JAMES ARMSTRONG DOUGLAS

THE CROWN, MAORI AND THE CONTROL OF NATURAL RESOURCES: RIGHTS AND PRIORITIES UNDER THE TREATY OF WAITANGI

LLB (Hons) RESEARCH PAPER
INDIGENOUS PEOPLES
AND THE LAW (LAWS 546)

Law Faculty
Victoria University of Wellington

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INTRODUCTION

In 1990 it need hardly be said that Maori Treaty rights have become a vital component of New Zealand political consciousness. The 1980s have seen a flourishing of claims to the Waitangi Tribunal and increasing litigation in the courts. Although Maori claims are most commonly identified with land rights, an overview demonstrates that issues of resource control have been at least as important as issues of land ownership. Five of the seven major reports produced by the Tribunal since 1983 have focused on resource-related concerns[1], notably the pollution of waterways and coastal areas and the effects of that pollution on traditional physical and cultural resources. The Court of Appeal has delivered judgements on legal aspects of the control of coal and forests[2]; the High Court has been activated particularly by fisheries issues[3].

More often than not the courts and Tribunal have been considering competing claims to the same resource, weighing the respective rights of the Treaty partners: the Crown on one side and Maori tribes on the other. For example one of the most substantial of the Tribunal's reports, the Muriwhenua Fisheries Report[4], investigates rights to sea fisheries claimed

exclusively by both the Crown, as allocatable in terms of its quota scheme for commercial fisheries, and by the Maori tribes of the region as an exclusive possession guaranteed to them under article II of the Treaty. This paper focuses on that report, but not primarily on the ownership question. Instead the discussion concentrates on various important issues that arise at the stage where the Treaty-based entitlement of Maori to use of a resource is generally accepted, or is at least so uncontroversial that it can be assumed to be accepted. In other words the general aim of this paper is to propose, outline and analyse the legal dynamics of relationships that arise *upon affirmation* of Maori resource rights. For example how does the recognition of Maori *rangatiratanga* under article II of the Treaty affect the interests of other potential users, and what if any residual *kawanatanga* powers does the Crown retain under article I?

These are issues that have been comparatively neglected in the current debate over resources, which has tended to focus on the struggle for ownership. However they are in essential need of legal definition, not least so that parties to the Treaty, and New Zealanders in general, can become more aware of precisely *what* they, the parties, are claiming or bargaining for. This would logically assist in fo-

cusing negotiations and dialogue and making solutions more readily apparent[5].

The paper is in two main parts. The first is an analysis of relevant legal authority, using the Muriwhenua Report as a starting point from which to extend the discussion to two important North American cases. The second consists of two case studies of traditional Maori resources drawn from the Ngai Tahu claim currently before the Tribunal. The intention here is to test the legal principles outlined in the first part by applying them in concrete and relevant contexts.

A Brief Legal Background to Maori Resource Issues

At present resource management law is in a state of transition. The Resource Management Bill currently before parliament is the product of government's intention to amalgamate and streamline the relevant legislation[6]. Effectively it takes over the work previously done by a number of major statutes, including the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967 and the Mining Act 1971. Like the Conservation Law Reform Act which has recently passed into law, it proposes to rationalise and simplify resource law and its administration. The underlying purpose of the Bill is "to promote the sustainable management of natural and physical resources"; and "sustainable management" is de-

fined as:[7]

> ...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs...

In undertaking the reform the government has consistently expressed its intention to incorporate recognition of the Treaty[8]. Although some of the statutes currently in operation contain special references to Maori or the Treaty the approach has been inconsistent and the overall effect has been described as "vague and confusing"[9]. Given the Crown's recent commitment in the form of its "Principles for Crown Action on the Treaty of Waitangi"[10], and the overwhelming importance of the resources issue, the reform process provided an ideal opportunity for the Crown to clarify its position on the role of the Treaty in the area.

Unfortunately the Resource Management Bill in its present form fails to satisfactorily achieve this. In clause 6 it provides yet another variation of the "Treaty protection clause" already present (in different forms) in a number of statutes:[11]

> 6. Treaty of Waitangi - In achieving the purpose of this Act, all persons who exercise functions and powers under this Act have a duty to consider the Treaty of Waitangi.

This is a poor provision, most obviously because it represents a lesser degree of Treaty protection than is provided by corresponding sections in the State-

owned Enterprises Act 1986 and the Conservation Act 1987. It is also evidently weaker than an important provision it is designed to displace. Under section 3(1)(g) of the Town and Country Planning Act local authorities must "recognise and provide for" the relationship between Maori and their ancestral land, a requirement which has also been held relevant for the purposes of objections to the Planning Tribunal under the Water and Soil Conservation Act.[12] As a result Maori are understandably unhappy with the Bill[13], but it seems that a greater general commitment from government is unlikely to eventuate immediately. But in the meantime aspects of the Crown's role continue to be defined by the courts and the Tribunal - and it is from these sources that specific legal principles must be drawn.

What is important to understand in any discussion of Treaty rights is the increasing advocacy of tribal self-regulation as a means of giving effect to the Maori right of *rangatiratanga* under Article II of the Treaty. While this has in particular been espoused by the Tribunal[14], the government has also shown some commitment to Maori autonomy in their own affairs. Where the Resource Management Bill's administrative scheme allocates many essential responsibilities to local government, it also allows for a number of parallel roles for iwi authorities[15]. Here it coincides

with two other bills which aim to recognise and define new structures for Maori involvement at the local government level. The first is the Runanga Iwi Bill 1989 which provides machinery for a form of self-government of tribal land, resources and populations. The second is the Local Government Amendment (No.8) Bill 1989 which creates a proposed structure for Maori participation in local government, Maori Advisory Committees.

The enactment of these bills is proving difficult. The Resource Management Bill still faces substantial opposition from pakeha as well as Maori interests,[16] and the detail of the two other bills has also been criticised[17]. All three could yet disappear from the the agenda entirely, particularly if the government should change in the 1990 elections. However the bills still indicate that governmental tendencies in recognising Maori resource rights are consistent to some degree with the concept of tribal self-regulation of tribal assets as advocated by the Tribunal, and also with providing for participation in the control of other resources in which there is a remaining Maori interest. While there may yet be some political resistance, pressure from Maoridom and the recommendations of bodies like the Tribunal should inevitably, in this writer's opinion, lead to the recognition of a role "akin to local government" for the tribes. Although the discussion in this paper does

not necessarily depend on such an eventuality, it is the context in which the concepts and conclusions present here can be most usefully viewed.

PART ONE: RESOURCE RIGHTS AND PRIORITIES

INTERNATIONAL JURISPRUDENCE & THE MURIWHENUA FISHING REPORT

In 1985 the Maori tribes of the northern peninsula of Northland (Muriwhenua) addressed an extensive claim to the Tribunal.[18] Although the claim also involved land grievances, an important part of it concerned fishing rights, and it was this part of the claim that the Tribunal chose to investigate first. After hearings which involved extensive submissions from the Crown, in the form of the Ministry of Agriculture and Fisheries (MAF), and the fishing industry the Tribunal published its findings in 1988[19]. A substantial document, it describes itself as as an "interim report" aiming to establish:[20]

> ...whether the fishing claims are well founded, in terms of section 6 of the Treaty of Waitangi Act 1975, and if they are, to defining as near as can be the nature and extent of Muriwhenua treaty fishing interests to assist the claimants and the Crown to negotiate satisfactory arrangements.

The Tribunal did consider that the claims were well-founded, and concentrated on the the second stage of its task - the definition of the Muriwhenua tribes' "interests". Anticipating general negotiations between Maori and government on the fisheries issue (which eventually resulted in the Maori Fisheries Act 1989), it stated that:[21]

> Our concern has therefore been, at this stage, to expand upon the data base that the working group

> may need, by considering the nature and extent of Treaty fishing interests, and by drawing particular attention to the Muriwhenua circumstances and needs...

The result of this work is an analysis of Treaty-rights which has wide applications not only to fisheries but to natural resource issues in general. As it did with respect to land in the 1986 Orakei Report[22], the Tribunal has taken advantage of the opportunity presented by the Muriwhenua claim to produce a core of general principles, establishing an extensive precedent designed to guide the resolution of future claims and negotiations in the resource sphere.

The Muriwhenua Findings

This is a brief and partial summary for background purposes of the Report's relatively comprehensive conclusions[23]. The relevant findings of the Tribunal were as follows:

1. That the Muriwhenua people had carried on extensive and exclusive inshore fishing operations in pre-European times and at the time of the Treaty over the area of the adjacent continental shelf, and that that area was accordingly a fishery to which they were guaranteed exclusive possession by the Treaty.

2. No agreement had been made with the Crown or any other to alienate or share those possessory rights.

3. That the Crown had failed to protect the Muriwhenua peoples' fishing interest and in fact had actively restricted it, in particular largely excluding Maori from commercial and off-shore fishing, all resulting in detriment to the tribes.

4. That Maori had a right to develop their fisheries as a result of technological change; that they had a right to fish commercially and that in fact there was a commercial component to their fishing in pre-Treaty times.

5. That the Treaty envisaged agreements would be sought, and that the Crown should now have to now negotiate with the Muriwhenua people for the commercial exploitation of the inshore fishery.

The Tribunal's fundamental position was obviously to uphold the article II *rangatiratanga* rights of the claimants under the Treaty, finding that the present denial of those rights was caused by, as Boast has put it, the Crown "exceed[ing] the authority given to it by the Treaty"[24] - namely its *kawanatanga* powers under Article I.

However the Tribunal also emphasised, as it has consistently done, that *kawanatanga* and *rangatiratanga* are not mutually exclusive concepts; rather they qualify each other.[25] Accordingly the Muriwhenua Report is not a simple affirmation of *rangatiratanga*

and corresponding dismissal of *kawanatanga*. In the detail of the report there are some very important observations on the dynamic between the two that persists regardless of the recognition, in any given case (such as Muriwhenua fisheries), of the prevalence of one. These include general findings as to the extent (and limitation) firstly of rights that are guaranteed to Maori by Article II; secondly the residual powers that are retained by the Crown under Article I; and thirdly, by implication, the prospective interests of those not specially entitled by the Treaty. Again, such conclusions are relevant for resource claims in general, not just Muriwhenua fisheries.

This part of the paper examines some of these findings. As stated in the introduction, the emphasis is on assessing the respective interests of the Crown, Maori and non-Maori resource users and the nature of their inter-relationship. The Tribunal's conclusions are examined in an international context since, rather than being entirely new or particularly tailored to New Zealand needs, they in fact reflect a jurisprudence of indigenous resource rights also developing more or less simultaneously in Canada and the United States. Accordingly a leading decision from both of these countries is discussed in the con-

text of the Muriwhenua Report. The aim is primarily to analyse their respective findings with a view to clarifying, and to some degree elaborating, those of the Tribunal. As a secondary purpose it is hoped to demonstrate that the law in the three countries is now remarkably similar, and that as a result the persuasiveness of the Tribunal's findings in Muriwhenua is enhanced.

International Parallels:

A) The United States: The Boldt Case

As a comparative study the Muriwhenua Report includes an extensive analysis of the decision of the United States Federal District Court in United States v State of Washington[26], commonly referred to as the Boldt decision (after the District Court Judge). The case concerned the extent of the inshore fishing rights of Indian tribes in Washington State derived from treaties made in the mid-19th century. Although the District Court decision is only one installment in a long history of litigation[27], its particular judgement stands, upheld in almost all respects by the United States Supreme Court[28].

The Tribunal was clearly attracted by the judgement, perceiving many similarities between the positions of the fourteen Indian tribes in the case and the Muriwhenua claimants. The conclusion that they

were "persuasive and important" prompted a listing of the major findings[28], many of which were reflected in the Tribunal's own conclusions.

The Boldt decision emphatically upheld the modern enforceability of 19th century treaty rights, despite great pressure from the State Government and fishing industry in Washington not to do so.[30] In the process it laid down a number of principles which, when combined, established a scheme for weighing and reconciling the respective rights of government, Indians and non-Indians in the fishing resource. Firstly it was held that the fishing intersts secured to the tribes by means of treaty were in the nature of a *right* as opposed to a mere privilege.[31] Under United States law the text of a treaty constitutes supreme law;[32] therefore prima facie "the State cannot pass laws that limit tribal fishing rights."[33]

However it was also held that "neither Indians or non-Indians may fish in a manner so as to destroy the resource."[34] This can be described as an overriding "conservation priority". Therefore it was ruled that:[35]

> ...the [individual] State has police power to regulate off reservation fishing to the extent reasonable and necessary for conservation of the resource i.e. the perpetuation of the fisheries species.

In addition the decision distinguished the inter-

ests of the Indian and non-Indian. Non-indians could not be in possession of a *right* as such but rather a *privilege* which "the state may grant,limit or withdraw."[36] This distinction moulds the state government's power to regulate the resource, for example in terms of conservation:[37]

> If alternative methods of conservation are available, the state cannot restrict treaty right fishing, even if the only alternative is to restrict non-treaty fishermen, commercial or otherwise.

The overall scheme then is a three-tier ranking of interest, in which the indigenous right to the resource prevails over the non-indigenous interest, but ranks below an overriding conservation priority.

The Tribunal's Approach: Echoing the Boldt Decision

In *Muriwhenua* the Tribunal confirmed the obligation of Government to recognise and actively protect Maori properly exercising a right derived from the Treaty of Waitangi. This is until Maori choose to allow that right to be legitimately extinguished by mutual and beneficial agreement.[38] In setting out its specific findings the Tribunal incorporated concepts of priority drawn directly from the Boldt case.

Firstly the conservation criterium was emphasised. While the Tribunal also found that "it is not traditional fishing when Maori deplete the resource", the more important finding for present purposes was that

"neither custom *nor the Treaty* confers on any Maori the right to destroy the resource" (emphasis added).[39] It was accordingly confirmed that the Crown, as a legitimate exercise of its *kawanatanga* function to maintain peace and good order, could make conservation laws applying to all persons.[40]

Secondly it was found that Maori interests derived from the Treaty must be characterised as rights that prevail over non-Treaty interests, which are only privileges.[41] In relation to conservation then, the Tribunal considered that:[42]

> Unless absolutely necessary, the Crown should not restrict the treaty right fishing of the tribes to counter over-fishing not caused by them even if it is necessary to restrict the general public fishing, commercial or otherwise.

The result is the same three-tier ranking identifiable in "Boldt": conservation; indigenous right; non-indigenous privilege. The conservation priority is founded on two complementary Treaty interpretations: first recognition of the Crown's article I rights in the resource management sphere; and second construction of Maori rights under article II as only prevailing when they are exercised properly - the Treaty does not protect a right to destroy or deplete a resource.

Despite the scheme presented here, conservation

should not be construed as the only basis on which Maori rights might be overridden. The Tribunal does not assert that it is an exclusive justification. It is possible to envisage other situations where the Crown would be construed as exercising its kawanatanga rights validly, for example where people are physically endangered by the continued exercise of the right, or some other matter of urgency. Conservation is therefore a subset of a theoretically more extensive "top tier" of overriding priorities. The Tribunal's emphasis on conservation simply recognises that it realistically represents the most likely and least debatable ground for Crown intervention. Its overall approach, modelled on the American, has been recently vindicated in a similar Canadian decision.

B) Canada: R v Sparrow

In 1990 the Supreme Court of Canada in *R v Sparrow* delivered perhaps the most explicit enunciation to date of this concept of priorities.[43] Sparrow, a member of the Musqueam Indian band of the Vancouver area, had been convicted at trial for taking fish with a net longer than which he was restricted to using by the terms of the Band's food fishing licence. On appeal the conviction was upheld, but on further appeals to the Court of Appeal of British Columbia[44] and finally the Supreme Court it was held in both instances that there was insufficient evidence to con-

vict Sparrow, and the matter was referred back for a new trial.

The reasoning of the Supreme Court developed a similar approach taken by the Court of Appeal. Firstly it was held that Sparrow was exercising a recognised aboriginal right in taking fish from the particular area for ceremonial or food purposes. His band had lived and fished in the area for as long as 15 centuries. Under the common law doctrine of aboriginal rights which applies in Canada, Indian hunting and fishing rights continue to exist until they are extinguished by the Crown.[45] In addition, and perhaps vitally, s35(1) of the Constitution Act 1982 provides that existing aboriginal rights "are hereby recognised and affirmed."

The question was whether Sparrow's right was an existing one. The Court held that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right" and in the light of this test rejected the Crown's argument that extinguishment had been effected by over a hundred years of regulation:[46]

> At bottom the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

Sparrow was therefore primarily held to be exer-

cising a constitutionally protected right. The next step was to consider to what extent the Crown had the power to restrict that right. The Court was clear that it could not simply be extinguished at will, since both the common law and the Constitution cast certain obligations upon the Crown:[47]

> ... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

On the basis of this principle the Court considered that when it is proved by an aboriginal right-holder that their right has been infringed by the Crown, that infringement will be unconstitutional unless the Crown can provide satisfactory justification. No comprehensive test for justification was formulated, but the Court did discuss principles that might apply:[48]

> First, is there a valid legislative objective?.... An objective aimed at preserving s35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

Unfortunately the Court did not give specific examples of what might constitute these "other objectives". However the Court of Appeal's finding that

there should be a general justification of "public interest" was expressly overruled as too broad to be sufficient justification on its own.[48]

The remainder of the judgement concentrates instead on the conservation justification, singled out by the Court as "surely uncontroversial":[50]

> ... it is clear that the value of conservation purposes for government legislation and action has long been recognised. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

Significantly the Court turned immediately to the issue of reconciling the rights of different user groups. In doing so it relied upon the previous judgement of one of its members, Dickson CJ, in *R v Jack*.[51] Dickson J, as he then was, had agreed with "the tenor of the argument" proposed by the Indian appellants in that case that "the burden of conservation should not fall primarily on the Indian fishery" but rather on non-Indian sports fishing first, non-Indian commercial fishing second, and only then on Indian rights.[52] The Supreme Court adopted this approach and recognised that after conservation Indian fisheries were "top priority". The practical effect of this scheme was described as follows:[53]

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available

> after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

A new trial was subsequently ordered to determine whether the net length restrictions could in fact be justified on conservation grounds.

Muriwhenua, Boldt and Sparrow:

Comparing the Approaches

The scheme of priorities so clearly established by Sparrow reflects the three-tier test that is similarly, if not as emphatically, recognised in both "Boldt" and Muriwhenua. In all three cases the general superiority of the indigenous right over non-indigenous interests in the resource is affirmed. Then conservation is uniformly recognised as a legitimate basis for qualification of that right by the Crown or state government. In Canada and New Zealand it is not isolated as the *only* basis but simply the most obvious or least controversial. In the United States it is singled out exclusively but, as we shall see, this only binds upon state and not federal government.

Distinctions:

(i) the Legal Status of the Indigenous Right

There are however some important differences be-

tween the jurisdictions as to the nature of the aboriginal right affirmed. For example the right recognised in "Boldt" is a treaty right that is justiciable under United States law; similarly the Canadian indigenous right is litigable under the Constitution, and possibly also under the common law doctrine of aboriginal rights. While it is arguable that Maori rights are also justiciable to the extent that the same doctrine is recognised as applying in New Zealand[54], at present the jurisprudence of such rights is firmly focused on the Treaty of Waitangi, an approach which the Tribunal for one favours. Unlike the U.S. treaties, our Treaty is not justiciable law (although it can be a powerful extrinsic aid) unless it is incorporated in a statutory provision.[55] This can be a disadvantage to Maori claimants. Nevertheless in the Tribunal we do have a statutory body authorised to evaluate the performance of Treaty obligations and make recommendations accordingly. We also have a significant dialogue between Maori and the Crown, so that realistically the need to search for principles is not diminished by the lack of a guarantee of relief should those principles be breached.

(ii) the Nature and Extent of the Indigenous Right

More important are any inconsistencies in the substance of the rights themselves, should they prove to

be material. In the Boldt case the tribes' right to take fish was secured to them by the various treaties "in common with all citizens of the territory." The Supreme Court held on that basis that the Indians were entitled to a maximum share of 50%, or a share that was sufficient to provide them with a "moderate living", whichever was *lesser*.[56] Even with this limitation of commercial capacity, the decision was still enough to provoke an uproar in the non-Indian fishing industry.[57]

In Canada the Indian fishing right has been expressly recognised only when it is exercised for the food or ceremonial purposes of the relevant band. The Supreme Court in *Sparrow* evaded the issue of whether the aboriginal right in that jurisdiction extended to cover commercial fishing on the basis that the case before it concerned food rights only.[58]

In New Zealand however such restrictions do not primarily apply. Firstly the commercial component of Maori fishing rights has been recognised and upheld by the Tribunal, and secondly the Treaty of Waitangi contains no stipulation that Maori must in any way share with non-Maori the resources to which they are guaranteed possession by article II. In criticising the apparent failure of MAF to consider the findings of the Boldt case (to which its attention had previ-

ously been drawn by the Tribunal) when devising the quota management policy for New Zealand fisheries, the Tribunal noted that the Treaty of Waitangi might be perceived as too threatening: "the English text speaks not of a right in common but of exclusiveness."[58]

However the Tribunal firmly rejected that this should affect the upholding of the right in any way:[60]

> The inconvenience of the end result today is not a ground for importing another construction, for the Treaty was not based upon a balance of convenience. Nor was the result impracticable, for special arrangements could have been made; nor need it be impracticable today for special arrangements can still be made.

The message is essentially that pakeha or anyone else need not be intimidated by the recognition of an extensive Maori proprietary interest, with a commercial component, in New Zealand's fisheries because negotiation is still capable of achieving a balanced result satisfactory to all. In addition the Tribunal confirmed the importance of the "principle of mutual benefit" to reinforce its conclusion that the Treaty not only expects such "arrangements" will be made, but to a reasonable extent obliges the parties to do so:[61]

> For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but even assisted where it can be.

> But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit.

In New Zealand therefore we have an authoritative interpretation of the Treaty which does effectively restrict the extent of Maori treaty rights (as well as of course Crown rights). By comparison it would seem an approach to be valued for its flexibility and because it avoids resort to the type of arbitrary distinction fastened on to by the North American decisions.

On the other hand a substantial degree of cooperation is a necessary component of any successful negotiation or mediation, and it is quite obviously mistaken to assume that the requisite motivation and good-will will be automatically present in any given situation.[62] But it remains significant for future claims that the Tribunal has recognised "mutual benefit" as an essential principle of the Treaty's interpretation. Indeed part of the problem may be that this is yet insufficiently realised, not least by those who are in prospective negotiating positions.

(iii) Government Powers and Obligations

There are also clear distinctions amongst the jurisdictions as to the nature of the state's role and powers. In the United States the Boldt decision has

established that there is comprehensive protection for Indian treaty rights at state level. However the federal position is quite different. Although aboriginal rights are to a great extent crystallised in treaty form, Congress clearly has the power to abrogate Indian treaties. In addition Congress is not as yet required by the Courts to justify any act of abrogation (except perhaps by the vastly wide criterion of what is good for the nation or for the Indians themselves)[63], although it is theoretically required to abrogate only where it is "consistent with perfect good faith towards the Indians."[64] Although there appears to be some fiduciary standard here, Congress has been widely criticised for failing to adhere to it in reality:[65]

> There is something particularly unseemly about the United States unilaterally abrogating treaties, many of which it imposed, with a people whose treatment can only be described as the nightmare of the United States dream.

It has been argued[66] that Congress should have to satisfy a more stringent legal test of justification before an act of abrogation will be valid. Until this happens however many Indian treaty rights continue to lead a somewhat shaky existence. A controversial illustration of this is provided by the 1986 decision of the United States Supreme Court in *United States v Dion*.[67]

Dion, an Indian, was convicted for hunting and selling body parts of the golden eagle on his tribe's reservation. The relevant legislation provided that the golden and bald eagles could be hunted by Indians, but for ceremonial purposes only, and then only if they had permits under the Act.[68] However the Indian treaty relating to Dion's reservation excluded any such prohibition. The Court held, following the last in time rule, that the statute effectively abrogated the treaty as far as hunting the eagles went, partly because a permit regime would be unnecessary if there was an existing treaty right.

It has been pointed out however that it is not at all clear that the legislation was intended to affect reservation rights, and that the permit system may well have been intended to allow non-reservation hunting for ceremonial purposes rather than to introduce a universal permit scheme.[69] Most importantly, the Supreme Court has been criticised for failing to clarify a vital issue: whether the courts could construe the legislative intention of Congress to abrogate a treaty from the "surrounding circumstances"; or whether in fact an explicit statement of intent from Congress was required.[70] Certainly its own decision in *Dion* reflects an adoption of the former approach more than the latter, and it is probable that

the Court was swayed towards finding there had been an abrogation by the positive purpose of the statute - conservation. While the protection of rare eagles is surely desirable, the decision os nevertheless highly questionable in terms of the protection of Indian treaty rights.

While the specific problem here is the United States courts' failure to adopt a strict method of construction when considering treaty abrogation, the root of that problem is the unwillingness of Congress to act according to a settled standard. Above all *Dion* highlights the desirability of an effective justification requirement for treaty abrogation. Not only would this greatly assist in establishing the intent of Congress in similar circumstances, but it would provide a greater measure of protection for treaty rights and encourage the dialogue that is surely desirable in any situation where long-held rights are taken away by government.

In Canada they have exactly what the United States needs. As we have seen the Crown has a fiduciary duty to the holders of aboriginal rights akin to a trustee's responsibility to beneficiaries. It is a relationship in which the "honour of the Crown" is at stake. In contrast to the power of the U.S. Congress, the Supreme Court in *Sparrow* was clear that

the Sovereign was unable to extinguish aboriginal rights at will, but instead only after adequate justification was given.

The Court went some distance towards an analysis of what was in fact adequate, while refuting the intention to set out an "exhaustive list". Assessment of justification would involve where relevant:[72]

> ... the questions of whether there has been as little infringement as possible to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

These were in addition to the clear concept of priorities. The bottom line was overall "sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians."[73]

While treaty-based, the situation in New Zealand is nearer to that in Canada than the United States. The Tribunal has outlined the Treaty-partner relationship as follows:[74]

> Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, *the fiduciary undertaking* of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress [emphasis added].

This is characterised as the principle of protec-

tion. As in Canada, the honour of the Crown is said to be at stake. While both the Tribunal and the New Zealand Court of Appeal have confirmed that the Treaty gave the Crown the right to make laws for both Maori and pakeha to ensure "peace and good order", both have also recognised that the Treaty imposed an obligation on the Crown to do more than simply passively protect Maori interests, but to do so actively to "the fullest extent practicable".[75] According to the Tribunal, this also means ensuring that Maori retain a "sufficient endowment" of land and natural resources such as fisheries in order to be able to "survive and profit".[76]

Summary: Do the Distinctions Matter?

Overall the differences between the three jurisdictions are not fundamentally important in the context of the principles considered in this paper. In New Zealand Maori should have, according to the Tribunal, a guarantee of at least an adequate interest in resources characterisable as taonga under the Treaty. The Canadian position is similar if somewhat lesser; there Indians have a guarantee of good behaviour from the Crown in recognising and affirming their interests, although unlike Maori their guarantee has the advantage of being constitutionalised. Indians in the United States appear to have little guarantee in the federal context, but this does not

necessarily detract from the persuasiveness of the principles laid down in the Boldt decision. It is wrong to assume that the decision would have been any different had Congress had no power or a diminished power to abrogate the treaties, and it was not envisaged in the case that it might exercise its power to undercut the effectiveness of the decision (nor has this happened).[77]

Similarly it is wrong to disregard the North American cases on the basis that Treaty of Waitangi rights are prospectively more extensive than those considered in "Boldt" and *Sparrow*. As shown above, the Tribunal has outlined a legal approach towards construing Treaty rights which emphasises co-operation, negotiation and common benefit. We clearly can not afford to be uneconomic resource users on a grand scale, but the recognition of Maori rights does not mean this is a likelihood; Maori need and are surely willing to perform economically as much as pakeha.[78]

Conclusion

It is recognised that a closely related jurisprudence of aboriginal resource rights has developed in recent years in the United States, Canada and New Zealand. This body of law provides important answers to questions about the extent of indigenous rights and their relationship to the rights of the state and

third parties. The combined weight of authority behind it is such that it should not be easily dismissed by those involved in resource management and use in New Zealand, particularly of course the Treaty partners - Maoridom and the Crown. It is considered that the consistency of approach is in fact such that it is valid to draw sensibly from the North American cases in order to supplement the findings of the Tribunal in *Muriwhenua*, and this conclusion provides the rationale for much of the analysis in part two of the paper.

PART TWO: CASE STUDIES FROM THE NGAI TAHU CLAIM

Introduction

The Tribunal is currently preparing its reports on the claim of the Ngai Tahu tribe of the South Island, easily one of the most important to have come before it.[78] It is a claim of enormous scope, being an amalgamation of several very significant and other smaller land claims with a claim to sea fisheries and also a further claim to the traditional food resources of the land, waterways and coast. It was heard over more than two years of hearings that finally concluded in October 1989.

The two case studies presented in this paper, the Titi Islands and Lake Ellesmere, are both drawn from the Ngai Tahu claim. They involve traditional food resources, or "mahinga kai", and are ideal studies for the purposes of this paper because there is little controversy as to the extent of their historical Maori associations - which in both cases are clearly significant. Instead the issues that need examination are the current legal status and management of the resources.

Although aspects of ownership will be considered, this is by no means the central focus of the studies. Discussions of management priorities is relevant and justifiable in both cases regardless of the issue of

legal title, simply because of the undeniable strength of the Maori interests involved. The discussion therefore does not rely on any assumption or prediction as to what the Tribunal's findings may demonstrate.

Indeed it is considered that the Maori Treaty interest can in some instances be fully recognised and protected without revesting of ownership. Tribal self-management does not necessarily require sole or even part ownership of the relevant resources. Boast has pointed out that although the "exclusive possession" of article II of the English text is difficult to equate with anything other than legal ownership, it is possible to conceive of autonomous management rights of any given resource for Maori as representing something approximating "te tino rangatiratanga" of the Maori text, even if ultimate title should reside with the Crown.[80] The validity of this analysis obviously depends on the willingness of the Crown to act in good faith, but in this respect it is important to keep in mind the definitions of the Tribunal and Court of Appeal of the Crown's duty to actively protect Maori Treaty interests.[81] This argument does not amount to a proposition that Maori ownership of resources is in some way undesirable; rather it is a suggestion of an alternative approach which may be

particularly useful in the interim while questions of ownership are (often slowly) being resolved.

Ngai Tahu examples have been chosen because there is a relevance about them in the light of the present claim, and a particular reality given the Ngai Tahu Maori Trust Board's clear intentions to actively involve itself where feasible in South Island resource management.[82] They are also practical studies in that the use of the resources is well documented, particularly now that the Tribunal's hearings have generated extensive written submissions, to which the writer owes a great debt.

CASE STUDY #1: THE TITI (MUTTONBIRD) ISLANDS

The Titis are a group of forty or so islands situated off the coast of Stewart Island, or Rakiura. As their name suggests, they provide a habitat for the titi, otherwise known as muttonbird or sooty shearwater, which migrates there every autumn from the northern Pacific to nest. For centuries these birds have constituted an important source of food not only for Maori of the Foveaux Strait region, but, largely by means of trade, South Island Maori in general. The Titis provide a classic example of traditional Maori resource use. More importantly for the purposes of this study, this use has never been curtailed and continues on a significant scale today; the issues presented are therefore either real or potentially real.

Traditional Food Gathering on the Titis

By the arrival of the European settlement southern Maori had developed a system of food-gathering that was specially tailored to their environment and its seasonal patterns. Anderson has described the "annual round" of the people of Ruapuke Island in Foveaux Strait:[83]

> In late winter they moved to the mainland, first to forest fowling camps (hunting tui, pigeons and kaka), then in spring to lamprey fisheries on the Mataura river. Eeling in the ear-ly summer brought them back to the coast where they fished

> and hunted seals, sometimes as far a field as Fiordland. In autumn they returned to Ruapuke Island harvest their potatoes and prepare for the muttonbird season. When, in late autumn, this was finished, they returned to their settlements for the winter.

Such active food gathering was necessary for survival in a climate which, until the arrival of the hardy potato in European times, was not favourable for growing crop staples such as kumara.

Although the titi, like many food sources, was only available during certain months of the year, Maori developed methods of preserving the birds in order to provide food for the whole year round. The basic tool of preservation was the poha, constructed of kelp and totara bark. The plucked birds were placed in a brine solution and then sealed in bags made of kelp and packed in the bark, or alternatively cooked and preserved in their own fat. These techniques meant that birds packed two years previously were edible; three years was probably the limit. Fish and eels were also preserved in this way, and the poha when placed in a flax basket was a convenient package for transport and trade purposes.

Ruapuke Island was a major centre for post-season Titi trading, where local Maori would barter the birds in return for products that others could supply, such as dried eels or materials for poha construction. By this means muttonbirds could be en-

joyed as far afield as the North Island, finding their way there through the trade networks.

The actual trip to the Titi Islands, te heke hau kai titi, took place in April and May. Generally it was Maori of the Foveaux Strait area that would take part in the actual gathering, but Ngai Tahu from as far north as Kaikoura might also make the long sea journey down to exercise their birding rights.

Individual Maori hapu or whanau would normally have a traditional association with a particular island or islands to which they would go each year. Rights were exercised exclusively by the consensual division of any one island into a number of zones, or manus, over which one group would have sole rights. There they would construct simple but durable thatched houses (whare rau), built to last for a number of seasons.

The first part of the season would involve taking the young birds from their nesting holes. The second part took place at night when the birds began their first migration; the birders would equip themselves with torches and capture the birds on the ground as they moved towards the shore to take flight. Then the arduous processes of plucking and preservation would begin.

Although there have been some changes in technology (e.g. battery-powered torches, aluminium containers for the birds), the muttonbird season is carried out in 1990 pretty much as it was in pre-European times.[84] The important differences lie in the legal administration of the resource rather than its use.

The Legal Status of the Titi Islands

In 1864 the Crown made the last of its major purchases in the South Island - Stewart Island. The sale of Rakiura was effected by the agreement of Aparima and Bluff chiefs to terms proposed by the Crown's agent, Henry Tacy Clarke. The total purchase price was 6,000 pounds.

A number of stories about the sale are still told. It is well known for example that representatives of the two interested tribal groups (much intermingled by then), Ngai Tahu and Ngati Mamoe, delayed Clarke with a lengthy and ceremonious discussion over which group was to have the right to effect the sale, the verdict finally going in favour of Ngai Tahu. However the understandings of the parties as to the fate of the Titis are still a source of controversy. The English text of the deed of sale provides that:[85]

> The land we now sell and convey, is the whole of the Island Rakiura, with its trees, minerals, waters, rivers, lakes, streams, and all appertaining to the said land, or beneath the surface of the said land, and all the large islands, and all the

small islands adjacent...

In addition the deed provided for reserves, the ninth lot of which included:

> ... the Titi Islands following[:] Horomamae, Wharepuaitaha, Kaihuka, Potuatua, Pomatakiarehua, Tia, Taukihepa, Rerewhakaupoko, Mokonui, Mokoiti, Timore, Kaimohu, Huirapa, Taketu, Heretatua, Te Pukeotakohe, Tamaitemioka, Pohowaitai, Poutama, Herekopare, and Pikomamaku. [These lands are reserved for us under the protection and management of the Governor.]

This list excludes the remaining Islands which were to become the sole property of the Crown.[86]

There do not appear to be any significant discrepancies between the English and Maori texts, nor has this in fact been alleged. What has been argued is that Maori were not aware that the Islands were to be included in the sale until they had signed, when it was too late to object.[87] However in the light of current evidence this is difficult to support. Although the inclusion of a list of reserves does not necessarily prove that the Islands were negotiated for there is no indication that the Crown attempted to defraud Rakiura Maori, as it may have done in the past in the South Island with deeds which, unlike the Rakiura Deed, promised reserves later.[88] One of the main vendors involved in the sale was Topi Patuki, and it is notable that he had offered the Islands for sale to the Crown at least once in previous years, with the qualification that Maori should retain their

birding rights, and so it is unlikely that they were not again discussed with Clarke.[89] Indeed if, as one submission to the Tribunal states,[90] the Crown islands are those which were at that time less frequented it would seem almost certain. But exactly what took place is unclear and possibly may never be known. Accordingly, as Montgomerie notes, "it is impossible to say whether all the islands on which Ngai Tahu wished to retain birding rights were reserved."[91]

The effect of the Rakiura deed was to divide the Titis into two categories: those ceded to the Crown ("Crown islands") and those reserved for the beneficial use of their traditional owners ("beneficial islands"). Those Rakiura Maori who were unable to assert rights to any of the beneficial islands therefore became dependent for birding on entry to a Crown Island, which was of course conditional on the consent of the Crown. In other respects Maori continued to utilise the islands as before.

In 1886 legislation was enacted to enable the promulgation of regulations for the Titis.[92] These first appeared in 1912[93] in response to squabbles which had arisen amongst the beneficiary users. The Native Land Court had tried to impose a system of permits as a solution to arguments over access rights

in 1909, but dispensed with this in favour of a judicial ruling on the rights of certain claimants. Finally the Court compiled a list of owners of the beneficial islands in 1924.[84] Whether or not these actions were within the scope of the Crown's management function (formally confirmed to be that of a trustee in 1922), this list has remained the essential reference for prospective claimants. Those who can point to a direct ancestor on the list are deemed to be beneficiaries; a right of succession which is still administered today by the Maori Land Court.

In 1941 Crown Land Regulations laid down a permit requirement for a European wishing to enter any of the Islands. Interestingly a European is any person other than a Rakiura Maori, who in turn is either Ngai Tahu or Ngati Mamoe,[85] emphasising the tribal nature of the resource and its use. Even with a permit, a European can have no birding rights.

No significant changes were then made until the Titi (Muttonbird) Islands Regulations 1978 were promulgated. Currently in force, these provide for:[86]

> ... the election each year of a committee of Rakiura Maoris and their spouses to make recommendations to the [Director General of Conservation] on matters concerning the islands.

The Rakiura Titi Committee is a recommendatory body only, unable to restrict the Director-General's legal powers in respect of both Crown and beneficial is-

lands, although obviously capable of influencing the exercise of his or her discretion.

The 1978 regulations are also the first to distinguish between the two categories of island. Beneficial islands are available to beneficiaries recognised by the Maori Land Court and authorised children and grandchildren. Crown islands are available to those Rakiura Maori who obtain a permit from the Director-General.[87]

Lastly, after a long wrangle between Maori and the Crown, the legal status of the beneficial islands was recently altered. Section 6(2) of the Maori Purposes Act 1983 vests the title to the islands in the beneficial owners "in accordance with their relative interests". The Crown is discharged of its statutory role as trustee by section 6(9), but continues to have the power to make and administer regulations. The 1978 Regulations therefore remain legitimately in force. In addition the Maori Land Court retains its jurisdiction over succession matters.

Current Issues:

(i) Conservation

Submissions to the Tribunal give an indication of some of the tensions that presently affect the management and use of the islands. Firstly there is an

important conservation issue. Since 1987 the administration of the islands has been the domain of the Department of Conservation, which took over the role from the old Department of Lands and Survey. The person specifically responsible, the District Conservator for the Rakiura District, has emphasised to the Tribunal the ecological value of the islands, maintaining that "they are the last arks of many endangered species of plant, bird, animal and insect."[88] Amongst others the Titis provide a habitat for the South Island Saddleback, the Stewart Island Robin, the Yellow-eyed Penguin, species of weta, rail and gecko, and Rata forest and other rare vegetation. The Conservator pointed out that these species have been threatened for many years by the gradual encroachment of rats on to the islands. As of May 1988 at least five Crown and eight beneficiary islands had become infested, the worst case being the so-called Big South Cape (Taukihepa) disaster of 1964-66, which resulted in the disappearance of many birdlife species from the island. The reasonable assumption is that the rats have been inadvertantly transported by vessels belonging in the main to muttonbirders, and that therefore the Crown, in the form of the Department, must continue to take an active role in the administration of the islands in order to control any further damage to native flora and fauna.

Rakiura Maori have defended their competence to protect the islands, as well as the extent of their culpability for the rat problem, given that the policing of the islands is not sufficient to prevent commercial fishermen gaining access in the off season.[99] The traditional conservation component in methods of Maori resource use has been emphasised. For example it is pointed out that the titi itself was taken annually for years without any noticeable decline of the species in the area, and this reflects a general contention that what amounts to "sustainable management" - the principle behind the Resource Management Bill - has long been part of the traditional philosophy of Maori resource use.[100]

It has also been suggested that unpaid traditional resource users will logically have a greater interest in protecting the resource than paid officials, for the simple reason that they are the *users* who benefit.[101] There is in fact an apparent tension between the Department and Maori as to what is valid conservation. For example there is substantial Maori criticism of the manner in which Conservation (then Internal Affairs) staff eradicated the troublesome weka on Codfish island (Whenua Hou) in Foveaux Strait.[102] Apparently some of the birds were transferred away from the island, but many others were shot and left

lying around. While Maori have described the shooting of the birds as an inappropriate and unnecessary measure, the District Conservator has maintained that as far as Codfish Island is concerned, only the Department has the skilled staff necessary to protect the natural habitat.[103]

(ii) Regulating Muttonbirders

One submission has suggested that the titi population itself has declined in recent seasons, pointing to air and sea pollution as possible factors.[104] While these factors may have external origins, any decrease in muttonbird numbers raises a second area of difficulty; controlling the actions of users. Eva Wilson complains quite forcefully in her book about the attempts of certain beneficiaries to deny others of their manus.[105] Whether or not such problems are widespread it is clear that there is firstly a limited amount of space on the islands in a popular season, and secondly that there are differences of opinion amongst the users as to the purposes of exercising birding rights. Improvements in transportation facilities have made the islands increasingly accessible to those with a right to use them, and it is possible that the commercial component of muttonbirding may be significantly expanding.[106] With the succession system there is a difficulty in ensuring that the beneficial islands are not over-exploited, and

realisitically controlling the numbers of birds taken from Crown islands and the practices of taking them may be no simpler.

(iii) Legal Administration

The distinction between Crown-permitted users and beneficial users is also the source of some discontent. One submission states:[107]

> In 1864 when the list of owners for the Titi Islands was being compiled many of the people concerned were at that time on the Titi Islands. Because of this several families were not included on the list of owners to the beneficial islands.... The Crown Islands were then made available to people who through no fault of their own had no beneficial right to partake in what was part of their normal food gathering.

In the light of the basic doubts about whether the Islands were even negotiated for it is impossible to confirm the accuracy of this report. However given the limited number of signatories to the deed it is entirely possible that some Rakiura Maori were left unprovided for, possibly victims of political disenfranchisement. It is likely, as the submission indeed suggests, that these were people who regularly birded on those less accessible islands which became Crown property. Regardless of the different legal status of the two groups of islands, it is questionable whether the distinction between the users should be maintained or replaced with a comprehensive scheme of rights.

Rights and Priorities: Applying Muriwhenua et al

The strict land question aside, it is difficult to conceive of the Titis as anything other than a taonga to Rakiura Maori for the purposes of the Treaty. If anything the Islands are an archetypal example. Rakiura Maori have had an exclusive and continuous association with them as a muttonbird resource which has been legally recognised in some form or other for over a century. The Crown Islands are part of this recognised relationship, and while there is doubt over their alienation of birding rights it would be doubly unjust to exclude them. There is therefore little difficulty in conceptualising the right to take muttonbirds from the islands as an indigenous right; even if the Crown possesed all of the islands this could be done. It is valid then to apply current jurisprudence in determining certain issues of the Islands' management.

Conservation

A central question is to what extent the Crown can legitimately restrict Maori rights for conservation purposes. In terms of the "priorities scheme" it is clear that privileged users should be the first targets of Crown constraints, but in this case there are really no privileged users as such; Europeans simply can not take birds and are not generally seen on the

islands. It would be repugnant to attempt to place those permitted to use Crown Islands in this category for reasons discussed above; their association with the islands is still in the nature of an indigenous right unless it is clearly determined that birding rights for those islands were fairly alienated in 1864.

In the mean time what the Crown should do is to ensure that all the islands are adequately protected from encroachment by other visitors (and illegitimate birders) and indirect spoilation by commercial fishing interests operating in the area *before* extending conservation measures to the indigenous interest. The Tribunal's clear requirement, which corresponds with the North American authorities, is that indigenous rights should be the last to be affected by conservation measures where possible.

Otherwise we know the Crown may be justified in controlling or preventing access to the islands on conservation grounds. However a number of details need to be addressed. The first question is what does in fact constitute a valid conservation ground? It is a nice question in terms of the Titis because the issue is not simply the depletion of the resource being harvested, but also, and most importantly at present, the threat to other wildlife presented by

the introduction of rats by muttonbirders.

In this light the authorities provide limited assistance. The Boldt decision defines conservation as any act ensuring the perpetuation of the species being taken under the indigenous right.[108] The perpetuation requirement is obviously area-related to some extent; Indians in Washington State can not destroy the salmon resource there on the basis that it continues to flourish in New Zealand. In this regard the fishing requirements within the relevant jurisdiction will probably be the important factor.

Similarly the focus in *Muriwhenua* is on avoiding depletion of the particular resource at issue.[109] Clearly if the muttonbird population on the Titis was threatened the Crown would have the right to impose controls. This is arguably despite the fact that it is only Maori who use the resource; not to legislate would be to fail to protect the continuing existence of the aboriginal right.

The problem remains that perpetuation of species is clearly not the right test to apply to situations where rare habitats containing many endangered species are at issue. While it would follow from the principle of active protection that the Crown should ensure that the habitat of the species being taken by indigenous right is not degraded; what is the case

where a habitat, possibly irrelevant to the survival of the species taken, is threatened by the act of taking? Obviously in some cases the preservation of such a habitat will be important even though the perpetuation in that area of any of the species living there may not be vital.

Does the Crown in fact have wider conservation powers, not just restricted to the species at issue? It is difficult to dispute that it does. The Canadian approach is useful in this respect; the test for what constitutes conservation adopted by the Supreme Court in *Sparrow* is not limited to the goal of perpetuation of the resource at issue, but rather extends to incorporate any measure which reflects a "valid legislative objective".[110] This is a sensible approach, and despite the primarily more restrictive test apparent in *Muriwhenua*, it is one that can be adopted here without departing from the Treaty or the Tribunal's principles. We have seen that the Tribunal affirmed the Crown's power to "legislate for all matters relating to peace and good order"[111], and that this included conservation. Accordingly if a real threat to a rare species is posed by the exercise of Treaty rights the Crown must be able to intervene. In an age of intense environmental consciousness it is part of the Crown's residual powers

under Article I of the Treaty to do so. Preserving the native habitat on the Titis and protecting the endangered species is highly desirable and clearly a valid conservation objective.

However having established this there is also a requirement that the Crown must be able to justify its action. The Tribunal has noted that conservation action will only be valid where it is necessary.[112] The North American cases, which were more obviously concerned with the point, go further in concurring that intervention must be both necessary *and* reasonable to ensure the conservation objective.[113] The state must be able to show[114] that there is a significant danger to the survival of the resource, and that the action it proposes to take is appropriate in the circumstances. Were it asked to consider it, this is almost certainly the approach that the Tribunal would adopt for New Zealand, as it is consistent with the logic of the overall priorities scheme, and also the principle of protection.

If indeed the Titis are the "last arks of many endangered species" it is straight-forward to conclude that Crown action may well be necessary. But it must also be reasonable; the essential point here is that the Crown should not simply be able to conveniently cry "conservation" in order to restrict indigenous

rights. In the United States case of *Dion* we have already seen an example of conservation measures being enforced to the detriment of the aboriginal right without clear legal justification. The Crown must limit its action to what is proportionately appropriate, and seek to infringe the aboriginal right as little as possible. Again, this is entirely consistent with the principle of protection.

In *Sparrow* the importance of consultation was also emphasised:[115]

> The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed...

While the New Zealand Court of Appeal has held that there is no strict obligation on the government to consult with Maori,[116] in a case such as the Titis it would be inconsistent with the partnership concept not to do so. The conservation qualities of Maori food gathering are well documented, not just in the Ngai Tahu submissions. Moreover in terms of the Titis the Maori administrative profile is high, particularly in the form of the Rakiura Titi Committee and the Rakiura Maori Land Incorporation. Clearly there is scope for positive negotiation and cooperation between the Crown and Rakiura Maori which might help to avoid an impending conflict over conservation aims and measures. If Maori could take action themselves

to ensure that muttonbirders do not transport additional rats to the islands the need for Crown action would substantially diminish.

This raises another issue; the extent to which Crown rights may be precluded by Maori regulation. In the Boldt decision it was held that:[117]

> ... the exercise of ... tribal regulatory control may affect the finding of "necessity" which is required for the validity of any state exercise of its police power to preserve the resource.

It is submitted that this should also be the principle in New Zealand. So long as Maori conservation methods, whatever they may be, are effectively preserving the resource, then the Crown has no right of intervention on the basis that it needs to act to preserve the species.

Summary: Conservation

The Crown clearly has a conservation role in the Titis. The approach of the international jurisprudence summarised in part one is to restrict that role to justifiably important action which does not unnecessarily trample on indigenous rights, and which in fact actively seeks to accomodate them. The Crown needs to be aware of the legal consensus that while conservation is definitely top priority for all people it can not be used as a convenient excuse for denying Maori their resource rights. The temptation for the Department of Conservation to assume that

their work in the Titis is automatically of overriding importance must be avoided. Nor should the potentially emotive quality of conservation issues be used to unjustly villify the legitimate exercise of Treaty rights. There are also of course obligations for Maori to consider, some of which will now be discuused.

Commercial Muttonbirding and the Duty to Regulate

The extent to which Maori have the right to commercially exploit traditional resources guaranteed to them under article II of the Treaty has become controversial in recent years. The attitude of some New Zealanders has been that Maori rights should be no different now than when they were reserved in 1840; in other words Maori can exploit their resources, but only with the tools and "canoes and fibres of yesteryear".[118]

In Muriwhenua however the Tribunal confirmed that Maori have a right to develop their resources commercially and to utilise modern methods and technology in doing so. Apart from the fact that some Maori were participating actively in business and trade before 1840, the Tribunal considered it could rely solely on the finding that "a treaty that denied a development right to Maori would not have been signed."[119]

We have seen that muttonbirds were traditionally an important trade resource, and with the arrival of the sealers and whalers in the late 18th century the market would surely not have been confined to Maori consumers. To some extent there is still a practice today of taking the birds for profitable sale, and there is an obvious opportunity for beneficiaries in particular to develop a minor industry. Some Rakiura Maori oppose this, maintaining that use of the resource should be confined to domestic purposes.[120] The concern here is essentially conservation. As the Tribunal has pointed out, there is "a tension in modern Maori society between conservation and development", just as there is "in society as a whole."[121]

While some pakeha share this conservation concern, others object to commercial activity for different reasons. To some extent there is resentment towards the idea of Maori "cashing in" on their traditional rights. It was perhaps such a concern that led the Supreme Court in the Boldt decision to restrict Indian fishing rights to a maximum of 50% of the annual catch on the basis a "moderate living" was all that should be guaranteed.[122] As a general rule, based on construction of Article II of the Treaty, Maori are not constrained in this sense. However there are some important limitations that must be kept in mind.

Firstly there is the principle of mutual benefit; as we have seen this requires partners to negotiate sharing where not to do so would be to unreasonably jeopardise the economic objectives of the state. Clearly this is a mechanism for limiting unjustifiable imbalances in resource ownership or control.

Secondly there is an obligation for tribes to competently regulate the use of their resources. Traditionally "individual use rights were subject to and flowed from the tribal overright."[123] In *Muriwhenua* the Tribunal found that the tribal control guaranteed by the Treaty included "the right to regulate the access of tribal members to tribal resources," but in addition it was stated, again in line with the Boldt decision,[124] that:[125]

> The right of regulation has become a duty in our time, to protect the resource and to bring a certainty to the law. This is now required through population and other changes. It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules.

It is wrong therefore to necessarily see Treaty resource rights as a goldmine for individual Maori. Individuals must operate within the tribal plan. The tribe in turn must exercise its administration with the principles of common benefit and the Crown s residual powers, particularly in the conservation

sphere, in mind.

Of course a duty to regulate tribal resources is irrelevant if there is no opportunity to exercise it. As mentioned in the introduction to this paper, tribal self-regulation may be the ideal, but it is certainly not yet a reality. This aside, the Titis are perhaps one of the best examples in the country of a traditional resource over which Maori have a real controlling interest akin to an exercise of *rangatiratanga*, particularly since title to the beneficial islands was vested in the "owners". However as we have seen important functions still reside with the Crown and the Maori Land Court. The assistance of the Crown is clearly valuable while Rakiura Maori (or the Ngai Tahu Trust Board) are unready to fully exercise their right of regulation. But if and when they are capable of doing so the Crown should turn over its residual functions to them. Maori may decide to retain the assistance of the Crown or Land Court and delegate their regulatory duty accordingly; however the important point is that they have the opportunity to exercise this right of decision. In this respect it is important to consider the Tribunal's finding in *Muriwhenua* that:[126]

> It is consistent with the Treaty that the Crown and the tribes should consult and assist one another in devising arrangements for a tribal control ...

In addition there would seem to be little justification in retaining the distinction between the Crown islands and beneficial islands while both are being used by the same people for the same purpose.[127] It is possible that the Crown could justify retaining control of the Crown islands on conservation grounds, but given that birders still enter them this is doubtful. In administrative terms alone it makes little sense to carry on different regimes for the two groups, and the incorporation of the Crown islands under a comprehensive scheme of Maori control would seem the sensible and desirable result.

Conclusion

The Titis study has elaborated on two important issues from the general jurisprudence discussed in part one. The first is the concept of a "top priority" of conservation. It is concluded that for Crown conservation action to be valid it should be both reasonable and necessary, primarily to ensure the species at issue is perpetuated. In addition the Titis study shows that this test can and must be analogised to take in wider conservation objectives. Whatever the purpose of the Crown's conservation action may be, from protecting one species to a whole ecology, the applicability of the justificatory requirements remains valid. It is also concluded that

where Maori methods of conservation are sufficiently successful on their own, this will generally preclude the Crown right of intervention.

Secondly the study has focused on the extent of the Maori Treaty right and, conversely, its limitations. The conclusion is that tribes have a both a right and a duty to regulate their resources, and that this regulation must be undertaken proficiently so that the resource is protected and the national interest not undermined. This includes a right to commercial exploitation of the resource, although again there must be sufficient conservation measures in place if it is to be ensured that government intervention is avoided.

CASE STUDY #2: LAKE ELLESMERE

Lake Ellesmere (Waihora) is situated on the Canterbury coast immediately south of Banks Peninsula, barely separated from the sea by the narrow buffer of Kaitorete Spit. It is a traditional fishing site for the Maori of the region[128], particularly important for its seasonal abundance in eels and flounder, although many other species, both native and introduced, have also thrived there. Depending on the water level it presently covers 16,600 - 29,300 ha; a considerable body.[129] However since European settlement its size has substantially diminished, and more vitally its ecology has drastically altered to the extent that its future is precarious.

Traditional Fishing on Ellesmere

In myth Ellesmere, or Waihora, is known as "Te Kete Ika a Rakaihatu": the fish basket of Rakaihatu, an ancient explorer who carved out the lakes of the South Island with his digging tool.[130] As an eel resource it was unparalleled; therefore it was a hugely important asset. Bill Dacker explains:[131]

> February was the beginning of the whakaheke (migration) of tuna (eels) back to the sea. From then through to April they would be caught in large numbers. This was the main time for preserving them. They would be boned and dried, after which they could be stored for up to a year for eating or for trade.
>
> These pawhera (preserved) eels and other fish were a major trade item. Though they were of lower

> value, they were as important as the trade in titi (muttonbirds). Much of what was dried in summer and autumn was kept to take or to send to the titi islands as supplies during the birding season.

The eels were caught largely by means of a system of trenches dug into the side of the lake; once the eels moved into a trench it was a relatively simple matter to extract them from the water.

The Crown Purchase of the Lake

David Alexander comments that:[132]

> ...from the early days of the Canterbury settlement the Crown appears to have regarded Lake Ellesmere as a Crown-owned resource unaffected by any residual Maori interest in it.

The basis for this position was that the lake had been purchased by the Crown as part of the enormous Kemp purchase. Acting under instructions from Governor Grey, Henry Kemp had bought the majority of land that is now Canterbury and Otago from Ngai Tahu chiefs in 1848.[133] Although the deed named the purchaser as the New Zealand Company, the Crown assumed that it was the effective buyer and the Native Land Court, in its judgement on the Kaitorete Spit, later confirmed that that was the effect of the transaction.[134]

Alexander's allusion to a residual Maori interest reflects at least two major doubts over the Kemp deed that are currently before the Tribunal. The first is an issue of legal title - whether in fact the whole

of the lake was within the boundaries of the Kemp purchase.[135] This is a difficult matter of historical evidence which is beyond the scope of this paper. The second issue is the more prominent of the two and probably also the more important in the final analysis; it concerns the extent to which the Kemp Deed provided for Maori control of traditional food resources.

The Maori text of Kemp's Deed reserved to the vendors their "mahinga kai". The question that arises is whether in doing so the Deed preserved Maori fishing rights on Ellesmere, or even control of the lake as a natural resource in itself. Although *mahinga kai* can be interpreted to mean all natural food resources, the Crown may have only intended to reserve existing cultivations (the English text of the Deed mentions only "plantations").[136] This is one of the major moot points to be addressed by the Tribunal - it has implications for many resources other than Ellesmere.

Rather than attempting to resolve it directly, it is sufficient for the purposes of this paper to accept that the lake represented a major physical (as well as spiritual) resource for local Maori, and that the fisheries resource was in fact so essential that its wholesale alienation could scarcely have been

contemplated by its Maori users and guardians. Evison has described it as "possibly the greatest natural food basket in the Southern Hemisphere"[137], and the first chief judge of the Native Land Court, Fenton CJ, did not hesitate to recognise its status:[138]

> The evidences of occupation by this claimant and his ancestors all indicate that the tribe have always regarded this as a valuable fishery.

The Chief Judge further described the fisheries at Waihora as "the most highly prized of all their possessions"; he even noted by way of dictum that the resource would be "included in the phrase mahinga kai."[138] On this evidence, there is no difficulty in classifying the lake as a *taonga* in terms of the Treaty.

Pakeha and the Lake

From the early days of the settlement of Christchurch, Europeans were well aware of the danger posed to the area by flooding.[140] Part of the response was to set about draining Ellesmere to less threatening levels. The periodic opening of the lake to the sea was begun in the 1860's and has continued to this day, despite comsistently vigorous protest from Maori as to the effect this was having on their fisheries. Various statutes were enacted last century to authorise drainage in the area, as well as some reclamation for railway purposes.[141] In 1905 the Ellesmere Lands Drainage Act vested the control of such activities in

the local catchment board, and in 1912 The Ellesmere Drainage Board was given the power to drain the Ahuriri Lagoon and lease the resulting reclamation. Irigation schemes have also decreased the water volumes entering the lake, and Ellesmere is presently substantially shallower and smaller than originally. The drainage continues however in the interests of protecting surrounding farmland.

Although low level exploitation of the lake's eel resource had taken place for 30 years previously, it was not until 1971 that the fishing became a major commercial industry. Throughout the 1970s Ellesmere yielded huge catches, notably 647 tonnes in 1975/6, and in 1976/7 constituted 34% of the national take.[142] To a lesser degree flounder and herring were also netted commercially. The results were ultimately a decline in eel numbers and size, and a quota system imposed in 1978 has reportedly failed to rectify the damage.[143]

Ecological Disaster

The major factor in the lake's natural decline has been pollution. In 1982 the Department of Lands and Survey published a report which described the disastrous state of affairs.[144] Over the years runoff from neighbouring farm land of nutrients such as phosphorous and nitrogen has resulted in severe eu-

trophication of the lake, encouraged by drainage of wetland that would otherwise allow them to filter through. This jeopardises important flora and fauna and possibly makes way for the life-strangling algae that has already infested nearby Lake Forsyth (Wairewa).[145] The present result is that the ecology of the lake is under intense pressure, and the very survival of Ellesmere as a meaningful resource is in doubt.

Effects on the Maori Community

The Maori people of Taumutu and Wairewa did not fare well in the years after Kemp's purchase, already weakened as they were by events earlier in the century: Ngai Tahu tribal in-fighting and Te Kauparaha's depredations in the 1820s and 30s. The drainage of the lake seriously impaired their traditional fisheries, and this was an important factor in their general decline. It was not their only difficulty; with regard to Wairewa, Taylor notes that crops were destroyed by flood and fire in the 1860s and 70s, and domestic conditions were characterised by poor sanitation, an impure water supply and resulting illness and poor health.[146] This fate refected the state of the tribe as a whole; the loss of land and access to food resources had left a good many Ngai Tahu destitute by the late 19th century.

It was a vital term of the Kemp Deed that the Crown would provide Ngai Tahu with adequate reserves. The reserves eventually awarded were in fact far from adequate, as the Crown has conceded to the Tribunal, and at Ellesmere there was no exception to this rule.[147] In order to alleviate the economic distress of the Taumutu people a special reserve of 308ha, the Taumutu Commonage, was created by statute in 1883.[148] In addition the Native Claims Adjustment Act 1894 reserved a further 66ha, with frontage to the Halswell River and Ahuriri Lagoon. However neither reserve, nor the two combined, has succeeded in providing the necessary resource base. In fisheries terms the utility of both has been diminished by the falling water level of the lake. Moreover a large proportion of the land itself has over the years been leased to third parties because of its lack of economic viability.[149] Although it seems that additional reserves may have been considered by the Crown, nothing has resulted and the position remains highly unsatisfactory.[150]

Throughout the history of European settlement Maori have continuously demonstrated their immense concern about the interference with Ellesmere. As an illustration Bill Dacker has recently compiled a list of known protests by Maori to local and national gov-

ernment between 1865 and 1912 over the drainage of the lake and the restriction and destruction of their fisheries.[151]

The struggle has been just as visible in recent years. In 1987 the Royal Forest and Bird Protection Society sought a National Conservation Order for Ellesmere. The Ngai Tahu Trust Board objected, seemingly on the grounds that the entrustment of the lake's management with "bureaucrats" was undesirable and in no way enhanced Maori opportunities for input and control.[152] Nevertheless the order proceeded; presumably under its auspices some steps have been taken to protect the resource from further damage. In the mean time however Ngai Tahu have put their own case for resuming traditional guardianship of Waihora before the Tribunal. A leading claimant has stated the objective as being:[153]

> ...the wise management, ... conservation, preservation and protection of these resources [of the lake] to provide for the individual whanau, hapu and Iwi needs or for means of barter for their well-being .... The priority must be for the preservation and conservation firstly to achieve our objectives for our people and our children to follow us.

Applying Muriwhenua

Rights v Privileges:

There is no doubt that the implementation of a comprehensive conservation plan is urgently required

at Ellesmere to both restore its natural qualities and preserve what little remains. Combined with the fact that the lake has constituted an important fisheries resource for both Maori and pakeha, this provides an ideal basis for a study of the way in which the "priorities scheme" might work in practice. For the purposes of the following analysis the issue of legal control of the lake will be for the moment left aside.

Let us make the fair assumption that a conservation plan at Ellesmere is likely to be implemented in the near future, and that part of the plan is to restrict fishing on the lake, which is necessary in order to protect the dwindling eel resource while the water quality of the lake is sought to be improved. Commercial fishing on the lake has significantly diminished in recent years, but let us also assume that there is still a substantial commercial interest in the resource. To what extent is the Crown able to act against Ngai Tahu fisheries?

The answer in terms of priorities is straight-forward. To repeat the Tribunal's basic principle:[154]

> Unless absolutely necessary, the Crown should not restrict the treaty right fishing of the tribes to counter over-fishing not caused by them even if it is necessary to restrict the general public fishing, commercial or otherwise.

Therefore the Crown must firstly establish the extent

to which restriction of the total fishery is necessary to conserve the eel resource; then it must apply that restriction to "general public" (non-Treaty) fising interests first. Logically it would restrict recreational fishing as far as possible before turning to commercial fishing, a refinement to the terms of the priority scheme that is expressly made in *Sparrow*.[155]

The result is that the benefit of any discrepancy between the extent of the eel fishery available and the number which needs to be conserved in order to perpetuate the resource in the lake is automatically conferred on Ngai Tahu fishing interests. There is only one possible qualification, and that is where the overfishing has in fact been caused by Maori. The Crown will then be able to intervene because "neither custom nor the Treaty confers on Maori the right to destroy the resource".[156] This is not relevant to Ellesmere where the important damage has been done by commercial fishing interests under Crown licence. Because Maori Treaty-right fishing is at present almost certainly not a threat to the resource *by itself*, the practical result is that it is entirely protected from Crown conservation measures.

The situation of course might be different if Ngai Tahu chose to develop commercial fishing on the lake

itself. Then it is possible that the Crown would be justified in intervening, although given the Crown's own part in failing to protect the lake in the past it would seem plain that such intervention would need to be accompanied by compensation of some form.[157]

Legal Control and Mutual Benefit

While the preceding analysis does help to illustrate the dynamic between rights and privileges, it is largely hypothetical by nature. In reality the whole issue is complicated by the question of who has the right to legal control of the fishery or the lake itself. As part of the claim for "mahinga kai" Maori can conceivably claim for either or both, and as we have seen have in fact claimed for guardianship rights over the lake.

In terms of the fishery alone this claim has substantial justification. Article II of the Treaty guaranteed to Maori the *exclusive* possession of those fisheries which they desired to retain; the reservation in the Kemp Deed of "mahinga kai" is compelling evidence of this desire, supplemented by 130 years of protest over the damage done in that time to the resource. In addition, given the state of the fishery in 1990, it would be unreasonable to maintain that Ngai Tahu should have any obligation to share under any principle of common benefit.

In reality Ngai Tahu may well have their rights in the fishery substantially, if not exclusively restored. There has been a suggestion of an arrangement being worked out with the Ministry of Agriculture and Fisheries which would amount to a placement of a *rahui*, preventing commercial fishing on the lake and protecting Maori rights.[158] Alternatively Ngai Tahu could apply to for the establishment of a *taiapure*, or local fishery, on the lake under the Maori fisheries Act 1989, as has been done recently with respect to Manakau Harbour.[158]

However Ngai tahu would prefer to have a greater interest in Ellesmere, perhaps best conceptualised as *kaitiakitanga*, or legal guardiansip of the lake. The desire is to have management rights for the lake vested in Ngai Tahu so that they can have a more comprehensive control over the fisheries resource. This would also recognise Ellesmere's importance as a taonga for Ngai Tahu in spiritual as well as physical terms.

In this light the claim has an obvious precedent in the Manakau Harbour claim, for which the Tribunal produced a report in 1985.[160] That claim also dealt with the a body of water which had "once supported an abundant marine resource" that had since become "ser-

iously depleted and adversely affected", largely due to pollution and commercial over-fishing.[161] As at Ellesmere there had been inadequate recognition of "fishing areas of particular importance to the local tribes."[162]

In *Manakau* two important propositions put forward by claimants were that the ownership of the harbour should be returned to the Manakau tribes or, alternatively, total rights of control.[163] The Tribunal rejected both of these contentions, considering instead, as Boast puts it, that:[164]

> Rangatiratanga could be safeguarded by means of ... an Action Plan to be proposed by the Commission for the Environment, and by the establishment of a body of Guardians of the Harbour, with at least half of this body being comprised of Kaitiaki of Manakau, appointed by the Minister of Maori Affairs form local Maori leaders...

In dismissing claims for ownership or total management rights the Tribunal was adopting an essentially pragmatic view. The complexity of the resource's management was the express consideration given for rejecting Maori control[165], and the Tribunal was no doubt concerned to make allowance for the interests of the Harbour's other users. The Manakau is vitally important to industry and local government as well as Maori. While the implementation of conservation measures and the protection of Maori interests was required, the management of the Harbour was

a complex matter of such public interest that vesting its control solely in Maori hands could not be justified.

This result illustrates the Tribunal's willingness to balance Maori Treaty rights with the practical needs of the community as a whole. This concept of balancing was later specifically discussed in the *Mangonui Sewerage Report*,[166] and is also reflected in the principle of mutual benefit described in *Muriwhenua*. However it must be viewed against the Tribunal's equally consistent desire to give effect to the literal terms of the Treaty; for example we have seen that the article II guarantee of the Muriwhenua Tribes' fishies was "not reduced by any current measure of inconvenience."[167]

From the *Manakau Report* itself comes a clear illustration of the tension that tends to emerge. The Tribunal stated:[168]

> We think it would be unfortunate if Maori fishing rights fell to be determined solely on a literal interpretation of the Treaty which guarantees an *exclusive* use of *all* Maori fisheries, for Maori fisheries are extensive and indeed, the whole of the Manakau could be described as a traditional Maori fishery.

Then, in *Muriwhenua*, the Tribunal commented that:[168]

> We do not think the Manakau report is authority for the proposition that the important resources of the lands and fisheries had to be shared. Were that so, there would have been no need to negotiate for the purchase of the land.

It is possible to construe these statements as contradictory, but it is probably fairer to characterise them as evidence of the very fine balancing act that it has been the Tribunal's function to perform. The difficulty in extracting an underlying principle from the two is an inevitable result of the nature of the Tribunal's task; reconciling legal principle with political and social realities.

However if conclusions are to be drawn it is sensible to give precedence to the more recent reports of the Tribunal, accepting that the Tribunal itself is still a relatively young and dynamic body. In the *Mangonui Sewerage Report* of 1988 there is also a contradiction of the *Manakau* conclusions on exclusive fisheries. Here the Tribunal considered that at least in relation to lands and fisheries "the Treaty must perforce be strictly construed" and that "the enjoyment and continued possession of lands and fisheries [under article II] was guaranteed".[170] It is clear also from *Muriwhenua* that where it is practically possible Maori rights under Article II should be upheld.[171]

This does not mean that the Tribunal has dispensed with its ability to construe compromise form the Treaty. The concept of "balancing" applied in *Mangonui* recognises that Maori Treaty rights will not

always prevail as long as they are not "unduly encroached on".[172] Similarly the principle of mutual benefit from *Muriwhenua* means that in some cases Maori may have an obligation to share. However the emphasis has changed from *Manakau*; rather than suggesting a need for compromise from the start, the dominant principle seems now to be to affirm the exclusive rights of Maori under article II wherever possible, and then require the negotiation of sharing of those rights where would be unreasonable not to do so. The need is to uphold the Treaty while allowing for *subsequent* political compromise, and in doing so to give Maori at least a measure of the negotiating strength necessary to be able to bargain effectively with the Crown. In this negotiating process both Maori and the Crown must be aware of the need for a respect for each other's development rights. To repeat the principle of mutual benefit:[173]

> ... neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit.

This is a somewhat pithy analysis, but it is perhaps all that is possible as every case must turn on its particular merits. To a large degree the obligation to share comes down to politics and economics, as the Tribunal was clearly aware in formulating the concept of mutual benefit. To use brief examples,

the Maori (Poutini Ngai Tahu) of the Arahura River in Westland are the traditional guardians of a precious taonga: the greenstone resource. Under the Treaty they are literally entitled to exclusive possession of that resource, and have been upset by its commercial exploitation in past years for the tourist trade.[174] In terms of common benefit as well as the Treaty their distress is justified. New Zealand really has little to gain from the exploitation of greenstone; the profits denied to those in the "commercial jewellery and ornamental trinket industry"[175] obviously do not constitute a denial of "reasonable state objectives", and to licence commercial mining would be to "unduly encroach" on Maori Treaty rights.[176]

By contrast while New Zealand's geothermal power resource is capable of being classed as a taonga, it is also of great potential value to the nation. This is the sort of example in which it is relatively easy to accept the application of requirements of mutual benefit and balancing; shared control of the resource with, for example, the Tuwharetoa and Arawa peoples of the central North Island would seem the desirable result.[177]

Returning to Lake Ellesmere, here, as at Manakau, there are a number of interests to be considered oth-

er than Maori Treaty rights: commercial fishing, local farming, the catchment board and other local authorities, and even mining.[178] It is possible to accept that a 50-50 guardianship arrangement similar to that at Manakau should apply. However there are a number of distinctions to consider.

Firstly the overall extent of those non-Treaty interests is perhaps comparitively small in importance to those at Manakau, particularly now that the commercial eeling industry has just about done itself out of business on the lake. As a result there would seem a less obvious need for compromise of Ngai Tahu rights. The issues of conservation and control are still complex (although again perhaps not to the extent at Manakau) but there is no reason to believe that Ngai Tahu will be unable to procure assistance in these matters where it is needed.

Secondly, the state of the resource is such that surely there is now a situation in which the intentions of Maori and the Crown must generally coincide: preservation, conservation and sustainable management. Accordingly it is difficult to conceive of the principle of mutual benefit being in any way flouted by the return of substantial or complete control of the lake to Maori guardians.

Thirdly, it is important to remember the Tribu-

nal's recent emphasis on strictly construing the guarantee of certain article II rights, including fisheries. Again, subsequent negotiation is capable of achieving a balanced and effective result, and in our example, given the scope of the task, Ngai Tahu may well want to negotiate some form of joint management with local authorities or the Crown. It is relevant in this respect to consider the submission of the leading claimant in the Manakau claim:[179]

> Nganeko stated that the Maori people desire their status as kaitiaki to be fully recognised, and that is not *the same as ownership.* She repeatedly emphasised that the Pakeha people needed to trust that the Maori people would act as effective guardians....They wanted tangata whenua's existing status to be acknowledged as a starting point; in that way they can negotiate a 50-50 partnership from a position of mana. They believe it is against the spirit of the Treaty for the Crown to demand compromise of mana from the outset.

Summary

Only fifteen years ago Lake Ellesmere constituted the most important eel fishing resource in the country; in fact it was probably one of the biggest in the world. Now urgent action is required if that resource is not to disappear entirely. The use of the lake for more than a century exemplifies extremely poor resource management, and certainly the antithesis of "sustainable management".

Throughout this period it has been the Maori interest in the Lake which has most obviously suffered.

It has been sacrificed in the interests of drainage, farming and commercial fishing. Now it is possible that it will be further sacrificed in the interest of conservation.

However on the basis of the priority principles drawn from *Muriwhenua* it is clear that if comprehensive conservation measures are introduced at Ellesmere, the mahinga kai rights of Maori must be the last to be restricted, and in fact should not be restricted at all unless it proves to be necessary after all other options are exhausted.

Moreover on the basis of general Tribunal findings it is concluded that a Ngai Tahu entitlement to exercise a substantial degree of legal control over the Lake and its fishery should be recognised. There can be little doubt that the resource falls under article II of the Treaty, and that it has always been (and still is) sought to be retained. The Tribunal's primary principle is that article II rights to land and fisheries in particular must be construed strictly. In special cases there may be a need for compromise - an obligation to share in the interests of the wider community - but the presumption is that such compromise should be negotiated from the starting point of affirmation of the full extent of the Maori rights.

Lake Ellesmere has the appearance of a case in which those rights should be strictly construed. It is unfortunate that this conclusion is made easier by the present state of the resource. However it is hoped for Ngai Tahu that its pollution and near-exhaustion will yet prove to be a blessing in disguise, if it does in fact facilitate the Crown's acceptance that the Lake should now be returned to Maori control.

CONCLUSIONS

Since the mid-1980's there has been a dynamic expansion of Treaty of Waitangi jurisprudence. In particular we have seen a fundamental shift in official attitudes over the role of the Treaty and the way in which it should be read. The Treaty is no longer to be dismissed as an anachronism; it is a living document. Its meaning should not be solely construed from its literal wording, but rather in terms of its underlying principles.

This notion of underlying principles has dominated legal interpretation of the Treaty. It has been used effectively by the Tribunal, the Court of Appeal and the Crown, all of whom have developed a core of general propositions in analysing the nature of the relalationship between Maori and the Crown signified by the Treaty. The respective conclusions may not always exactly coincide, but that there is now a consensus that the Treaty represents more than the sum total of its words is plain.

However in *Muriwhenua* the Tribunal has shown its willingness to move beyond general principles in defining the implications of the Treaty in the resource sphere. This paper has outlined and analysed a relatively detailed scheme of legal rules, adopted largely from a United States court case, which sets out

clearly the respective rights of the Crown and Maori in the management and control of traditional resources. It represents a body of law which, while compatible with general principles such as protection and partnership, lends more precise definition to the interface of *kawanatanga* and *rangatiratanga* in the particular field it addresses.

The intention in Part One was to background this law and provide a broad summary of its substance. Then in Part Two some of the more important concepts and issues were discussed in specific contexts. The particular aspects to arise were:

1. The meaning of the term "conservation" for the purpose of determining the extent of the Crown's residual powers in this area;
2. The extent of the Maori right, particularly its commercial component, and the tribal duty to regulate the exercise of the right;
3. The effect of the distinction between Treaty rights and Crown-granted privileges;
4. The extent to which strict Treaty rights may in certain cases be qualified in the national interest and for the benefit of society as a whole.

While the discussion highlights that there are some difficult areas (particularly the essentially

political issue of "mutual benefit"), the broad conclusion of this paper is that the scheme of priorities itself represents a formulation of rights and obligations that is consistent with the terms and principles of the Treaty, is workable in the New Zealand context, and is prospectively very useful. Perhaps most importantly it addresses the vital point of where the Treaty parties stand on the conservation issue, providing a framework and principles which are compatible with and in fact representative of the current consensus that sustainable management of our natural resources must now be the common goal. In this writer's opinion it does so in a way that accurately reflects the power-relationship anticipated by the Treaty, protecting Maori rights under article II to the greatest extent possible without unduly restricting the Crown's ability to provide effective national governance.

Having said this, it is clear that in the aftermath of the public reaction to the *Muriwhenua Report* these principles have not sustained (or even attained) an especially high profile in Treaty negotiation and debate. Perhaps this has been so because in New Zealand we are not yet as accustomed to developing and applying what are best described as legal rules in the indigenous rights field as, for in-

stance, the North Americans are. We have certainly embraced general principles, perhaps above all the Court of Appeal's "partnership" concept[180], which is important, but the complex nature of our present disputes realistically requires something more than notions of cooperation and good-will.

On the other hand it is not considered desirable that we should reduce the debate to legal technicalities; as the Tribunal noted in *Manakau*, "we can find better answers than those found in North America which depend on relator actions in the Courts".[181] It is recognised that the real solutions to our present difficulties should be primarily worked out politically than imposed by law. However law can help to focus the political process. As the Tribunal has recognised in producing the *Muriwhenua Report*, direct negotiation, or alternatively mediation, between Maoridom and the Crown is desirable, but really needs a "data-base" of historical and legal material if it is to work efficiently and honestly. Otherwise there is the danger that it will degenerate into rhetorical debate, or, as Robert Mahuta has described it, fail to progress beyond "negotiation about negotiation."[182]

It is concluded that the material discussed in this paper would, if generally adopted, assist in ef-

ficiently and effectively resolving issues in the very substantial field of Treaty disputes over resource rights and control. It is attractive because of its settled weight of overseas authority and its compatibility with our Treaty jurisprudence, but perhaps mostly because it provides clear solutions in an area that currently offers more questions than answers.

Afterword

The Resource Management Bill discussed in the introduction has returned from Committee with changes to both the sections quoted. "Sustainable management" (s4) is now defined as:

> ...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs without unduly compromising the ability of future generations to meet their own needs...

Section 6 now reads:

> Treaty of Waitangi - In achieving the purpose of this Act, all persons who exercise functions and powers under this Act have a duty to take into account the special relationship between the Crown and te iwi Maori as embodied in the Treaty of Waitangi.

FOOTNOTES

1 These are: *Kaituna River* (Wai-4, November 1984); *Motonui-Waitara* (Wai-6, March 1983); *Manukau* (Wai-8, July 1986); *Mangonui Sewerage* (Wai-17, August 1988); *Muriwhenua Fisheries* (wai-22, June 1988).

2 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142

3 For instance *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; *New Zealand Maori Council and Anor v Attorney-General (ministry of Agriculture and Fisheries) and Anor* (1987) unrep, CP 553/87 Wellington; *Ngai Tahu Maori Trust Board and Ors v Attorney-General (Ministry of Agriculture and Fisheries) and Ors* (1987) unrep, CP 559/87 Wellington.

4 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai-22) 1988* (2ed,1989)

5 The Tribunal's approach in *Muriwhenua* is a direct recognition of this sentiment. See below, n21.

6 See *Directions for Change: A Discussion Paper* (Ministy for the Environment, August 1988), and *People, Environment and Decision Making: The Government's Proposals for Resource Management Law Reform* (Ministry for the Environment, December 1988).

7 cl 4(2)

8 *Directions for Change*, 14-16, 27-28; *People, Environment and Decision Making*, 23-24, 32-34.

9 R P Boast "The Treaty of Waitangi - A Framework for Resource Management Law" (1989) 19 VUWLR, special supplement published by New Zealand Planning Council and VUWLR, p64. See also pp27-29.

10 *Principles for Crown Action on the Treaty of Waitangi* (Department of Justice, 1989)

11 s4 Conservation Act 1987; s9 State-Owned Enterprises Act 1986; Long Title, Environment Act 1986

12 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 513

13 *Report of the Iwi Transition Agency Working group on the Runanga Iwi Bill, Local government amendment Bill No 8, and Resource Management Bill* (1990)

14 For example above n4, 187.

15 See for example cl 31, cl 56(2)(b), cl 151.

16 Both the National Party opposition and the Business Roundtable have been prominent critics of

the Bill in its present form.

17 Above n13, and see also: Jane Kelsey, *A Question of Honour? Labour and the Treaty* (1990) 176-186; Shane Jones "Iwi and Government" in P McKinlay (ed) *Redistribution of Power? Devolution in New Zealand* (1990) 64-78.

18 The claimants were kaumatua (leading elders) representing the tribes and Maori organisations of the Muriwhenua area. See above n4, 3-4.

19 Above n4

20 Above n4, 2

21 Above n4, "Summary of Report", xxi

22 *Report of the Waitangi Tribunal on the Orakei Claim (Wai-9)* (1987)

23 For the Tribunal's complete conclusions see avove n4, 196-238; in summary 239-40.

24 Above n9, 5

25 See above n9, 5

26 *United States v State of Washington* 384 F Supp 312 (1974). See above n4, 159-168.

27 The Federal District Court decision was appealed to the Court of Appeals, Ninth Circuit [(1979) 520 F Rep 2d 676] and the United States Supreme Court: *State of Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658, 61 L Ed 2d 823, 99 St 3055 (1979). Further issues were litigated in *United States v Washington (Phase II)* 506 F Supp 187, 203 (1980) (in the Federal District Court), appealed again to the Court of Appeals [759 F 2d 1353 (1984)].

28 See above, *Fishing Vessel*

29 Above n4, 164

30 See above n9, 21 for the reaction of the state fishing industry to the decision.

31 Above n26, 332

32 United States Constitution, art6, cl 2

33 Above n26, 401

34 Above n26, 401

35 Above n26, 333

36 Above n26, 332

37 Above n26, 342

38 Above n4, 218-220; paras 11.3.7 (f)-(p)

39 Above n4, 237 [11.6.10(b)] and 231 [11.6.1(a)(ix)]

40 Above n4, 233 [11.6.1(c)(ii)]

41 Above n4, 238 [11.6.10(i)]

42 Above n4, 232 [11.6.1(c)(v)]

43 *R v Sparrow* [1990] unrep, SCJ No.49. Page references are to the preliminary version.

44 *Sparrow v R* [1987] 2 WWR 577

45 For useful background see B Slattery "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727

46 Avove n43, 54

47 Above n43, 74
48 Above n43, 83
49 Above n43, 84
50 Above n43, 84-6
51 *Jack v R* [1980] 1 SCR 294
52 Above, 313
53 Above n43, 90
54 See *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 with regard to s88(2) of the Fisheries Act. However only a subsistence (as opposed to commercial) right was upheld, and then only because the statutory protection covered a non-territorial right. Territorial aboriginal rights claims (ie land ownership, as opposed to a usufructory hunting or fishing right) are at present barred by s155 of the Maori Affairs Act 1953; see P G McHugh "The Legal Basis for Maori Claims against the Courts" (1988) 18 VUWLR 1, 8 and 14.
55 For examples see above n11; but see also *Huakina*, above n12.
56 Above n27, *Fishing Vessel*, 686
57 See above n9, 21
58 Above n43, 60-61
59 Above n4, 169
60 Above n4, 212 [11.3.5(c)(v)]
61 Above n4, 194-5
62 The Tribunal has emphasised the need for negotiation to enable political rather than legal solutions to disputes. However at present negotiations have been less productive overall than they could be. In July 1990 Tainui leader Bob Mahuta described progress with the raupatu (confiscation) negotiations as amounting to little more than "negotiating about negotiating". See "Tribunal chief stresses need for negotiations" *Dominion* Wellington, 21 July 1990
63 *Lone Wolf v Hitchcock* 187 US 553, 556 (1903)
64 Above
65 M Townsend "Congressional Abrogation of Indian treaties: Reevaluation and Reform" (1988) 98 Yale LJ 793, 812
66 For example Townsend, above.
67 *United States v Dwight Dion Snr* 476 US 734, 90 L Ed 767, 106 S Ct 2216 (1986)
68 Eagle Protection Act, specifically a 1962 amendment.
69 N Esmay "Great Nations, like Great Men, Should Keep their Word - but do They?" (1987) 22 Land and Water 443
70 See T Riley "Federal Conservation Statutes and the Abrogation of Indian Hunting and Fishing Rights" (1988) 58 Colorado LR 699
71 Above n43, 74
72 Above n43, 96

73 Above n43, 97
74 Above n4, 194
75 See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (per Cooke P) and 681-2 (per Richardson J); also, with respect to the Tribunal, above n4, 194
76 See above n4, 215-217; also above n22 (*Orakei*), 137-147
77 See above n9, 23; and for an indication of the more cooperative approach that has developed in fisheries management in the Pacific North-West, see P H Harrison "The Evolution of a New Comprehensive Plan for Managing the Columbia River Anadromous Fish Resource" (1987) 16 Environmental LJ 705.
78 See for example the comments of Robert Mahuta in "Te Whenua, Te Iwi" from J Phillips (ed) *The Land and the People* (1987), 82
79 Claim of Henare Te Rakiihia Te Hau and the Ngai Tahu Maori Trust Board (Wai-27)
80 Above n9, 7-14
81 See above n75
82 See for example T O"Regan (Chairman of the Ngai Tahu Maori Trust Board) "The Ngai Tahu Claim" in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1990) 234, 254-261
83 A Anderson *When all the Moa Ovens Grew Cold* (1983), 43
84 E Wilson *Titi Heritage: the Story of the Muttonbird Islands* (1979)
85 Text taken from above n79, document E17: "Copy of the Deed of Sale of Rakiura."
86 The Crown Islands are Betsy, Big, Bunker, Edwards or Motunui, Ernest, Jacky Lee, Kunanihi, North, Pihore, Pukeweka, Putauhina, Rat, Rukawahakura, Takawihini, the Sisters, and Weka.
87 See above n84
88 For example the Kemp Deed; see below n133
89 See above n79, document U3: submission of Deborah Montgomerie, 4
90 Above n79, doc E31: submission of Jane Karina Davis
91 Above n89, 14
92 1st sch (cl 48) Special Powers and Contracts Act 1886
93 At that stage under s24 of the Land Act 1908
94 Above n84
95 The Titi (Muttonbird) Islands Regulations 1978, reg 2
96 Above, regs 7 and 8
97 Above n95, regs 2 and 3
98 Above n79, doc P8: submission of Ronald Tindal
99 Above n79, doc E1: submission of Robert Agrippa

Whaitiri; doc H13: submissions of Rakiura Maori Land Incorporation; doc J10: submission of H R Tau

100 See for example below n145, 5

101 Above n79, doc J10: submission of H R Tau

102 Above n79, doc H13: submissions of Rakiura Maori Land Inc

103 Above n79, doc P8: submission of Ronald Tindal

104 Above n79, doc H13: submission of Paddy Gilroy

105 Above n84

106 Tipene O'Regan has pointed out (in private conversation) that generally some birds must be sold to cover the substantial costs of the birders; by "commercial" this paper means activity above and beyond just covering costs - ie involving significant profit.

107 Above n79, doc E31: submission of Jane Karina Davis

108 Above n26, 342

109 Above n4, 232 [11.6.1(c)(iii)]

110 Above n43, 84-86

111 Above n4, 232 [11.6.1(c)(ii)]

112 Above n4, 232 [11.6.1(c)(v)]

113 See above n26, 342; above n43, 86-96. In *Sparrow* the "necessary" requirement is conveyed most explicitly at p96: there must be "as little infringement as possible in order to effect the desired result."

114 The responsibility is on the Crown to successfully justify its action. In the Boldt decision the test for the US system was formulated as follows: "Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under the direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of the fish (above n26, 342).

115 Above n43, 96-97

116 Above n75, 605 (per Cooke P); 682-3 (per Richardson J)

117 Above n26, 403

118 Above n4, 234 [11.6.5(c)]

119 Above n4, 235 [11.6.6(c)]

120 Above n79, doc E1: submission of Robert A Whaitiri

121 Above n4, 238 [11.6.10(h)]

122 Above n27, *Fishing Vessel*, 686

123 Above n4, 230 [11.6.1(a)]

124 Above n26, 333, 340, 403

125 Above n4, 230 [11.6.1(v)]

126 Above n4, 231 [11.6.1(x)]

127 When the Maori Purposes Bill 1983 was debated in the House, the member for Southern Maori, Hon.Mrs Tirikatene-Sullivan, asked the member moving the Bill, Hon Mr Couch, what the position would be with the Crown islands; Mr Couch seemed to reply that it was up for negotiation. However the claim submissions show that no arrangement has yet eventuated (NZ Parliamentart Debates Vol 454, 1983:3640-44).

128 Specifically the people of Taumutu at the south of the Lake and Wairewa at the north; Belgrave gives the hapu as Ngai Tuahuriri and Ngati Kuahikiki, see above n79, doc V2: submission of Dr M Belgrave.

129 See above n79, doc P16: submission of R W Little

130 B Dacker *The People of the Place: Mahika Kai* (1990) 18

131 Above, 13

132 Above n79, doc Q10: submission of D J Alexander

133 H C Evison (ed) *The Treaty of Waitangi and the Ngai Tahu Claim* (1988) 23

134 For the Kaitorete Judgement see *MacKay's Compendium Vol II* 210-219

135 See above n79, doc P14: submission of J A Barnao

136 See above n128, Belgrave

137 See below n145, 14

138 Above n134, 216

139 Above n134, 216

140 Above n79 doc p16: submission of R W Little

141 For a summary of the relevant statutes see above n79, doc J9.

142 Above n79, doc P16: submission of Dr P Todd

143 Above n79, doc P16: submission of Dr P Todd

144 J D Palmer *Ellesmere - A Critical Resource* (Dept of Lands and Survey, 1982)

145 J D Palmer and A Goodall *RMLR Working Paper No.29: Water Resources and the Kai Tahu Claim* (Ministry for the Environment, Wellington 1989)

146 W A Taylor *Lore and History of the South Island Maori* (1952), 80-90

147 See Above n79, doc X1: Closing Submissions for the Crown, on the Kemp Purchase.

148 Taumutu Native Commonage Act 1883

149 The Maori Trustee has the power to lease the lands under the Maori Reserved Lands Act 1955 (Part III).

150 Above n79, doc Q10: submission of D J Alexander

151 Above n 130, 36

152 Above n79, doc J10: submission of H R Tau

153 Above

154 Above n4, 232 [11.6.1(c)(v)]

155 Above n43, 88

156 Above n4, 231 [11.6.1(a)(ix)]

157 For discussion of attitudes to compensation as

a form of redress see below n160, 76, and above n82, 256

158 Above n79, doc R26: submission of R W Cooper of MafFish

159 Maori Fisheries Act 1989 (Part IIIA); for the Manakau application see J Gardiner "Maoris seek Control of Manakau Harbour" *The Dominion* Wellington, 10 August 1990.

160 *Report of the Waitangi Tribunal on the Manakau Claim (Wai-8)* (1985; 2ed 1989)

161 Above, 75

162 Above n160, 75

163 Above n160, 76

164 Above n9, 9

165 Above n160, 77

166 *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim (Wai-17)* (1988), 7 and 60

167 Above n4, 212 [11.3.5(c)(v)]

168 Above n160, 83

169 Above n4, 184

170 Above n166, 4

171 Above n4, 202

172 Above n166, 7

173 Above n4, 195

174 See above n79, docs D12, D17, D19

175 Above n82, 250

176 The Crown has in fact agreed not to grant mining licences for greenstone.

177 For a detailed discussion of the geothermal energy issue see R P Boast *Geothermal Energy: Maori and Related Issues: Resource Management Law Reform Working Paper £26* (Ministry for the Environment, Wellington 1989).

178 Sand mining takes place on the Kaitorete Spit; see above n145, 22

179 *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-88* (Parliamentary Commissioner for the Environment, Wellington 1988), 72

180 See above n75, 664 (per Cooke P); 682 (per Richardson J)

181 Above n160, 83

182 See above n62

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