seemingly unquestioned belief in the virtue of the colonial project, set about converting the New Zealand landscape into what Charles Hursthouse called the 'Britain of the South', thereby bringing it into agricultural production.¹⁸ In doing so the rights of Maori clearly had to give way in what was unquestioningly held to be the interest of progress. This was tied up with the values Pakeha settlers held whereby Maori were seen to have a weak moral claim to the lands of New Zealand because the uses they put it to were considered insubstantial and wasteful. To their eyes, New Zealand, with its inferior indigenous biota, was a land that was desperate to be cultivated. And the path of progress was unquestioningly believed to lead to a rose-wreathed cottage set in a pastoral landscape – the endpoint towards which wild nature was inevitably destined. As has been set out in chapter 4 of this report, this attitude was reinforced by the thinking of scientists, most especially Darwin, whose theory of natural selection and evolution held that indigenous flora and fauna in places such as in New Zealand, would be replaced by stronger and more voracious introduced species. Further, in its social manifestation, the theory pointed to the inevitable demise of Maori.

All this highlights the unselfconscious manner in which Pakeha, and by extension the Crown, set about transforming New Zealand. That Maori and New Zealand's indigenous flora and fauna would give way to Pakeha, and what the environmental historian Alfred Crosby has called their 'portmanteau biota', was never questioned.¹⁹ A corollary of this of course was that Maori authority over their lands and the flora and fauna it supported would inevitably pass away. In terms of the ecological consequences of their actions, there seems to have been a similarly low awareness amongst Crown agents and officials in the first decades after the Treaty. But of course this is hardly surprising when for many what they sought to achieve was the displacement of indigenous ecosystems with components of European ones. It is also important to realise that the European settlers were not the masters of the changes they were affecting. As Crosby has observed of New Zealand, it 'did not occur to any pakeha

18. C Hursthouse, *The New Zealand Handbook: A Complete Guide to the Britain of the South*, London, Stanford, 1861

19. Alfred Crosby, *Ecological Imperialism: The Biological Expansion of Europe, 900-1900*, Cambridge, Cambridge University Press, 1986, p 162

for decades and decades after that spilling and strewing alien organisms into an ecosystem can be like lighting a candle in order to lessen the gloom in a powder magazine.²⁰

In the later nineteenth century though, from around the 1870s, at least some Pakeha became much more aware of the environmental consequences of their actions, and began advocating for the protection or conservation (as in wise-use) of certain species and habitats. From this time a shift is also discernible in the Crown's approach to the environment. The Crown's policies in the first decades after the signing of the Treaty can be typified as being a *laissez faire* approach, its focus being almost solely to facilitate land settlement, a major plank of which was the acquisition of Maori land. Hence people were free to release any species into the wild, and could hunt any species they wanted upon their own land. But from the late 1860s the Crown's approach became increasingly more interventionist, passing legislation that placed controls on certain activities, and afforded protection to certain landscapes and species. Initially such protection was only afforded to exotic game species, but was later extended to certain indigenous birds and tuatara.

A feature of Crown action and policy in relation to flora and fauna through out the 1840 to 1912 period was that Maori environmental knowledge was ignored. In all of the areas of policy examined in this report, there is no evidence of Maori knowledge being sought and used in the development of policies or legislation. Similarly no evidence has been adduced to show that Maori customary law in relation to flora and fauna was ever used as an element of any control or management structure, despite there being a range of what could be described as 'resource management' mechanisms – such as *rahui* – within traditional Maori culture. This failure to acknowledge Maori knowledge of the environment is an aspect of the way in which Maori have historically been written out of the natural history and national conservation systems of New Zealand. In some ways this can be seen as a consequence of the way in which many settlers and Crown officials were blind to the existence of value in any culture or knowledge system outside of their own. A consideration is how this Eurocentrism aligned with the British Crown's explicit recognition of Maori customary rights – evident both in the Treaty of Waitangi and the instructions of Crown officials both before and immediately after 1840. It would seem that the recognition of such customary rights simply meant that the Crown was obliged to extinguish them in order to facilitate set-

20. *Ibid*, p 229

tlement and the development of other natural resources. Thus the history of Crown action in relation to flora and fauna is generally one of excluding Maori customary rights – either by extinguishment where they were recognised, or simply through ignoring them and assuming authority in respect of certain species and habitats. The Crown's assumption of authority over certain inland waterways and in respect of certain native birds, are examples of the latter. The only exception to these patterns of abrogation and extinguishment uncovered in the course of research for this report was the recognition and protection of Maori fishing rights in the 1877 Fish Protection Act.²¹ However, as is noted below, the inclusion of such a provision in a statute is no guarantee that either Government or the courts will give effect to it.

The issue of the extinguishment of Maori rights to land is a very important one to emerge from this study. Given that under English common law rights to flora and fauna are largely seen as an incident of land ownership, it was through land passing out of their ownership that was perhaps the greatest determinant in Maori losing access to, and authority over, indigenous flora and fauna. Crucial in this was the Crown's approach to purchasing Maori land whereby all rights in the land bought were held to be extinguished. In this way the new owner's title – be it the Crown, or if on-sold, a third party – was free of any encumbrances or vestigial rights to such things as flora and fauna. Two important questions are apparent in relation to this policy and practice of extinguishment. Firstly, was it apprehended at the time by Maori who contracted with the Crown to sell their land that all of their rights to it were to be extinguished? And secondly, were such purchases actually effective extinguishments, or it was possible that under common law, Maori could still enjoy certain customary rights to the land in question? The first question has been addressed above and the tentative conclusion drawn that at least some Maori may not have appreciated that as far as the Crown was concerned, it was acquiring all rights in the land concerned. Irrespective of the Crown's intention though, it is possible that some purchases were not total extinguishments. This leads to the second issue: under the common law doctrine of aboriginal title (broadly outlined above in chapter 5) is it possible that Maori could still have enjoyed rights to flora and fauna on land that they had sold? This matter is ultimately one to be dealt with in the courts, or in the context of the Wai 262 claim by way of legal submission. But our reading of various authorities on the

21. s 8, Fish Protection Act 1877. See chapter 10 of this report.

matter suggest that it is possible that a non-territorial aboriginal title could pertain over lands that had been sold, but over which Maori had continued to exercise customary rights; for example taking birds, fish or plant material. Another important consideration in this regard is whether the Crown's intention of extinguishment was clear and plain, and as noted, this could be doubtful in some cases.

As well as by purchase or cession, customary rights can also be extinguished by statute or executive action. This would seem to be particularly relevant in the case of this report in relation to animals protection legislation whereby the Crown instituted legislation that meant Maori could only hunt certain species of bird in prescribed seasons, and if they held a licence issued by the Crown. The issue is whether such legislation revealed a clear and plain intention to extinguish Maori customary rights to such birds. An authority on aboriginal title, Paul McHugh, argues that a statutory extinguishment can be only partial in nature. In this regard he states that legislation regulating rights to flora and fauna, that for example, introduces licensing systems, does not necessarily extinguish the customary rights of indigenous people to such biota.²² But irrespective of whether an aboriginal title to this flora and fauna exists, a number of things are clear in relation to the animals protection legislation in New Zealand: Maori were never consulted when it was being developed, Maori never knowingly surrendered their rights to the fauna that it affected, and many Maori saw the Treaty as having guaranteed their rights to take birds that came under its purview. In particular Maori were aggrieved that they were no longer free to hunt as they pleased upon land that remained in their ownership.

15.10.1 Maori agency

A key theme of this report is the nature and extent of Maori agency in relation to changes affecting the indigenous flora and fauna of New Zealand. As noted above it is problematic to generalise about the actions and views of hapu and iwi, let alone Maori. However, issues can still be raised and some broad principles adduced in relation to such matters. In accordance with the axiom that one of the major determinants in Maori losing access to and authority over indigenous flora and fauna was through them selling so much of their land, it must be asked why so many hapu willingly parted with so much of their territory. As noted above it is

22. Paul McHugh, *Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, pp 136–137

possible that in the period up to 1865, Maori did not fully appreciate that under English common law they were ceding all their rights in the land they were agreeing to sell. But this position is less sustainable for sales transacted in the latter part of the period under review when the consequences of selling land must have been much more apparent. Obviously there are a wide range of exigencies that could have led some Maori to sell such as indebtedness, and pressure from Crown agents and private individuals. But the question remains why so many Maori sold so much of their land when the consequences of doing so must have been relatively clear.

When Maori did retain their land, another set of issues arise from the engagement of so many Maori in the period under review in new economic activities. Often such activities involved the exploitation, and sometimes, displacement of indigenous flora and fauna upon Maori land. For example, in selling cutting rights to their forests, or in clearing land of indigenous vegetation so as to be able to graze stock, Maori were participating in the destruction of indigenous flora and fauna and its habitat – all of which are claimed to be taonga in the Wai 262 claim. And as is clear from chapter 9 of this report, the extent of such activity by Maori was widespread in parts of the country. An important point to make though, is that in engaging in these activities that involved, at times, significant destruction of indigenous ecosystems, Maori were not necessarily completely abandoning customary usages across all of their territory, or in relation to all habitat-types. For instance, it seems that while Maori would often grow crops and raise livestock for sale on the open market, they would continue to undertake traditional economic activities to sustain themselves. In this regard there is evidence that Maori wanted reserves that were suitable for traditional economic activities (such as the reserves that Ngai Tahu sought in the South Island), and that the Crown did award reserves of this type. But given that such reserves were often eminently unsuitable for agriculture, Crown action in this regard was possibly more about wanting to keep suitable agricultural land for settlers, than encouraging Maori to continue traditional economic practices.

Another important point to bear in mind is that the Treaty has in recent times been interpreted by the courts and the Waitangi Tribunal as embodying a development right. In this way the Treaty not only affords Maori guarantees as to the ownership of their natural resources, but also the right to develop and use them as they wish.²³ Consequently the Treaty

23. For a discussion of development rights and the Treaty principle of mutual benefit, see Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report*, GP Publications, Wellington, 1999, pp 41–42

can be seen as providing Maori the choice to participate in the old or new worlds, or both – the different paths not being mutually exclusive. The fact remains, however, that in the period 1840 to 1912, many Maori seemed willing to give up traditional economic activities in order to participate in the new cash economy. But although this was at least a partial abandonment of customary modes of utilising indigenous flora and fauna, it did not constitute Maori giving up their rights to such resources.

It is also clear that Maori were aware that the ecosystems that sustained the indigenous flora and fauna were in decline, and that their authority over the same was being slowly eroded. For example, Hone Heke, the member for Northern Maori, complained variously that the destruction of forest by Pakeha was causing a decline of pigeon numbers, and that the introduction of trout was having a catastrophic impact upon indigenous fish populations.²⁴ Related to this, Crosby adduces evidence showing that the 'parallel between the widespread usurpation of New Zealand's biota and the decline of Maori was one not missed by the indigenes. Years before the Treaty of Waitangi, the indigenes recognised the link between their fate and that of the ecosystem in which they had participated in for forty generations before the coming of the pakeha.'²⁵

15.10.2 The Treaty of Waitangi and Maori authority over flora and fauna

It is axiomatic that the Treaty of Waitangi, as well as guaranteeing to Maori the ownership of their land, acknowledged and confirmed their rights to the flora and fauna of New Zealand. As *taonga* in the Maori version, and 'estates, forests, fisheries and other properties' in the English, it is clear that the ambit of article two includes such biota.²⁶ In his decision as to the ownership of Lake Omapere, Judge Acheson of the Native Land Court averted to the unlikelihood of Nga Puhi signing the Treaty of Waitangi had it been suggested at the time that it did not recognise lakes as being a Maori property.²⁷ It would seem highly probable that Maori would have adopted a similar position vis-à-vis the flora and fauna sustained by the lakes.

This view is supported by the numerous occasions recorded in this report where Maori asserted their authority over flora and fauna, often invoking the Treaty as a source of such rights. For example, at the Maori Parliament at Orakei in 1879, a person speaking on behalf of Nga Puhi

24. See NZPD, 1900, vol 113, p 36; NZPD, vol 122, p 605; NZPD, 1907, vol 142, p 790

25. Crosby, pp 265–266

26. The word 'whenua' that is used in the Maori version of article two (in the Treaty text spelt 'wenua'), and commonly translated as land, would seem likely to embrace a wider meaning than just land, including also the biota and ecosystems of the land in question.

27. Bay of Islands Native Land Court minute book 11, 1 August 1929, pp 20–21, cited in White, p 237

and Te Rarawa, stated that under ‘the Treaty of Waitangi we were to continue in possession of our lands, and fisheries, and forests. I [therefore] ought to have the *mana* over my fishing grounds’.²⁸ Similarly in petitions to Parliament, Maori asserted that the Treaty was a source of their rights in relation to the flora and fauna they were concerned with.²⁹

But irrespective of the fact Maori perceived the Treaty as being a source of rights in relation to flora and fauna, with the exception of legislation affecting fisheries passed since 1877, the Treaty was not given legislative effect to in any Act pertaining to indigenous flora and fauna. This has meant that Maori have enjoyed no legally cognisable Treaty rights to flora and fauna (other than to some species of fish), and that therefore they have been treated on the same basis as other New Zealanders in relation to access to flora and fauna. The failure of the Crown to give legal effect to Maori Treaty rights to flora and fauna can be seen as being a part of its general abrogation of Maori authority over New Zealand’s indigenous biota. But as is apparent with the nineteenth century fisheries legislation, the Treaty being included in an act of Parliament was no guarantee that the courts would give effect to it.³⁰ It was also of course also possible for the Crown to make provision for Maori to exercise rangatiratanga or authority over indigenous flora and fauna without giving legal effect to the Treaty; something else that it failed spectacularly to do in any meaningful way in the period 1840 to 1912.

As a consequence, by the end of the twentieth century, Maori, as well as having been dispossessed of much of their traditional territory, had been divested of their rights to take certain species of flora and fauna, even upon land that they had retained in their ownership. Concomitant with this decline in authority was the major alteration, and in some cases destruction of ecosystems that caused major declines in the populations of certain species. In some cases this resulted in extinction. In the case of both of these phenomena, this report has demonstrated that the Crown was to a large extent, though not wholly, an agent of both – Maori themselves being a significant agent of habitat change in the period 1840 to 1912.

28. AJHR, 1879, session 11, G-8, pp 26, 28, cited in Feldman, pp 15–17

29. See for example, Petition no.122/1888, AJHR, 1888, I-3, p 10

30. As noted in chapter 10, the Waitangi Tribunal has stated that the clause protecting Maori fishing rights in the 1877 Fish Protection Act was largely ‘window dressing’: Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice, 1988, pp 141–142