

A MAORI RIGHT TO OWN AND MANAGE NATIONAL PARKS?

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INTRODUCTION

In Aotearoa New Zealand 14 national parks have been created, encompassing the most spectacular mountains, rivers, lakes, coastlines and forests in the country. They constitute a major component of the conservation estate – an estate that lies over 30 per cent of the country’s landmass. The estate is owned by the Crown and for the most part exclusively managed by a Crown body, the Department of Conservation. The purpose of this address is to explore whether Maori, the Indigenous peoples of Aotearoa New Zealand, have a legal right to challenge the Crown’s ownership and management of national parks.

This question falls within a wider research project that I am pursuing entitled “reimagining national parks from a rethought law and nature platform”.¹ This research is fixated with the notion of space, and in particular on an argument that it was upon declaring the lived homes of Indigenous peoples “space” that colonial governments successfully overlaid their laws and rules on Indigenous place. The law played a crucial role in achieving this colonial objective. A simultaneous discussion occurred in society and in law whereupon the colonist settlers labelled much of the ‘fearfully mountainous’² lands “wastelands”, and the colonist courts labelled the people who inhabited these lands “savages”. The wild land, wild people dichotomy played a crucial role in the colonisation of this south Pacific country.

But the discourse in society and in law has been recast. Today, the “wastelands” and “savages” of yesteryear have had a rapid rise to encompassing new statuses. The wastelands have become the country’s “Crown jewels”, and the savages potentially have a relationship with the Crown akin to partnership. So, the question is: if law made permissible colonial space, what does it mean if contemporary law now recasts a new lens and recognises Indigenous place? The conservation estate has proved a perfect place to explore the intricacies of reconciliation law because it often represents the places most special to both peoples – Maori and Pakeha (the Maori word for the European settlers), and the place remains in the power of the Crown to reimagine (unlike, for example, land now labelled privately owned).

To help bring alive this issue, I first focus the story on a central North Island mountain, Tongariro, that became encompassed in Aotearoa New Zealand’s first

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¹ It partly constitutes my PhD thesis currently being undertaken at the Faculty of Law, University of Victoria, Canada.

² Eric Pawson, ‘The Meaning of Mountains’ in Eric Pawson and Tom Brooking (eds), *Environmental Histories of New Zealand* (2002) at 138.

national park. As this story will illustrate, the avenue for Maori to argue a right to own and manage national parks is being played out in the political arena. I then conclude with a brief explanation of why in law there appears little recourse for Maori despite Maori now being recast as potential partners of the Crown.

MAKING TONGARIRO COLONIAL PLACE

Tongariro has become a culturally layered place. Its first narrative is told by Maori, and, in particular, the tribes of Ngati Tuwharetoa and Ngati Rangi. One traditional story that relates to this mountain concerns a love battle. Two male personified mountains in the region, Tongariro and Taranaki, fell in love with Pihama, a female personified mountain. The loser, Taranaki, was banished from the region, forced to flee to the west coast to stand alone. Other stories abound including ones that explain the geographical volcanic features of Tongariro. The mountain was, and still is, of central importance to these tribes, providing them with their identity and sustenance.

The next narrative is told by the European settlers that began arriving in large numbers in the mid to late 1800s. While they initially recognised the lands of Aotearoa New Zealand as Maori owned in the signing of the *Treaty of Waitangi* in 1840,³ new measures were employed commencing in the 1860s to free up large tracts of land for colonial settlement.⁴ Law was used as a tool to endorse the new narrative of nationhood – a country founded and settled by the British. In 1877, the courts began to endorse this new evangelism. The *Treaty of Waitangi* was deemed a ‘simple nullity’ because ‘No Body politic existed capable of making cession of sovereignty’ because Maori were ‘primitive barbarians’.⁵ Effectively, the landscape became terra nullius (no-man’s land) and as a consequence Maori were categorised as “savage”. To the newcomers’ eyes, the landscape became a clean blanket, gazed upon as untouched and wild awaiting civilisation.

Wishing to protect the lands from private speculators, the paramount chief of Ngati Tuwharetoa, in 1887, gifted the Tongariro mountain range to the nation for use by Maori and Europeans, to be labelled a national park and co-owned and co-managed.⁶ The Pakeha settlers were very taken with the national park idea. They accepted that it ‘was almost useless so far as grazing was concerned’⁷ and ‘it was only of value for the scenery in connection with it’.⁸ Despite the utilitarian urge to put to use this land, a

³ To view a copy of the Treaty: see First Schedule of the *Treaty of Waitangi Act 1975* or the government’s official Treaty website: <http://www.treatyofwaitangi.govt.nz> (Accessed 28 August 2008).

⁴ See *New Zealand Settlements Act 1863*, and *Suppression of Rebellion Act 1863*. For commentary see Alan Ward, *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand* (1974); Richard Boast, *Buying the Land, Selling the Land: Governments and Maori land in the North Island 1865-1921* (2008); and David Williams, “*Te Kooti Tango Whenua*”: *The Native Land Court 1864-1909* (1999).

⁵ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78.

⁶ Correspondence relevant to the gift is contained in *Appendices to the Journals of the House of Representatives* (II) 1887 at G-4.

⁷ Minister of Lands, Hon. McKenzie, *New Zealand Parliamentary Debates* vol. 86 (11 October 1894) at 679.

⁸ Minister of Lands, Hon. McKenzie, *New Zealand Parliamentary Debates* vol. 80 (28 July 1893) at 322.

seven-year delay ensued. A dispute emerged between the government and the tribe as to the national park boundary. Eventually the *Tongariro National Park Act* was passed in 1894 with a provision that permitted the government to confiscate from the tribe land surrounding the gifted summit.⁹

The story of the creation of Aotearoa New Zealand's first national park, the Tongariro National Park, is for the most part typical of experiences in other British colonial countries. In countries like the United States, Canada, Australia and New Zealand, the national park label proved a successful colonial tool to:

- 1) put to use perceived waste lands; and
- 2) legitimate the colonists' decisions to leave the "mother" country and settle in lands that contained the most beautiful landscapes in the world.

It was not coincidence that the world's first national park emerged in the United States (in the form of the Yellowstone National Park in 1872), and the concept was swiftly adopted in Australia (in 1879), Canada (in 1885) and New Zealand. At the heart of the national park label was a belief that mountainous lands were "worthless" in all economic development senses and should be put to use for scenic purposes to attract tourists from all over the world.¹⁰ Thus, lands encompassed within national parks became colonial place, overlaid with new place names and new histories.

At one point, in the 1920s, in a unique departure from the erasure from colonial memory of place being Indigenous, the Members of the House of Representatives brainstormed ideas for better associating the mountain with Maori. But the rationale for doing so was entirely monetary. As stated by one Member: 'if we could show them Maori characteristics and the antiquarian instincts of the Maori – then the rich visitors who come to New Zealand'¹¹ would spend twice as much.

TONGARIRO: NOW A BICULTURAL PLACE?

Turning now to today, it is no longer acceptable in law to describe the lands as being terra nullius before the arrival of the Europeans or to classify Maori as once being primitive barbarians. The law now posits that Maori once owned all the lands in Aotearoa New Zealand and that the principles of the *Treaty of Waitangi* cast an obligation on the Crown to actively protect Maori and to engage with Maori in good faith.¹² Thus, if law has been recast to now accept that the lands of Aotearoa New

⁹ Section 2. For commentary see Jacinta Ruru, 'Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience' (2004) 3 *Indigenous Law Journal* 111.

¹⁰ For a detailed discussion of this movement: see John Shultis, *Natural Environments, Wilderness and Protected Areas: An Analysis of Historical Western Attitudes and Utilisation, and their Expression in Contemporary New Zealand* (Ph.D. Thesis, University of Otago, 1991).

¹¹ Member for Christchurch East, *New Zealand Parliamentary Debates* vol. 198 (17 October 1922) at 238.

¹² See for example *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 and the proceedings that marked the anniversary of this case: Jacinta Ruru (ed), "*In Good Faith*" *Symposium Proceedings Marking the 20th Anniversary of the Lands Case* (2008).

Zealand were in fact Indigenous place and not colonial space,¹³ ought this lead to a reimagining of how national parks are owned and managed?

The current *National Parks Act 1980* remains totally monocultural. Section 4(1) declares that ‘for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest’ must be preserved in perpetuity.

The *Conservation Act 1987* is the umbrella statute that mandates the Department of Conservation to manage national parks. It contains a direction to the Department’s administrators and managers to give effect to the principles of the *Treaty of Waitangi*.¹⁴ However, the Act creates a dichotomy, for at its core are the preservation and protection of the conservation estate.¹⁵ The Act renders it near impossible to respect Maori, and permit them to gather Indigenous flora and fauna from national parks, when the managers have a mindset to preserve and protect the environment.

In addition to the monocultural nature of the governing legislation, the Crown has an explicit policy that no large tracts of conservation land can be returned to Maori as part of *Treaty of Waitangi* settlements. While this policy is being fiercely debated by tribes in the North Island, the tribe that has the most amount of its traditional lands encased in the conservation estate – Ngai Tahu in the South Island –settled with the Crown in 1998. On the ownership front, Ngai Tahu were only able to secure a seven-day vestment of Aoraki/Mount Cook, the mountain that lies at the centrepiece of the Aoraki/Mount Cook National Park. At the expiry of the seven days, Ngai Tahu must gift the mountain back to the nation.¹⁶

Comparatively more progress has been made on the management front, but nothing resembles co-management. Typical features include rights to representation on conservation boards and statutory acknowledgments of association. For example, pursuant to the *Ngai Tahu Claims Settlement Act 1998*, the Minister of Conservation, the Conservation Authority, and conservation boards in the bottom two thirds of the South Island, must have particular regard to the advice of *te runanga o Ngai Tahu* (the governing body of the tribe) in specific situations. The Act declares certain mountaintops, lakes and valleys as *Topuni* – a statutory label used to acknowledge “Ngai Tahu values”, meaning Ngai Tahu’s cultural, spiritual, historic and traditional association with specific areas. The Act also recognises the Ngai Tahu association with taonga species (that is, species of special cultural value), such as native birds, plants, animals and fish. However, similar legal rights do not exist for all other tribes.

What has become of the Tongariro National Park? Most significantly, the Crown has become more accepting that it was initially an Indigenous place. In 1993, Aotearoa New Zealand became the first in the world to receive recognition under the revised World Heritage cultural landscapes criteria specifically recognising the value of this

¹³ This was most clearly accepted in the Court of Appeal case *A-G v Ngati Apa* [2003] 3 NZLR 643.

¹⁴ Section 4.

¹⁵ Section 2 ‘conservation’.

¹⁶ See ss 13-18 of the *Ngai Tahu Claims Settlement Act 1998*.

land to Ngati Tuwharetoa. The recently published management plan captures a new commitment to the tribes explicitly stating that management of the park must recognise and support the unique relationship Maori have with the park. However, Ngati Tuwharetoa and Ngati Rangi remain mostly isolated from the management of the park. They have taken a claim to the Waitangi Tribunal asserting extensive Crown breaches of the *Treaty of Waitangi* in establishing the Park boundaries and subsequently managing it.¹⁷ The Tribunal heard closing submissions in July 2007, and is due to make its recommendations in late 2008. The tribes and the Crown will then enter direct negotiations aiming for reconciliation.¹⁸

There is evidence that today's narrative of reconciliation has not yet crystallised into a re-imagined place. Maori concern remains for the genuineness of the Pakeha retelling of history and relationships. Without a shift in power and theoretical underpinnings of what reconciliation ought to mean, devising new respectful relationships through words is similarly problematic as was simply ignoring Maori rights and responsibilities in the land. While the new narrative at least now acknowledges who Maori are, it continues to mask what they want. It has become common to recognise past Maori association with place, rather than present Maori desires to reconnect to that place in the modern day.

A MAORI LEGAL RIGHT TO OWN AND MANAGE NATIONAL PARKS?

As the above tells, the dialogue between the Crown and Maori for better ownership and management recognition has occurred on the political front. But, could it be played out in the courts? Do the common law doctrine of native title or the *Treaty of Waitangi* provide a route for Maori to claim ownership of land encompassed in national parks?

In 2003, the Court of Appeal held that it was possible that the common law doctrine of native title could encompass land either permanently or temporarily under salt water.¹⁹ In light of no clear and plain legislation asserting Crown ownership of the foreshore and seabed, it might have been possible for Maori to claim ownership, at least prior to Parliament enacting the *Foreshore and Seabed Act 2004*. Could Maori claim ownership of, for example, mountains within the conservation estate pursuant to the common law doctrine of native title? It is not a question that the courts have addressed. Moreover, the orthodox position on the *Treaty of Waitangi* is that it is not enforceable in the courts unless it has been incorporated into statute.²⁰ To date, Parliament has only incorporated the Treaty in a manner that directs certain decision-

¹⁷ For information about the claim see the Tribunal's website under the National Park Inquiry heading, at: http://www.waitangi-tribunal.govt.nz/inquiries/national_park_inq/ (Accessed 28 August 2008).

¹⁸ See the work of the Office of Treaty Settlements at: <http://www.ots.govt.nz> (Accessed 28 August 2008).

¹⁹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

²⁰ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. But see a recent critique of this case: A Frame, 'Hoani Te Heuheu's Case in London 1940-1941: An Explosive Story' (2006) 22 *New Zealand Universities Law Review* 148.

makers to have some level of regard to the principles of the Treaty.²¹ At the moment there appears to be little willingness in the courts to disrupt that precedent.²²

In Aotearoa New Zealand, Parliament is supreme. There is no entrenched constitution and thus no remedy like that available in Canada to the Aboriginal peoples under section 35 of Canada's *Constitution*. The Waitangi Tribunal, as a commission of inquiry, usually has power to make only non-binding recommendations to the Crown to settle outstanding Treaty breaches.²³ Likewise, international law offers no binding affirmations on the Crown. It is debatable whether a fiduciary claim could be brought against the Crown independently of the *Treaty of Waitangi*.²⁴

Is it acceptable that law provides no recourse for Maori?

By way of conclusion, if Aotearoa New Zealand is truly committed to finding full and final settlements with its Indigenous Peoples, a more respectful reconciliation is required.

²¹ Section 4 of the *Conservation Act 1987* is one example.

²² See *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 269.

²³ See *Treaty of Waitangi Act 1975*.

²⁴ See *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 269.