Te Tiriti o Waitangi and the Management of National Parks in New Zealand

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ABSTRACT

This thesis assesses the historical and current legislative provision for including nga iwi Māori in the management of national parks. The method of assessment is one of comparison between the legislative provisions and the guarantees promised to nga iwi Māori in te Tiriti o Waitangi.

Part One, Chapter One, establishes the relevance of te Tiriti o Waitangi to the management of national parks. This chapter is designed to act as the benchmark for the assessment of national park legislation.

Part Two outlines the early national park legislation. Chapter Two begins by focusing on the emergence of the national park estate in the late nineteenth, and early twentieth, centuries. Chapter Three focuses on the first consolidated national park statute, the National Parks Act 1952.

Part Three assesses the present statutory provision for including nga iwi Māori in national park management. Chapter Four focuses on the original provisions of the National Parks Act 1980. Chapters Five, Six and Seven focus respectively on the major statutory amendments since made to the National Parks Act 1980: the Conservation Act 1987, the Conservation Law Reform Act 1990, and the Ngai Tahu Claims Settlement Act 1998. Chapter Eight turns to assess national park management documents.

Part Four, Chapter Nine, concludes by exploring how legislation could be used in the future to better provide for the Tiriti right of nga iwi Māori to be included in the management of national parks.

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Introduction

The most scenically spectacular "... mountains, forests, sounds, seacoasts, lakes, and rivers ..."[1] in New Zealand are protected by 'national park' status. This status is attached to thirteen areas of land throughout the country. Four exist in the North Island[2] and nine in the South Island.[3] It is an estate that contains "... scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest ...".[4] The estate is a sanctuary for our flora and fauna. It represents a time gone by, a glimpse of how New Zealand once was. Today, the parks are the 'jewels' of the Crown,[5] owned and managed by the Crown on behalf of the people of New Zealand.

Two centuries ago the national park label for protecting land was unheard of, as was Crown control of land in New Zealand.[6] Two centuries ago Māori were the undisputed managers of the spectacular wonders of New

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[1] Section 4(2)(e) of the National Parks Act 1980. A map illustrating the boundaries of the national park estate in New Zealand is reproduced in Appendix One of this paper.
[2] Egmont, Tongariro, Urewera and the Whanganui National Park.
[3] Abel Tasman, Arthur's Pass, Fiordland, Kahurangi, Mt Aspiring, Mt Cook/Aoraki, Nelson Lakes, Paparoa, and the Westland National Park. It is expected that a fourteenth park, the Stewart Island/Rakiura National Park, will be officially declared a national park pursuant to the *Gazette* in May 2002.
[4] Section 4(1) of the National Parks Act 1980.
[5] This expression has been used numerous times in reference to national parks. For example: see Ken Peddington, "The National Parks of Aotearoa/New Zealand: The Crown Jewels or Jewels of the Crown?" in *Centenary Seminar: 100 Years of National Parks in New Zealand Proceedings 24-28 August 1987.* (1987) North Canterbury National Parks and Reserves Boards. For a more recent example: see Government Press Release, 1 May 2001, "Rakiura National Park - a jewel in the conservation estate".
[6] The first country to establish a national park was the United States of America in 1872: the Yellowstone National Park.

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Zealand. The 'mountains, forests, sounds, seacoasts, lakes, and rivers' were considered 'taonga'[7] and were managed according to tikanga Māori.

Today Māori are largely alienated from the management of the national park estate. It is my view that this should not have occurred. Management of natural resources is directly referred to in the founding document of this country: te Tiriti o Waitangi / the Treaty of Waitangi.[8] This document, it is argued, should be guiding how these special areas within the national park estate are managed.

The national park label is a western conservation concept. In New Zealand it means land that is scenically valuable, endowed with ecological systems and natural features so beautiful, unique or scientifically important that it comes within the threshold test of the need for preservation in the national interest.[9] The national park estate is, therefore, undoubtedly special. It is unique, it is beautiful, and it is of national importance.

Hence, a question which has been asked throughout the world, as well as in New Zealand, is: who should be charged with protecting this special land? The controversy involves the rights of indigenous peoples to be included in the management of publicly-owned natural resources.

[7] Taonga, translated in a simple form, means 'property' or 'resource.' A more accurate translation may be "... any material or non-material thing having cultural or spiritual significance for a given tribal group ..." Waitangi Tribunal, *Ngawha Geothermal Resource Report.* (Wai 304, 1993) at 20.

[8] Hereinafter this document is referred to as te Tiriti o Waitangi, or simply te Tiriti. This reference is intended to be a reference to both the Māori and English texts of this document. Both versions are reproduced in Appendix Two of this paper.

[9] Section 4(1) and (2) of the National Parks Act 1980.

This paper focuses that debate on New Zealand, and in particular on te Tiriti o Waitangi and national park legislation. The principal question examined is whether national park legislation has given effect to the guarantees promised to nga iwi Māori in te Tiriti o Waitangi. In seeking answers to this question, this paper tracks the legislative establishment, and provision for, national parks.

Part One, Chapter One, launches into a discussion of te Tiriti o Waitangi and asks how tino rangatiratanga and kawanatanga should relate to each other in regard to national park management. By using the jurisprudence developed in the Waitangi Tribunal, this chapter puts forward a Tiriti-based model, describing how our national parks should be managed. This model is designed to act as the benchmark against which historical and present national park legislation will be measured.

Part Two consists of three chapters. These chapters trace the development of our national park legislation up to 1980, the year in which the current National Parks Act was enacted. The historical legislation is important to discuss because it provides an insight into how and why the management of our national parks has developed almost devoid of any awareness of te Tiriti o Waitangi. This discussion thus provides an essential foundation to the remaining parts of the paper. It is also important to discuss because few secondary sources exist in regard to historical national park legislation - no doubt because the legislation is piecemeal and "... to say the least, untidy ...".[10]

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[10] Jane Thomson, *Origins of the 1952 National Parks Act* (1976), Department of Lands and Survey, Wellington, at 3: "Before 1952 legislation governing the administration of national

Chapter Two begins this historical discussion by addressing the early practice of setting aside land to be protected from sale. In particular, it focuses on the emergence of national parks up until 1951. Chapter Three examines the first statute that consolidated all law relating to national parks, the National Parks Act 1952.

Part Three moves to discuss national parks today. The first chapter in this part, Chapter Four, begins with a discussion of the original enactment of the National Parks Act 1980. The next three chapters focus respectively on the major statutory amendments since made to the National Parks Act 1980: the Conservation Act 1987, the Conservation Law Reform Act 1990, and the Ngai Tahu Claims Settlement Act 1998. Provisions in each of these three statutes have potentially brought the management of national parks closer to the espoused Tiriti o Waitangi management model put forward in Chapter One of this paper. Chapter Eight, the final chapter in this third part, tests this potential by turning to the management plans and strategies, made pursuant to the National Parks Act 1980, which direct the day-to-day management of national parks.

Part Four constitutes the final part of this paper. Besides providing a conclusion, Chapter Nine outlines several legislative measures that should be adopted so the management of our national parks can be better aligned

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parks was, to say the least, untidy: it was a matter for conjecture whether some reserves really were, and whether others ought to be national parks; and although certain clear principles for the administration of the parks had evolved, they were nowhere plainly stated in legislation....".

with the guarantees made to nga iwi Māori in te Tiriti o Waitangi over 160 years ago.

It is important to note that this paper has a number of limitations. In particular, it is concerned only with national park management issues, and not ownership issues. In addition, it is primarily an application of the Waitangi Tribunal's interpretation of te Tiriti o Waitangi. It is essentially a study of national park legislation and some of the documents which have been published pursuant to this legislation. This paper does not attempt to focus in any real sense on the practical day-to-day management of national parks.* This paper concerns national parks, not areas which are merely administered as if they are a national park.[11] Bearing these limitations in mind, this paper is still able to present a picture of national park management in New Zealand, and to advance the thesis that our national parks have not been, and continue not to be, managed in accordance with te Tiriti o Waitangi.

This paper is a reflection of the law as at 30 June 2001.

* Well, well, what a surprise!

[11] For instance, the Waitutu Block: see the Waitutu Block Settlement Act 1997.

PART ONE

TE TIRITI O WAITANGI: A BENCHMARK MANAGEMENT MODEL

Chapter One

Interpreting and Applying te Tiriti o Waitangi

Te Tiriti o Waitangi promised to Māori "... te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa ...",[12] that is: "... chieftainship over their lands, villages and all their treasures ...",[13] or, as the English version reads:[14]

> ... full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...

Te Tiriti is thus a "... political agreement to forge a working relationship between two parties ...".[15] It is our founding document. It is our first national environmental policy statement.[16] Hence, it provides us with a model for how our environment should be managed, including the national park estate.

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[12] Ko te Tuarua.
[13] Translation of Ko te Tuarua by Professor Sir Hugh Kawharu. A copy of this translation is reproduced in Appendix Two of this paper.
[14] Article II.
[15] Waitangi Tribunal, *Muriwhenua Land Report.* (Wai 45, 1997) at 386. See Appendix One of this paper for copies of the English and Māori texts of te Tiriti o Waitangi.
[16] As argued by Hirini Matunga in "Decolonising Planning: The Tiriti o Waitangi, the Environment and a Dual Planning Tradition" in Memon and Perkins (eds), *Environmental Planning & Management in New Zealand.* (2000), Dunmore Press Ltd, Palmerston North, ch. 3 at 38.

This chapter therefore examines how te Tiriti o Waitangi provides the basis for accommodating two people's values in the management of national parks. Its implications are explored through the application of the discussions made by the Waitangi Tribunal concerning the rights of tangata whenua to be included in the management of natural resources. The Tribunal's interpretation is then applied specifically to national parks. This is achieved by putting forward a Tiriti-based model for national park management. This model, it is argued, should be guiding the management of our national parks - a model which recognises the fundamental importance of recognising and respecting both Tiriti partners: the Crown and Māori.

I. An Interpretation: The Waitangi Tribunal and Natural Resources

The jurisprudence of the Waitangi Tribunal is the appropriate benchmark for interpreting te Tiriti o Waitangi in this paper, for three reasons.[17] Firstly, it is the one specialist body that has exclusive authority to investigate and apply the principles of te Tiriti o Waitangi.[18] Secondly, it is a body that has had a great deal of experience interpreting and applying te Tiriti principles to the management of natural resources. Thirdly, the

[17] Whilst it may be appropriate to use the Waitangi Tribunal as a reference point for this paper, it must be recognised that this may not be the appropriate reference point for nga iwi Māori themselves. For instance, the Waitangi Tribunal is a Crown established body. Nonetheless, the scope of this paper demands a confined reference point, and because this is a legal paper, the jurisprudence of the Waitangi Tribunal was thought the best reference option.

[18] See the Long Title, Preamble and section 5(2) of the Treaty of Waitangi Act 1975. A useful secondary source on the Tribunal's jurisdiction: see E Durie "Background Paper" (1995) 25 VUWLR 91.

Tribunal has a bi-cultural membership and procedure, which is itself consistent with the principles of te Tiriti.[19]

The Waitangi Tribunal is guided by the statutory directions given to it in the Treaty of Waitangi Act 1975. Its role is to inquire into claims made by Māori that they are, or are likely to be, prejudicially affected by acts or omissions of the Crown which are inconsistent with the principles of te Tiriti o Waitangi.[20] The 1975 Act makes no attempt to define "the principles", instead leaving this task to the Tribunal. The Tribunal has the authority to determine the meaning and effect of te Tiriti, but in doing so the Act makes it clear that both texts of te Tiriti are to be taken into consideration.[21] The decisions that the Tribunal makes are usually only recommendatory in nature, although its decisions are accorded respect by the judiciary.[22]

There exists no complete list explaining the principles of te Tiriti. In fact the Tribunal has made it clear that it has little wish to provide one: "It would be imprudent for us to attempt that which the Court of Appeal chose not to, namely to enumerate the principles of te Tiriti in one claim. We should restrict ourselves to those relevant to the claim before us....".[23] The

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[19] Section 4(2), ibid.
[20] Section 6(1), ibid.
[21] Section 5(2), ibid.
[22] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 661 has held that the Waitangi Tribunal decisions are to be accorded considerable weight and respect by the ordinary Courts. For a further judicial discussion on the relationship between the Waitangi Tribunal and the Courts: see *Te Runanga o Muriwhenua Inc v Attorney-General (The Muriwhenua Fisheries Case)* [1990] 2 NZLR 641, at 651-652.
[23] Waitangi Tribunal, *Muriwhenua Fishing Report.* (Wai 22, 1988) at 193. The Court of Appeal case being referred to is the [1987] case, ibid.

justification for this lies in the fact that te Tiriti is to be regarded as "... a living document to be interpreted in a contemporary setting....".[24]

The principles listed below are ones that appear a number of times throughout the various Waitangi Tribunal reports. Before turning to this list though, one principle needs to be emphasised. The idea that "... the Māori gift of governance to the Crown was in exchange for the Crown's protection of Māori rangatiratanga...."[25] has become fundamental to any interpretation and application of te Tiriti. This idea, according to the Tribunal, is the "... general overarching principle ..."[26] of te Tiriti.

Implicit in this paramount principle are a number of other principles, including those listed below:[27]

- te Tiriti implies a partnership, exercised with the utmost good faith;
- te Tiriti is an agreement that can be adapted to meet new circumstances;
- tino rangatiratanga includes management of resources and other taonga according to Māori cultural preferences;
- taonga includes all valued resources and intangible cultural assets;
- the exchange of the right to make laws for the obligation to protect Māori interests;

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[24] Dr Janine Hayward, "Appendix 'The Principles of the Treaty of Waitangi'" in *Rangahau Whanui Series National Overview*. Vol II (1997) Waitangi Tribunal, at 475. See also the Court of Appeal decision [1987] supra n 22.

[25] Waitangi Tribunal, *The Whanganui River Report*. (Wai 167, 1999), at 265.

[26] A number of Waitangi Tribunal reports use this expression: see, for example, Waitangi Tribunal, *Te Whanganui-a-Orotu Report*. (Wai 55, 1995), at 201; Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*. (Wai 27, 1992), at 269; and *Ngawha Geothermal Resource Report* supra n 7 at 99. This point has also been endorsed by the Court Appeal: see [1987] supra n 22.

- the Crown obligation actively to protect Māori Tiriti rights;
- the need for compromise by Māori and the wider community;
- a duty to consult;
- the Crown cannot divest itself of its obligations;
- the right of development;
- the tribal right of self-regulation;
- the Crown's obligation legally to recognise tribal rangatiratanga;
- the Crown's right of pre-emption and its reciprocal duties; and
- the principle of options.

A number of the Waitangi Tribunal's decisions have concerned the management of natural resources, some of which fall within the conservation estate. The approach taken by the Tribunal in this respect is outlined briefly below. This approach is then applied to national parks.

Natural resources, because of the second article of te Tiriti, conjure a discussion of taonga: "... te tino rangatiratanga ... o ratou taonga katoa ...". The Waitangi Tribunal has developed a certain threshold test in regard to taonga. The test demands that the taonga must be "... highly valued, rare and irreplaceable ... ",[28] and must also be "... of great spiritual and physical importance ...".[29] If this threshold is met, then the Crown is under an "...

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[27] These principles have been taken from Hayward supra n 24 (a study based on Waitangi Tribunal reports, judicial decisions and political party interpretations of te Tiriti).
[28] Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims.* (Wai 153,1993), at 34.
[29] Idem.

affirmative obligation ..."[30] to ensure the protection of the taonga "... to the fullest extent reasonably practicable....".[31]

The Tribunal accepts that the Crown has the right and duty to make laws for the conservation of natural resources, but this is a qualified right:[32]

> Undoubtedly the Crown does have a right and duty to make laws for the conservation of natural resources. But this need not be inconsistent with the exercise of rangatiratanga.

Tino rangatiratanga is an expression that encompasses notions of 'autonomy', 'self-management', 'self-regulation', and 'self-government'.[33] Rangatiratanga, according to the Waitangi Tribunal, "... denotes the mana of Māori not only to possess, but to control and manage ... [taonga] ... in accordance with their own cultural preferences ...".[34] This same report added:[35]

> While the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control and resource protection, that right is to be exercised in the light of article 2 of the Treaty. It should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short,

Which?
You can have one or the other but both.

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[30] Waitangi Tribunal, *Mohaka River Report.* (Wai 119, 1992), at 75. A number of other reports have also stated this: see for example *Te Arawa* supra n 28; W*hanganui River Report* supra n 25; and *Ngawha Geothermal Resource Report* supra n 7 at 136.
[31] *Mohaka River Report*, idem.
[32] Ibid at 65.
[33] W*hanganui River Report* supra n 25 at 283-284. See also M Durie, "Tino Rangatiratanga. Māori Self Determination" (1995) 1 *He Pukenga Kōrero* (A Journal of Māori Studies) 44.
[34] *Ngawha Geothermal Resource Report* supra n 7 at 136. See also W*hanganui River Report* supra n 25 at 64.
[35] *Ngawha Geothermal Resource Report*, idem.

the tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.

The Tribunal rejected the Crown's recent argument that te Tiriti deprives Māori of authority over natural resources. The Crown had based this on an argument that natural resources fell outside the Article II protection of tino rangatiratanga because they were solely within the province of Article I. The argument was unsuccessful. The Tribunal agreed with the Māori claimants that such an argument is "... inconsistent with the Treaty language and contemporary understanding of it ...".[36]

Although the Tribunal has accepted that in "... exceptional circumstances ..." the Crown may be able to override the fundamental right of rangatiratanga, it must be as a "... last resort ..." and be "... in the national interest....".[37] In the recent *Whanganui River Report* the Tribunal clarified this 'national interest' justification by stating emphatically that "... the national interest in conservation is not a reason for negating Māori rights of property....".[38]

In cases of natural resource disputes which have met the 'taonga threshold test', inclusive management roles have been recommended by the Waitangi Tribunal. For example, according to the Tribunal the Whanganui River

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[36] *Whanganui River Report* supra n 25 at 329.
[37] Waitangi Tribunal, *Turangi Township Report.* (Wai 84, 1995), at 15.2.1 (3).
[38] *Whanganui River Report* supra n 25 at 330.

should be managed by the iwi responsible for this river, this taonga.[39] In another river report the Tribunal stated:[40]

> We think that rangatiratanga, applied to the Mohaka river, denotes something more than ownership or guardianship of the river but something less than the right of exclusive use. It means that the iwi and hapu of the rohe through which the river flows should retain an effective degree of control over the river and its resources as long as they wish to do so.

Shared management of the Waipoua Forest, a taonga to Te Roroa people, and today part of the conservation estate, was recommended by the Tribunal: [41]

> The claimants must appreciate that the Crown has the right to manage the land it owns. In keeping with 'the meaning and effect' of the Treaty, we believe that tangata whenua should share in the control and management of natural and cultural resources on Crown land and their traditional resources areas.

A different kind of natural resource, geothermal resources, have also been considered by the Waitangi Tribunal. In the *Ngawha Geothermal Resource Report* the Tribunal stated: [42]

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[39] Ibid at 329. Note that although the Whanganui River is not included in the Whanganui National Park, it is an integral part of the area and provides an important access way into and through the Park.

[40] *Mohaka River Report* supra n 30 at 64.

[41] Waitangi Tribunal, *Te Roroa Report* (Wai 38, 1992), at 183. In this report the Tribunal made reference to the NPA 1980 as one way in which this objective could be achieved. Reference was also made to the Conservation Act 1987 and the Resource Management Act 1991.

[42] *Ngawha Geothermal Resource Report* supra n 7 at 153.

> ... the Crown's right or obligation to manage geothermal resources in the wider public interest must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes.

These are but some of the Waitangi Tribunal's decisions in this field.[43] The above comments reflect the common nature of the approach taken by the Tribunal in regard to natural resources: tangata whenua continue to have rights, and should be able to exercise these rights, in regard to their taonga.

The Waitangi Tribunal's interpretation and application of te Tiriti provides a vision of how our natural resources should be managed. Māori have a right to be acknowledged in the management of natural resources. So long as natural resources within national parks meet the 'taonga test', te Tiriti provides a right for tangata whenua to be included in national park management.

Craft.

II. An Application: How National Parks Should Be Managed

1. National Parks and Article II

Article II guarantees to nga iwi Māori tino rangatiratanga over their taonga. Taonga includes natural resources.[44] Mountains, forests, sounds, seacoasts,

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[43] Other relevant reports include Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report.* (Wai 27, 1995) regarding the discussion of Taiaroa Head; and Waitangi Tribunal, *Pouakani Report.* (Wai 33, 1993) regarding the discussion of the Pureora Forest Park.

[44] Many of Waitangi Tribunal reports discuss this concept in depth. See also Brian Garrity, "Conflict Between Māori and Western Concepts of Intellectual Property" (1999) 8 Auckland U L Rev 1192; and A H Angelo, "Personality and Legal Culture" (1996) 26 VUWLR 395

lakes and rives are taonga. But do they meet the Waitangi Tribunal's 'taonga threshold test' so as to oblige the Crown to protect tangata whenua rights? The answer must undoubtedly be yes. Firstly, a genealogical link can be made by tangata whenua to many of the natural resources within national parks, and secondly, a detailed history of use of national park land can be recounted.

a. A genealogical link

'Mountains, forests, sounds, seacoasts, lakes and rivers', which are common features protected by the national park label, are tupuna of tangata whenua. For example, land is the ultimate tupuna. Land is Papatuanuku. This whakatauki illustrates this thought:[45]

Ko Papatuanuku to tatou whaea
Ko ia to matua atawhai
He oranga mo tatou
I roto i te moengaroa
ka hoki tatou ki te kopu o te whenua

The land is our mother
She is the loving parent
She nourishes and sustains us
When we die she enfolds us in her arms

(Angelo's thesis is that we must redirect our attention to the Māori cultural meaning involved where a Treaty of Waitangi claim concerns taonga).

[45] This whakatauki is reproduced in Roberts et al, "Kaitiakitanga: Māori perspectives on conservation" (1995) 2 *Pacific Conservation Biology* 7, at 10.

Also sacred are mountains. For instance, many mountains in the South Island have recently been described in legislation as sacred ancestors from whom the Ngai Tahu iwi descend.[46] Aoraki/Mount Cook is the most notable example. It is the highest mountain in New Zealand, and is situated in the Aoraki/Mount Cook National Park. A schedule to the Ngai Tahu Claims Settlement Act 1998 tells the story of how four sons, including one named Aoraki, born of the union between Papatuanuku and Raki,[47] came in a canoe, known as Te Waka o Aoraki, and "... cruised around Papatuanuku who lay as one body in a huge continent known as Hawaiiki....".[48] Unable to find land and unable to return to their celestial home, their canoe finally ran aground on a hidden reef:[49]

> The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today. Aoraki is the mountain known to Pakeha as Mount Cook, and his brothers are the next highest peaks near him.

Humans and natural resources have a common ancestry. This link has been coined 'environmental whanaungatanga' - the familial relationship with all components of the environment.[50] All resources represent the identity and place of humans in the world order:[51]

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[46] The descriptions are statements made by Te Runanga o Ngai Tahu to which the Crown is acknowledging, see sections 206 and 239 of the Ngai Tahu Claims Settlement Act 1998.
[47] Ngai Tahu dialect for 'Ranginui'.
[48] Schedule 80 of the Ngai Tahu Claims Settlement Act 1998.
[49] Idem.
[50] Roberts et al supra n 45.
[51] Ibid at 6.

> ... everything in the universe, inanimate and animate, has its own whakapapa, and all things are ultimately linked via the gods to Rangi and Papa. There is no distinction or break in this cosmogony, and hence in the whakapapa between the supernatural and natural. Both are part of a unified whole.

Rivers are also sacred. Consider this explanation given by the Atihaunui-a-Paparangi people:[52]

> The [Whanganui] river is seen as a taonga - as an ancestral treasure handed down as a living being related to the people of the place, where that relationship has been further sanctioned and sanctified by antiquity and many ancestral beings. It governed their lives, and like a tupuna, it served both to chastise and to protect.... It was something that they treasured, and though they had possession and control in fact, they did not see it in those terms; rather, they saw themselves as users of something controlled and possessed by gods and forebears. It was a taonga made more valuable because it was beyond possession.

These examples illustrate the genealogical link Māori have with land and natural resources. Many of these resources are integral to the national park estate.

b. Historical use

Tangata whenua have had a long association with land that is now within the boundaries of our national parks.[53] Even legislation is beginning to

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[52] *Whanganui River Report* supra n 25 at 46.

[53] See Keri Hulme, "Te Whenua Whai-Taoka" in Gerald Hutching and Craig Potton (ed), *Forests, Fiords & Glaciers. New Zealand's World Heritage.* (1987), Royal Forest & Bird

recognise this association. For instance, a number of the schedules to the Ngai Tahu Claims Settlement Act 1998 specifically depict Ngai Tahu historical use of national park land. In reference to the resources of Pikirakatahi (Mount Earnslaw) - a mountain that lies within the Mount Aspiring National Park - it states:[54]

> ... the tupuna (ancestors) had considerable knowledge of whakapapa, traditional trails, places for gathering kai (food) and other taonga, ways in which to use the resources of the land, the relationship of people with the land and their dependence on it, and tikanga for the proper and sustainable utilisation of resources.

Tikanga is the controlling mechanism that dictates interaction with and use of taonga. A number of Māori terms are fundamental to the understanding of and application of tikanga. All these terms derive from the fundamental belief of how the world was created from the union of Ranginui and Papatuanuku. Two common sayings are: land cannot be owned for one cannot own one's mother, and I belong to the land, the land does not belong to me.[55]

Protection Society of New Zealand, Wellington, ch. 5. See also David Thom, *Heritage. The Parks of the People.* (1987) Lansdowne Press, Auckland, ch. 5.

[54] Schedule 87 of the Ngai Tahu Claims Settlement Act 1998.

[55] See, for example, E Durie, "Ethics and Values" Te Oru Rangahau Māori Research and Development Conference, Massey University 7-9 July 1998 (copy downloaded from: http://www.kennett.co.nz/law/indigenous/); Ministry of Justice, *He Hīnātore ki te Ao Māori. A Glimpse into the Māori World. Māori Perspectives on Justice.* (March 2001), Ministry of Justice, Wellington; and Law Commission, *Study Paper 9. Māori Custom and Values in New Zealand Law.* (March 2001), Law Commission, Wellington.

Two important concepts are tapu and mauri. Tapu encapsulates the idea of sacredness of all around us.[56] It is what regulates society. Before a tree can be cut down, for example, a karakia needs to be said to Tane, the god of the forest, seeking permission to use and take the tree. If the karakia is not performed then the tapu will be breached and harm will befall the person. Mauri translates into English as a life principle or life essence. All resources, all things have mauri, a life force. Nothing is lifeless.[57]

And another important concept that is relevant to understanding the tikanga of natural resources is 'kaitiakitanga'. Kaitiakitanga translates to mean the act of guardianship:[58]

> ... to be a kaitiaki means looking after one's own blood and bones - literally. One's whanaunga and tupuna include the plants and animals, rocks and tress. We are all descended from Papatuanuku; she is our kaitiaki and we in turn are hers.

Tikanga encapsulates these concepts. The land that is now within the boundaries of our national parks was once managed in accordance with tikanga, taking into account these ideas and beliefs in tapu, mauri,

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[56] See Pierre Tohe "Māori Jurisprudence: the Neglect of Tapu" (1998) 8 Auckland U L Rev 884. See also John Patterson, "Environmental Mana" (1999) 21 *Environmental Ethics* (An Interdisciplinary Journal dedicated to the Philosophical Aspects of Environmental Problems, The Center for Environmental Philosophy and the University of North Texas) 267.

[57] This concept has been discussed at length in the High Court: see *Huakina Development Trust v Waikato Valley Authority and Ors* [1987] 2 NZLR 188. See also Jim Williams, "Mauri and the traditional Māori environmental perspective" (1997) 14 *Environmental Perspectives* (Newsletter of the Environmental Policy and Management Research Centre, University of Otago) 3.

[58] Roberts et al supra n 45 at 7. See also Nin Tomas, "Implementing Kaitiakitanga Under the RMA" (1994) *New Zealand Environmental Law Reporter* 39; and Selwyn Hayes, "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 Auckland U L Rev 893.

kaitiakitanga and, of course, in Papatuanuku the ultimate ancestor of all things, including people.

Article II and its guarantee of rangatiratanga over taonga is therefore relevant to the national park estate. To summarise, the land within the national park estate is taonga to tangata whenua. Once it was managed by tangata whenua solely in accordance with tikanga Māori. Since the signing of te Tiriti o Waitangi, the Crown has also had a right to manage natural resources. But the Waitangi Tribunal's interpretation of te Tiriti finds that the Crown's right is not absolute. Te Tiriti o Waitangi is our founding document, and is based on respecting two peoples' beliefs and values.

Te Tiriti should be guiding the management of our national parks. This being so, what does it mean? What would a Tiriti o Waitangi model look like for national park management?

2. *A Tiriti Model*

A Tiriti management model would, firstly, endorse both the Crown's right to govern, and the Māori right to exercise tino rangatiratanga. Secondly, nga iwi Māori would be recognised as the tangata whenua of national park land. They would be recognised as having a spiritual, historical and cultural link with the land. It would be recognised that this land is a taonga to the tangata whenua. Likewise, it would also be recognised that national park land is special to Pakeha, and that it represents to them the jewels of the conservation estate. Thirdly, the Māori conservation ethic would be accorded equal status to the Pakeha conservation ethic. Both ethics would,

for example, influence the classification of permitted activities within the national park estate. Both the Crown and Māori would have similar rights to be involved in national park management. Fourthly, both would have a right to direct the development of national park policies. Such rights would not be confined to tangata whenua simply being regarded as a special interest group. Nor would this right to manage simply mean that tangata whenua must be consulted whenever particular national park issues arise. Such representation measures do not equate to tino rangatiratanga. But, what does equate to tino rangatiratanga could be different for the tangata whenua of each national park. This in itself must be recognised.

To summarise then, a Tiriti management model would be respectful of one another's values. This would mean that the Tiriti rights of both parties would be recognised and provided for in the management of national parks. If national park legislation was being guided by te Tiriti, recognition and provision for these values and rights would be evident.

Tania Ruru has conceptualised the different ways rights to, for instance, representation could be expressed in legislation.[59] Her continuum model consists of nine expressions. It is presented in a progressive manner with each expression representing a more inclusive stance towards the right of nga iwi Māori to be included in the management of natural resources. This model, which was originally devised for resources managed under the

[59] Tania Ruru, *The Resource Management Act 1991 and Nga Iwi Māori.* Unpublished, LLM Thesis, University of Otago, 1997 at 28-31.

Resource Management Act 1991, has been adapted here for the national park estate.[60] It is stated as:

Level One: **General Interest Group only**

At this level nga iwi Māori would be considered one of a number of interest groups. Their interests would be given no express mention or priority in legislation. Where considered relevant, nga iwi Māori interests would be weighed against the interests of other groups in the administration and management process.

Level Two: **Special Interest Group**

Nga iwi Māori interests would be mentioned in legislation making it clear that they are a special group whose interests must be given due weight by national park management bodies.

Level Three: **Discretionary Consultation/Consideration**

At the third level legislation would suggest that regard be had to considering consultation with nga iwi Māori in respect of activities which would affect their interests. Their viewpoint, however, would have no binding effect on decision-makers, but would be one element to be considered.

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[60] Because this model is management focused (rather than ownership focused) it provides a suitable way to view national park provisions within the confined management-oriented

Level Four: **Mandatory Consultation/Consideration**

National park legislation would prescribe that consultation take place with nga iwi Māori when ever their interests would be affected. Their viewpoint would have the status of mandatory consideration but would have no necessary binding effect on decisions made.

Level Five: **One Māori Vote**

At the fifth level national park legislation would prescribe that one Māori representative, holding the power to vote, be present on all national park management bodies.

Level Six: **Fifty Percent Representation**

At the sixth national park legislation would prescribe that nga iwi Māori constitute fifty percent of those sitting on national park management bodies.

Level Seven: **Equal Status to national park management bodies**

At the seventh level the legislation would prescribe that appointed nga iwi Māori organisations be given the same status as existing national park management bodies and administer the national park estate in partnership with these bodies, in joint documents or in separate but parallel documents.

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framework of this paper.

Level Eight: **Māori Veto subject to Judicial Review**

At the eighth level the legislation would prescribe a Māori veto on all national park management decisions affecting their interests. This veto could be subject to judicial review in the ordinary courts. This veto would operate with respect to both administrative and management functions.

At a slightly elevated level, say level 8.5, this veto could be subject to judicial review by only the Waitangi Tribunal.

Level Nine: **Māori Veto subject to Māori Review**

Lastly, at the ninth level, this veto would be the same as that prescribed at level eight, but would be subject to review by only nga iwi Māori.

To briefly discuss Ruru's model, if national park legislation was being guided by te Tiriti o Waitangi, surely legislative measures today to provide nga iwi Māori with representation would fall nearer to the end point of this continuum. Recognising both governance and tino rangatiratanga rights surely must mean, if we are to use the Waitangi Tribunal's interpretation as the benchmark, more than consultation and single rights to representation: mid-realm aspirations. A right to be consulted is after all not the same as a right to have one's views actioned. Perhaps the end-realm expressions would better reflect partnership aspirations. Level seven for instance would provide nga iwi Māori with a right to be recognised and represented in the

management of national parks to a standard that would clearly identify them as a Tiriti partner. Moreover, a departure from level seven to the higher realm of veto power may prove contrary to the Waitangi Tribunal benchmark - for the Tribunal holds that the Crown has the right to govern and, although this is qualified by a right of rangatiratanga, the Crown still has the overriding power, albeit only in exceptional circumstances.

In Chapter Nine this continuum model is discussed in detail. In the meantime, as this paper turns to assess historical and current legislative provisions, the different expressions of this model should be kept in mind. Each level is after all an example of how the Tiriti partner, the Crown, could use its power to legislate in a manner that incorporates its Tiriti partner, nga iwi Māori, in national park management. Likewise, the four points concerning recognising and respecting tangata whenua ethics and rights should be kept in mind throughout the following discussion of how national parks should be managed.

III. Conclusion

In 1994 Margaret Mutu, then one of only two Māori members on the New Zealand Conservation Authority (an independent body involved in the management of national parks), stated, in reference to current legislation: [61]

[61] Margaret Mutu, "Māori Participation and Input into Resource Management and Conservation in Aotearoa/New Zealand." A Paper Presented at the *Ecopolitics VIII Conference* held at Lincoln University, 1994 (copy obtained from Māori Studies Department, University of Auckland).

> ... the realities on the ground for hapuu and iwi are nowhere near what our ancestors envisaged and certainly not what these Acts provide for.

This chapter has looked at te Tiriti o Waitangi and how that document should apply to our national parks. As Mutu's comment suggests, national parks are not being managed today as they should be - as our ancestors who signed te Tiriti envisaged.

This paper now turns to track the establishment, and management, of our national parks to the present day. This assessment will illustrate how natural resources (the jewels, the taonga) within national parks have been managed without due regard to te Tiriti. This discussion of how our national parks should be managed will be revisited at the conclusion of this paper, in Chapter Nine, where current initiatives in national park management are measured against the guarantees in te Tiriti o Waitangi. The following analysis will illustrate the gap between 'how should' and 'how are' our parks being managed.