MICHAEL HERON

THE MAORI RIGHT TO SHARE IN OIL AND GAS

RESEARCH PAPER FOR INDIGENOUS PEOPLES AND THE LAW

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LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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- To my darling flatmates.

CONTENTS

INTRODUCTION

Formulating a basis for a tribal claim to oil and gas resources involves several difficulties. First, no tribe used these resources and it is unlikely they had any knowledge of them. Second, neither party to the Treaty of Waitangi would have contemplated that such resources were covered by the Treaty. Third, the mobile nature of the resource makes determining ownership more difficult because it cannot necessarily be linked to ownership of the land above the resource. A fourth preliminary difficulty is that the words of the Treaty understandably offer little help.

Issues of ownership have been clarified somewhat by the Petroleum Act 1937 under which ownership of oil and gas within the territorial waters is vested in the Crown. Ownership of the resource within the exclusive economic zone has not been acquired by the Crown.

Thus claims to the resource, if they can be properly based, involve either a claim to compensation for loss or a claim for recognition of ownership.

The writer takes three separate but interrelated approaches to the basis for a claim to oil and gas. The first is based on the common law relating to ownership of oil and gas, and then in turn on the words of the Treaty of Waitangi. The second is based on the principles of the Treaty and their application to Crown ownership and management of oil and gas. The third approach relies on the common law doctrine of aboriginal title.

Material from other jurisdictions will be examined for indications as to the obligations owed by the respective states to their indigenous peoples. It also provides possible solutions to a difficult problem.

The principal issue addressed in the paper is what obligations does the Crown owe to Maori people in respect of oil and gas. The next stage is what steps must the Crown take to satisfy its obligations and the ambitions of the Maori people. Inherent in this is an examination of whether current legislation satisfies the obligations.

Current Ownership and Management: The Petroleum Act 1937

For the purposes of this paper, "oil and gas" will refer to "petroleum" as defined by section 2 of the Petroleum Act 1937 (the Act). Essentially this means all naturally occurring hydrocarbons or mixtures of such. Section 3 of the Act vests ownership of petroleum, on or below the surface of any land, in the Crown. Section 2 defines land as being all land within the territorial limits of New Zealand including land under water. The territorial limits of New Zealand are twelve miles from low water mark.[1] Thus the Crown owns all naturally occurring oil and gas within the twelve mile limit. The oil and gas beneath the remaining one hundred and eighty eight miles (or more) to the limit of the exclusive economic zone are not vested in the Crown. All rights exercisable by New Zealand for the purpose of exploiting the natural resources of the continental shelf are, however, vested in the Crown.[2] As far as oil and gas are concerned, all the provisions of the Petroleum Act 1937 apply except for section 3.[3] Thus no ownership is vested but the Crown controls who may prospect and mine for petroleum in the exclusive economic zone.[4]

The licence scheme in the Petroleum Act 1937 applies, therefore, to all prospecting and mining for oil and gas. The Crown (by the Minister of Energy) controls the recovery of oil and gas, and royalties are payable on all petroleum produced.[5] The current royalty rate is 12.5 percent of the selling value of the petroleum, valued at the production facilities.[6] In 1987 the Crown received $21 million in royalties from natural gas and petroleum.[7]

Under section 36 of the Petroleum Act 1937 the Minister of Energy has power to grant him/herself any licence and can deal in any licence. This gives the Minister wide powers to benefit from the sale of licences as well as getting royalty revenue.[8] Just how wide this power is, is subject to current High Court proceedings.[9]

From 1985 to 1986 government policy was to take an 11 percent "carried interest" in all prospecting licences. This converted into an 11 percent contributing interest upon discovery of petroleum. From mid-1986 the Government decided to sell these carried interests[10] and other interests acquired under prior policies. Revenue from these sales and from their share in mining licences amounted to $34.5 million in 1987.[11]

Maori tribes have no control over the issue of prospecting or mining licences over areas of land which they own or have exercised customary rights on. The tribes get no share in the royalties paid to the Crown. Indeed, the principal objection raised by Sir Apirana Ngata and other members of Parliament to the Petroleum Bill, was that all royalties were being collected by the Crown and landowners got none.[12] The Member of Parliament for Central Otago put the argument well:[13]

> ... the Treaty of Waitangi guaranteed those rights to the Maori people at common law, and the Parliament of New Zealand is now seeking to take away those rights and vest them in the State. The fact that petroleum is of a migratory character does not alter the law at all, because one of our common law principles is that a commodity, such as gas or oil, which is of a migratory character, becomes the property of any landowner who takes control of it on his land and gets possession of it. If the State permits the sinking of a well on Maori lands and secures then the right to petroleum, it does so at the expense of the Maori who has full ownership as recognized by common law. That right of ownership was definitely guaranteed him by the Treaty of Waitangi. So, if any member of the House desires to carry out the spirit of the Treaty of Waitangi ... there is a duty ... to see that at least some compensation is paid to these people in respect of this privilege or right which is now being taken away.

The opinion of the Solicitor-General was sought as to whether the legislation breached the Treaty of Waitangi. The Solicitor-General said:[14]

> I am also clearly of the opinion that the legislative provision referred to does not transgress the Treaty of Waitangi in that it proposes to take from the Native land

> owner no more than from the European. The legislation is comprehensive and treats equally all subjects of His Majesty.

The opinion had considerable effect in swaying the views of dissenting members. It concentrated solely on article three of the Treaty and the Maori right to be treated equally as British subjects. Article two of the Treaty was ignored by the Solicitor-General.

The Bill was passed, however, principally because it would encourage oil companies to prospect for petroleum and foster local petroleum production. Crown ownership enabled simplicity in the transfer of resource ownership and royalty collection. It is interesting that such considerable debate was entered into over whether Maori should get a share of the royalties. It is ironic that Maori rights to be treated equally under article three of the Treaty of Waitangi should be given as authority to defeat rights guaranteed to them under article two.

Fifty two years later Maori tribes have no share in the greatly increased wealth resulting from large finds of oil and gas.

(1) COMMON LAW OWNERSHIP OF OIL AND GAS

The common law regarding oil and gas ownership is not settled. The difficulty is that they are mobile resources and thus cannot be easily linked to ownership of the land above. Two views are popular:[15]

(1) Such mobile resources do not belong to the surface owner but only are owned when reduced into possession.

(2) They are owned as long as they remain on site but ownership can be lost if they move before the surface owner reduces them into possession.

The Treaty

In article two of the English version of the Treaty, Maori people were guaranteed:

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

Given a liberal interpretation of "Lands and Estates", or of "other properties", it can be argued that Maori were guaranteed their existing ownership of oil and gas at common law, under the Treaty. It matters not that Maori people were unaware of their ownership. Ownership does not depend on whether one knows what is owned. The Treaty guaranteed Maori their possessions, one of which, at common law, was oil and gas. The broader nature of "rangatiratanga" guaranteed to Maori in the Maori version of article two would support this interpretation, (more will be said on rangatiratanga in the next section). The possibility that "minerals" may have been guaranteed to Maori under the Treaty has been recognised in the Working Papers of the Resource Management Law Reform review.[16] Thus the

expropriation under section 3 of the Petroleum Act 1937 would clearly be a breach of the guarantees in the Treaty and is likely to prejudicially affect those who could have had interests in oil and gas. This could and has given rise to claims to the Waitangi Tribunal.[17]

The difficulty with this approach is the unsettled nature of the common law. Added difficulties include the confiscation of oil bearing land prior to 1937 under the New Zealand Settlements Act 1863 and the question whether interests in oil and gas can be severed from the main interest in land. The writer does not propose to discuss these issues.

(2) THE PRINCIPLES OF THE TREATY OF WAITANGI

Much reference is made to these slippery beasts in recent legislation.[18] No doubt more will be made particularly in the resource management area as a result of the current review.[19] Although they are difficult to grasp and mostly intangible, they can provide directions for the Crown to follow.

The most authoritative statement on the principles and the Crown's obligations is found in New Zealand Maori Council v. Attorney-General[20]. The Court concluded the Treaty signified a partnership between Maori and pakeha, a solemn compact requiring both parties to act reasonably and in good faith.[21]

This relationship between the parties in turn was held to put fiduciary obligations on the Crown which extended to active protection of Maori people[22]. The Crown, the Court held, had a duty to ensure the Maori people could utilise their resources in the best way possible in the circumstances. The Court's conclusions on the principles of the Treaty accorded with the Waitangi Tribunal reports to that date.

In particular the Manukau Report emphasised the duty to actively protect Maori interests and the fiduciary nature of

this duty.[23] The Tribunal defined rangatiratanga as "full authority status and prestige with regard to their possessions and interests."[24] The Orakei Report confirmed that rangitiratanga meant more than the English translation and that Maori people were guaranteed full authority and mana over their lands.[25] The Muriwhenua Report again confirmed the guarantee of full authority.

Thus the fundamental principles of the Treaty are fairly settled. They were set out and explained by the Parliamentary Commissioner for the Environment as:[26]

(1) Partnership - exercised with utmost good faith, analogous to a fiduciary relationship.

(2) Active protection - ensuring Maori retain sufficient resources for their foreseeable needs.

(3) Tribal rangatiratanga - tribal control of tribal resources.

These principles were expanded upon in the Crown's recent statement on the principles of the Treaty of Waitangi[27]. Five principles were set out.

(1) The principle of government: the Government has the right to govern and make laws.

(2) The principle of self management: the iwi have the right to control their resources as their own.

(3) The principle of equality: all New Zealanders are equal before the law.

(4) The principle of reasonable cooperation: reasonable cooperation on issues of major concern.

(5) The principle of redress: the Government must provide effective processes for resolution of grievances.

The essence of these principles is contained in the trade off between the principle of government and the principle of self management. The Crown recognises that the latter should take precedence where resources and taonga have been retained. Where there is a general need which can only be managed at a national level, the Crown asserts that it must act on behalf of all New Zealanders.[28]

The position of oil and gas within this framework is uncertain. It must be remembered that these principles represent those by which the Government will act when dealing with Treaty issues. This does not imply that they are the definitive statement on the subject. They are, however, in the most part consistent with prior statements. It has now to be considered, what the implications of these principles are.

Implications of the Principles

The first implication is that complete Crown ownership and control of the oil and gas resource is inconsistent with these principles. The mana of a tribe must be reduced by entry on to their land and removal of a resource without permission or compensation. Maori must share in the royalty revenue collected by the Crown. One partner receiving all the benefits of a partnership resource is clearly wrong. The argument which won the day in the debate over the Petroleum Bill was that oil and gas belong to the people of New Zealand and Crown ownership can ensure equal benefit to all.[29] Maori people deserve equal benefit under article three of the Treaty, but much more under article two. The pakeha was not guaranteed anything in article two, so to treat the two races equally as regarding ownership and control of a source of wealth is to benefit the pakeha. The famous words of Hobson - "He iwi tahi tatou - We are now one people"[30] are today recognised as untrue.

This is not a situation where there is a danger to all or a general need requiring national Crown action.[31] International experience has shown that tribes can control oil and gas resources without hindering the exploitation of the resource. There is no reason to suggest control and ownership could not be shared effectively.

The Maori right to full control and authority over their resources may derogate from the simplicity of sole Crown ownership. According to Sir Apirana Ngata, however, the Ngati Porou of the East Coast District had been in agreement with oil companies since 1881. The agreements allowed the companies to prospect and gave the landowners royalties (5 percent) upon discovery.[32] It may not be that difficult to achieve then.

The Court of Appeal recently recognised that partnership does not necessarily mean an equal division of the claimed asset. This will depend on the contributions (if any) other parties have made to the asset.[33] It is difficult to imagine who else should share in the royalties. The big players in New Zealand petroleum exploration no doubt would wish to have an input in the control over the resource and their contribution to such a risky business would need to be recognised.

The Manukau Report showed that Maori aspirations and mining were not inconsistent. Maori people are aware of the aims of big business; business people should be aware of the aims of Maori. The problem is shown in the Manukau Report.[34]

> Industrial development and Maori interests need not conflict. The cardinal cause of complaint is twofold, that the tribes have not been adequately consulted on developments that affect their interests in the lands and fisheries of an area, and that they receive no benefit from the utilisation of those resources of the lands and waters that they have not freely alienated.

An important consequence of partnership, recognised in the Muriwhenua Report[35] is the principle of mutual benefit. Both parties to the Treaty should gain from it. Both should benefit

from new technologies, new markets and new resources. Since neither party knew of the existence of petroleum in 1840, both should benefit from its relatively recent discovery.

Thus these basic principles require a change in the structure of ownership and management of oil and gas. Maori tribes should share in the resource and benefit from the wealth it produces. The Crown must actively encourage Maori control and development of their resources. The solemn compact of the Treaty of Waitangi requires the Crown to share the benefits of a resource which it obtained access to by way of the Treaty.

Further Principles

Although many specific principles can be drawn from the materials, the writer will concentrate on two further obligations which can be drawn from the Treaty and which are based on the fundamental principles referred to previously. The first is the fiduciary-like obligations of the Crown to the Maori people. The second is the Maori people's right to development of their natural wealth and resources. Both of these have implications as to whether Maori people should be able to share in the oil and gas resource, and how this sharing should be achieved.

Fiduciary Obligations

The difficulty is moving from the Court of Appeal's recognition of the Crown's fiduciary-like obligations, to ones which can be enforced in the courts. A fiduciary must act honestly and in the best interests of the beneficiaries. A fiduciary must not profit by reason of their position. These propositions are well settled.[36] The Crown must utilise the oil and gas resources under Maori owned or Maori customary land in the best interests of the Maori people. The Crown is likely to be failing this obligation given Maori have no input as to the use of the resource, nor receive royalties from mining.

The Crown must not profit from dealing in the oil and gas or the licences to retrieve it unless the profit is passed on to the beneficiaries. Nga iwi o Taranaki have been denied the benefits from their former land by a combination of confiscations under the New Zealand Settlements Act 1863, and the expropriation of oil and gas in section 3 of the Petroleum Act 1937. With all of New Zealand's oil and gas production coming from in or offshore of the Taranaki region it is easy to see the Crown is benefitting at the expense of Nga iwi o Taranaki.

Granting oneself a mining licence over potentially valuable land would also be a breach of the fiduciary duty.[37]

- Enforcing the fiduciary duty -

In Guerin v. The Queen[38] the Supreme Court of Canada allowed the plaintiffs to recover $10 million damages for the Crown's breach of a unique fiduciary duty owed to them. The plaintiffs were members of the Musqueam Indian Band in Vancouver. Part of their reserved land was surrendered to the Crown to be leased as a golf course. Indian reserve lands must be surrendered to the Crown before they can be sold, leased or otherwise dealt with.[39] The Crown leased the lands at bargain rates with restricted increases available in the rents. The Indians thought they had agreed to more favourable terms and did not find out the difference until 12 years later. Upon finding out they sued the Crown for breach of trust.

The trial judge found that the Crown was a trustee and was liable for breach of the trust. The Federal Court of Appeal per Le Dain J. concluded that no trust was created by the surrender and the Indians could not, therefore, recover for breach of it.[40]

The Supreme Court agreed with this conclusion but based the Crown's liability on the existence of another equitable

obligation, a fiduciary duty. The Crown had a discretion to decide what use of the land was in the best interests of the Indians. It had an obligation to act in their best interests. This obligation arose from the Indians having an aboriginal title to the land and having to surrender the title to the Crown before it could be dealt with.

This was sufficient to impose a fiduciary duty on the Crown. The Crown breached its fiduciary duty by obtaining a much less valuable lease than that agreed upon. The damages awarded by the trial judge of $10 million were upheld.

The application of this fiduciary obligation in Canada has proven difficult and uncertain.[41] This is principally because of its undeveloped nature. An argument could be made for its application in New Zealand.

The Crown has an obligation to act in the best interests of the Maori people under the principles of the Treaty already discussed. The Maori people have or did have an interest in oil and gas beneath their lands either by way of aboriginal title (discussed later) or common law ownership. The Crown has a discretion under the Petroleum Act 1937 as to how the Maori people can benefit. Section 12(1) allows the Minister to grant mining licences on such terms and conditions as the Minister may specify. These terms could include provision for benefit to the Maori tribe involved. Section 18(2) allows the Minister and the licensee to agree on royalty payments before the licence is extended to a specified term. Such an agreement could include the relevant Maori tribe in the benefit of the royalties.

Professor D.E. Fisher, an expert on natural resources law, has recognised the wide powers of the Crown to engage in petroleum development. Such development can be undertaken by an agent appointed to act on behalf of the Crown.[42] Until recently this agent has been Petrocorp Ltd. It is possible that Maori

tribes could be appointed as Crown agents enabling them to participate in prospecting and mining. This would allow some sort of sharing within the existing scheme.

The difficulty is that at present the Crown's treaty obligations are not enforceable at law. So there is no legal obligation to act in the best interests of the Maori people. If the principles of the Treaty of Waitangi were given positive application (as they may be in the coordinated resource management legislation) this would create such an obligation. The Crown would have a legal obligation to act in the best interests of the Maori people and a discretion as to how to do so. Little direct benefit has been received by Maori for the utilization of their resources so a breach of the obligation would be easy to establish. Damages equivalent to the share a partner should receive, could be awarded.

Another approach to creating a legal obligation is by way of the trust. In Guerin the Supreme Court rejected the arguments that an express, implied or constructive trust arose. The problem was that essential basic elements of a trust were missing, primarily the subject matter of the trust and its purpose were uncertain.[43] Lack of the essential elements was also the simplified reason for the failure of the argument that the Crown was a trustee in the cases Kinloch v. Secretary of State for India[44] and Tito v. Waddell (No. 2)[45]. These cases show the Crown is unlikely to be a trustee unless it consents to this and there are express words creating the trust. Even if a trust is found it is likely to be an unenforceable political obligation rather than an enforceable equitable one.

- Fiduciary obligations in the United States of America -

A guide to the substance of the fiduciary obligations regarding oil and gas can be found in an examination of the American Indian position in the United States of America (U.S.).

The Federal Government of the U.S. exercises "broad but not unlimited"[46] power over Indian affairs. This power was established by way of discovery, vesting ownership of the fee simply in the Government.[47] This fee simple was subject to the Indians' right of possession under aboriginal title.

> The relationship is also distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians.[48]

In general Indian reservation land is held on trust by the U.S. for the Indians. Whether Indian tribes have ownership over the mineral resources under their lands depends on the treaty or statute which created their interest.[49] In U.S. v. Shoshone Tribe of Indians[50] the relevant treaty reserved a mineral rich area of land (which was known to the U.S. to contain minerals) for the "absolute and undisturbed use and occupation" of the tribe. The Supreme Court held that in light of this phrase and the policy of the Government to deal fairly with the Indians, the tribe owned the minerals.

Although no specific land was set aside under the Treaty of Waitangi it could be argued that the terms of the Treaty and the policy of the British Government were so similar to this case, that the result should be the same for customary Maori land.

The typical situation in the U.S. is that Indian tribes have beneficial ownership of the minerals on their reservations whilst the U.S. holds the legal title in trust for them.

Tribes can lease their land for mining[51] and more recently have been enabled to enter into direct agreement with mineral developers with respect to exploration, production and sale of minerals.[52] Such agreements are subject to the approval of the Secretary of the Interior. A tribe can also create its own constitution providing for the development of their mineral

resources.[53] This constitution is also subject to approval by the Secretary. Such a constitution is subject to federal law but otherwise would govern the tribe's dealings with mineral developers and their activities on tribal land.

Consistent with tribal sovereignty over their lands, they can tax business activities conducted thereon.[54] Tribes can, therefore, bargain for royalties from mineral developers, and tax their activities on reservation. This gives them (where their mineral reserves are plentiful) considerable wealth and power. One writer suggests the stakes are enormous and that a domestic OPEC has been created.[55]

In overseeing the mineral agreements entered into by tribes, the Secretary of the Interior owes fiduciary obligations to them. The Secretary must ensure that tribes get the maximum benefit from minerals on their land.[56] For lease agreements the Secretary must ensure the Tribe gets the maximum royalty payment.[57] Other duties are set out in statute and include the obtaining of satisfactory performance bonds from the lessee and satisfactory bids for any leases being sold.[58]

The Secretary's obligations in regard to mineral agreements are also set out in the statute.[59] In deciding whether to approve an agreement the Secretary must have regard to:

(1) The potential economic return;

(2) The potential environmental, social and cultural effects; and

(3) Dispute resolution procedures.

Section 2103(e) of the Indian Mineral Development Act of 1982 expressly preserves the fiduciary duty of the Secretary. The same section states the U.S. shall not be liable for any losses sustained by a tribe under an agreement. Obviously a

difficulty will arise where losses occur under an agreement due to a breach of the Secretary's fiduciary obligations. For example the Secretary might not have regard to liability for environmental damage and the Tribe might suffer loss. The conflict is unresolved but will most likely be decided in favour of the Indian tribe given the policy of interpretation in favour of the Indians. The section was created so that the U.S. did not become general insurers for Indian business ventures, which is clearly a risk given the guardian-ward relationship between the U.S. and the tribes.

Another unresolved problem is where the Secretary has a conflict of duties. An example is where there is an oil shortage. The Secretary would have a duty to ensure adequate oil supplies, but also a duty to obtain the best price for the tribes. These may not necessarily conflict but there is no indication as to which would prevail.[60]

In summary, the fiduciary obligation of the U.S. is discharged by ensuring the Indians have an interest in oil and gas (and other minerals) on their land and they receive the maximum benefit from this interest.

This provides clear guidance to the Crown in New Zealand as to how the fiduciary obligations to Maori, under the Treaty, should be discharged.

The Right to Development

In the Manukau Report the Waitangi Tribunal made it clear the Maori people were not averse to development. Indeed they were developers and exploiters of resources much like the Pakeha.[61]

The Muruwhenua Report introduced the idea of the right to development[62], emphasising the mutual benefit to be had from the Treaty.

> The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty (The Crown has generally accepted these principles ...)[63]

Article One of the Declaration on the Right to Development states:[64]

> 1. The right to development is an inalienable human right by virtue of which ... all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, ...
>
> 2. The human right to development also implies the full realisation of the right of peoples to self determination, which includes, ..., the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article Three states:

> 1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

The concept of "ethno-development" is of fairly recent origin but includes full control over the resources under traditional lands and the right to participate in scientific advancements.[65]

Although Maori people cannot enforce this obligation until it is enacted in municipal law, it creates an obligation at international law. The Crown is obliged to share the benefits of new technology and new resources. This was the outcome of the Muriwhenua Report, the Crown was obliged to share the new found off-shore fishery resource. The Crown was morally bound to support a Maori fishing industry so that both Maori and Pakeha could share in the resource.[66] The result is the now hotly disputed Maori Fisheries Bill[67] which allocates 50 percent of the total allowable take of fish to Maori tribes over a 20 year period. The Bill also proposes to make $2 million a year available to assist Maori tribes in establishing their fishing business. Despite the "catches" in the Bill, particularly the exclusion of fishery claims to the Waitangi Tribunal and the repeal of section 88(2) of the Fisheries Act

1983, it represents a valuable recognition of the right to development.

Recent developments have indicated that Maori tribes will get less than the share given by the initial Bill and less direct control over its use. In April of this year the Government proposed an interim solution of 10 percent over 4 years with the remainder to be settled by the courts. The latest development is a Government proposal to have pan-tribal control of Maori fisheries rather than direct tribal control.[67A]

In the Te Reo Maori claim[68] it was recognised that Maori people should share in the new methods of communication (TV, radio) brought about by technological advancement.

Sir Apirana Ngata made the same arguments to the House in debate over the Petroleum Bill 1937.[69] He said:

> Did the Maoris know that there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them today? If so, it will not hold water.

R.P. Boast makes a similar argument. He says that Tribes could argue that had they retained their land they would have developed and profited from the resources under them.[70]

Clearly it is unjust to restrict the Maori to traditional uses of land and methods of business. If the Pakeha were so constrained they also would not benefit from the oil and gas resource.

It is well known that Maori people used and traded in other minerals particularly pounamu (greenstone) and obsidian for adzes and other tools.[71] The Ngati Tahu of Taupo have a

claim before the Waitangi Tribunal concerning Crown expropriation of the geothermal resource they traditionally used.

All these mineral resources would be a taonga under the Treaty (article two of the Maori version) and thus should be protected. Given the natural development of societies it is submitted that Maori tribes may well have discovered and exploited the oil and gas resources below their lands. The Crown should not deny them this right simply because it got to it first.

The right to development is consistent with the view that the Treaty is a "foundation for a developing social contract". As part of the principles of the Treaty of Waitangi it constitutes an obligation which the Crown is at least morally obliged to fulfil. If the principles of the Treaty of Waitangi were enacted in the proposed "Statute of Consistency" for resource use [72], then the obligation may be a legal one.

Summary on Implications of the Principles

The fundamental and further principles discussed above show the Crown has an obligation to give Maori control of the oil and gas under their lands. Nothing else will fulfil their Treaty obligations. Negotiation, however, could and most probably would see the current regime remain while Maori perhaps share in the revenues or are compensated for their loss as with forests. Such a share would be a valuable step in the economic advancement of the Maori, something which is essential if New Zealand desires to maintain its godzone image. Any settlement which fails to grant full control to Maori over their resources, however, cannot be expected to be final.

(3) ABORIGINAL TITLE TO OIL AND GAS

Aboriginal title is a unique interest in land which entitles native peoples to occupy and use their traditional lands. The Crown's acquisition of sovereignty did not affect this right and in this way the Treaty is declaratory of the Maori aboriginal title.

The importance of establishing aboriginal title over lands containing oil and gas depends on the location of the land.

(1) Territorial waters and land

In this area the Crown owns the oil and gas. Aboriginal title claims would only be of relevance to show the Crown had breached its fiduciary duty and its Treaty obligations to the owners of the title.

(2) The exclusive economic zone

Here the Crown does not own the resource. Aboriginal title claims, subject to recognition by the courts, could give Maori tribes some sort of right to the oil and gas underneath the area claimed. This would be subject to, or possibly removed by the Crown's rights under section 3 of the Continental Shelf Act 1964.

This is a simplification of the issues involved, further explanation of the detailed problems follows.

Establishing Aboriginal Title

In Hamlet of Baker Lake and Others v. Minister of Indian Affairs and Northern Development and Others[73] the Federal Court (Trial Division) of Canada set out the elements a native tribe must prove to establish aboriginal title. They are:

(1) The plaintiffs and their ancestors must be part of an organised society.

(2) The society must have occupied the territory which is being claimed.

(3) The occupation must have been to the exclusion of others at the time when sovereignty of the Crown was established.

The exact length of time the land must be occupied for is not settled. In the Baker Lake case it was suggested the land had to be occupied since the Crown's acquisition of sovereignty.[74] Some suggest a much lesser length of time but still a substantial period (20 - 50 years).[75]

Content of Aboriginal Title

Aboriginal title gives a tribe the right to occupy and use the land. This right of use allows the Tribe to draw all the profit the land may produce provided the structure of the land is not damaged.[76] The exact content of this right is not settled. One writer argues the title includes the right to exploit the mineral resources under the land.[77] P.G. McHugh, an authority on aboriginal title, contends that it is limited to traditional uses of the land.[78]

Aboriginal title in the form of a non-territorial customary fishing right has been recognised by New Zealand courts. In Te Weehi v. Regional Fisheries Officer[79] and in Ministry of Agriculture and Fisheries v. Hakaria[80] the Courts upheld Maori customary fishing rights but the right was restricted. The right could only be exercised for personal consumption and not for commercial benefit. The right had to be exercised for a proper purpose following a recognised tradition.

The cases are unclear, however, as to whether they are a recognition of aboriginal title or a recognition of fishing rights under the Treaty. Section 88(2) of the Fisheries Act 1983 provides little guidance.

If these cases do represent Maori rights under aboriginal title they may well be fatal to an oil and gas claim. Although they deal with different subject matter, they show that the right is very restricted. Such a non-traditional use as mining for oil and gas is unlikely to be within the scope of the aboriginal title. Nevertheless this is far from settled, so it is worthwhile considering further issues involved in an aboriginal title claim.

Extinguishment

An aboriginal title can be extinguished by native consent or by clear legislative intent that it is to be extinguished. As far as title to oil and gas in territorial waters is concerned, section 3 of the Petroleum Act 1937 would clearly extinguish aboriginal title. Aboriginal title may still be claimed over areas in the exclusive economic zone.[81] If a Maori tribe could establish that it used a certain fishing ground to the exclusion of all others in 1840, then it may follow the tribe has a right to exploit other resources of the area (oil and gas). Of particular relevance is the Maui field which is situated just outside the twelve mile limit. Subject to the courts giving a less narrow content to aboriginal title, such an area could feasibly be the subject of a claim.

The effect of section 3 of the Continental Shelf Act 1964 may not be fatal to such a claim. Instead it may be seen as confirming the fiduciary relationship between the Crown and the tribe. The Crown may control the rights to exploit the resources for the benefit of the Maori tribe who have a proprietary interest in them. The Crown would be under the same obligations as existed in Guerin[82].

Section 155 of the Maori Affairs Act 1953 provides that Maori customary title to land shall not be enforceable by proceedings in any Court against the Crown. Obviously this bars claims of aboriginal title to land, but it is recognised that non-territorial aboriginal title (as in Te Weehi[83]) could still be enforced against the Crown.[84] Such a non-territorial aboriginal title claim to oil and gas has been recognised as a possibility by a leading New Zealand commercial lawyer.[85]

Compensation

Extinguishment of a valid aboriginal title brings with it an obligation on the Crown to pay damages. There is a presumption to this extent[86] but jurisdictions differ as to when it arises. In the United States compensation is only payable where the aboriginal title has been recognised.[87] Title can be recognised by statute or treaty. In Canada it makes no difference whether title is recognised or unrecognised,[88] compensation is presumed as with the taking of any private proprietary right.[89]

Even if the U.S. rule is applicable in New Zealand, it is submitted that the Treaty, being declaratory of Maori aboriginal rights, would be sufficient recognition to give rise to the presumption that compensation is payable.

Where there is an extinguishment of aboriginal title it requires clear words in the statute to rebut the presumption.[90]

Section 39(1) of the Petroleum Act 1937 entitles every person injuriously affected by the Act to full compensation. Section 39(5), however, expressly denies compensation in respect of petroleum existing in its natural state. This would seem clear enough to rebut the presumption in favour of compensation.

The same restriction on compensation applies to the exclusive economic zone by virtue of section 4 of the Continental Shelf Act 1964.

Compensation for loss of the aboriginal right to the oil and gas resource is therefore statute barred. Recognition of the interest, at least outside territorial waters is still possible. P.G. McHugh points out the difficulty that Courts will be faced with when asked to recognise a proprietary interest outside New Zealand's territory. He argues the Waitangi Tribunal will have no such difficulty.[91]

Aboriginal title at common law, therefore, provides little hope of giving Maori an interest in oil and gas. It is merely an indication of the Crown's breach of its fiduciary and other Treaty obligations to the tribes. Aboriginal title did exist but has been extinguished and compensation has been denied. It is unlikely that the courts will even recognise aboriginal title as having extended to include the right to exploit oil and gas reserves.

This avenue has been blocked and it is submitted that the repeal of section 155 of the Maori Affairs Act 1953 will not clear the way. Compensation will still be barred by the Petroleum Act 1937.

The fixed nature of aboriginal title also means it is an inferior right compared to the dynamic application of the Treaty principles.

- OTHER JURISDICTIONS -

Alaska (U.S.) and Australia have both made attempts to deal with aboriginal ownership of minerals or compensation for loss of them. A brief view of their solutions will be given.

The Alaska Native Claims Settlement Act 1971[92]

The Alaska Native Claims Settlement Act 1971 (the Act) can be seen as a recognition of natives' right to share in the benefit of natural resources under traditional lands. The Act was designed as a comprehensive settlement of all native claims based on aboriginal title in Alaska. In return for extinguishment of all aboriginal title or claims to such, native Indians were granted 40 million acres of land and $962 million in compensation.

Royalties on oil and gas were to be paid at a rate of two percent of the gross value of minerals recovered.[93] This payment was to cease after $500 million had been paid.

Alaska was divided into 12 regions composed of natives of common heritage with one extra region for non residents. Each region forms a corporation which utilizes the assets granted to it with a view to profit. Each native is granted shares in these regional corporations. In order to protect the corporations from outside takeover, a 20 year ban on sale of shares in the corporations was imposed. This is due to expire in 1991.

Despite the Act's declared intention to be a comprehensive and final settlement of aboriginal claims, it has been beset by slow distribution of funds and protracted litigation.[94] In 1987 amendments were made to the Act to allow shareholders to have more control over the activities of the corporations and to allow them to prevent outside takeover.[95]

The effect of the Act on aboriginal title to the continental shelf was not clear, however, and this led to litigation attempting to stop the Secretary of Interior offering leases for oil and gas exploration on the continental shelf. In People of Village of Gamble v. Clark[96] it was held that the words "... in Alaska ..." extended to cover the continental

shelf and thus aboriginal rights over it. This was based on the Congressional debates and submissions preceding the Act. The fact that the Act was intended to be a comprehensive settlement also swayed the United States Court of Appeals.

Of interest in the case was the plaintiffs' assertion that their right to hunt and fish gave them a concomitant right to the minerals underlying the traditional fishing grounds. The Court of Appeals did not need to decide this but the impression given is that it was assumed.[97]

Despite the difficulties experienced, the Act represents a clear recognition that aboriginal title does or should extend to include oil and gas reserves beneath traditionally used areas. The success of such a one-off settlement seems to have been rather naively assumed. A similar settlement in New Zealand would be plagued with difficulties also, given that the real need is for control over resources and full tribal rangatiratanga.

Australia

The failure to recognise Aboriginal sovereignty prior to colonisation has left Aborigines reliant on legislation for any land or mineral rights. The landmark decision in Milirrpum v. Nabalco Pty Ltd[98] held that Australia was a settled colony and thus the doctrine of aboriginal title did not apply without legislative recognition. The Aborigine argument was that the native clans had been in possession since time immemorial and held common law rights over these lands. The rights extended to ownership of the minerals (bauxite) beneath the lands. Thus Crown grants of leases to mine the bauxite would be invalid.

The Supreme Court of Northern Territory rejected the Aborigine argument and with the absence of a Treaty guarantee this left the Aborigines reliant on the whim of the legislature.

The decision in Milirrpum v. Nabalco Pty Ltd has not been entirely accepted, although it still remains the law. The split decision of the High Court of Australia in Coe v. Commonwealth of Australia[99] on the point of whether Australia was settled or conquered allows some scope to argue aboriginal title may still be relevant.

Some efforts to redress the landlessness and economic powerlessness of Aborigine have been made by Commonwealth and State parliaments. Two Acts in particular will be concentrated on. These are the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) and the Aboriginal Land Rights Act 1983 (NSW).

- Aboriginal Land Rights (Northern Territory) Act 1976 -

The Act sets up Land Trusts for the benefit of Aboriginal owners entitled by traditional use of the land.[100] Land is granted to the Trusts pursuant to a recommendation made by the Aboriginal Land Commissioner based on land claims made to this person by aboriginal natives. Section 12(2) of the Act reserves minerals, in land granted to Trusts, to the Crown.

Aboriginal Land Councils are set up to administer the use of Trust land. No mining on Aboriginal land is permitted except with consent of the Aboriginal Land Council or where the Governor-General declares that mining is in the national interest.[101] Thus the Land Councils effectively control entry onto their lands by mineral developers. Section 43 of the Act allows Land Councils to negotiate with developers for payment in return for their consent to mining. Although this does not mean a share in royalties, the Crown retains these (section 16), it allows for substantial control and benefit from resource development.

Payments received by the Crown, other than royalties, for grants of mining interests are to be passed on to the Land

Councils.[102] Where mining is undertaken by or on behalf of the Crown, royalties that the Crown would have received are to be passed on to the Land Councils.[103]

The Aboriginal Land Councils cannot consent to mining operations without ensuring the traditional owners are fully informed of the agreement, consent to it, and its terms are reasonable.[104]

The system allows Aborigine owners to decide for themselves, to what use their land will be put. It maintains their dignity and allows them to benefit from what was traditionally theirs. The exception where mining is deemed to be in the national interest is uncertain and ensures that full sovereignty over their land is not given.[105]

This residual Crown control is an attempt to balance Aboriginal rights with national interests. The approach is understandable but objectionable from the standpoint of full control over aboriginal resources.[106]

- Aboriginal Land Rights Act 1983 (NSW) -

This Act differs from the Northern Territory equivalent in several important aspects. First, grants of land to Aboriginal Land Councils do not reserve all minerals to the Crown. Only gold, silver, coal and petroleum are reserved.[107] Consent of the relevant Land Council is necessary to mine on aboriginal lands, except where legislation provides otherwise in relation to coal, petroleum, silver and gold. Consent can be given subject to payment of fees or royalties as the Land Council thinks fit.

Second, there are no exceptions to allow mining on Aboriginal land where the owners do not consent. The national interest is not allowed to override Aboriginal control.

Third, the right to negotiate as to fees for consent to mining, extends to agreement that royalties be paid.[108] This increases the value of the veto far beyond that given in the Northern Territory.

The major reservation in the Act is that relating to silver, gold, coal and petroleum. Full control and benefit of traditional lands is thus effectively denied.

The Australian legislation shows the reluctance to grant Aborigines control over their lands and resources. There is obviously a conflict between the national interests (control over scarce resources) and those of the Aborigines. The solution in most States has been to allow restricted benefit from minerals. Control over petroleum or benefit from its discovery has been conspicuously denied to the Aborigine.

FORTHCOMING TRIBUNAL CLAIMS

The most significant claim with regard to petroleum will be that of Nga Iwi o Taranaki. The claim alleges that Nga Iwi o Taranaki were wrongfully described as in rebellion against the Crown and therefore lost land under the New Zealand Settlements Act 1863. Compensation is sought for the loss of benefits from petroleum development that should have rightfully accrued to them. It is unfortunate that the claim is being made for compensation only rather than control or ownership of the resource. This seems to be a result of the lack of expertise counsel have in this area. Given that the Taranaki area contains all of New Zealand's petroleum mining operations, the recommendation of the Waitangi Tribunal will be of great significance.

The Ngati Tahu of Taupo seek acknowledgment of traditional Maori ownership and use of energy and minerals in geothermal areas. The claim is principally concerned with ownership of the geothermal energy resource, expropriated by the Crown under

the Geothermal Energy Act 1953, without compensation. The likelihood of success in this claim is higher than with petroleum because the resource was traditionally used and would clearly be a taonga guaranteed under article two.

Finally, the Tainui "Raupatu" claim, principally concerned with confiscation of lands and the coal under them, is to be heard next year. Their case, considered by the Court of Appeal recently, will be discussed below.

RECENT CASES

Two recent cases have been heard with implications on Maori claims to a share in petroleum.

In M.R.R. Love v. Attorney General[109] the plaintiffs sought an injunction to stop the Labour Government's sale of its shares in Petrocorp Ltd to Fletcher Challenge Ltd. The basis of the claim was that the plaintiffs (representing Nga Iwi o Taranaki) had a claim before the Waitangi Tribunal. This claim might result in a recommendation that shares in Petrocorp Ltd be given as compensation to the Tribe for past wrongs. The sale of the shares, it was argued, precluded the plaintiffs from getting redress which they may be entitled to.

The plaintiffs argued that they were likely to receive recognition from the Tribunal, of their rights to petroleum as a natural incidence of the rights guaranteed under the Treaty.

Ellis J. rejected the plaintiffs' arguments saying neither the Ministry of Energy Act 1977 or the Finance Act 1982 (which empowered the sale) required account to be taken of the Treaty of Waitangi. The Judge held he was not empowered to give effect to the Treaty in considering the sale of Petrocorp shares. This conclusion is open to question given the decision in Huakina Development Trust v. Waikato Valley Authority.[110] Nevertheless Ellis J. based his decision principally on

administrative law, holding that as the plaintiffs had no right, power or privilege affected by the decision to sell, it was not reviewable under section 4 of the Judicature Amendment Act 1972.

The decision is a sad one as it represents a victory for expediency over honouring the Treaty. Clearly the sale of Petrocorp Ltd without any regard for Maori claims to its assets or the petroleum resource, breaches the Treaty obligations of the Crown. Little will be left to compensate the Maori people if such actions are allowed. The dispute would be better dealt with over the negotiating table rather than in the courtroom, where concentration on legal rights disguises the true obligations.

The Tainui Case[111]

This case turns on the issue of whether a mining licence is an interest in land. The Tainui claim that the Crown transfer of coal mining licences to Coal Corporation are subject to the "claw-back" provisions of the State Owned Enterprises Act 1986[112]. If the Court were to find that such licences are an interest in land, then they would be subject to a binding recommendation of the Waitangi Tribunal[113]. If the Tribunal were to recommend that the licences be granted to Tainui as redress for the losses under the New Zealand Settlements Act 1863 (or other Crown acts) then the Crown would be bound to transfer the licences to Tainui. Tainui could then sell the licences to whom it pleased (almost certain to be to Coal Corporation who would be reimbursed by the Crown).

The value of the land involved (in dollar terms) depends almost entirely on whether the coal is included as part of it. The attractiveness of the Government's sale of Coal Corporation also depends very much on its ownership of the mining licences. The Tainui argument is that the coal under their land is a natural incident of lands guaranteed to them. They

also submit the coal is a taonga used by them for heating and as a koha (gift). The claim is then a two stage one. First a mining licence must be recognised as an interest in land. Then the Tainui must satisfy the Waitangi Tribunal that coal was guaranteed to them under the Treaty.

If these arguments succeed the Tainui will have won a major battle in securing tribal control over resources. They will also have secured a valuable economic base.

A SOLUTION: FACTORS TO CONSIDER

1. Ownership of Petroleum

Crown ownership provides a simple basis for negotiation and acquisition of mining rights. The vagaries of the common law are avoided and arguably the Crown can act in the interests of all New Zealanders. Diversified ownership may discourage developers from entering what is already a difficult and risky business.

Ownership and control, however, do not have to be vested in one body, as Australian and United States examples show. The difficulty is in balancing the owners' interests against the controllers, particularly where the Crown is the owner and Maori tribes are to be in control.

2. Control

Full tribal rangatiratanga requires full control and authority over resources under customary land. It is in the national interest, however, to ensure maximum benefit from our natural resources and a continued local supply of scarce energy.

Again diversified control of resources may discourage developers' entry into the business although this has not posed a problem in the U.S. Maori tribes have shown they are not

averse to development and no doubt would welcome the financial boost.

An example of loss of control within a negotiated settlement is shown in the forestry case. Control of forests on customary land has been denied to Maori tribes. The Crown Forest Assets Bill 1989 does not remedy this but represents significant recognition of the need to compensate for this loss. The Waitangi Tribunal is again given binding powers regarding the return of land. Compensation equal to the market value of the trees is to be paid to the affected tribe (under clause 23 and the First Schedule to the Bill). No ownership or control is given but a 100 percent share in the value of the resource on customary land (land which the Waitangi Tribunal recommends to be returned) is granted.

In order for the Crown to continue its active protection and the discharge of its fiduciary obligations some overriding control would need to be retained. One-off settlements such as the forestry one above, which enable Maori to divest themselves, may be consistent with self determination, but do not provide the required continued protection of tribal resources. This overriding control could simply be Parliament's ability to legislate for changed circumstances, but it must be used effectively to prevent current generations of Maori giving up their resources to the detriment of generations of the future.

3. Beneficiaries

This is the problem of who should benefit from a share in the resource. Should only those tribes located in areas where oil and gas are mined benefit? Or should all the tribes of New Zealand benefit? The Alaskan settlement addressed this by distributing the royalties according to membership. No special benefits were accorded to the tribe whose land covered the resource. Thus the regional corporation with the most members

received the most royalties and that with the least, the least. This seems to be the most equitable solution since having land over such fugacious resources was a matter of good fortune.

4. Tribal or Pan-Tribal Control

Given that all Tribes should benefit from a share in the resource, it is logical that the administering body should be pan-tribal. This would lessen the difficulty of having to deal with different bodies in different areas. The Crown and the new body would form two separate systems of control. Conditions of licences, royalty rates and other controls would be matters for the new body. It might be considered that uniform environmental standards ought to apply, but it is hardly likely that Maori would allow less stringent standards than the Crown.

This structure does not fit easily with the recent move to promote iwi authorities in the Maori Affairs Restructuring Bill 1989. Petroleum exploration companies cannot be expected to deal with many different bodies who may have widely varying terms and requirements. It is in the national interest that the already risky business of prospecting for valuable petroleum is not further complicated. A pan-tribal authority would allow minimum administrative complication while providing adequate representation. Representatives from each iwi authority could constitute the petroleum authority.

A pan-tribal system has been recently promoted[114] for control of Maori fisheries but has met with strong criticism principally because tribes have traditionally controlled their fisheries. The case is different for petroleum where no such traditional control existed (except over the land above). A pan tribal authority is logical given the need to recognise the contributions of petroleum developers.

5. Geographic Divisions

A fair settlement would be division of New Zealand into half. The location of each half is crucial. The Taranaki region and surrounding sea would have to be negotiated, with full knowledge of where the major fields lie. A half share in this area may not satisfy Nga Iwi o Taranaki but it would be a major step forward compared to the current share.

6. Political Will

This is the crucial ingredient. It seems obvious the obligation to share in the resource exists. Whether or not it is legally enforceable is really insignificant, given that Parliament can quickly unenforce it. Such a sharing would be misunderstood by many and would be much disliked. It would cost a party precious political support in the forthcoming election year. The year 1990 would be appropriate, however, because it represents the 150th anniversary of Parliament's licence to exist. Recognition of the mutual benefit to be obtained from resource sharing would be a major step in our history.

A POSSIBLE SOLUTION

From the factors above emerges a basic scheme which could satisfy Maori aspirations and the Crown's obligations. The writer is not an oil-field administrator, so the solution will be very basic in content.

A pan-tribal authority would be set up, in which ownership of petroleum would be vested. The areas covered by the authority would be agreed on by negotiation but should approach a half share of existing resources and a half share of the total area of existing Crown control.

The authority would have full control over the exploration and mining for petroleum over its area. This would include the collection of royalties and setting of environmental standards. Royalties would be distributed to tribes (or iwi authorities) on a membership basis, with membership determined by independent calculation.

The Minister of Energy would retain a right to veto any mining agreement where it is in breach of the Crown's fiduciary obligations. An example of this is where the agreement provided clearly inadequate fees or royalties to the authority. Another is where the authority divested itself of ultimate control or ownership over the resource. Where issues of national concern arose, for example an energy crisis, the parties would be expected to negotiate a solution giving reasonable cooperation to each other. No power to approve of mining in the authority's area would be given to the Crown. The Crown would be unable to allow mining where the authority refused to give consent.

The Crown should provide resources for the establishment of the authority, but the authority should fund itself thereon from royalty and licence revenue.

Should the authority choose to develop fields itself then the Crown should assist in funding the venture to a limited extent. The authority should be encouraged to raise finance in the financial markets and become self reliant. Initially this may be a little optimistic and Crown support will be required, but only for adequate return. The Crown should not become an insurer for the authority's ventures. The veto power of the Minister may ensure this.

Overriding control will lie with the Crown in the form of Parliamentary sovereignty.

CONCLUSION

This paper argues the case for a Maori share in the oil and gas resource. The writer has no doubts that such a share is warranted. Justice, the Treaty of Waitangi, international law and international practice all require the Crown to divest itself of the monopoly. 1990 provides an excellent opportunity for the Crown to recognise its obligations. The guarantee of rangatiratanga rings hollow without full tribal control over their resources.

Footnotes

1. Under section 3 of the Territorial Sea and Exclusive Economic Zone Act 1977.

2. Under section 3 of the Continental Shelf Act 1964.

3. Under section 4 of the Continental Shelf Act 1964.

4. For a different view of the effect of similar U.K. legislation see Lonsdale (Earl) v. Attorney-General [1982] 1 WLR 887, 947.

5. Under section 18 of the Petroleum Act 1937.

6. Ministry of Energy Petroleum Exploration in New Zealand: News February 1989, 30.

7. Ministry of Energy Overview: Resource Allocation and Rent Recovery (Welligton, January 1989), 5

8. For example a U.S. oil firm, Arco, paid the Government $1.5M for a 55 percent share in a prospecting licence. Reported in The Dominion Wellington, New Zealand 5 April 1989.

9. The Minister took a mining licence to the Ngaere field adjacent to the Waihapa field. The partners to the Waihapa licence are seeking judicial review of the Minister's action arguing it was made on the basis of information they had disclosed to the Minister. Petrocorp (Exploration) Ltd & Ors v. D.G. Butcher June 1989, High Court, Wellington CP 613/88, decision pending.

10. D.E. Fisher "State Participation in Petroleum Development in New Zealand" [1986/87] 7 OGLTR 190, 192.

11. Above n 7.

12. Hon. Sir Apirana Ngata, MP, NZ Parliamentary debates Vol 249, 1937: 1041.

13. Hon. Mr Bodkin, MP, NZ Parliamentary debates Vol 249, 1937: 1048.

14. Quoted in a speech by the Hon. Mr Fagan, MP, NZ Parliamentary debates Vol 249, 1937: 1236.

15. Set out in Borys v. Canadian Pacific Railway Co. [1953] AC 217,229.

16. Ministry for the Environment Resource Management Law Reform Working Papers No 1, 7; No 5, 23 (July, 1988).

17. Under section 6(1) of the Treaty of Waitangi Act 1975 as substituted by section 3(1) of the Treaty of Waitangi Amendment Act 1985. For example the claim on behalf of Nga Iwi o Taranaki seeking amongst other things compensation for loss of benefits from oil and gas under confiscated land.

18. For example section 6(1) of the Treaty of Waitangi Act 1975; section 9 of the State Owned Enterprises Act 1986; the long title of the Environment Act 1986 and section 4 of the Conservation Act 1987.

19. See Ministry for the Environment Resource Management Law Reform: Directions for Change, (August, 1988) 14.

20. [1987] 1 NZLR 641.

21. Above n 20, 664 per Cooke P, 673 per Richardson J.

22. Above n 20, 664 per Cooke P.

23. Waitangi Tribunal Manukau Report Wai-8 (July, 1985), 70.

24. Above n 23, 67.

25. Waitangi Tribunal Orakei Report Wai-9 (November, 1987) 149.

26. Parliamentary Commissioner for the Environment Environmental Management and the Principles of the Treaty of Waitangi (November, 1988), 19.

27. Department of Justice Principles for Crown Action on the Treaty of Waitangi (Wellington, July 1989)

28. Above n 27, 11.

29. Made by the Hon. Mr Webb, MP, NZ Parliamentary debates Vol 249, 1937: 1038-1039.

30. C. Orange, The Treaty of Waitangi (Allen & Unwin, Wellington, 1987), 55.

31. Above n 27, 11.

32. Hon. Sir Apirana Ngata, MP, NZ Parliamentary debates Vol. 249, 1937: 1041.

33. New Zealand Maori Council v. Attorney General Unreported 20 March 1989, Court of Appeal, CA 54/87.

34. Waitangi Tribunal, Manukau Report Wai-8 (July, 1985), 87.

35. Waitangi Tribunal, Muriwhenua Fishing Report, Wai-22 (June, 1988), 194.

36. P.D. Finn. Fiduciary Obligations (The Law Book Co. Sydney, 1977), 15.

37. Above n 9.

38. (1985) 13 DLR (4 ed) 321.

39. The Indian Act R.S.C. 1970 c. I-6 s 37 (Canada).

40. Guerin v. The Queen (1982) 143 DLR (3 ed) 416, 455, 470-1.

41. For example see article by Donovan W.M. Waters in Equity, Fiduciaries and Trusts T.G. Youdan (ed) (Carswell Co. Ltd, Canada, 1989), 411-425.

42. Above n 10 and

D.E. Fisher "Legal Stability and the Role of Government in Petroleum Exploration in New Zealand" [1987/88] 5 OGLTR 134.

43. Above n 38, 342.

44. (1882) 7 App Cas 619.

45. [1977] 3 All E.R 129.

46. F. Cohen Handbook of Federal Indian Law (1982 ed) (The Michie Co. Virginia), 207.

47. Above n 46, 209.

48. Above n 46.

49. Edward B. Berger "Indian Mineral Interest - A Potential for Economic Advancement" (1968) 10 Ariz LR 675, 680.

50. (1938) 304 U.S. 111.

51. Indian Mineral Leasing Act of 1938 25 USCA s 396.

52. Indian Mineral Development Act of 1982 25 USCA s 2102.

53. Indian Reorganization Act of 1934 25 USCA s 476.

54. Merrion v. Jicarilla Apache Tribe (1982) 455 US 130.

55. George D. Cameron III "Indian Taxation of Reservation Minerals - A Domestic OPEC in the Making" (1984/1985) 22 Am.Bus LJ 429.

56. Jicarilla Apache Tribe v. Supron Energy Corp (1986) 782 F.2d 855.

57. The majority in the case above adopted the dissent of Judge Seymour in the lower court, reported at (1984) 728 F.2d 1555, 1563. The authority for the footnoted statement is at p 1570.

58. Above n 51, s 396(b),(c).

59. Above n 52, s 2103.

60. A.G. Houle "Non-Lease Agreements Available for Indian Mineral Development" (1984) 24 Nat Resources J 195.

61. Waitangi Tribunal Manukau Report Wai-8 (July, 1985), 58,91.

62. Waitangi Tribunal Muriwhenua Fishing Report Wai-22 (June, 1988), 234.

63. Above n 62.

64. UN General Assembly 41st Session Resolution 128 4 December 1986.

65. See article by Benedict Kingsbury in Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi I.H. Kawharu (ed) (Oxford University Press, Auckland, 1989), 121 especially 141-143.

66. Above n 62, 239.

67. Bill No. 81-1 introduced by the Hon. C. Moyle, MP, 22 September 1988.

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68. Waitangi Tribunal Te Reo Maori Report Wai-16 (April, 1986).

69. Above n 9, 1044.

70. In his paper contained in the Proceedings of the 22nd Annual Conference of the NZ Branch of the Australasian Institute of Mining and Metallurgy (August 1988).

71. J. Davidson The Prehistory of New Zealand (Longman Paul, Auckland, 1987), 100, 199.

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73. (1979) 107 DLR (3 ed) 513,542.

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77. Above n 75, 748.

78. P.G. McHugh "The Legal Basis for Maori Claims Against the Crown" (1988) 18 VUWLR 1, 14.
also "Aboriginal Title in New Zealand Courts" [1984] 2 Cant.L.R. 235, 260.

79. [1986] 1 NZLR 680.

80. Unreported 19 May 1989 District Court, Levin.

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82. Above n 38.

83. Above n 79.

84. Above n 81,6.

85. P. Blanchard article in New Zealand Planning Council Pakeha Perspectives on the Treaty (September, 1988, Wellington), 54-55.

86. Above n 75, 765-766

87. Tee Hit Ton Indians v. U.S. (Supreme Court) (1955) 348 US 272.

88. Guerin v. The Queen (1984) 13 DLR (4th) 321, 337.

89. As far as this applies to minerals see Lonsdale (Earl) v. Attorney-General [1982] 1 WLR 883, 937.

90. Above n 89.

91. Above n 81, 19.

92. 43 USCA ss 1601-1628.

93. Above n 92, s 1608.

94. See preamble to Alaska Native Claims Settlement Act Amendments of 1987, 43 USCA s 1601.
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95. Alaska Native Claims Settlement Act Amendments of 1987 43 USCA s 1601.

96. (1984) 746 F.2d 572.

97. Above n 96, 573.

98. (1971) 17 FLR 141.

99. (1979) 53 ALJR 403 affirming (1978) 52 ALJR 334 (Mason J).

100. Section 4(1).

101. Section 40(1).

102. Section 16.

103. Section 63(4).

104. Section 48.

105. M. Barker "Aborigines, Natural Resources and the Law" (1983) 15 UWALR 245, 292.

106. Above n 105.

107. Section 45(2), 45(11).

108. Section 45(5).

109. Unreported, 17 March 1988, High Court Wellington CP 135/88.

110. [1987] 2 NZLR 188.

111. RTK Mahuta and the Tainui Maori Trust Board v. Attorney General & Ors August 1989, Court of Appeal CA 126/89 Decision pending.

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113. Above n 112, section 27B.

114. Above n 67A.

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