

# New Zealand Maori Claims to Fisheries Resources

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**Abstract.** New Zealand's fisheries are perhaps best known for the individual transferable quota (ITQ) system brought about by the Fisheries Amendment Act 1986. There is general recognition that the ITQ system has improved the biological status of fisheries resources and commercial returns. The 1986 Act allocated quota to fishing firms and individuals that met the allocation criteria. Part-time fishers, many of whom were Maori, New Zealand's indigenous people, were excluded from the initial allocation. The 1986 Act did not address claims by Maori of having indigenous rights guaranteed by the Treaty of Waitangi 1840. The English-language version of the Treaty of 1840 is recognised by the Crown as the founding document of New Zealand as a nation. Maori widely accept another version in Maori language, *Te Tiriti o Waitangi*. A key term in the Maori-language version is *kawanatanga*, the right of *iwi* (large kinship group) to self-government in their particular region. *Kawanatanga* was offered by Maori in return for the Crown providing several guarantees, one of which was Maori rights to fisheries resources. Since the Treaty, Maori have protested against government actions and legislation that have eroded their rights guaranteed by the Treaty. The implementation of the 1986 Act prompted further Treaty-based claims to large areas of fisheries, and the ITQ system was used to settle several claims. This paper explores Maori views on resource use and claims to fisheries resources, legislative changes enacted to settle Maori fisheries claims, and claims that remain outstanding. The insights of this paper have relevance to the broader discussion on indigenous perspectives.

Key words: Indigenous peoples, Indigenous rights, New Zealand, Individual transferable quota.

## 1. INTRODUCTION

To fully understand New Zealand's individual transferable quota (ITQ) system, it is imperative to comprehend the growing presence that Maori, New Zealand's indigenous people, have in the fishing industry. Beginning in the late 1980s, Maori have received vast transfers of quota holdings and other assets that ensure they will have a continued and growing presence in the industry. The assets transferred to Maori are the result of settlements to their claim that the Crown breached the Treaty of Waitangi 1840, considered the founding document of New Zealand as a nation. The Treaty of 1840 explicitly states that Maori have rights to their natural and cultural resources.

However, government actions and legislation subsequent to the Treaty of 1840 have eroded Maori Treaty-based rights. Maori have continued to object to the erosion of their rights, bringing numerous legal claims against the Crown which have mostly been, until recently, unsuccessful. The implementation of the Fisheries Amendment Act 1986, which introduced the ITQ system, prompted further Treaty-based claims to large areas of fisheries. Many Maori objected to the ITQ system as it was seen to force their severance from the ocean, raid their sea resources and sell their right to participate in fisheries while others were allowed access to their traditional fishing grounds. Some Maori have questioned why the ITQ system and its bureaucracy have replaced some of their traditions, conservation practices and their extensive knowledge of the sea (Wai-22, 1988).

This paper explores Maori claims to fisheries resources, legislative changes enacted to settle those claims and claims that remain outstanding. In so doing, this paper explores Maori views on resource use which require consideration of Maori history, their social system and traditions, including fisheries management practices. It is important to place Maori fisheries claims in this broader context for two reasons: first, to better understand why Maori call themselves *tangata whenua* (people of the land) and what significance this has to their resource claims; second, to counter the longstanding misconception that Maori historically had limited involvement with the sea. This misconception conveniently accommodated the early Anglo-Commonwealth settlers' encroachment onto Maori traditional coastal and off-shore fishing grounds. This misconception has continued to influence most of New Zealand's fisheries legislation.

This paper begins with a section titled Indigenous Peoples' Rights, which is discussed in the context of colonisation. The following sections are Maori Early History and Traditions, Early Colonial History, Fisheries Management Legislation, Maori Fisheries Claims and Settlements, and Conclusions and Recommendations. The author, being non-Maori, acknowledges the inherent difficulty of speaking about issues of importance to Maori and presents this paper with respect and good faith. At the same time, being of Native American descent, the author can appreciate some issues of importance common to indigenous groups.

## 2. INDIGENOUS PEOPLES' RIGHTS

It is important to place Maori claims to fisheries resources within the wider arena of indigenous peoples' rights, since indigenous peoples worldwide now seek the survival of their cultures and control of their own destinies (Coates, 1998). 'Indigenous' or 'aboriginal' peoples are generally defined as 'the living descendants of preinvasion inhabitants of lands now dominated by others' (Anaya, 1996:3). During the last few decades, indigenous peoples have increased their political strength to (1) gain recognition of their cultures and heritage, (2) address the effects of having been economically dispossessed and disenfranchised from their traditions, languages and resources, and (3) reclaim what they have lost. This section briefly outlines indigenous peoples' efforts on the above three points.

In the eighteenth and nineteenth centuries, British and European nations increased their efforts to establish colonial settlements in what had become new migrant nations, including the United States, Canada, Australia and New Zealand. At the time that new migrant nations were first settled by colonising nations, a doctrine in international law stated that a change of sovereignty on cession between colonists and indigenous peoples did not affect the property rights of the indigenous peoples (Kingsbury, 1989). Indigenous peoples, therefore, had rights to retain possession of their lands and to full sovereignty, and these rights could not be extinguished. Contrary to this doctrine, the practice of colonisation legitimised the pacification of indigenous peoples by a combination of genocide, wars and low-intensity armed conflict, mass population transfers, treaties ceding land while proclaiming friendship, paternalistic segregation, ethnocidal assimilation, and talk of post-assimilation self-government (Havemann, 1999). New Zealand's colonial history mirrors the experience of other new migrant nations.

The effects of colonisation remain and impede indigenous peoples' efforts to reaffirm their culture and heritage. The cause of these impediments are often nations' institutional and ideological intolerances towards indigenous peoples and their social systems (Quentin-Baxter, 1998). One example is the common law principle underpinning the 'tragedy of the commons' which is often used to support the application of property rights in the management of natural resources. Colonial societies in the new migrant nations attempted to avoid the social dilemmas outlined in the 'tragedy' by transplanting their preponderance towards state or private property rights to the new colonies, while giving little or no consideration to the suitability of common property rights or indigenous peoples' resource management practices. This transplantation occurred despite many indigenous societies throughout the world, including those of New Zealand, providing numerous examples of resource

management practices based on institutional decision-making arrangements and cultural factors that had sustainably managed common resources for centuries (Pálsson, 1999).

To date, the new migrant nations have taken significant steps to recognise the losses that their indigenous peoples have endured and to address their outstanding claims through political, legal and social channels. While some nations can be described as having decolonised their external relations, colonisation continues through structural inequities between indigenous peoples and their nations' dominant cultures (Fleras and Spoonly, 1999). Since the early 1980s, however, there has been a remarkable upswelling in international activity concerning the position of indigenous peoples (Kingsbury, 1989).

### 2.1 UN Draft Declaration on the Rights of Indigenous Peoples

The primary means to collective expression of indigenous peoples' rights has been the United Nations (UN). In 1982 the UN Commission on Human Rights established a working group on Indigenous Populations. This working group was established to facilitate dialogue between governments and their indigenous peoples to review developments in the protection of their human rights and fundamental freedoms and to develop international standards on their rights. In 1993 the working group developed a Draft Declaration on the Rights of Indigenous Peoples, which consists of guidelines and principles based on established international human rights doctrines.

The Draft Declaration's third article has attracted the most controversy by stating 'indigenous peoples have the right to self-determination'. As would be expected, many UN member nations, including New Zealand, have voiced their concerns about the inclusion of the self-determination concept in the Draft Declaration without it being explained or qualified. Their main concern is that self-determination could threaten the preservation of their existing territories. Although the Draft Declaration does not exclude secession by indigenous peoples, the thrust of the Draft Declaration is that indigenous peoples will remain full members of their nations' societies (Quentin-Baxter, 1998), provided they are entitled to full and equal participation in the creation of government institutions, making them perpetually in control of their own destinies (Anaya, 1996).

It is expected that the adoption of the Draft Declaration will provide considerable moral force for member nations to use it as a legal benchmark for government policies. Various UN instruments, along with the International Decade for the World's Indigenous Peoples 1995-2004, help raise awareness of changes needed in addressing indigenous peoples' rights.

### 3. MAORI EARLY HISTORY AND TRADITIONS

New Zealand was the last habitable region of the world to be settled by humans (Orbell, 1995). Most archeologists' estimates place the first human arrivals in New Zealand between 800 AD and 1100 AD, with it being unlikely that there were significant new arrivals after 1200 AD. However, more recent analysis shows that humans may have first arrived around 2000 years ago, then left or died out, and resettled in greater numbers at around 1400 AD (Holdaway and Jacomb, 2000).

Maori commonly refer to an original homeland, *Hawaiki*, and their ancestors sailing in either single or double *waka* (large dugout canoes) to the new land they called *Aotearoa*, the land of the long white cloud. (Brailsford, 1989; Halbert, 1999). It has been speculated that some later arrivals came to this new land after fleeing unfavourable conditions in their home lands. The later arrivals either intermarried with the earlier inhabitants, or conquered them to produce new social formations (Walker, 1996). The various arrivals to *Aotearoa* over centuries, if not millenia, help explain differences among Maori in dialect and interpretation of traditions and the difficulties encountered when applying a pan-Maori perspective.

Like other indigenous peoples throughout the world, Maori have a sense of 'rootedness' in the land and sea which provides them with a way of seeing the natural world in its entirety and their inter-relatedness with the environment (Ririnui and Memon, 1997). Since Maori consider everything in the world to be alive and related, they make no distinction between nature and human society. The natural world and human society are inseparable and have been since the beginning of time. Humans and all other life forms are indissolubly tied together through kinship (Orbell, 1995). Everything in the natural world is viewed as possessing its own *mauri* (life force), which is not to be altered to any great extent. Maori *tikanga* (customary values and practices) were developed to ensure that resource use did not disturb its *mauri*. Humans possess *mauri-ora* (higher order of *mauri*), which bestows on humans *kaitiakitanga* (responsibility towards other living things). *Kaitiakitanga* encompasses rules, beliefs and ethical obligations humans have to protect the integrity of resources for future generations (Ririnui and Memon, 1997).

Maori depict gods as the source of all knowledge, and ancestors carry knowledge through their *whakapapa* (genealogy), and transmit it to human descendants. The *whakapapa* begins with the Maori account of creation, the union of *Ranginui* and *Papatuanuku*. These first parents have a number of children, with *Tane* as the son who brings the world into existence by separating his parents. This separation thrusts *Ranginui* into the realms of space and time to become the sky, and *Papatuanuku* becomes

the earth mother. *Tane* is attributed with having fathered the trees and birds before making the first woman from the soil of *Hawaiki*, thus making all humans belong to the land. These creation legends show how spiritual agents and the transcendental forces of *mana* (authority, power, prestige) pervade the Maori cosmos and personal interactions (Fleras and Spoonley, 1999).

Maori kinship-based society is hierarchically structured. *Whanau* (extended family) is led by the *kaumatua* (male elder) and the *kuia* (female elder). A collection of *whanau* make up a *hapu*, which is led by the *rangatira* (chief). A grouping of related *hapu* make up an *iwi* led by the *ariki* (paramount chief) (Walker, 1999). The concept of *iwi*, however, did not eventuate until the late nineteenth and early twentieth centuries (Orbell, 1995) when related *hapu* formed *iwi* in response to warfare and population increases at that time (Walker, 1999). Prior to then, the *hapu* was responsible for landholdings, with each aspiring to claim a stretch of coastline, land for horticulture and interior forests for hunting and as sources of timber. Inland *hapu* sought to control the land around lakes and along riverbanks.

The fabled *waka* traditions differentiate *hapu* and *iwi* from one another by their identification with revered *waka* ancestors or their descendants (Walker, 1996). Even those who trace their *whakapapa* to having always lived in *Aotearoa* acknowledge ancestors whose origin was *Hawaiki* (Orbell, 1995). *Whakapapa* is the determinant of all *mana* rights to land, membership in a *whanau*, *hapu* and *iwi*, kinship roles and responsibilities to other kin, and one's place and status within society (Mahuika, 1998).

#### 3.1 Maori Traditional Fisheries Management

Maori involvement with fishing embraces a spiritual dimension common among Polynesian peoples. Fishing is included in the *Maui* account of the creation of *Aotearoa*. The South Island was *Maui's* canoe from which he hooked a fish which when brought to the surface became the North Island. Other examples include *Tangaroa* as the god and father of fish. Since fish belong to *Tangaroa* and they are his children, people are allowed to take them when they show respect for *Tangaroa* and his sea-home. *Io* (creator of all) nurtures *Tangaroa's* children in nurseries within bays, rock pools, estuaries and the blue waters. The harvesting of the waters honoured the precious gift of life (Brailsford, 1989). *Punga* is considered the father of the shark, whales and other marine mammals, and *Ru* is the father of lakes and rivers (Wai-22, 1988). The much-treasured *pounamu* (greenstone) is considered to have been originally a fish that had swum from the original homeland, *Hawaiki* (Orbell, 1995). This spiritual dimension to fishing empowers Maori with *mana atua* (prestige and power of the gods) (Ririnui and Memon, 1997).

The linking of fisheries management to the spiritual realm and the *hapu*'s communally-based structure helped ensure that fisheries were managed sustainably. *Tikanga* (customary values and practices) and *kaitiaki* (guardianship of resources) maintained the long-term preservation of ecosystems and fish stocks by regulating access and use. In most cases, the property rights to fisheries resided in those with *mana moana* (sovereignty over freshwater and sea holdings), which was usually the *hapu* occupying adjacent land. Their territorial boundaries extended to inland water ways and out to sea. Because of fisheries' links with the gods, and the strong reliance *hapu* had on fisheries as a food source, they were considered *taonga* (treasure or a prized possession). The fisheries of each *hapu* had clearly defined areas with known access rights, and the knowledge of their *tauranga ika* (fishing grounds) was closely guarded and handed down through the generations (Ririnui and Memon, 1997).

As fisheries were common to particular *hapu*, they came under the traditional authority of the *rangatira* who had responsibility for sustaining the fisheries resources. The exercise of *rangatiratanga* (chieftainship) invoked prohibitions and enforcements such as *tapu* (spiritually-based restrictions), thus having the power and influence of the gods. When *tapu* was placed on a fishery there were restrictions and prohibitions to protect or control the fish stocks. It was understood that exploitative behaviour towards fisheries, such as breaching *tapu*, was a serious offence that could invoke the punishment of the gods. A less serious offence could result in offenders being subjected to *murū*, (plundering of offender's possessions by *whanau* or *hapu*) (Wai-22, 1988).

The early explorers and colonial settlers to *Aotearoa* expressed amazement at Maori fishing standards, their displayed ingenuity and knowledge of the fishing grounds, as well as the abundance of fish life (Wai-22, 1988). On December 4, 1769, Joseph Banks, on board Cook's ship *Endeavour*, wrote:

... [The Maori] after having a little laugh at our seine, which was a common kings seine, shewd us one of theirs which was 5 fathom deep and its length we could only guess, as it was not stretchd out, but it could not from its bulk be less than 4 or 500 fathoms [700-900 metres]. Fishing seems to be the chief business of part of the countrey; about all their towns are abundance of nets laid upon small heaps like hay cocks and thatchd over an almost every house you go into has nets in its making (Wai-22, 1988:42).

A reported observation, dated December 29, 1814, stated that Maori were well supplied and very industrious with their fishing. It also reported that Maori observed certain

fishing rights with limits to areas marked by stakes driven into the water. Several rows of stakes defined areas belonging to the different *hapu*, and trespassing instantly attracted retribution (Wai-22, 1988).

These historical accounts and many others demonstrate that Maori utilised their fisheries resources and conducted trade amongst themselves and with settlers. By the 1820's Maori were substantially involved in providing European ships and coastal whaling stations with provisions. By the 1830s, ships were carrying large quantities of Maori produce to Sydney, which continued well after the signing of the Treaty of 1840 (Wai-22, 1988).

#### 4. EARLY COLONIAL HISTORY

The anarchic colonial settlement of New Zealand during the late 1700s and early 1800s led to cultural clashes between Maori traditions and those of the colonial settlers. These clashes caused New Zealand to form as a nation with two disparate traditions. In contrast to Maori emphasis on kinship, respect for ancestors, spirituality, and millennial connectedness to the natural world, the Anglo-Commonwealth settlers brought their concepts of modernity, the Westminster governmental system, scientific positivism, capitalism, and Christianity's monotheism (Walker, 1999). Settlers then viewed Maori as impediments to progress and the spread of civilisation, believing the 'landscape could be tamed, and the savage domesticated and assimilated' (Walker, 1999:108).

Conflicts arose repeatedly between Pakeha (those of European descent) and Maori over land and sea claims. Pakeha interactions with Maori resulted in the introduction of foreign diseases that devastated the Maori population. The introduction of muskets in the 1820s intensified warring between some Maori factions, leading to further atrocities and devastation of their traditional society. By 1835, many Maori desired that the musket wars cease, and they turned to Christian missionaries, which further undermined their traditional society. The Christian missionaries advised the Maori chiefs to agree to signing the Treaty of Waitangi 1840, which marked the next stage in the erosion of Maori culture (Walker, 1996).

At the time the Treaty of 1840 was signed, Maori were by no means weak, compliant or submissive. Maori claimed all their lands, not just their settlements and cultivations, and they were well armed, outnumbering Pakeha by thirty to one. They were intent on preserving their autonomy, and clearly retained control of the land and sea. Maori were hopeful that the Treaty of 1840 would lessen the threat of further French settlements and the anarchy that prevailed in New Zealand at the time (Ward and Hayward, 1999).

The English-language version of the Treaty of 1840 is recognised by the Crown as the founding document of New Zealand as a nation. Maori widely accept another version in Maori language, *Te Tiriti o Waitangi*. Both versions of the Treaty of 1840 have three articles. The first article of the English-language version states that Maori ‘cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty ...’ The Maori translation of this article, however, uses the term *kawanatanga* (the right of *iwi* to self-government in their particular region). This difference in translation, with the English version ceding sovereignty and the Maori version ceding governance, deceived the Maori signatories, causing the Treaty of 1840 to be the first step in the subversion of Maori sovereignty (Walker, 1999).

The English-language version of the second article states that the Queen of England guarantees Maori ‘the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively and individually possess ...’ This guarantee requires Maori to agree to an exclusive pre-emptive clause that allows the Queen ‘the exclusive right of Preemption over such lands ...’ This clause allows the Crown to purchase Maori land should they be inclined to dispose of it ‘at such prices as may be agreed upon ...’ The second article in the Maori version, however, guarantees Maori chiefs *tino rangatiratanga* (unqualified exercise of their chieftainship over their lands, villages, fisheries and all their *taonga*). The guarantee of *tino rangatiratanga* contradicts the English-language version of the first article (Walker, 1999). Maori agreed to the first article upon the Crown’s conditional promise to recognise the second article’s guarantee of Maori’s undisputed rights to their resources, lands, forests, fisheries, *taonga*, etc. (Mahuika, 1998). The third article in both versions has the Queen of England extend to Maori ‘royal protection and imparts to them all the Rights and Privileges of British Subjects’.

Soon after the Treaty was signed, the guarantee to Maori that they retain ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’ was ignored by the colonial government, which was intent on accommodating the growth in colonial settlements by acquiring Maori land. This was done primarily by the manipulation of the English-language version’s pre-emptive clause to suit the interests of the settlers (Sorenson, 1999).

Successive governments asserted the Crown’s sovereignty by the use of military force to subdue and intimidate Maori chiefs; extinguishing native title to land through unscrupulous purchases and other means through the Native Land Court; transmigration of settlers from the United Kingdom to gain numerical dominance; military invasion; confiscation of land; and political

disempowerment. The erosion of Maori chiefs’ land base disempowered them, forcing over 90 per cent of Maori to subsistence living on remnants of their traditional land (Walker, 1999). Thereafter Maori and Pakeha became binarily opposed to each other ethnically, socially and culturally, and this historical opposition remains (Walker, 1996).

As is evident, most, if not all, that was guaranteed to Maori by the Treaty of 1840 has been alienated from them. Since the signing of the Treaty Maori land holdings have diminished from around 66 million acres to around 3 million acres (Mahuika, 1998). By 1985 only 1800 Maori worked in the fishing industry; few owned vessels and licences while most worked as labourers (Kelsey, 1990).

## 5. FISHERIES MANAGEMENT LEGISLATION

By 1792 there was a thriving sealing industry throughout *Aotearoa*’s waters, and whaling became prosperous by the early 1800s, attracting whaling ships primarily from Australia, the United Kingdom and the United States. Maori fisheries management practices could not control the exploits of sealers and whalers, thus making the late 1700s until the mid-1800s a period characterised by a distinct lack of management of some fish stocks. Subsequently, New Zealand’s fisheries management can be classified into three distinctly different regimes: from 1866 to 1962 a limited entry system existed consisting of a range of regulations to limit participation in fisheries; 1963 to 1982, a regulated open entry system was in place that encouraged greater domestic participation in fisheries; and, beginning 1983, the QMS was implemented to address overcapitalisation that occurred during the previous regime, to rebuild overexploited inshore fisheries, and to enhance efficiencies for the industry, in part, through the allocation of ITQ.

These three fisheries management regimes have all operated with similar assumptions about Maori and their involvement in fishing. The first assumption is that Maori lacked their own fisheries management systems, hence there was a need for statutory management. This assumption was perpetuated by the lack of any national fisheries departments having responsibility for ascertaining the nature and extent of Maori fishing and any entitlements they may have had (Wai-22, 1988). The second assumption is that Maori fishing activity should be limited to subsistence use. However, this assumption fails to acknowledge well-documented early successes Maori had in large scale fishing and trade.

Only a few exceptions in fisheries legislation recognised Maori rights to fisheries resources. For example, the Fish Protection Act 1877 Section 8 states ‘nothing in this Act ... shall be deemed to repeal, alter or affect any provisions of the Treaty of Waitangi, or take away, annul, or abridge

any of the rights of the aboriginal natives to any fishery secured to them thereunder'. However, the few examples of statutory recognition of Maori fishing rights were not honoured in practice. They were generally held to be ineffective due to no Maori fisheries having been recognised by statute (Quentin-Baxter, 1998).

Maori have taken a number of cases to New Zealand Courts over their customary fishing rights, and claims to lakes, rivers and foreshores. Some of these cases were inclusive of Maori rights to land. Some cases resulted in the Crown promising Maori reserves. Of the few that were granted, most were reduced or taken out of Maori control. Some Maori fishing rights claims continued for years and eventually ended in Maori accepting what they could obtain while the Crown usually ceded very little (Wai-22, 1988). For over one hundred years, the New Zealand Courts interpreted and implemented fisheries legislation in ways that continued to erode Maori fishing rights, leaving them with limited involvement in the management of some fisheries, restricting their use to subsistence purposes or neglecting their claim to having any rights to fisheries resources.

Statutory recognition of Maori fishing rights was restated in the Fisheries Act 1983 Section 88(2) by stating 'nothing in this Act shall affect any Maori fishing rights'. However, the Fisheries Amendment Act 1986, which brought about the ITQ system, further marginalised Maori in fishing. The 1986 Act makes no reference to the 1983 Act Section 88(2) nor any other reference to Maori having Treaty-based fishing rights. Furthermore, the 1986 Act allocated ITQ to fishing firms and individuals that met the allocation criteria. Part-time fishers, many of whom were Maori, were excluded from the initial allocation.

The implementation of the ITQ system prompted Maori claims to large areas of fisheries. Many Maori viewed the ITQ system as a breach of the Treaty of 1840's second article that guaranteed Maori full, exclusive and undisturbed possession of their fisheries. The ITQ system was viewed by many Maori as severing them from the ocean, raiding their sea resources and selling their right to participate in fisheries while others were allowed access to their traditional fishing grounds. In so doing, the ITQ system and its bureaucracy replaced some Maori traditions, conservation practices and their extensive knowledge of the sea (Wai-22, 1988).

Beginning in the mid-1980s, Maori began to file Treaty-based claims to fisheries resources in response to the implementation of the ITQ system. The basis to Maori claims is that they never relinquished their fishing rights, and that the Crown breached its Treaty of 1840 obligations. While the ITQ system initially prompted indigenous claims to large areas of fisheries, it proved to be an effective means of resolving some claims.

## 6. MAORI FISHERIES CLAIMS AND SETTLEMENTS

The Government's intent to implement the ITQ system and resolve Treaty of 1840 grievances placed significant political pressure on the settlement of Maori fishing rights claims. The first Treaty-based claim in response to the ITQ system began in June 1985 by a collection of *iwi*, the Muriwhenua, of the far north of the North Island. The Muriwhenua claim and subsequent fisheries claims were filed with the Waitangi Tribunal.

The Waitangi Tribunal was established in 1975 with the passing of the Treaty of Waitangi Act 1975. The Waitangi Tribunal's functions are to assess the Crown's acts or omissions against the principles of the Treaty of 1840, assess whether inconsistencies in the Crown's acts or omissions have had a prejudicial effect on Maori, and how a prejudicial effect might be compensated and/or remedied. It should be noted that there has not been broad agreement on what the Treaty of 1840 principles actually are beyond the obligation of Treaty partners to act in good faith, and the Crown to consult with and involve Maori in decision-making under the Treaty's guarantee of *rangatiratanga* (Parliamentary Commissioner for the Environment, 1998).

The Waitangi Tribunal's report on the Muriwhenua claim concluded that numerous and serious breaches of the Treaty of 1840 had occurred, and the effects on the Muriwhenua people had been wide-ranging, costing them income, jobs, trade and opportunities to develop their own fisheries. Furthermore, their having to leave their traditional area to search for employment had severely impacted on their traditional ways. Influenced by steps taken in Canada and the United States, the Waitangi Tribunal's report stated that a new agreement between the Crown and the Muriwhenua people was essential, and this new agreement had to assist the restoration of their tribal base and the development of their industrial capability (Wai-22, 1988).

The Muriwhenua claim and the Waitangi Tribunal's Muriwhenua Fishing Report provided the basis for injunctions against further ITQ allocations. In September 1987 the Muriwhenua claimants successfully petitioned the High Court for an injunction against further ITQ allocations. Maori and the Crown entered into negotiations, interspersed with disputes, on how Maori fisheries might be given effect in light of *tino rangatiratanga*, as outlined in the second article of the Maori-language version, and Maori having full, exclusive and undisturbed possession of their fisheries, as outlined in the second article of the English-language version.

## 6.1 Maori Fisheries Act 1989

During protracted negotiations between Maori and the Crown, the Crown implemented an interim and without prejudice settlement. Although Maori negotiators objected to some aspects of this interim settlement, it was passed into law as the Maori Fisheries Act 1989. The 1989 Act outlined several contributions made by the Crown to Maori, including the transfer of 10 percent of existing total allowable commercial catch before 31 October 1992 to the new Maori Fisheries Commission. In order to meet this obligation, the Government actively traded in the open market to obtain ITQ. The 1989 Act also included a \$10 million payment made by the Crown to Maori. It is important to note that the 1989 Act included provisions for the Crown to recognise *tino rangatiratanga* by enhancing Maori involvement in the control and management of fisheries.

The Maori Fisheries Commission was required to administer these settlement assets on behalf of Maori, which it did primarily through its commercial enterprise, Aotearoa Fisheries Ltd., and short-term ITQ lease arrangements. The Maori Fisheries Commission was also required to facilitate the entry of Maori into the business and activity of fishing, but it had no power to allocate assets to Maori or develop a means of allocating assets. Maori made it clear, however, that their acceptance of 10 percent of ITQ did not represent the full settlement of their fisheries claims. The assets provided to Maori by the 1989 Act are known as the pre-settlement assets.

In August 1987 the Ngai Tahu people, who at the time of the 1840 Treaty had *kaitiaki* over most of the South Island, filed a fisheries claim against the Crown. Ngai Tahu claimed (1) they had the right to full ownership of fisheries out to twelve miles off the coast of their traditional boundaries; (2) as a partner with the Crown in the Treaty of 1840 they were prepared to grant fifty percent of ITQ within this twelve mile zone to the Crown; and (3) they were prepared to accept ITQ outside the twelve mile zone as compensation for the Crown's stewardship of fisheries having resulted in serious depletion of fishstocks within the twelve mile zone (Wai-27, 1992).

After a series of claim hearings from August 1987 to September 1991, the Waitangi Tribunal concluded that (1) Ngai Tahu had never disposed of their exclusive right to sea fisheries; (2) the Crown had breached its Treaty of 1840 obligations to Ngai Tahu; (3) Ngai Tahu have an exclusive Treaty right to the sea fisheries up to twelve miles from their territorial boundaries; and (4) Ngai Tahu have a Treaty development right to a reasonable share of the sea fisheries within twelve to two hundred miles (Wai-27, 1992).

## 6.2 The Treaty of Waitangi Settlement Act 1992

At the time negotiations took place on the Ngai Tahu claim, Sealord Products Ltd., New Zealand's largest seafood firm, was offered for sale, and this was seen as an opportunity to settle Maori fisheries claims. In 1992 the Deed of Settlement was signed between Maori and the Crown as the full and final settlement of all Maori commercial fisheries claims in accordance with the Treaty of 1840. The Treaty of Waitangi Settlement Act 1992 gave effect to the 1992 Deed of Settlement and repealed the Fisheries Act 1983 Section 88(2). The 1992 Act resulted in the Crown agreeing to provide \$150 million for Maori to enter into a 50/50 joint venture with Brierley Investments Ltd. in the purchase of Sealord Products Ltd., and 20 percent of all new species brought within the ITQ system to be allocated to Maori. The assets allocated to Maori through the 1992 Act are known as the post-settlement assets. It should be noted that Maori did not unanimously support the 1992 Deed of Settlement, and a Court of Appeal injunction against the 1992 Deed was attempted.

Some of the main points of the 1992 Act include: (1) Maori non-commercial fishing rights remain subject to the Fisheries Act 1983, and hence remain in accordance with the Crown's obligations under the Treaty of 1840; (2) the Minister of Fisheries is to consult and develop policies with Maori to recognise their use of and management practices for non-commercial fishing rights; and (3) regulations are to be developed that recognise and provide for Maori customary food gathering and their special relationship with places that have customary food gathering importance, such as *tauranga ika* (fishing grounds) and *mahinga mataitai* (sea reserves).

The 1992 Act brought about the reconstitution of the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission Te Ohu Kai Moana (TOKM) to administer both pre and post-settlement assets. TOKM was empowered to devise, in consultation with Maori, a scheme to distribute the pre-settlement assets, valued in 1992 at around \$130 million, with a current value of around \$300 million (O'Regan, 1999). Since 1992 TOKM has held numerous meetings to consult with *iwi* about the method of allocating pre-settlement assets. The proposed optimum method of allocation has assets distributed to *iwi*, since *tikanga* has fisheries rights held collectively.

It is intended that once the assets are allocated to *iwi*, they will have full discretion on how to use those assets to benefit their members. In November 1998 seventy-eight *iwi* received the TOKM's *Report on the Proposed Method for Allocation of Pre-Settlement Assets*. To date, thirty-five *iwi* have accepted the proposed allocation method while eighteen have rejected it, and others have expressed conditional acceptance, no response or no decision. There are proposed *iwi* mandate, representation and structural

requirements to be agreed to before the allocation method is implemented (TOKM, 1999). The proposed optimum pre-settlement allocation method is as follows: Inshore ITQ, fishstocks caught at depths to 300 metres, will be allocated according to *iwi* coastline adjacent to their *rohe* (traditional boundaries). Deepwater ITQ will be allocated so that half will use the coastline basis, and the other half will use a population basis, according to the 1996 Census data. The allocation of deepwater ITQ takes into account the Waitangi Tribunal's findings that Maori have a right to share in the development of deepwater fisheries (TOKM, 1999).

It is intended that other pre-settlement assets, such as shares in TOKM and cash holdings, will be allocated to *iwi* according to the volume of ITQ allocated to them and the *iwi* population basis, respectively (TOKM, 1999). It is expected that after the pre-settlement assets have been distributed to *iwi*, a new Maori Fisheries Act will set out a scheme for distributing the post-settlement assets.

### 6.3 Outstanding Maori Fisheries Claims

As mentioned, the 1992 Act stated that Maori customary fishing rights remain and new fisheries regulations are to recognise and provide for Maori customary food gathering and their special relationship with such places. In addition, the Fisheries Act 1996 included provisions for the recognition of *taiapure* (local fishery areas). It is expected that the development of these places will encourage more Maori to be involved in fisheries (Te Puni Kokiri, 1993). Despite the government's inaction on this matter, to date several *mataitai* and *taiapure* have been established. The current management of *mataitai* and *taiapure* raises some difficulties for local Maori authorities in expressing their traditional management practices. These difficulties demonstrate that the expression of *rangatiratanga* has been narrowly prescribed, perpetuating Maori's distrust of legislation for the protection of their customary rights (Ririnui and Memon, 1997).

In 1997, after a five year process of drafting national regulations for customary fishing rights, Ngai Tahu joined with Te Tau Ihu o te Waka a Maui, a confederation of eight *iwi* from the top of the South Island, to determine the South Island Customary Fishing Regulations. This joint effort includes five regional co-ordinators who work closely with the Ministry of Fisheries and honorary fisheries officers. The co-ordinators also work with those nominated by *tangata whenua* to specify conditions for customary take, ensure *iwi* have reliable databases, assist with establishing *mataitai* and *rahui* (temporary closures). Most other *iwi* continue their unresolved discussions on customary rights and regulations directly with the Ministry of Fisheries (TOKM, 1997).

An issue of importance concerning customary rights is that the Treaty of Waitangi Settlement Act 1992 does not state the amount of fish to be taken. The Minister of Fisheries has proposed that allowances for customary take be within total allowable catches (TAC) while TOKM has recommended allowances be set at 10 to 20 percent of the TAC for most fishstocks. However, the determination of customary take remains unresolved (TOKM, 1998).

Currently, there is a claim before the New Zealand Courts that has significant legal implications for Maori and all New Zealanders. This claim was filed by Te Tau Ihu o te Waka a Maui for customary title to the foreshore (land below mean high tide) and seabed of the Marlborough Sounds, at the top of the South Island. The Te Tau Ihu o te Waka a Maui claim is currently before the Maori Appellate Court after an interim decision was made by the Maori Land Court. The interim decision states that Maori customary title to the foreshore and seabed may still exist, pending certain conditions. The Maori Appellate Court is now considering evidence to determine whether the deeds of land sales in the area included the foreshore and whether any legislation relates to the foreshore and seabed and may have extinguished any pre-existing customary title Maori had prior to 1840. Te Tau Ihu o te Waka a Maui's claim has significance for two reasons. First, the Marlborough Sounds area is used extensively by recreationalists and marine farmers, primarily for the growing of Greenshell™ mussels. Recently, there has been a flurry of marine farm applications, which are now being reviewed by various local councils (Bess and Harte, in press). Second, in the event the claim is successful, it could set a precedent for other *iwi* to raise similar claims throughout New Zealand.

## 7. CONCLUSIONS AND RECOMMENDATIONS

Prior to the arrival of Pakeha, Maori had a centuries-old relationship with the natural world, and their relationship with the sea permeated their way of seeing the world. Until the mid-1800s, Maori society remained strong and vibrant, and the practice of *tikanga* and *kaitiaki* ensured fisheries remained sustainable. After the arrival of colonial settlers, the Treaty of 1840 was viewed as desirable for Maori-Pakeha relations. The Treaty was a relatively enlightened 'blueprint' that provided Maori with protection of their resources in exchange for the Crown having authority over New Zealand (Fleras and Spoonley, 1999). However, in practice, the Treaty of 1840 paved the way for British imperialism and sovereignty (Walker, 1999). The suppression of Maori culture and language, and their assimilation into Pakeha culture, led to numerous Maori losing the capacity to speak or think in Maori terms (Fleras and Spoonley, 1999). The inappropriateness of some New Zealand institutions and Pakeha involvement in issues critical to Maori have



worked to break down traditional Maori society. This has made it almost impossible for Maori to maintain tribal responsibility for their own people and for society at large to appreciate Maori having the right to maintain their own way of life (Ministerial Advisory Committee, 1988).

The settlement of some Maori Treaty-based claims has brought about the reclamation of much of their traditional land and fisheries resources. Now, Maori-owned ITQ totals 224,000 tonnes, approximately one-third of the total ITQ (O'Regan, 1999). The combined pre- and post-settlement assets from the Maori Fisheries Act 1989 and the Settlement Act 1992 ensure that Maori will continue to have a major influence in the development of the commercial fishing industry. However, many *iwi* find it difficult to incorporate their traditional fisheries practices within the confines of the ITQ system and its bureaucracy.

Now that Maori commercial fisheries claims have been settled, the greater challenge for New Zealand is defining Maori customary rights and determining fishery regulations that secure these rights. Similar to Treaty-based rights, customary rights hinge on *tino rangatiratanga* and the concept of *mana*. According to Walker (1999), Maori *mana* and *tino rangatiratanga* may coexist with that of the Crown, provided there are discrete institutional frameworks that recognise and respect the legitimacy of this arrangement. This is what Maori believed they were guaranteed when signing the Treaty of 1840. However, New Zealand has been particularly averse to discussing the notion of sovereignty, perhaps due to having little experience with federalist notions of dividing sovereignty (Palmer, 1998).

Coates (1998) reminds us that the recognition of indigenous peoples' rights should remain culturally focused, not legalistic, and that all members of a society, including government institutions, have the responsibility to be involved in progressing relationships based on trust and confidence. Maori customary rights are first and foremost about the expression of Maori culture through *tino rangatiratanga*. However, the concept of Maori fisheries without pecuniary gain is foreign to the Crown. In addition, the concepts of *tikanga* and *kaitiaki* connote a sense of co-operation, trust, spiritual-connectedness and sustainability of the ecosystem. Since the mid-1980s the Crown has focused on entirely different concepts as it has steadfastly reformed both public and private sectors with strong emphasis placed on competition, individualism and other market-driven forces.

Like the settlement of Maori commercial fisheries claims, many legal and political arrangements have been made over the last few decades that provided quick solutions to the worsening of conditions for indigenous peoples. According to Coates (1998), the fundamental challenge now facing governments and non-indigenous peoples is whether they are committed to the sustainability of

indigenous cultures and societies. The New Zealand Government still has before it the challenge of conceptualising the Maori world view and implementing its concepts into government policies and institutions. 'Without such a conceptualisation and without an open agreement on the goal, it is difficult to imagine indigenous organisations and governments creating lasting solutions' (Coates, 1998:88). The process of addressing all issues surrounding Maori customary rights will require Pakeha and government institutions to see through different lenses and to reassess their assumptions about institutions and frameworks to a much greater extent than was required of them when addressing Maori commercial fishing rights, which fit conveniently within the newly formed government-supported ITQ system.

If, in the near future, New Zealand's non-indigenous people do not confirm their commitment to the survival of Maori culture and society, then Maori's population growth rate and their enhanced political and economic strength will, in time, move society's response in their favour. If non-indigenous people's affirmative response comes sooner than later, there is the prospect of moving closer to Coates' advice to (1) focus on understanding New Zealand's pattern of racial interaction; (2) commit to support for Maori language and culture; (3) agree on a collective development strategy that matches Maori aspirations with government programmes and private sector activities; and (4) create living treaties, not once-and-for-all-time agreements that provide little flexibility for the future. There will then remain the prospect that the disparate cultures and traditions in Aotearoa New Zealand will become *he iwi kotahi tatau* (one people) as many Maori first hoped when they signed the Treaty of 1840.

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