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

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A thesis submitted for the degree of Master of Laws at the Faculty of Law Te Whare Wananga o Otago, University of Otago Otepoti, Dunedin Aotearoa, New Zealand

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ABSTRACT

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

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

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


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

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Finally, personal thanks to my parents, whanau, friends and my tane, Andrew, for your aroha; and Te Roopu Whai Putake, especially Paula Wilson, a past tumuaki, and Rachel Hall, the current tumuaki, for your continuing tautoko for my mahi.
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Ngatiwai Trust Board v Pouhere Taonga/New Zealand Historic Places Trust HC Auckland, 3/97, 15 October 1997, Hammond J.


Te Runanga o Muriwhenua Inc v Attorney-General (The Muriwhenua Fisheries Case) [1990] 2 NZLR 641.

Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur 72.
Introduction

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

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

---

\(^1\) Section 4(2)(e) of the National Parks Act 1980. A map illustrating the boundaries of the national park estate in New Zealand is reproduced in Appendix One of this paper.

\(^2\) Egmont, Tongariro, Urewera and the Whanganui National Park.

\(^3\) Abel Tasman, Arthur's Pass, Fiordland, Kahurangi, Mt Aspiring, Mt Cook/Aoraki, Nelson Lakes, Paparoa, and the Westland National Park. It is expected that a fourteenth park, the Stewart Island/Rakiura National Park, will be officially declared a national park pursuant to the Gazette in May 2002.

\(^4\) Section 4(1) of the National Parks Act 1980.


\(^6\) The first country to establish a national park was the United States of America in 1872: the Yellowstone National Park.
Zealand. The 'mountains, forests, sounds, seacoasts, lakes, and rivers' were considered 'taonga'\(^7\) and were managed according to tikanga Māori.

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

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

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

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

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

\(^9\) Section 4(1) and (2) of the National Parks Act 1980.
This paper focuses that debate on New Zealand, and in particular on te Tiriti o Waitangi and national park legislation. The principal question examined is whether national park legislation has given effect to the guarantees promised to nga iwi Māori in te Tiriti o Waitangi. In seeking answers to this question, this paper tracks the legislative establishment, and provision for, national parks.

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

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

10 Jane Thomson, Origins of the 1952 National Parks Act (1976), Department of Lands and Survey, Wellington, at 3: "Before 1952 legislation governing the administration of national
Chapter Two begins this historical discussion by addressing the early practice of setting aside land to be protected from sale. In particular, it focuses on the emergence of national parks up until 1951. Chapter Three examines the first statute that consolidated all law relating to national parks, the National Parks Act 1952.

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

Part Four constitutes the final part of this paper. Besides providing a conclusion, Chapter Nine outlines several legislative measures that should be adopted so the management of our national parks can be better aligned
with the guarantees made to nga iwi Māori in te Tiriti o Waitangi over 160 years ago.

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

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

\footnote{For instance, the Waitutu Block: see the Waitutu Block Settlement Act 1997.}
PART ONE

TE TIRITI O WAITANGI: A BENCHMARK MANAGEMENT MODEL
Chapter One

Interpreting and Applying te Tiriti o Waitangi

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

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

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

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\(^{12}\) Ko te Tuarua.

\(^{13}\) Translation of Ko te Tuarua by Professor Sir Hugh Kawharu. A copy of this translation is reproduced in Appendix Two of this paper.

\(^{14}\) Article II.

\(^{15}\) Waitangi Tribunal, Muriwhenua Land Report. (Wai 45, 1997) at 386. See Appendix One of this paper for copies of the English and Māori texts of te Tiriti o Waitangi.

\(^{16}\) As argued by Hirini Matunga in "Decolonising Planning: The Tiriti o Waitangi, the Environment and a Dual Planning Tradition" in Memon and Perkins (eds), Environmental Planning & Management in New Zealand. (2000), Dunmore Press Ltd, Palmerston North, ch. 3 at 38.
This chapter therefore examines how te Tiriti o Waitangi provides the basis for accommodating two people's values in the management of national parks. Its implications are explored through the application of the discussions made by the Waitangi Tribunal concerning the rights of tangata whenua to be included in the management of natural resources. The Tribunal's interpretation is then applied specifically to national parks. This is achieved by putting forward a Tiriti-based model for national park management. This model, it is argued, should be guiding the management of our national parks - a model which recognises the fundamental importance of recognising and respecting both Tiriti partners: the Crown and Māori.

I. An Interpretation: The Waitangi Tribunal and Natural Resources

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

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

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

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

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

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¹⁹ Section 4(2), ibid.
²⁰ Section 6(1), ibid.
²¹ Section 5(2), ibid.
²² New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641 at 661 has held that the Waitangi Tribunal decisions are to be accorded considerable weight and respect by the ordinary Courts. For a further judicial discussion on the relationship between the Waitangi Tribunal and the Courts: see Te Runanga o Muriwhenua Inc v Attorney-General (The Muriwhenua Fisheries Case) [1990] 2 NZLR 641, at 651-652.
justification for this lies in the fact that te Tiriti is to be regarded as "... a living document to be interpreted in a contemporary setting...."  

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

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

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

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26 A number of Waitangi Tribunal reports use this expression: see, for example, Waitangi Tribunal, Te Whanganui-a-Orotu Report. (Wai 55, 1995), at 201; Waitangi Tribunal, Ngai Tahu Sea Fisheries Report. (Wai 27, 1992), at 269; and Ngawha Geothermal Resource Report supra n 7 at 99. This point has also been endorsed by the Court Appeal: see [1987] supra n 22.
• the Crown obligation actively to protect Māori Tiriti rights;
• the need for compromise by Māori and the wider community;
• a duty to consult;
• the Crown cannot divest itself of its obligations;
• the right of development;
• the tribal right of self-regulation;
• the Crown's obligation legally to recognise tribal rangatiratanga;
• the Crown's right of pre-emption and its reciprocal duties; and
• the principle of options.

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

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

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

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

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

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

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30 Waitangi Tribunal, Mohaka River Report. (Wai 119, 1992), at 75. A number of other reports have also stated this: see for example Te Arawa supra n 28; Whanganui River Report supra n 25; and Ngawha Geothermal Resource Report supra n 7 at 136. 
31 Mohaka River Report, idem. 
32 Ibid at 65. 
34 Ngawha Geothermal Resource Report supra n 7 at 136. See also Whanganui River Report supra n 25 at 64. 
35 Ngawha Geothermal Resource Report, idem.
the tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.

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

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

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

36 Whanganui River Report supra n 25 at 329.
37 Waitangi Tribunal, Turangi Township Report. (Wai 84, 1995), at 15.2.1 (3).
38 Whanganui River Report supra n 25 at 330.
should be managed by the iwi responsible for this river, this taonga.\textsuperscript{39} In another river report the Tribunal stated:\textsuperscript{40}

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

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

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

A different kind of natural resource, geothermal resources, have also been considered by the Waitangi Tribunal. In the \textit{Ngawha Geothermal Resource Report} the Tribunal stated: \textsuperscript{42}

\begin{flushleft}
\textsuperscript{39} Ibid at 329. Note that although the Whanganui River is not included in the Whanganui National Park, it is an integral part of the area and provides an important access way into and through the Park.
\textsuperscript{40} \textit{Mohaka River Report} supra n 30 at 64.
\textsuperscript{41} Waitangi Tribunal, \textit{Te Roroa Report} (Wai 38, 1992), at 183. In this report the Tribunal made reference to the NPA 1980 as one way in which this objective could be achieved. Reference was also made to the Conservation Act 1987 and the Resource Management Act 1991.
\textsuperscript{42} \textit{Ngawha Geothermal Resource Report} supra n 7 at 153.
\end{flushleft}
... the Crown's right or obligation to manage geothermal resources in the wider public interest must be constrained so as to ensure the claimants' interest in their taonga is preserved in accordance with their wishes.

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

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

II. An Application: How National Parks Should Be Managed

1. National Parks and Article II

Article II guarantees to nga iwi Māori tino rangatiratanga over their taonga. Taonga includes natural resources. Many of Waitangi Tribunal reports discuss this concept in depth. See also Brian Garrity, "Conflict Between Māori and Western Concepts of Intellectual Property" (1999) 8 Auckland U L Rev 1192; and A H Angelo, "Personality and Legal Culture" (1996) 26 VUWLR 395
lakes and rives are taonga. But do they meet the Waitangi Tribunal's 'taonga threshold test' so as to oblige the Crown to protect tangata whenua rights? The answer must undoubtedly be yes. Firstly, a genealogical link can be made by tangata whenua to many of the natural resources within national parks, and secondly, a detailed history of use of national park land can be recounted.

a. A genealogical link

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

\begin{verbatim}
Ko Papatuanuku to tatou whaea
Ko ia to matua atawhai
He oranga mo tatou
I roto i te moengaroa
ka hoki tatou ki te kopu o te whenua
\end{verbatim}

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

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

45 This whakatauki is reproduced in Roberts et al, "Kaitiakitanga: Māori perspectives on conservation" (1995) 2 Pacific Conservation Biology 7, at 10.
Also sacred are mountains. For instance, many mountains in the South Island have recently been described in legislation as sacred ancestors from whom the Ngai Tahu iwi descend. Aoraki/Mount Cook is the most notable example. It is the highest mountain in New Zealand, and is situated in the Aoraki/Mount Cook National Park. A schedule to the Ngai Tahu Claims Settlement Act 1998 tells the story of how four sons, including one named Aoraki, born of the union between Papatuanuku and Raki, came in a canoe, known as Te Waka o Aoraki, and "... cruised around Papatuanuku who lay as one body in a huge continent known as Hawaiiki...." Unable to find land and unable to return to their celestial home, their canoe finally ran aground on a hidden reef:

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

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

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46 The descriptions are statements made by Te Runanga o Ngai Tahu to which the Crown is acknowledging, see sections 206 and 239 of the Ngai Tahu Claims Settlement Act 1998.
47 Ngai Tahu dialect for 'Ranginui'.
49 Idem.
50 Roberts et al supra n 45.
51 Ibid at 6.
...everything in the universe, inanimate and animate, has its own whakapapa, and all things are ultimately linked via the gods to Rangi and Papa. There is no distinction or break in this cosmogony, and hence in the whakapapa between the supernatural and natural. Both are part of a unified whole.

Rivers are also sacred. Consider this explanation given by the Atihau-nui-a-Paparangi people:

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

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

b. Historical use

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

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52 Whanganui River Report supra n 25 at 46.
recognise this association. For instance, a number of the schedules to the Ngai Tahu Claims Settlement Act 1998 specifically depict Ngai Tahu historical use of national park land. In reference to the resources of Pikirakatahi (Mount Earnslaw) - a mountain that lies within the Mount Aspiring National Park - it states:\textsuperscript{54}

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

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

\begin{footnotes}
\footnotetext{Protection Society of New Zealand, Wellington, ch. 5. See also David Thom, \textit{Heritage. The Parks of the People.} (1987) Lansdowne Press, Auckland, ch. 5.}
\footnotetext{\textsuperscript{54} Schedule 87 of the Ngai Tahu Claims Settlement Act 1998.}
\end{footnotes}
Two important concepts are tapu and mauri. Tapu encapsulates the idea of sacredness of all around us. It is what regulates society. Before a tree can be cut down, for example, a karakia needs to be said to Tane, the god of the forest, seeking permission to use and take the tree. If the karakia is not performed then the tapu will be breached and harm will befall the person. Mauri translates into English as a life principle or life essence. All resources, all things have mauri, a life force. Nothing is lifeless.

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

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

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

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

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

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

2. A Tiriti Model

A Tiriti management model would, firstly, endorse both the Crown's right to govern, and the Māori right to exercise tino rangatiratanga. Secondly, nga iwi Māori would be recognised as the tangata whenua of national park land. They would be recognised as having a spiritual, historical and cultural link with the land. It would be recognised that this land is a taonga to the tangata whenua. Likewise, it would also be recognised that national park land is special to Pakeha, and that it represents to them the jewels of the conservation estate. Thirdly, the Māori conservation ethic would be accorded equal status to the Pakeha conservation ethic. Both ethics would,
for example, influence the classification of permitted activities within the national park estate. Both the Crown and Māori would have similar rights to be involved in national park management. Fourthly, both would have a right to direct the development of national park policies. Such rights would not be confined to tangata whenua simply being regarded as a special interest group. Nor would this right to manage simply mean that tangata whenua must be consulted whenever particular national park issues arise. Such representation measures do not equate to tino rangatiratanga. But, what does equate to tino rangatiratanga could be different for the tangata whenua of each national park. This in itself must be recognised.

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

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

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

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

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

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

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60 Because this model is management focused (rather than ownership focused) it provides a suitable way to view national park provisions within the confined management-oriented...
Level Four: **Mandatory Consultation/Consideration**
National park legislation would prescribe that consultation take place with nga iwi Māori when ever their interests would be affected. Their viewpoint would have the status of mandatory consideration but would have no necessary binding effect on decisions made.

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

Level Six: **Fifty Percent Representation**
At the sixth national park legislation would prescribe that nga iwi Māori constitute fifty percent of those sitting on national park management bodies.

Level Seven: **Equal Status to national park management bodies**
At the seventh level the legislation would prescribe that appointed nga iwi Māori organisations be given the same status as existing national park management bodies and administer the national park estate in partnership with these bodies, in joint documents or in separate but parallel documents.
Level Eight: **Māori Veto subject to Judicial Review**

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

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

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

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

To briefly discuss Ruru's model, if national park legislation was being guided by te Tiriti o Waitangi, surely legislative measures today to provide nga iwi Māori with representation would fall nearer to the end point of this continuum. Recognising both governance and tino rangatiratanga rights surely must mean, if we are to use the Waitangi Tribunal's interpretation as the benchmark, more than consultation and single rights to representation: mid-realm aspirations. A right to be consulted is after all not the same as a right to have one's views actioned. Perhaps the end-realm expressions would better reflect partnership aspirations. Level seven for instance would provide nga iwi Māori with a right to be recognised and represented in the
management of national parks to a standard that would clearly identify them as a Tiriti partner. Moreover, a departure from level seven to the higher realm of veto power may prove contrary to the Waitangi Tribunal benchmark – for the Tribunal holds that the Crown has the right to govern and, although this is qualified by a right of rangatiratanga, the Crown still has the overriding power, albeit only in exceptional circumstances.

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

III. Conclusion

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

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61 Margaret Mutu, "Māori Participation and Input into Resource Management and Conservation in Aotearoa/New Zealand." A Paper Presented at the Ecopolitics VIII Conference held at Lincoln University, 1994 (copy obtained from Māori Studies Department, University of Auckland).
... the realities on the ground for hapuu and iwi are nowhere near what our ancestors envisaged and certainly not what these Acts provide for.

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

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

NATIONAL PARKS: THEIR LEGISLATIVE HISTORY
Chapter Two

The Piecemeal Emergence of a National Park Estate

The specialised device of reserving land as a ‘national park’ was first implemented by legislation in New Zealand in 1894. However, it was not until 1952 that legislative uniformity for national park creation and administration was achieved. This chapter traverses the piecemeal emergence of the national park estate prior to the enactment of the National Parks Act 1952.

The first part of this chapter provides a brief overview of the more prominent pre-1894 conservation statutes. The remainder of this chapter explores the origins of the national park estate, an era in which the legislation has been appropriately labelled as "... to say the least, untidy ...". Special mention is made of the Tongariro National Park, a park regarded historically as being especially inclusive of tangata whenua. The practice of using conservation legislation to deem protected land a national park is addressed, as is the first statute which attempted to amalgamate protected areas, being the Public Reserves, Domains and National Parks Act 1928.

This chapter conveys clearly how tangata whenua were excluded from the early stages of setting aside land for the purpose of a national park, including the Tongariro National Park. It concludes that tangata whenua
views, and rights contained within Te Tiriti o Waitangi, simply did not feature in the Government's drive to protect special areas from degradation.

I. The Early Conservation Estate

The concept of reserving land from private sale for public use became a well established practice following the signing of Te Tiriti o Waitangi in 1840 - a practice which was to become closely aligned with the national park concept in the later part of that century.

The idea that land could be protected so as to provide "... public amusement and recreation ..." found favour from 1860 onwards in the form of public domains, Land Act reserves, and thermal spring reserves. This public use justification was later extended to land that contained "... natural curiosities ..." and "... scenery ..." of a character considered to be of national interest. This idea that land should be protected for the benefit of the people, as opposed for any intrinsic or ecological benefit, became integral to national park creation.

A regulatory system was central to many of these protected areas. For instance, a monetary penalty could be imposed on any person who: lit a fire; wilfully broke a fence or a tree; dug the ground; or shot or injured a

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62 See Thomson supra n 10.
63 Section 5(3) of the Public Domains Act 1860. See also section 144 of the Land Act 1877 and section 6(1) of the Thermal-Springs Districts Act 1881.
64 Section 227 of the Land Amendment Act 1885.
65 Section 235(9) of the Land Act 1892. The Scenery Preservation Act 1903 later provided for the protection of land according to its scenic value.
bird or animal in a public domain. The regulatory system developed in these years became closely linked with later national park management.

Often a monetary rationale justified the creation of these early reserves and domains. For example, the ability to create financial gain through tourism acted as the principal justification for protecting thermal areas:

The country in which the hot springs are is almost worthless for agricultural or pastoral, or any similar purposes; but when its sanitary resources are developed, it may prove a source of great wealth to the colony ...

Legislation permitted the fixing and collecting of fees for the use of the thermal springs. To put such ‘worthless’ areas to use by capitalising on their tourist potential were sentiments that became closely associated with the national park concept.

Support also emerged for protecting forests for preservation reasons. But the measure was controversial. Tree felling was regarded as crucial to the advancement of the Pakeha settlement of New Zealand for export and employment, while forest clearance was needed for cultivation and pastoral production. But the associated "... wanton and unnecessary waste ..." in

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66 Section 9 of the Public Domains Act 1860. Note that early national park legislation adopted wording similar to this section.
67 Letter from the Hon. Fox, Member for Rangitikei, to the Hon. the Premier, AJHR (II) 1874, H-26, at 5.
68 Section 6(7) of the Thermal-Springs Districts Act 1881.
70 Heaphy (4) NZPD 189 (7 October 1863).
these practices triggered public pressure for forest protection.\textsuperscript{71} Many blocks of land which later became incorporated within national park boundaries first received protection through state forest legislation.

Thus, the provision for reserving land from private sale took many forms. The rationales for doing so ranged from the practical to the purely aesthetic. But the devices were all Western. Neither reserve nor domain mechanisms were premised on tikanga Māori, even though much of this land had more than likely already been accorded special protection status by tangata whenua. After all, mountains, forests, thermal springs and so on were often regarded as taonga by tangata whenua and, therefore, concepts such as tapu and kaitiakitanga already applied. For instance, take this statement made by Ngatihaua Witehira, a kaumatua of Ngapuhi:\textsuperscript{72}

\begin{quote}
It has been said that the hot pools [of the Ngawha springs] represent the eye of the taonga. But its heart is ... within the depths of mother earth. If we abuse the very heart the pain will affect the heart, the eyes.
\end{quote}

But such relationships with land and resources were absent from these early conservation statutes. Instead, the legislation enabled those in power to take ownership of such taonga and cloak them with western concepts of conservation management. Consider, for example, this quote by Dr Finlay, reproduced by Roche:\textsuperscript{73}

\begin{quote}
\textsuperscript{71} A number of well researched accounts of the early state forest legislation exist. See discussion in Shultis, supra n 69 at 165 - 173. See also Thom, ch. 10 supra n 53.
\textsuperscript{72} Reproduced in \textit{Ngawha Geothermal Resource Report}, supra n 7 at 21.
\end{quote}
... some of the most attractive scenery in the Dominion existed in native land ... and it was desirable that power should be given to the State to obtain for the people of the Dominion for all time these fine beauty spots.

While the practice of protecting land as reserves and domains gained momentum here, the national park mechanism for protecting land had emerged overseas: in the United States in 1872, Australia in 1879, and Canada in 1885. Those in New Zealand were aware of the concept, and had been from at least 1874. But, as one author writing on this era observed, "... those who had heard of the new 'National Park' concept obviously regard it as no more than a specialised device for looking after thermal attractions and spectacular scenery ...". Instead, New Zealand focused its energies during these early years on establishing a comprehensive system for land protection through reserves and domains. Nonetheless, the prestige associated with the national park device was to prove too big an attraction to resist.

at 129-130 where Ward discusses land alienations pursuant to the Thermal Springs Districts Act 1881.

74 See Shultis, supra n 69 at ch. 5 for a detailed discussion and comparison of the first four national parks in the world.


76 Harris ibid at 32. The landscape of these national parks tended to be mountainous, with thermal springs and forest cover. See also Shultis supra n 69 at ch. 5, in particular the table at 203 which depicts the reasons for the establishment of the first four national parks in the world and the type of landscape each of these national parks tended to cover.
II. Tongariro National Park: Our First National Park

The tangata whenua of the Tongariro vicinity lead the way for the creation of New Zealand's first national park, the Tongariro National Park. This part traces the legislative link between Ngati Tuwharetoa and this park.

An iwi boundary dispute explains why Horonuku Te Heuheu Tukino IV, the paramount chief of Ngati Tuwharetoa, gifted the sacred summits of Tongariro to the Government for the purpose of a national park. An iwi boundary dispute explains why Horonuku Te Heuheu Tukino IV, the paramount chief of Ngati Tuwharetoa, gifted the sacred summits of Tongariro to the Government for the purpose of a national park.77 Discussions concerning the possibility of gifting the land took place during a Māori Land Court sitting. The Court had adjourned its hearing on the proper boundaries between Ngati Tuwharetoa and a neighbouring iwi, Ngati Maniapoto, when Te Heuheu Tukino asked his son-in-law, a Pakeha Member of Parliament at the time, Hon. Mr Grace, for advice:78

If our mountains of Tongariro are included in the blocks passed through the Court in the ordinary way, what will become of them? They will be cut up and perhaps sold, a piece going to one pakeha and a piece to another. They will become of no account, for the tapu will be gone. Tongariro is my ancestor, my tupuna; it is my head; my mana centres round Tongariro.... I cannot consent to the Court passing these mountains through in the ordinary way. After I am dead, what will be their fate? What am I to do about them?

77 Correspondence relative to the gift is contained in AJHR (II) 1887, at G-4. A copy of this correspondence is attached to this paper: see Appendix Three.
78 This discussion has been reproduced by many authors. This particular reproduction has been taken from: James Cowan, The Tongariro National Park, New Zealand. Its Topography, Geology, Alpine and Volcanic Features, History and Māori Folk-lore. (1927) Tongariro National Park Board, Wellington at 30.
In reply, Grace suggested: 79

... why not make them a tapu place of the Crown, a sacred place under the mana of the Queen? That is the only possible way in which to preserve them for ever as places out of which no person shall make money. Why not give them to the Government as a reserve and park, to be the property of all the people of New Zealand, in memory of te Heuheu and his tribe.

In order to protect the 'specialness' (the tapu) of the Tongariro summits, Te Heuheu gifted the summits to the nation for the specific purpose of becoming a national park "... mo te Iwi katoa, Pakeha me te Māori...." (translated as "... for the use of both the Natives and Europeans...."). 80 Thus the first official link between the national park label and a block of land in New Zealand was made.

However, legislation was not enacted to protect the summits as a national park until 1894 - seven years after the gift. The reason for the delay was simply that the Government wanted to acquire the ownership of the surrounding summit land first so that legislation could deem the whole area to be a national park. It was believed that this surrounding summit land: 81

... should be the property of the colony for all time. There are in Tongariro various mineral springs which will be places of resort, and should not pass

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79 Cowan, idem.
80 See supra n 77.
81 Dr Newman, Member for Thordon (57) NZPD 400 (20 May 1887). For example, in 1884 the Dr Newman had asked the Minister of Lands if their government was going to reserve the district as a national park, (49) NZPD 538 (17 October 1884). The next day an article appeared in the Weekly News urging action to protect the area (18 October 1884, Parliamentary News & Gossip Column). For a detailed discussion of the initial movement, see Harris supra n 75.
into the hands of private speculators, who will put up baths and charge very heavy prices ... It will be a very great pleasure-resort for all kinds of people ... 

The Government, however, encountered problems implementing its plans. Ngati Tuwharetoa held most of the surrounding summit land. Members of the House believed it unreasonable for the Ngati Tuwharetoa owners to expect any considerable monetary compensation for the land. They held that "... the Native land ... was of very little value to the Natives; it was never used for cultivation, and, in fact, it was only of value for the scenery in connection with it ..." - a totally ignorant statement for the 'Natives' valued this land above all else. After all, the summits are their tupuna. But many others, including the Government and many farmers, miners and loggers, believed the area to be 'worthless' in all economic development senses.

... anyone who had seen the portion of the country ... which he might say was almost useless so far as grazing was concerned, would admit that it should be set apart as a national park for New Zealand ...

This desire to see the area as a national park, as a 'resort' to provide 'pleasure' to the people, nearly came about through legislation that would have forcibly taken the land from the people of Ngati Tuwharetoa in return for a price determined by a valuer - a one-sided solution considering the

82 Native Minister, Hon. Mitchelson, expressed that the iwi "... were willing to sell, but at a price which was prohibitive ..." (69) NZPD 935 (17 September 1890).
83 Minister of Lands, Hon. McKenzie (80) NZPD 322 (28 July 1893).
84 Minister of Lands, Hon. McKenzie (86) NZPD 679 (11 October 1894).
perceived economic 'uselessness' of the area. The Member for Northern Māori, Mr Heke, called it a "... monstrous piece of legislation...." that "... was entirely inconsistent with the Treaty of Waitangi....".  

However, when the Bill came before the House for the final time the parliamentary records show its passing had the support of Ngati Tuwharetoa. Intensive negotiations between the two parties had paid off for the Government. The Bill became law in 1894, providing protection to 62,300 acres of land. However, the Tongariro National Park Act 1894 (TNPA 1894) did allow the Governor to forcibly take surrounding land owned by tangata whenua in return for monetary compensation.

The TNPA 1894 gave the Governor the responsibility to administer and manage the park, but then established a Board of Trustees to which the Governor was to divest all powers of management; the Governor's ability to do so being sourced in the Public Domains Act 1881. The Surveyor-General and the Director of the Geological Survey were appointed permanently to the Tongariro National Park Board. In accordance with

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85 See ibid.
86 (86) NZPD 679 (11 October 1894).
87 See the discussion in the House recorded at: (86) NZPD 788 (15 October 1894), in particular, Dr Newman's, Member for Wellington Suburbs, statement that he "... would not be doing justice to the Native chief, Te Heuheu Tukino the younger, unless he said that he had assisted him very materially to at last bring the other Natives to give their consent to this Bill becoming law. Honourable members must know the great difficulty there was in getting a Bill through the House when the Natives objected....".
88 In recent years the date of the creation of the Tongariro National Park has been confused for in 1987 the Department of Conservation celebrated 100 years of national parks in New Zealand. In 1887, the legal inception of the first national park was still seven years off.
89 See section 2.
90 Section 3.
91 See section 4 of the TNPA 1894 and section 12 of the Public Domains Act 1881.
92 Section 4 of the TNPA 1894.
Te Heuheu's wish, his son was appointed to this Board for life.93 Thereafter, the Minister of Lands was to appoint a successor to Tureiti Te Heuheu Tukino on five year terms.

Many of the rationales which had emerged for protecting land from private sale in the form of reserves and domains appeared in the TNPA 1894 and in the discussions surrounding its enactment. One example has already been discussed: the idea that this land was 'useless' except for its ability to provide pleasure to the people. The monetary rationale was also evident. Section 5 of the TNPA 1894 provided the means to keep management costs 'comparatively trifling' by setting out the possibility of the making of regulations to prescribe fees94 and tolls for the use of the Park.95 This ability to set fees was supported for:96

...it will be a source of attraction to tourists from all parts of the world ... the cost of management need not be great, but will be comparatively trifling, and I think that to a certain extent it may be made self-supporting by charging a reasonable fee to tourists who visit that part of the country ...

Being required to pay, it was believed, would not discourage people from visiting the Park for this was to be the 'finest park in the world'. Such sentiments help illustrate that the national park concept was embraced as a means to gain substantial prestige and to create a separate identity from the older world of Britain and Europe. The only other countries to have

93 Section 4 and 4(1), ibid. It was made a condition in the gift: see supra n 77 at 1.
94 One way in which it was expressed that a fee could be charged was by having guides take tourists to the top of the mountain: see discussion (57) NZPD 401 (20 May 1887).
95 Section 6 reflected a self-supporting ideal by adding that money accrued from such fees and tolls must be used for the park's administration.
incepted the concept had also been recently colonised: the United States, Australia, and Canada.97

A public enjoyment rationale was also reflected in the TNPA 1894. The Board was, for example, able to plant and build on the Park and set parts of the Park aside as gardens, open spaces and footpaths.98 Such provisions allowed for the vicinity to be used as a playground, a type of 'pleasure' or 'recreation' ground for the people to use and enjoy.99 Still, there existed restraints on how the public could use this 'playground'. By relying on the Public Domains Act 1881, the TNPA 1894 empowered the Board to make by-laws, orders and regulations for the preservation of certain plants and animals, and restrict the entry of people, vehicles, dogs and cattle.100 Penalties could also be attached to any wilful action such as the lighting of fires, the breaking of fences and trees, the digging of ground, the injuring of birds and animals, or to the removing of any plants from the area.101

The TNPA 1894 consisted of only six sections, but by relying on the Public Domains Act 1881 it put forward a comprehensive administration and management regime. New Zealand's first national park was born.

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96 Hon. Ballance, Native Minister and Minister of Lands (57) NZPD 399 (20 May 1887).
97 Shultis, supra n 69.
98 See section 4(1)(6) of the Public Domains Act 1881. The final subsection, section 4(7), emphasised the wide-ranging nature of the power; anything was justified so long as it was for the proper and beneficial management and administration of the park.
99 These expressions were common in New Zealand and overseas in respect to national parks. See comments in (79) NZPD 311-312 (7 July 1893) and Shultis, supra n 69.
100 Section 10 of the Public Domains Act 1881.
101 Section 17, ibid. This also is a power that can be delegated - see section 12 of this 1881 Act.
However, to herald this park as an example of the "... first Western country to reserve a national park in cooperation with its indigenous people ..." is to gloss the history of the Park's origins. While co-operation was obviously evident in 1887 (the year the summits were gifted), subsequent Government actions caused that relationship to deteriorate. For instance, it took seven years before the gifted summit lands were given legislative protection as a national park. During these intermediate seven years the tangata whenua were hounded by Government to part with the surrounding summit land. And even when the area was given legislative protection, powers had been included in the TNPA 1894 to forcibly take the land owned by tangata whenua in return for monetary compensation!

Even the statutory right to representation on the management board proved vulnerable. Buried in the Reserves and other Lands Disposal and Public Bodies Empowering Act 1914 was a provision that entirely changed the management regime. The Minister (of the Department) of Tourist and Health Resorts became responsible for managing the Park. To the fore came the playground ideal; the Park could now be used as a sports ground, and stands and pavilions could be erected. Gone was the management Board and the right of a Te Heuheu Tukino descendant to be included in the Park's management.

102 Shultis, supra n 69 at 196.
103 For the Government to celebrate a centenary of national parks in New Zealand in 1987 contributed to this gloss.
104 See section 54(2). Only sections 1 (the Long Title) and 2 (concerning land acquisition) of the TNPA 1894 were left standing following the enactment of this 1914 Act.
105 See section 9(a) of the Tourist and Health Resorts Control Act 1908. Note that this section is a word-for-word replica of section 29(1)(e) of the Public Reserves and Domains Act 1908, a section concerned with recreation-ground reserves.
Dissatisfaction, however, emerged. The Member for Rotorua felt that a "... very great injustice was done in 1914 to those people when the control was vested entirely in the Tourist Department and the then chief of the Ngati Tuwharetoa Tribe was thrown off the Board ...". The Minister of Lands felt that the park needed a board of control to "... develop and popularize ..." the Tongariro National Park.

In 1922 the Tongariro National Park Bill was introduced. This generated several interesting discussions. There was an obvious tension as to what a national park should represent: exclusively native flora and fauna, or a mix of native and introduced flora and fauna. A suggestion that a monument be constructed in recognition of Te Heuheu's gift sparked the interest of many in the House. Keen to see the Park being associated with tangata whenua, Members also urged promotion of the past use of the land through a book containing old Māori legends and the construction of a Māori village. The rationale:

If to visitors coming to NZ we could show similar efforts on the part of the Natives as are shown in Norway - if we could show them Māori characteristics and the antiquarian instincts of the Māori - then the rich visitors who come to New Zealand, instead of leaving 100,000 (pounds) as they are doing to-day, would probably leave 2,000,000 (pounds) behind them. We want to encourage

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Section 9(b) of the Tourist and Health Resorts Control Act 1908.

Mr Hockly, Member for Rotorua, (198) NZPD 226-227 (17 October 1922).

Hon. Guthrie, ibid at 219.

A proposal to introduce heather provided the focus of this debate: see supra n 107 at 218-241.

Member for Otaki, Mr Field, ibid at 233.

Member for Christchurch East, supra n 107 at 238.

Ibid at 239.
such people. We want to get this country advertised, and there is no better way of doing it than by taking such a course as I speak...

Members in the House obviously felt comfortable acknowledging the association Māori had with the vicinity. But few felt comfortable with the idea that Māori may still have rights to the land. One inquisitive Member directly asked the Minister of Lands "... what rights the Māoris have had in connection with these lands ... Have they, for example, the right of shooting pigeons? Are we going to deprive them of any rights they now enjoy?...". The answer was blunt. Replying that he had no knowledge of any rights, the Minister emphasised that the lands within the Park were now Crown owned land.

This discussion illustrates that the Government was prepared to accept that Ngati Tuwharetoa had a special link to the land. The choice, however, to only recognise links that would have a potentially beneficial monetary spin off, demonstrates how far removed the Government was from a Tiriti based management model.

The Tongariro National Park Act 1922 (TNPA 1922) had grown in size - the original 6-section 1894 statute was now a 30-section, largely self-supporting, statute. It reintroduced the Tongariro National Park Board as holding responsibility for managing the Park. It also reinstated that a successor to Te Heuheu Tukino be appointed to the Board.

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113 Mr Sidey, Member for Dunedin South, supra n °7 at 223.
114 Later in the debate, Mr Glenn, Member for Rangitikei, emphatically stated that Māori should have no rights to shoot, adding that the park should be a sanctuary for the native birds, ibid at 229.
The national park concept had obviously taken hold in New Zealand. Other parks were soon to be created. Yet for more than 80 years the Tongariro National Park Board was the only national park board to expressly require tangata whenua representation. This in itself should not be lost sight of in spite of the above criticisms concerning the establishment of this Park.

III. The Other National Parks

1. Their Creation

The Egmont National Park was established six years after the creation of the Tongariro National Park. The ability to generate monetary gain through tourism lead to this area being protected.115 Amassing to over 70,000 acres,116 the Egmont National Park Act 1900 (ENPA 1900) afforded this large tract of land national park protection (this land has since been recognised in statute as being unfairly taken from the tangata whenua).117

However, prior to 1928, it was more common to use Land Act legislation to protect land as a national park, in particular the Land Acts of 1877, 1885 and 1892. This was so, even though these statutes contained no express

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115 See for example the comments made by Mr McGurie, Member for Egmont: "... thousands of tourist visited Egmont every year, and it was acknowledged to be the most graceful mountain in the world...." (94) NZPD 233 (11 August 1896).
116 See the Schedule of the ENPA 1900.
provision allowing land to be reserved for the purposes of a 'national park'.

Five national parks were created this way, the:

- Hooker Glacier National Park;\(^{119}\)
- Tasman National Park (Mount Cook vicinity);\(^{120}\)
- Arthur's Pass National Park;\(^{121}\)
- Otira Gorge National Park;\(^{122}\) and
- West Coast Sounds National Park.\(^{123}\)

Similar conservation, monetary and public use rationales to the Tongariro and Egmont National Parks were expressed as justifications for protecting this land. For example, according to Mr Montgomery,\(^{124}\) immediate steps were required to prevent the destruction of the bush and the scenery in the Otira Gorge. The area, he stated, was "... useless ..." for any purpose other than a national park.\(^{125}\) As a national park, he stressed, it would prove to be a "... goldmine in the future in the way of inducing tourists to visit that part of the colony....".\(^{126}\)

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\(^{118}\) The following areas were referred to as 'national parks' in a Department of Lands and Survey report in 1921: see the Scenery Preservation Report, copy of which is presented in AJHR (I) 1921-1922, at C-6 at 2. It was stated in this Report that "... in reserving an area of over 3,000,000 acres the successive Governments of New Zealand have recognized the importance of preserving the unique and beautiful scenery of the Dominion for the enjoyment of the present and future generations....".

\(^{119}\) *New Zealand Gazette* of 15 January 1885, at 95-96.

\(^{120}\) *New Zealand Gazette* of 28 July 1887, at 1008.

\(^{121}\) *New Zealand Gazette* of 24 October 1901, at 2034.

\(^{122}\) Idem.

\(^{123}\) February 1905 pursuant to the Land Act 1892.

\(^{124}\) Member for Ellesmere.

\(^{125}\) (100) NZPD 155 (24 November 1897). Comments of a similar nature were again expressed in the House in 1899: see (109) NZPD 344-345 (15 September 1899).

\(^{126}\) Ibid. This same rationale had been expressed in regards to the Tongariro and Egmont National Parks.
The presence of such a large national park estate existing in these early years, especially prior to 1928, has been an obscure fact in our national park history. Official publications tend to cite the creation of, for example, the Arthur's Pass National Park as at 1929 even though the land in this vicinity had been set aside as a national park reserve in 1901. In fact, more than half of the total area of all national parks existing in 1980 had been gazetted as a park or reserve as early as 1907\textsuperscript{127} - reserved land which enabled "... dwellers in every part of the colony to realise what the land of the Māoris looked like before its colonisation by Europeans...."\textsuperscript{128}

After 1928, it was more common to use the Public Reserves, Domains and National Parks Act 1928 to establish a national park (rather than the Land Acts). Two national parks were created pursuant to this 1928 Act: the Arthur Pass National Park on 29 July 1929\textsuperscript{129} and the Abel Tasman National Park on 9 December 1942.\textsuperscript{130} Both parks constituted land which had previously been protected and administered under the: Scenery Preservation Act 1908; Land Act 1924; the Forests Act 1921-22; and Part I of the Public Reserves, Domains, and National Parks Act 1928.

Therefore, prior to 1952, there existed no uniform way to legislatively create a national park. Two had been created pursuant to special legislation (Tongariro and Egmont), and five had been created pursuant to Land Act legislation. Two of these five 'Land Act national parks' were subsequently


\textsuperscript{128} Supra n 118 at 3.

\textsuperscript{129} New Zealand Gazette of 1 August 1929, at 1932.
declared a national park pursuant to the Public Reserves, Domains and National Parks Act 1928 (Arthur's Pass and Abel Tasman), while another was brought under Part One of the Public Reserves, Domains and National Parks Act 1928 (Part One being concerned with public reserves, the Sounds National Park). The other two were simply left under the Land Act legislation (the Hooker Glacier and Tasman National Parks). This summary thus portrays clearly the 'untidy' nature of our early national park statutes. It will be of no surprise then that national park management was similarly 'untidy.'

2. *Their Management*

The Egmont National Park adopted a management process akin to the Tongariro National Park. A corporate Board was primarily responsible for its management. But in comparison to the Tongariro National Park Board, all eight of the named Egmont National Park Board members held locally related positions; none represented local tangata whenua. Another difference concerned the ease with which a person could be penalised for acting in a prohibited manner. If a person was found, for example, lighting a fire or removing plants, they were presumed to be acting in a prohibited manner until the contrary could be proved.132

This tighter policy existed because, in the late 1890s (just prior to the Egmont National Park being established), a dispute had arisen between the

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130 *New Zealand Gazette* of 10 December 1942, at 2865.
131 See section 2 of the ENPA 1900. This illustrates that the Tongariro measure was in response to a condition of the gift of the summit lands, rather than a response to recognising the Tiriti rights of nga iwi Māori to be included in the management of national parks.
132 See sections 14 and 15, ibid.
tangata whenua and the local conservation groups concerning the "... taking of large numbers of tui and pigeon by the local Māori for feast days....". The tangata whenua claimed the right to hunt in and out of season under te Tiriti o Waitangi, but the conservation groups argued that te Tiriti conferred no special rights to kill tui. The ENPA 1900 endorsed the latter view, ensuring processes were in place enabling the easy imposition of a penalty upon a person acting contrary to its provisions, such as by killing tui.

The five 'Land Act national parks' were managed in accordance with the various Land and Public Reserves Acts. The management regime in place for the five parks was minimal in comparison to the Tongariro and Egmont National Parks. No comprehensive management regime existed. No special boards of management were appointed to these reserve type national parks. Still, this management regime had no regard for the fact that these areas were also perceived as special, albeit in a slightly different fashion, by tangata whenua (special for their spiritual, historical and cultural association with the land, and not necessarily for their scenic uniqueness).

133 Lockhead supra n 117 at 117.
134 Ibid at 118.
135 The ENPA 1924 later repealed the ENPA 1990. The ENPA 1924 continued the original emphasis of including local body representation without going to local tangata whenua inclusion: see section 24(1). Otherwise the ENPA 1924 was very similar in layout and content to the TNPA 1922.
136 See section 2 "Public reserve" of the Public Reserves Act 1881.
138 See comment, for example, in the Department of Lands and Survey Scenery Preservation Report reproduced in supra n 118. Note it was not until 1952 that legislation articulated a
The later establishment of the Arthur's Pass and Abel Tasman National Parks created a precarious management situation: three statutes (the TNPA 1922, the ENPA 1924, and the Public Reserves, Domains and National Parks Act 1928), were in operation to administer four national parks.\(^{139}\) However, this fragmentation appeared worse than it was because the 1928 Act largely replicated the Tongariro and Egmont National Park legislation. For instance, body corporate boards,\(^{140}\) financing,\(^{141}\) and penalty\(^{142}\) provisions were of a like nature to the TNPA 1922 and ENPA 1924.

Like the Tongariro and Egmont statutes, the 1928 Act shied away from defining the purpose of setting land aside as a national park. Few clues were given in the House while the 1928 Act was being discussed in its Bill form. Instead the debate focused on the significance of public reserves and domains. Attention only turned to national parks as concern mounted for the protection of the Arthur's Pass vicinity. This concern centred on the railway trips to the district: "... there is no government body to control the excursionists in their rambles about the mountains, and their depredations in

\(^{139}\) A fifth national park, the Sounds National Park, continued to be administered and managed as a reserve under Part One of the Public Reserves, Domains and National Parks Act. Subsequent enactments, however, saw this area being managed in a like manner to the statute-created national parks; the area was protected against fire and the interference with flora and fauna: see section 26 of the Reserves and other Lands Disposal Act 1938; section 30 of the Reserves and other Lands Disposal Act 1941; and section 38 of the Reserves and other Lands Disposal Act 1948. Note also the Peel Forest Park was often referred to in these years as a national park: see Thomson supra n 10. Instead it was a forest park. But the Peel Forest Park Act 1926 closely resembled the wording of the TNPA 1922 and ENPA 1924 which explains the confusion.

\(^{140}\) See sections 72 - 79 of the Public Reserves, Dcmain and National Parks Act 1928.

\(^{141}\) See section 85. Note that section 91 reinforced the link between national parks, tourism and monetary gain. This section allowed national park boards to levy and collect fees from anyone "... camping and picnicking ..." in a park.
the way of taking valuable plants....". The discussion concluded that the area must be protected as a national park so as to halt its degradation. This discussion suggests that the national park label was regarded in this era as a landscape protection tool capable of regulating behaviour. Of continued absence was the idea that the national park label was merely supplanting a protection mechanism that had existed in this country for hundreds of years: a conservation protection system based on tikanga Māori.

IV. Conclusion

The legislation during the period prior to the enactment of the National Parks Act 1952 aptly suits the description of legislative 'untidiness'. It also aptly suits being classified as an example of monocultural management of natural resources. Little regard was had to the fact that these precious lands were once managed undisputedly by the tangata whenua. Likewise, little regard was had to the historic, traditional, cultural, and spiritual relationship that tangata whenua have with these lands - land which was rapidly gaining value in a preservation sense to Pakeha, but land which had for many hundreds of years previously been revered with respect and protected according to tikanga Māori.

142 For example, similar actions such as lighting fires and damaging trees were prohibited. However, in comparison, if a person acted in a prohibited manner they could either be fined or imprisoned.
143 Mr Seddon, Member for Westland, (219) NZPD 587 (27 September 1928).
144 Idem.
Chapter Three

Consolidation Achieved: the National Parks Act 1952

In 1952, "An Act to consolidate and amend the law relating to National Parks" was enacted. This Act, the National Parks Act 1952 (NPA 1952), marked the end to the piecemeal nature of national park legislation. Three aspects of the NPA 1952 are discussed in this chapter: its explanation of the purpose of national parks, its provision allowing Māori land to become part of the national park estate, and its provision for national park management. This chapter concludes that this Act was as exclusive of nga iwi Māori, just as past legislation had been. The only exception to this conclusion concerns the Egmont National Park, which is discussed later in this chapter.

I. Rationalising the National Park Concept

The NPA 1952 contained the first legislative statement for why national parks exist in New Zealand. Section 3(1) stated:

\[ ... \text{the provisions of this Act shall have effect for the purpose of preserving in perpetuity as National Parks, for the benefit and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality or natural features so beautiful or unique that their preservation is in the national interest.} \]

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\[ ^{145} \text{Long Title.} \]
\[ ^{146} \text{Section 3(1).} \]
Section 3(2) further strengthened this general purpose statement. It stated that national parks were to be administered and maintained in a manner which provided for the:  

- preservation of national parks as far as possible in their natural state;  
- preservation of native flora and fauna as far as possible;  
- extermination of introduced flora and fauna as far as possible;  
- maintenance of soil, water and forest conservation; and  
- freedom of entry and access subject however to all conditions and restrictions as may be necessary for the preservation of native flora and fauna and for the welfare in general of the parks.

The two subsections can be summarised as creating two purposes for national parks: preservation and public recreation, although, if contested, the preservation rationale was paramount. Yet preservation itself was not absolute, for it was couched in the qualifying terms "as far as possible". This qualification recognised that national parks, after all, were "... the principal playing-areas of New Zealand...."  

Despite the clear statement of purpose in section 3, the Act contained no express reference to the rights or values of nga iwi Māori. Although many features within national parks are tupuna of tangata whenua and have been accorded protection by tangata whenua for hundreds of years this was not recognised. In spite of the encompassing nature of the public recreation purpose

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147 Section 3(2)(a)-(d).  
148 Hon Mr Corbett (Minister of Lands) (297) NZPD 712 (5 August 1952). The Act recognised the potential conflict between the two rationales for a variant on the national park device was
expression, which expressed hope that the public would be able to receive "... in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, lakes, and rivers ....", it is doubtful that the drafters of this section had in mind a historic, traditional, cultural and spiritual relationship.

This oversight consequently affected the right of tangata whenua to be included in the management of national parks. For example, section 6 stated that national parks must be managed in accordance with the principles of the Act, that is, with section 3. It is, therefore, disappointing that land so special and closely associated through identity to tangata whenua was not deemed worthy of express mention in this first legislative expression for why we use the national park label to protect land.

On a different slant, the preservation rationale in section 3 prioritised native, over introduced, flora and fauna. Therefore it could be argued that this section gave effect to tangata whenua values as native flora and fauna are their tupuna. But protecting a resource simply because it falls within a landscape of national interest - the rationale for the preservationist approach, and which is incorporated in section 3 - is alien to tikanga Māori:

... use is not a sacrilege but can be an honouring of wildlife, or potentially even an added incentive to good environmental stewardship. In this view humans are

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introduced: 'special areas' within national parks (section 12). Preservation trumped without any qualification in these areas.

149 Section 3(2)(d).

150 Todd Taiepa et al, "Co-management of New Zealand's conservation estate by Māori and Pakeha: a review" 24 Environmental Conservation (3) 1997, 236 at 239.
seen as a fully-interacting component of ecosystems and moderate impacts of humans as natural.

In comparison to Western understandings of conservation, the Māori conservation ethic encourages resource use. This distinction was not recognised in the NPA 1952 (nor is it a distinction recognised in current national park legislation).\footnote{These differences in conservation management practices are discussed in Chapter Five of this paper in relation to the definition of 'conservation' in the Conservation Act 1987 (the companion statute to the current NPA 1980).}

II. The New National Park Estate

The passing of the NPA 1952 brought together, under one administrative umbrella, five national parks: Tongariro; Egmont; Abel Tasman; Arthur's Pass; and Sounds (Fiordland). The previous statutes that had epitomised the piecemeal nature of national park legislation were repealed.\footnote{These being the TNPA 1922, the ENPA 1924, and Part III of the Public Reserves, Domains and National Parks Act 1928: see twelfth schedule of the NPA 1952. Note, according to Hon. Mr Corbett (Minister of Lands) these five parks represented 4.5 per cent of the total land area of New Zealand, (297) NZPD 7:2 (5 August 1952). Note, also as at 1952 the reserve-type Tasman and Hooker Glacier national parks continued to remain on the perimeters of the national park estate.} Five more national parks were created under this Act: Mount Cook in 1953; Urewera in 1954; Nelson Lakes in 1956; Westland in 1960; and Mount Aspiring in 1964.

The process of setting land aside as a national park raises an issue of concern to nga iwi Māori: the use of Māori land to constitute the national
park estate. Even though the NPA 1952 stipulated that only Crown land could be used in national park creation, the means for the Minister of Lands to acquire private land was also permitted - by use of the Public Works Act 1928. Private land was defined in the Act to include "... any Māori land...." The potential for this provision to affect Māori land more than any other type of private land was not missed by those (in the House) who participated in the debate while the Act was in its Bill form. In fact, it was recognised that the provision to take "any private land" went almost solely to Māori land: "... I do not think there are any blocks of first-class bush country held other than by the State or by Māoris....", and if there were any such blocks of land, then they would be "... too small for the Government to worry about....".

Parliamentary records show that Māori Members, in particular, feared the Crown would justify the taking of Māori 'bush-clad' land in return for compensation that would not reflect the importance of the land to its owners. Hon. Tirikatene, Member for Southern Māori District, urged that discussions take place with the owners of Māori land, before it was taken.

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153 While this issue concerns ownership rather than management considerations, it is briefly discussed here for it does have certain consequences for the role tangata whenua should have in national park management.
154 Section 10(1).
155 Section 13(1).
156 Section 2 'Private land'. The generic term 'Māori land' is used, in this paper, to mean both Māori freehold land (which is owned by Māori for a beneficial estate in fee-simple) and Māori customary land (which is vested in the Crown but held by Māori under their own customs and usages): see the Māori Land Act 1931. This Act was replaced in 1953 by the Māori Affairs Act 1953 which continued to define Māori land in a similar manner. This 1953 Act has since been repealed: see Te Ture Whenua Māori Act 1993.
157 Mr Kearins, Member for Waimarino, (297) NZPD 766 (5 August 1952).
158 (297) NZPD 724 (5 August 1952).
After all, these areas are their sole heritage.... and if they were holding the property for the future benefit of themselves or of their families then that should be taken into consideration when compensation was being computed.

The concern that owners of Māori land would not be consulted nor adequately compensated was premised on the past use of the public works legislation to acquire Māori land for Crown purposes. The public works legislation reinforced this fear for it specifically differentiated between Māori land and General land. Compensation, for example, was always payable in relation to General land, but was not a mandatory requirement for Māori land. Professor Alan Ward has recorded the common practice that took place in the 1950s in relation to compensation levels:

Māori land which was marginal and undeveloped appears to have been valued at very low rates for compensation purposes by valuers with European perspectives toward land value. Māori owners were often not even aware that land had been taken and that compensation had been awarded.

In terms of te Tiriti o Waitangi and its guarantee to nga iwi Māori that they have a right to exercise tino rangatiratanga over their taonga, it is disappointing that the NPA 1952 continued the historical practice of permitting the taking of Māori land for national park purposes, a practice which had been initiated in our first national park statute, the TNPA 1894, and was obviously still favoured by the Crown.

159 See Part IV of the Public Works Act 1928. Note also the different procedures involved for taking Māori land; see section 10(1) of this Act.
160 Ward supra n 73 at 316. Also recall that the TNPA 1894 contained similar provisions.
While the NPA 1952 was in place, a specific example of confiscated Māori land constituting an earlier national park emerged. In 1978, the Government accepted that much of the land contained within the original Egmont National Park boundaries was confiscated Māori land. Section 4 of the Mount Egmont Vesting Act 1978 attempted to make amends by returning Taranaki/Mount Egmont, the centrepiece of the Park, to the Taranaki Māori Trust Board. But section 5 stated that the Board subsequently gifts the mountain back to the Crown. The Crown's gesture was therefore only symbolic.

Doubt has since been cast on the credibility of this 1978 Act. The Waitangi Tribunal has recently stated that it has found no evidence to suggest that the tangata whenua agreed to the arrangement. In reference to this 1978 Act, some have named it the "'Magic Mountain' - 'now you have it, now you don't'...." However, a recent submission to the Tribunal provides an explanation for why the Taranaki iwi may have agreed to the 1978 Act:

It appears unusual that the Trust Board should wish to forsake ownership of the mountain by Taranaki Māori for no apparent return. It is submitted ... that the political climate of 1975 was such that the Board felt it was necessary to perform a gesture of goodwill designed to create a more favourable environment within which a monetary settlement could be negotiated.

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161 However, pursuant to the New Zealand Settlements Act 1863 rather than public works legislation.
162 The Taranaki Report supra n 117 at 299.
163 Idem.
164 Ibid. Note, the issue of ownership remains contentious today as eight Taranaki iwi with an interest in the mountain have laid claims with the Crown for its return, though a solution is likely to be some years away.
A more recent example of a similar gesture concerns the gifting of Aoraki/Mount Cook to Ngai Tahu, and will be discussed in Chapter Seven of this paper.

III. The Management Regime

1. Structure

With all national parks being under the one statute, the NPA 1952 was able to create a new consolidated national park management regime. This regime incorporated a three tier structure: the Minister of Lands as the overseer, a newly established National Parks Authority as the intermediate body responsible for national park management at the national level, and national park boards as the regional bodies responsible for the daily administration and management of the parks.

2. Responsibilities

Section 6 of the NPA 1952 defined the duties of the National Parks Authority to include the following:

(a) To advocate and adopt schemes for the protection of National Parks and for their development on a national basis:

(b) To recommend the enlargement of existing Parks and the setting apart of new ones:
(c) To recommend to the Minister the manner in which moneys appropriated by Parliament for the administration, maintenance, and improvement of National Parks should be allocated:

(d) To exercise in relation to National Parks and National Park Boards such powers and functions as are conferred on the Authority by this Act:

(e) Generally to control in the national interest the administration of all National Parks in New Zealand.

Additionally, the NPA 1952 stated that the Authority was to act in accordance with the principles laid down in the Act, principally section 3 - a section devoid of any express mention of nga iwi Māori rights and values.\textsuperscript{165} The Authority was also to give effect to any Government decision that was conveyed to it.\textsuperscript{166}

In comparison, the national park boards, which operated at the regional level, had the responsibility of administering, managing and controlling parks in accordance with the NPA 1952, subject to the general policy and direction of the Authority, and:\textsuperscript{167}

\ldots in such a manner as to secure to the public the fullest proper use and enjoyment of the Park consistent with the preservation of its natural features and the protection and well being of its native flora and fauna.

Specific powers were vested in the boards. For example, they were able to: provide facilities, such as huts and ski tows, to park rangers and park users, provide licences to those who wished to carry out a business within a park,

\textsuperscript{165} See section 6.
\textsuperscript{166} Section 7.
\textsuperscript{167} Section 26.
erect bridges, and, with the prior approval of the Authority, set apart any part of the park for any specified purpose of public amusement or recreation, or for camping and parking sites.\textsuperscript{168} In effect, the boards could do anything that "... may be requisite for the proper and beneficial management, administration, and control of the Park or any part thereof...."\textsuperscript{169} Many of the powers given to the boards emphasised the importance of the public use rationale for national parks. Other provisions, however, gave them the power to give effect to the preservation rationale. By-laws could be implemented to preserve the native flora and fauna, and provisions within the Act made it a penalty, for example, to light a fire, to wilfully injure a tree or shoot a bird.\textsuperscript{170}

The duties of the Authority and the boards can, therefore, be categorised as silent on tangata whenua rights. They had no legislative responsibility to be concerned expressly with tangata whenua interests. The NPA 1952 was like past national park legislation. That is, it provided a management regime contrary to that contemplated by the Māori signatories to te Tiriti o Waitangi.

3. Representation

The National Park Authority comprised nine members, none of whom was expressly to be or represent Māori. Instead, it constituted five representatives of four Government Departments (Lands and Survey, Internal Affairs, New Zealand Forest Service and Tourist and Publicity),

\footnotesize
\begin{itemize}
  \item \textsuperscript{168} Section 28(1).
  \item \textsuperscript{169} Section 28(1)(j).
  \item \textsuperscript{170} See Part IV of the NPA 1952.
\end{itemize}
three representatives of three non-government organisations (Royal Society of New Zealand, Forest and Bird Protection Society of New Zealand, and Federated Mountain Clubs of New Zealand), and one person to represent national park boards.\textsuperscript{171} The Minister of Lands spoke favourably of this make-up, stating that the:\textsuperscript{172}

... very wide representation should provide a policy which will be able adequately to ensure future control, on broad lines, of this very important part of our national heritage.

Thus, non-government organisations were considered worthy of being given a statutory right of representation on the Authority, but tangata whenua were not. The mono-cultural representative make-up initiated in the NPA 1952 is only just beginning to be displaced today, fifty years later.

The national park board membership was similarly mono-cultural. The Authority, and to a lesser extent the Federated Mountain Clubs, determined the composition of most of the boards.\textsuperscript{173} The NPA 1952, however, continued the prior legislative stance of appointing a Te Heuheu Tukino descendent to the Tongariro National Park Board.\textsuperscript{174}

Yet, some years after the implementation of this 1952 Act, a significant change was made to the make-up of Egmont National Park Board. In 1977, an amendment to the NPA 1952 gave the local Taranaki iwi a statutory

\textsuperscript{171} Section 4(1).
\textsuperscript{172} Hon. Mr Corbett, (297) NZPD 713 (5 August 1952).
\textsuperscript{173} Section 18(2).
\textsuperscript{174} Section 16. It also continued the legislative provision of providing for local body representation on the Egmont National Park Board: see section 17.
right to sit on this Board.\textsuperscript{175} Yet, the achievement was hard won. When the National Parks Amendment Act 1977 was first introduced into the House it made no provision for representation on the Board for Taranaki iwi. Hon. Matiu Rata, the Member for Northern Māori, described the Bill as "... another example of the Government's arrogance on matters affecting the Māori people...."\textsuperscript{176} Justification for the exclusive stance lay in the belief that national park land is owned by all New Zealanders, and therefore the ability of the Minister of Lands to appoint members should not be restricted in any manner: "Those members may be Māori, they may be pakeha, but they will all be New Zealanders who represent the national interest...."\textsuperscript{177}

But, the 'fallacy' of the argument was noted:\textsuperscript{178}

> If the Federated Mountain Clubs of New Zealand and the New Zealand Ski Association are specifically entitled to be represented, then why not another group with a significant and much more traditional right in that area - the Māori people?

It was while the Bill was at the select committee stage that it was amended to give the Taranaki Māori Trust Board the statutory right of representation - it was only the second board in New Zealand's national park history to do so.\textsuperscript{179}

\textsuperscript{175} Section 2 of the National Parks Amendment Act 1977 allowed the Minister of Lands to appoint one person on the recommendation of the Taranaki Māori Trust Board.

\textsuperscript{176} (413) NZPD 2673 (2 September 1977).

\textsuperscript{177} Hon. V S Young, Minister of Lands, ibid at 2684.

\textsuperscript{178} Hon. Mrs Tirikatene-Sullivan, Member for Southern Māori, idem.

\textsuperscript{179} The amendment was made as a result of the submission made by the Taranaki Māori Trust Board to the select committee: see discussion in the House: (416) NZPD 4952-4954 (1 December 1977).
IV. Conclusion

The NPA 1952 was introduced into the House in July 1952. In its Bill form its object was "... to present in a more clear-cut and concise manner a policy for the control and administration of these vast areas of open spaces which we call our national parks....". In many ways the Act was successful. The rationale of having national parks was made apparent, including what could and could not be done within their boundaries. It also achieved a consistent approach to national park management thereby providing the stability and consolidation that our national parks had lacked under the previous piecemeal legislative regime.

But, in regards to nga iwi Māori, the 1952 Act lacked background and substance. There was no evidence that nga iwi Māori were consulted in its drafting. The Act lacked express awareness of the relationship tangata whenua have with much of the land within national park boundaries - some of which was forcibly taken from them. There is no reference to te Tiriti o Waitangi in the public debates surrounding this Act, nor in the wording of the Act itself. Back in 1894 politicians were at least comparing proposed statutes with te Tiriti. By the 1950s, however, mainstream society had all but forgotten its existence. The NPA 1952 was simply premised on a mono-cultural view of why 'mountains, forests, sounds, seacoasts, lakes and rivers' are special.

180 Hon. Mr Corbett, Minister of Lands, (297) NZPD 712 (5 August 1952).
181 See supra n 86.
The conclusion to this study of the legislative history of national parks must be that te Tiriti o Waitangi was not guiding the management of these early parks. Can the same still be said of legislation today?
PART THREE

NATIONAL PARKS TODAY
Chapter Four

The Passing of the National Parks Act 1980

Today the National Parks Act 1980 (NPA 1980) directs the management of our national parks. Whilst major amendments have since been made to this statute, the primary purpose of this chapter is to concentrate on its original content and the many factors that created the impetus to oust its predecessor, the NPA 1952. The continued elusiveness of nga iwi Māori in the management of national parks is made apparent in this chapter. This was so even though society was becoming, at last, more aware of te Tiriti o Waitangi. Nonetheless, this awareness was not reflected in the original enactment of the NPA 1980.

I. The NPA 1952 Under Scrutiny

Beginning in the early 1970s, and reaching a climax for national parks in the later part of that decade, increasing environmental concern led to a review of statutory provisions concerned with protecting the environment. For example, the Clean Air Act 1972 and the Marine Pollution Act 1974 were enacted. Many amendments were also made to existing statutes to reflect environmental awareness. Integral to this era was the questioning of the role for...
national parks. The issue of how best to manage the parks dominated many national park conferences held in the late 1970s.183

In response to the dissatisfaction expressed during these conferences, the National Government appointed a special Government caucus committee in March 1979 to review the national park administration system. The incentive to review was based on the "... growing concern ... that the present system of administering national parks and reserves was inefficient and wasteful of resources ...".184 The caucus committee conducted its review by inviting public comment. More than 100 submissions were received. The submitters ranged from private individuals, to park boards themselves, park user groups, government departments and tourist operators. Inspecting the list of submitter's names, there appears to have been no submission made from a Māori point of view.185

The committee's discussion paper, which was based on the submissions received, was published in July 1979. It reiterated many of the submitter's arguments, including the position that the administration system was fragmented and uncoordinated, that the National Parks Authority was

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184 (430) NZPD 1126 (1 July 1980), Hon V Young (Minister of Lands).
overly bureaucratic in structure to such an extent that conservationist views were over-ridden by departmental views, and that administrative matters, not policy planning, dominated the Authority's work load.\textsuperscript{186} The discussion paper presented a number of recommendations, including:\textsuperscript{187}

That oversight and co-ordination of National Parks, Maritime Parks and reserve areas of national and international importance be unified at national level under one body and at district level by a district body or bodies where more than one is required.

To achieve this ... the existing National Parks Authority be replaced by a new body called the National Parks and Reserves Authority and at district level, ... National Park Boards, and ... Reserve Boards ... be replaced by a series of new bodies called (locality) National Park and Reserves Boards.

The main functions of the new bodies to be directed to the oversight of policy, proposals for new parks and additions, management plans, public issues and other important items of policy with the right to publish views and findings.

The administration and management of national parks and reserves of national and international importance (including historic, scenic, nature and scientific) be undertaken by the Department of Lands and Survey.

Where the Tourist Hotel Corporation has a presence in a national park or reserve a consultative committee comprising members of the Department of Lands and

\textsuperscript{186} Government Caucus Committee Report, "Review of the Administrative Structure of National Parks and Reserves administered by the Department of Lands and Survey". Unpublished, July 1979, at Appendix A 'List of Submissions'.

\textsuperscript{187} Ibid at 35.

\textsuperscript{187} Ibid at 48-49.
Survey and Tourist Hotel Corporation be established to continue the close cooperation that is needed with the Tourist Hotel Corporation.

Not one recommendation concerned giving nga iwi Māori a statutory right to participate in national park management. The explanation may have been that the caucus was simply unaware of te Tiriti o Waitangi, and that nga iwi Māori should be given a more inclusive role. Although the indigenous rights movement in the 1970s had been visible, it had not focused on rights to be included in conservation management. Disempowerment within the environmental management realm was but just one arena of concern for nga iwi Māori. Loss of land, language, health, and so on were of pressing concern. And, while the Māori point of view was beginning to be heard in the environmental arena, it tended to be a lone voice. Te Rina Sullivan Meads, who spoke at the Environment '77 conference, noted: 188


Māori members of these [environment] groups are conspicuous by their absence, in spite of the fact that ecological consciousness and conservation form the basic principle of Māoritanga, both spiritually and physically.

And, whilst the Waitangi Tribunal had been established and nga iwi Māori were making claims concerning environmental practices to it, many of those claims were not heard and reported until the following decade, the 1980s. 189 But even so, the obligation to demand a right to participate in national park

189 For example, the Kaituna River issue was not reported on until 1984 despite being lodged by the claimants in 1978: see Waitangi Tribunal, Kaituna River (Wai 4, 1984). However, an exception is the Waitangi Tribunal, Fisheries Regulations (Hawke) (Wai 1, 1978).
management ought not to have been wholly the responsibility of nga iwi Māori. Te Tiriti o Waitangi guarantees nga iwi Māori a right to be able to express tino rangatiratanga, and therefore one would expect that the Government, and its associated bodies, would provide for this right. However, this thought process did not feature in this Government appointed caucus committee's discussion paper.

On the 1st July 1980, the Minister of Lands, Hon V Young, moved that the National Parks Bill be introduced. The Bill adopted many of the recommendations made by the caucus committee, including the streamlining suggestion that national parks be administered alongside reserves under the same national and regional boards. In reference to the Bill, the Minister stated, "... in the main the Bill re-enacts the existing law without substantial alteration ..."; "... the current spirit and philosophies of the National Parks Act 1952 ..." have been "... retained and carried forward in the new Bill....". The Bill was enacted and became law on 1 April 1981.

II. Clarifying the National Park Concept

Similarly expressed to section 3 of the NPA 1952, is section 4 of the NPA 1980. Section 4(1) explains the existence of national parks on the basis that they "... 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....", and therefore must be protected in perpetuity "... for their intrinsic worth and for the benefit, use and enjoyment of the public ...". Likewise, subsection two further declares that
the parks are to be administered and maintained according to such principles as:

- preservation of an area in its natural state (as far as possible);
- preservation of native plants and animals (as far as possible);\(^{191}\)
- extermination of introduced plants and animals (as far as possible);
- maintenance of sites and objects of archaeological and historical interest;
- provision of free entry and access so the public may receive in full measure the inspiration, enjoyment, recreation and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers and other natural features.

These subsections retain much of the previous language used in the NPA 1952. The play off between preservation and public use is continued. The qualifier 'as far as possible' is replicated. The 1980 Act also uses the 'special area' device as a means to overcome potential conflict between the dual principles of preservation and public use.\(^{192}\) However, section 4 is not an exact copy of the earlier section 3. Several new phrases appear. To illustrate this, section 4(1) is reproduced below with the new insertions italicised:

> It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, 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*,

\(^{190}\)Supra n 184 at 1127.

\(^{191}\)Section 5(1) and (2) clarifies the total protection of indigenous plants and animals.

\(^{192}\)See section 11 of the NPA 1952 and sections 12 and 13 of the NPA 1980.
or natural features so beautiful, unique, or *scientifically important* that their preservation is in the national interest.

Section 4(1) thus represents an important attitudinal change through protecting national parks for their intrinsic worth, their scientific importance, and for their ecological systems. It captures the importance of protecting land under the national park label for reasons other than scenic and recreational value, and in doing so clarified the national park concept.

But, distinctly missing from section 4 is express provision for nga iwi Māori and nga tikanga Māori. The newly inserted expression ‘intrinsic value’ might arguably capture the unique relationship Māori have with many of the resources within national parks, but even if it does the expression cannot be considered equivalent to an express recognition. An implied recognition offers Māori little protection in a society that is generally against special provision to Māori, especially in the environmental sphere. An implied recognition only downgrades the guarantees provided to nga iwi Māori in te Tiriti o Waitangi. Remember that the natural features protected by the national park label - mountains, forests, sounds, seacoasts, lakes and rivers - are tupuna of nga iwi Māori. One would expect, if one had this understanding, that the special relationship Māori have with the land would be used as a justification for the use of the protective national park device. Because section 4, unlike many other sections in the NPA 1980, remains today in its original form, the lack of any express awareness of Māori relationships with land and resources within

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193 Note, this issue is touched on further in this paper in Chapter Seven.
national parks is a concern. Without recognition, the legislation shows little respect to nga iwi Māori.

Nonetheless, on the policy front, the NPA 1980 signified a clear turning point in conservation legislation, a change that recognised the importance of protecting land for its own value, albeit not a value that was based on a Māori relationship with the land. The progression of national park legislation from 1894 to 1980 can be conceptualised by using a model presented by Douglas Fisher in the mid-1980s. Fisher's model consists of seven stages, each stage represents a progressively more advanced environmental legal system. Fisher summarised the model as:

- Stage 1: environmental neutrality based upon a common law accommodation of largely private interests
- Stage 2: legislation to facilitate natural resource development
- Stage 3: legislation to protect specific aspects of the environment
- Stage 4: permissive relevance of environmental considerations
- Stage 5: mandatory relevance of environmental considerations
- Stage 6: environmental planning
- Stage 7: environmental neutrality based upon integrated natural resource management.

Absent from Fisher's model is te Tiriti o Waitangi. Fisher justified its absence by stating that te Tiriti has not generally been regarded as forming part of the law of New Zealand, and that New Zealand's environmental law

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195 Ibid at 35.
is cast in the mould of British Commonwealth legal systems.\textsuperscript{196} This is certainly so of the legislation analysed so far in this paper. Fisher did, however, recognise that "The Treaty could quite clearly become a very significant legal instrument in environmental management..."\textsuperscript{197} if the Government was prepared to incorporate it into environmental legislation. National park legislation, as a statute specific example of environmental law, obviously has yet to expressly do so.\textsuperscript{198}

Other than the Tiriti aspect, the progression of national park legislation is usefully conceptualised by using this model. Early national park legislation before 1952 falls within the third stage in that it constituted "... a limited response by the legal system to perceived environmental problems...".\textsuperscript{199} This third stage signifies the foundations of a legal system beginning to question the role of the environment.\textsuperscript{200}

Legislation has been enacted that seeks to achieve potentially conflicting objectives. The public interest requires natural resource development and environmental protection simultaneously. Does one have legal priority over the other? How are these tensions resolved?

This stage aptly describes early national park legislation and its predominant objective of encouraging the public to enjoy natural resources. In these early years the focus had almost exclusively been on recreation and scenic values - the parks providing the public with extensive 'playgrounds'.

\textsuperscript{196} Idem.
\textsuperscript{197} Idem.
\textsuperscript{198} Since the passing of the Conservation Act 1987, the Treaty of Waitangi has been implied into the NPA 1980. This point is substantiated in Chapter Five of this paper.
\textsuperscript{199} Fisher supra 194 at 34.
Entry into the fourth stage was marked by the passing of the NPA 1952, in which stage.201

Specific environmental concerns are made relevant to decision-making. Instead of merely responding to environmental problems that have arisen, the legal system seeks to encourage the anticipation of these problems by enabling them to be accounted for in the course of development decision-making.

Section 3 of the 1952 Act illustrated this progression. It captured in legislation for the first time the purpose of a national park, and in doing so forced both preservation and public use values to be taken into account by decision makers, such as the Minister of Lands, the National Parks Authority and the national park boards.

By largely replicating in section 4 the purpose for national parks in the NPA 1952, the NPA 1980 remained firmly within the fourth stage of the model. Even though it made preservation a mandatory consideration, thus meeting the defining standard of the fifth stage, the legislative qualifier 'as far as possible' meant both statutes remained firmly within stage four.

Still, section 4 is a marked improvement on section 3 in environmental protection terms. The desire to protect land for its intrinsic worth, ecological systems, and scientific importance indicates the existence of underlying support for our legal system to become more embracing of

200 Idem.
201 Idem.
environmental management, or 'planning' as Fisher puts it. And, as Fisher said, that progression could very well involve aligning te Tiriti o Waitangi to environmental planning legislation.

III. The Management Regime

1. Structure

The NPA 1980 largely retained the three tier management structure implemented by the NPA 1952. At the top, the Department of Lands and Survey ('the Department') retained responsibility for administering and managing all national parks. At the mid level, the principal change concerned the renaming of the National Parks Authority as the National Parks and Reserves Authority. Similarly, at the bottom tier, the national park boards became national park and reserves boards.

The first diagram below illustrates the administrative structure for New Zealand's protected areas. The second diagram provides a break down of the bodies operating under the Minister of Lands. Both diagrams help to identify the placement of national park managing bodies in the overall context of protected land management. The diagrams highlight the absence of a body directed towards recognising the rights of nga iwi Māori to exercise rangatiratanga.
Diagram 4.1 Administrative structure for New Zealand’s protected areas\textsuperscript{202}

\textsuperscript{202} This diagram is taken from South Pacific Regional Environmental Programme, Third South Pacific National Parks & Reserves Conference Conference Report - Volume 3 Country Reviews (Western Samoa, 24 June - 3 July 1985) at 135.
Diagram 4.2 Operations under the Minister of Lands\textsuperscript{203}

\begin{center}
\begin{tikzpicture}
  \node {MINISTER OF LANDS} child {node {DIRECTOR-GENERAL OF LANDS}} child {node {ASSISTANT DIRECTOR-GENERAL OF LANDS}} child {node {LAND ADMINISTRATION DIVISION}} child {node {SURVEYOR-GENERAL}} child {node {SURVEY DIVISION}} child {node {DRAUGHTING DIVISION}} child {node {FIELDS DIRECTOR}} child {node {FIELD DIVISION}} child {node {NATIONAL PARKS \& RESERVES AUTHORITY}} child {node {LAND SETTLEMENT BOARD}} child {node {NATURE CONSERVATION COUNCIL}};
\end{tikzpicture}
\end{center}

2. **Responsibilities**

The Department of Lands and Survey continued to have responsibility for administering and managing all national parks. The 1980 Act stipulated that the Department must carry out its duties in accordance with any statements of general policy, and any management plan in operation for a national park. Furthermore, it must do so:

... in such a manner as to secure to the public the fullest proper use and enjoyment of the parks consistent with the preservation of their natural and historic features and the protection and wellbeing of their native plants and animals.

Extensive powers were ascribed to the Minister of the Lands and Survey Department, including being able to:

- permit the use of any part of the park for any specified purpose of public recreation;
- permit the use of any part of the park as a station for the transmission of electronic communication;
- erect or authorise any person to erect in the park ski-lifts or carry out works designed to facilitate tourist traffic;
- appropriate any part of the park for camping sites or for parking places for vehicles for the convenience of persons using or visiting the park; and
- grant licences permitting the carrying on of any trade, business, or occupation within the park.

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204 This changed in 1987: see the Conservation Act 1987 and Chapter Five of this paper.
205 Section 43.
206 See section 49.
However, the Act also stated that the Minister must act in accordance with any operative management plans. The extent of the Minister's powers caused much consternation in the House, as the Bill passed through Parliament. The opposition party, Labour, stated outright that it viewed this Bill as giving the Minister "... supreme power ...". The political and public discontent was heeded and a number of changes were subsequently made to the Bill constraining certain ministerial powers, for example, the duty to act in accordance with management plans. Also, section 19 in its clause form read: “In the exercise of its powers and functions, the Authority shall give effect to the policy of the Government ...”. This was subsequently changed to read: “In the exercise of its powers and functions, the Authority shall have regard to the policy of the Government ...”.

The National Parks and Reserves Authority and respective national park and reserves boards’ responsibilities are illustrated in the table below.

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207 (430) NZPD 1141 (1 July 1980) Mr Isbey (Member for Papatoetoe). In the past this power had been vested with the national park boards.

208 The select committee responsible for reviewing the National Parks Bill received some 450 submissions from the public.

209 Emphasis added.

210 Section 19 of the NPA 1980, emphasis added.
<table>
<thead>
<tr>
<th>Management Plans</th>
<th>National Parks and Reserves Authority Section 18/1980</th>
<th>National parks and reserves boards Section 30/1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Approve</td>
<td>• Prepare, review and amend</td>
<td>• Prepare, review and amend</td>
</tr>
<tr>
<td></td>
<td>• Determine priorities for implementation</td>
<td>• Determine priorities for implementation</td>
</tr>
<tr>
<td></td>
<td>• Advise Commissioner or the Authority on interpretation</td>
<td>• Advise Commissioner or the Authority on interpretation</td>
</tr>
<tr>
<td>General Policies</td>
<td>• Prepare and approve statements of general policy</td>
<td>• Review and report to the Commissioner or the Authority on the effectiveness of the administration of general policies</td>
</tr>
<tr>
<td></td>
<td>• Review and report to the Minister or the Director-General on the effectiveness of the administration of general policies</td>
<td></td>
</tr>
<tr>
<td>Establishing and enlarging national parks</td>
<td>• Consider and make proposals</td>
<td>• Advise Commissioner or the Authority</td>
</tr>
<tr>
<td>Finance</td>
<td>• Advise Minister or</td>
<td></td>
</tr>
</tbody>
</table>

211 'Commissioner' in relation to national parks means the Commissioner of Crown Lands for the land district in which the park is situated: see section 2 'Commissioner' of the NPA 1980.
212 Director-General means the Director-General of Lands appointed under the Land Act 1948: see section 2 "Director-General" of the NPA 1980.
Management plans are ten-year plans providing for the management of the respective park in accordance with the Act. Each national park must have a management plan. These plans are fundamental to the park's management direction. The content of national park management plans is discussed in detail in Chapter Eight of this paper.

A general policy statement is a statement directed towards achieving the broad objectives of the NPA 1980. In 1983, the *General Policy for National Parks* document was published. It begins by recognising the potential conflict between section 4 objectives:

Clearly the intention of the legislation is that policies should be directed to ensuring an appropriate balance between the preservation of areas that are integral to New Zealand's heritage, and provision for optimum public access to and enjoyment of areas that lend themselves to recreation use. Each park has its own mix of such areas, and in some there are greater needs for the setting apart and enjoyment of amenities areas than in others. It follows that the scope of public access and enjoyment of parks will be governed by the particular make-up of each park. However, if parks are to be maintained in perpetuity and added to from time to time, there must be clear public

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214 Ibid at 6-7.
understanding of the reasons for and conditions of any restriction on public access and a constant educational process to stimulate public use and enjoyment of these national assets by keeping people fully informed as to what they are and why they are being protected.

The General Policy statement goes on to record numerous policy statements in regard to issues such as:

- selecting new parks and park boundaries;
- domestic animals;
- fish, fishing, and game birds;
- identifying persons, places, and events of national or historic significance;
- access for the disabled;
- aircraft and airspace;
- boating;
- visitor safety and public health;
- mineral exploration, prospecting, and mining; and
- generation of electricity.

In fact, thirty one issues are identified in the statement. Yet, only two issues incorporate policy that expressly recognises nga iwi Māori. The policy directive concerning public participation expressly recognises the importance of consulting with nga iwi Māori.215

Interested individuals and organisations will where appropriate be approached directly for their view on specific proposals. In particular consultative procedures with local Māori groups which have historical or spiritual ties to

215 Ibid at 8 (Policy 2.2).
the land in national parks will be fostered, and the views of such groups will be fully considered in formulating management policies.

The policy directive concerning the protection of national park resources constitutes the second reference in the statement to nga iwi Māori.²¹⁶

Traditional uses of indigenous plants or animals by the Māori people for food or cultural purposes will be provided for in the management plan where such plants or animals are not protected under other legislation and demands are not excessive.

By providing for this recognition in the General Policy statement, the failure to include any express provision for nga iwi Māori in section 4 of the NPA 1980 is partly remedied. The 1983 policy statement goes some way to aligning itself to the Tiriti benchmark in that it recognises the importance of providing for traditional use of indigenous plants and animals, and that consultation should be fostered where tangata whenua have historical or spiritual ties to national park land. While recognition is important in regards to te Tiriti guarantees, mere consultation does not equate to a recognition of tino rangatiratanga. Rather, tino rangatiratanga concerns notions of 'self-management' and 'self-regulation'.²¹⁷ The General Policy statement fails to recognise the importance of such notions.

²¹⁶ Ibid at 21 (Policy 8.11).
²¹⁷ See discussion in Chapter One of this paper.
3. **Representation**

When the NPA 1980 first came into effect it restricted the power of the Minister of Lands to appoint members to the National Parks and Reserves Authority. It stated that the Royal Society of New Zealand, the Royal Forest and Bird Protection Society and the Federated Mountain Clubs could each recommend to the Minister one appointment.\(^{218}\) The Minister was to appoint a further three people after consultation with the Minister of Tourism, and the Minister of Local Government.\(^{219}\) And, the Minister was to appoint a further four people "... having special knowledge of or interest in matters connected with the policy for the management of national parks and reserves or having special knowledge of or interest in matters connected with wildlife ...".\(^{220}\)

The Minister, in comparison, had more discretion as to who to appoint to national parks and reserves boards. The power was only constrained in that the Minister had to consult with the National Parks and Reserves Authority, and be satisfied that the person appointed had a:\(^{221}\)

\[
\ldots \text{special knowledge of or interest in matters connected with the policy for and management of national parks and reserves, regional or community affairs, tourism, recreation, or conservation ...}
\]

\(^{218}\) Section 17(2)(a)-(c).
\(^{219}\) Section 17(2)(d).
\(^{220}\) Section 17(2)(e).
\(^{221}\) Section 32.
Two exceptions to this appointment procedure existed. The 1980 Act ensured continued legislative protection to Ngati Tuwharetoa and Taranaki: a representative from each of those two iwi still had a right to sit on their respective managing boards.\textsuperscript{222}

The Act made no provision to extend such a representative right to other tangata whenua nor any statutory right for Māori to sit on the Authority. Mr Wetere, Labour Member for Western Māori in 1980, asked the Minister of Lands, when the Act was in its Bill form before the House:\textsuperscript{223}

\ldots will Māori be represented on the Authority, what consultations did the Minister have with the Māori people as to their representation on the national parks and reserves boards?

But the Minister side-stepped the consultation query, and answered the representation issue by stating that special representation on the Tongariro and Egmont boards will continue, but no such special rights should exist on the Authority for this body is "... responsible for the overall policy and management of national parks ...".\textsuperscript{224} This response suggests that overall policy is not concerned with Māori interests. The legislation indicates that overall policy is, however, concerned with mountaineering and tourism interests (the Federation Mountain Clubs and the Minister of Tourism both had a right to be consulted before the Minister made an appointment to the Authority).

\textsuperscript{222} See sections 32(4)(b) and 32(5)(b).
\textsuperscript{223} (430) NZPD 1128 (1 July 1980). This is the same type of argument as was presented in opposition to Taranaki iwi being given the statutory right in 1977: see Chapter Four.
IV. Conclusion

While the enactment of the NPA 1980 Act did not dramatically change the management regime implemented by the NPA 1952, it represented an important progression towards a self-supporting environmental legal system. Despite the 1980 Act remaining silent on Tiriti o Waitangi obligations, attitudinal changes were becoming evident. The provisions contained in the statement of General Policy were especially indicative of this. Recognition of tangata whenua associations with national park land, and the need to consult as a result were, for the first time, being identified as national goals.

The next three chapters of this paper move to discuss how other statutes have changed the nature of national park management by amending the NPA 1980.

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224 (430) NZPD 1128 (1 July 1980), emphasis added.
Chapter Five

Departmental Reform: the Conservation Act 1987

Conservation legislation was radically recast in the second half of the 1980s. A new institutional framework for managing conservation lands was implemented via the creation of a new ministerial department, the Department of Conservation. This Department, established under the Conservation Act 1987, became responsible for a raft of conservation-type statutes including the NPA 1980. This chapter explores the implications of this reform in relation to national parks and nga iwi Māori. Both the structure and the responsibilities of the new Department are discussed, along with the Department's conservation mandate. Of obvious significance, bearing in mind that the Department of Conservation is ultimately responsible for national parks, is section 4 of the Conservation Act:

4. Act to give effect to Treaty of Waitangi - This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

A large part of this chapter thus concentrates on section 4 and attempts to examine why the Treaty provision appeared in the Conservation Act, what the section means, and what its possible ramifications are for national park management.
I. The Department of Conservation

1. Responsibilities

The Department of Conservation is a specialist Department dedicated to managing all land held under the Conservation Act for conservation purposes, and advocating and promoting the conservation of natural and historic resources generally. In addition, the Department has a duty to:

- administer all Acts in its First Schedule;
- manage for conservation purposes all land and resources held under the Conservation Act;
- advocate the conservation of natural and historic resources;
- promote the benefits of conservation to present and future generations;
- educate and promote material relating to conservation;
- the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism; and
- advise the Minister on relevant matters.

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225 See Conservation Act 1987, section 6 and the First Schedule. Note that the Department of Conservation became responsible for a total of twenty two statutes.
226 See section 6(a).
227 Section 6(a) - (g).
In bringing together, under the one Department, conservation-type statutes, the Conservation Act signalled an end to the disordered government department system: 228

From the Forest service [the Conservation Department] will take over the environmental forestry section; from the Department of Lands and Survey it will take over the parks and reserves directorate; from the Department of Internal Affairs it will take the Wildlife Service and the Historic Places Trust; it will take coastal and foreshore responsibilities from the Ministry of Transport; and it will take the Queen Elizabeth II National Trust, the Nature Conservation Council, and the Biological Resources Centre, as well as some elements from the Commission for the Environment.

The Conservation Act was heralded as the "... centrepiece of the process of environmental restructuring...", 229 and was considered "... landmark legislation ...", 230 for it marked an end to the "... pioneering and exploitative phase of development ..."). 231 It represented "... another step towards maturity in terms of the Government's responsibility on behalf of the people towards New Zealand's natural resources...", 232 and signified our readiness to now "... live in harmony with [our] environment and resources that sustain [us]...". 233 The Long Title to the Conservation Act accordingly states that this is: "An Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation...".

229 Hon Russell Marshall, Minister of Conservation, (479) NZPD 7884 (19 March 1987).
230 Ken Shirley, Member for Tasman, ibid at 7881.
231 Ken Shirley, Member for Tasman, idem.
232 Hon Russell Marshall, Minister of Conservation, supra n 229 at 8002.
233 Mr Woollaston, Member for Nelson, ibid at 7983.
With regard to national parks specifically, the Department of Conservation assumed the powers formally exercised by the Department of Lands and Survey. It became responsible for administering and managing all national parks in accordance with any statements of general policy, and any operative national park management plan.\textsuperscript{234}

... in such a manner as to secure to the public the fullest proper use and enjoyment of the parks consistent with the preservation of their natural and historic features and the protection and wellbeing of their native plants and animals.

2. \textit{Structure}

The Department of Conservation is divided into two parts: Head Office and regional conservancies.\textsuperscript{235} Today, Head Office constitutes the Director-General, and nine managers, one of which is Eru Manuera, the Tumuaki Kaupapa Atawhai (Māori Advisor) - quite a different structure to its predecessors! Today, the Department even recognises Māori as stakeholders in regard to being a Tiriti partner, and as being land owners. This point is illustrated in the diagram below.

\textsuperscript{234} See section 65(1) and the Second Schedule, and section 43 of the NPA 1980.
\textsuperscript{235} See Appendix Four of this paper for a map detailing the conservancy boundaries.
Diagram 5.1 Department of Conservation's Stakeholders

In recent years the Department has issued several mission and vision statements which attempt to be inclusive of tangata whenua. Many of these statements are discussed in Chapter Eight of this paper.

II. Its Conservation Mandate

Unfortunately the creation of the Department of Conservation did not mark the end to the Government's 'monocultural' approach to managing publicly owned lands, in particular national parks. Although a more comprehensive approach to managing natural resources was introduced, which was positive in terms of tikanga Māori and concepts of the environment being a holistic entity, its underlying philosophies were not. The Department has a singular mandate: conservation through the practice of preservation and protection. Conservation is defined in the Act as:\textsuperscript{237}

\begin{quote}
the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.
\end{quote}

The reliance on preservation and protection as a means to achieve conservation is a western concept which is based on a "man:nature" dichotomy whereby human use and impacts are viewed as environmentally damaging. This perception differs radically to the Māori environmental ethic:\textsuperscript{238}

\footnotesize
\begin{itemize}
\item [\textsuperscript{237}] Section 2 'Conservation'.
\item [\textsuperscript{238}] Roberts et al supra n 45 at 16. See also Peter Dwyer, "Modern conservation and indigenous peoples: in search of wisdom" (1) Pacific Conservation Biology 1994, 91 (Dwyer
\end{itemize}
... the nearest one can get in attempting to define a “Māori conservation ethic” in western terms is to describe it as one which is based on a kin-centric world view, i.e., in which humans and nature are not separate entities but related parts of a unified whole.

Thus the dichotomy that is evident in the western understanding of conservation does not exist in a nga iwi Māori perception of conservation. Rather than ascribing to preservation, a means which serves to alienate all human use of resources, the Māori conservation ethic encourages resource use.239 This Māori conservation ethic is thus:240

... one of conservation for human use, and rahui (temporary prohibitions) [are] intended to ensure the sustainability of the resource for this purpose, and not because of the “sanctity” or “intrinsic value” of the resource concerned.

This ethic of ‘conservation for human use’, or sometimes expressed as ‘conservation for future use’, is thus philosophically different to the western concept of conservation which is currently encapsulated in our regulating legislation:241

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239 See comment made in Chapter Three of this paper, in particular Taiepa et al supra n 150.
240 Roberts et al supra n 45 at 15.
... Māori responsibility to the environment did not mean they were preservationists; rather, they actively utilised and developed nature for subsistence and cultural purposes.

The singular mandate of conservation through preservation and protection theoretically allows little opportunity for nga iwi Māori to practice their own conservation ethic.\textsuperscript{242} Or as Edward Ellison, the Ngai Tahu representative on the New Zealand Conservation Authority (established in 1990) has recently stated:\textsuperscript{243}

\begin{quote}
In essence the conservation legislative principle of "protection" is hostile to the customary principle of "sustainable use", and the spiritual linkage of iwi with indigenous resources is subjected to paternalistic control.
\end{quote}

The philosophies underlying the NPA 1980 replicate in many ways the approach taken by the Conservation Act. Take section 4 of the NPA 1980. This section is designed to set the framework and guide all decisions made in relation to national parks. Preservation is declared as the ultimate rationale. To action this rationale, those empowered to administer and manage national parks must adhere to the management priorities set forward in that section. The number one priority is preserving a national park in its natural state, the number two priority is preserving the natural qualities of a

\textsuperscript{242} In reality, however, it may not be as one-sided. For instance, the Department of Conservation has the power to be able to issue permits to tangata whenua permitting the collection of certain resources on conservation lands. Yet, the decision to issue a permit is at the discretion of the Department. Thus, in deciding whether to issue a permit, the Department must validate its decision in the context of 'conservation' as defined in the Act. Therefore, even if the Department does decide to allow the collection of certain flora and fauna, the process still relies on alliance with the monoculturally defined term conservation.

national park, and the third priority is to provide public access as far as may be consistent with the first two objectives.\(^{244}\)

In adopting a singular mandate of conservation, and not a more encompassing plural mandate, the Conservation Act failed to represent any significant shift towards including nga iwi Māori in the management of the conservation estate. This is despite the fact that when the Conservation Act was enacted there existed, on the world scene, a definition of conservation which was more accommodating of the Māori approach. The *World Conservation Strategy* defined conservation as:\(^{245}\)

\[
\text{... the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.}
\]

This approach obviously had little support in New Zealand. Instead, the Conservation Act continued the theme of advocating preservation and protection as the means to attain conservation of natural and historic resources. To adopt a different mandate would have been, with little doubt,

\(^{244}\) The contrast between the Māori environmental ethic and a Western scientific approach is illustrated in: Henrik Moller, "Customary use of indigenous wildlife - Towards a bicultural approach to conserving New Zealand's biodiversity" in McFadgen and Simpson (comp), *Biodiversity: Papers from a Seminar Series on Biodiversity, hosted by Science and Research Division, Department of Conservation, Wellington, 14 June - 26 July 1994* (1994), at 89-1125 (copy obtained from Moller personally, Zoology Department, University of Otago), see in particular page 107 which compares the two ethics in a summarised table form.

a politically contentious move. The Māori conservation ethic, after all, is critiqued by many. Those that oppose its re-introduction point to past experiences as evidence of why it would be destructive to incorporate a Māori conservation ethic into present day practices. Common points of contention include the hunting of the moa to extinction and the use of fire as a tool for forest management. But, as Chanwai and Richardson have succinctly argued, this should not disqualify the Māori conservation ethic.

These possible reservations to the 'sustainability' of indigenous culture should not, however, justify disqualifying the role of Māori in resource management decisions. Pakeha development activities over the past 150 years have caused massive ecological damage, and yet this is not held to disqualify Pakeha society from seeking to improve environmental conditions today. What is important is the development of new cross-cultural approaches to resource management that synthesise the contributions of both European science and technology with the traditional knowledge and cultural world-view offered by indigenous peoples.

The underlying philosophy in managing conservation lands, including national parks, was, and remains, monocultural. The Conservation Act marked no significant move towards expressly incorporating a Māori ethic into the practice of conservation. While the stipulation to "promote the benefits of conservation to present and future generations" and to preserve and protect the "intrinsic value" of natural resources are new,

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246 For example, while sustainable use concepts are applied to non-conservation resources in New Zealand, conservation resources are viewed as special, and in some instances, as the 'jewels' of the Crown.
247 Chanwai and Richardson supra n 241 at 163.
248 Section 6(c).
249 Section 2 'Conservation'.

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and welcome in regards to nga tikanga Māori, their place in the practice of conservation is marginalised. Jennifer Caldwell, for example, has argued.\textsuperscript{250}

While the new administrative structures [in regards to the Environment Act 1986 and the Conservation Act 1987] espouse commitment to the new philosophy of the legislation [intrinsic values], they have neither the philosophical background nor the practical procedural means to give meaning to the concept or the ethic.

... the rights of trees, lakes, mountains and animals to be regarded as essential and important members of the biotic community, having value simply because by their existence they contribute to the diversity of life on this planet, appears exceedingly fragile.

Tourism has, in fact, remained a principal mainstay behind the practice of protecting and preserving natural resources. Section 6(e) of the Conservation Act\textsuperscript{251} is evidence of this. Consider, also, these two comments below:

... it will be a source of attraction to tourists from all parts of the world ...\textsuperscript{252}

... harmony involves ensuring that the mechanisms exist to conserve, protect, and preserve the eco-systems that make New Zealand unique in the world ... and give this country its unique character, which makes us proud to be New Zealanders.\textsuperscript{253}

\textsuperscript{250} Caldwell supra n 182 at 159 and 160.
\textsuperscript{251} "To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism...".
\textsuperscript{252} Hon. J Ballance, Native Minister and Minister of Lands, supra n 96.
\textsuperscript{253} Mr Woollaston, Member for Nelson, supra n 233.
Both comments were made by Members of Parliament in the House. The first was made in 1887 in relation to the Tongariro National Park Bill, the second was made in 1987 in regard to the Conservation Bill.

This brief insight into the philosophies of the Conservation Act is enough to raise doubt as to whether it did mark an end to the monocultural approach to managing publicly owned lands in New Zealand. But, what of section 4 of the Conservation Act? Does this section not demand, and therefore provide, a more pluralistic, bi-cultural approach to managing conservation lands such as national parks? What is the relationship between section 4 and the underlying philosophies encapsulated in conservation oriented legislation? This chapter now turns to discuss this section in depth, and to hopefully address some of these questions.

III. Section 4 and Giving Effect to the Principles of the Treaty of Waitangi

The discussion in this part is divided into three parts. It begins by looking at why the Conservation Act incorporated "the Treaty of Waitangi". Next is an examination of the wording of section 4. Lastly the potential impact of section 4 for national park management is discussed.

254 In this paper, where sources have referred to te Tiriti as "the Treaty of Waitangi", the original expression "the Treaty of Waitangi" is used.
1. An Explanation for its Inclusion

Two fundamental discourses emerged in the 1980s that together created the impetus for institutional reform of publicly owned lands. Both critiqued New Zealand’s conservation management regimes, and both perceived radical departmental reform as the only way in which the problems could be remedied. The first group condemned the system for its complex and overlapping legislation, and its uncoordinated agencies who often shared mandates to simultaneously protect and utilise one resource. For example, the Department of Lands and Survey held responsibility not only to manage national parks but also to purchase private land, develop Crown land, survey crown land and so on. The second group critiqued the system for being "... unacceptably monocultural ..." - a fair comment in regard to the management of national parks!

Both discourses had measurable success. The first discourse succeeded in convincing the Labour Government to initiate a process to reform the institutional management of natural and historic resources. This reform process began in earnest in 1984, and by mid 1985 a government appointed Working Party had published its recommendations to the Government. It

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256 See Land Act 1948.
had identified a number of shortcomings, including acknowledging that past practices had alienated Māori from the environmental management system. This signalled the success of the second discourse (nga iwi Māori). In summary, the Working Party's criticisms included: 259

- the many roles played by the Crown in the environmental management system;
- insufficient guidance on matters of policy provided by government to those public authorities administering the system;
- the adversary relationships or tensions created by the system among the various interests involved;
- the uncertainty faced by private developers in formulating and executing proposals for natural resource use; and
- the failure to recognise either the conservation ethic practised by the Māori community or their rights guaranteed by the Treaty of Waitangi.

The Working Party recommended departmental reform to remedy these shortcomings. It envisaged the creation of a Ministry for the Environment and the establishment of a new Department solely responsible for the management of natural and historic resources (such as the national park estate). Overall, the Working Party's report was expressly inclusive of nga iwi Māori concerns, and encouraged the Government to support a more inclusive stance on nga iwi Māori involvement in environmental management and planning. Take this comment, for example: 260

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259 This summary has been taken from: Fisher supra n 194 at 39, punctuation and emphasis added.

260 Environment 1986 supra n 258 at 17.
The views of the Māori community deserve special mention. Whereas the philosophy of the pakeha community has evolved from one based on the values of development to a belief that conservation must be integrated with development, the Māori people have traditionally practised conservation and lived off sustainable resources. Their relationship to all physical and natural resources is a personal one, and their view of the environment as a context of cultural identity is important. They have seen themselves, for much longer than conservation groups, as poorly treated by development-oriented administrations. They see their rights to “O ratou taonga katoa” (“all things prized by them”) guaranteed by the Treaty of Waitangi, and their partnership contract with the pakeha, ignored or overlooked.

This aptly put statement shows that official environmental policy was becoming increasingly aware of the Māori conservation point of view. Nga iwi Māori were being recognised, for the first time at the government level, as legitimate players in the management of natural resources.

International conference proceedings, in an indirect manner, and hearings before the Waitangi Tribunal, in a direct manner, were the principal forums which succeeded in capturing the government's attention for nga iwi Māori concerns. On the international conference scene, support for the rights of indigenous peoples to be included in the management of publicly owned lands had gained momentum. For instance, in 1982 delegates from throughout the world, including New Zealanders, met in Indonesia to discuss the role national parks play in sustaining society.261

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261 See International Commission on National Parks and Protected Areas (ed), National Parks, Conservation, and Development. The Role of Protected Areas in Sustaining Society.
relationships, and corollary rights, indigenous peoples have with many protected areas in their home countries were raised by a Californian delegate.\textsuperscript{262} He urged that the practice of consultation with indigenous peoples be adopted by managers of conservation estates. These peoples, after all, he argued "... have a long history of use or occupancy of areas ... have a familiarity with its ... ecological processes ..."\textsuperscript{263} and so.\textsuperscript{264}

Every effort should be made to achieve the desired conservation objective with minimum disruption of traditional ways of life and maximum benefit to local people.

In 1985, the Third South Pacific National Parks and Reserves Conference was held in Western Samoa.\textsuperscript{265} A number of the delegates spoke of the rights of indigenous peoples to be included in national park management. Listed below are some of the titles given to these talks:

- Tenure and Taboo: Customary Rights and Conservation in the South Pacific;\textsuperscript{266}
- Aboriginal Customs and Knowledge and its relevance to Protected Area Management in New South Wales;\textsuperscript{267}
- Resolving Conflicts between Traditional Practices and Park Management;\textsuperscript{268}

\textsuperscript{262} Raymond Dasmann presented a paper: "The Relationship Between Protected Areas and Indigenous Peoples", in ibid at 667-671.
\textsuperscript{263} Ibid at 670.
\textsuperscript{264} Idem.
\textsuperscript{265} See \textit{Third South Pacific National Parks & Reserves Conference, Conference Report - Volume 2, Collected Key Issue and Case Study Papers} (Western Samoa, July 1985).
\textsuperscript{266} Presented by Peter Eaton, University of Papua New Guinea, in ibid at 114.
\textsuperscript{267} Presented by the New South Wales National Parks and Wildlife Service, Australia, supra n 265 at 138.
\textsuperscript{268} Presented by Losefatu Reti, Department of Agriculture, Forests and Fisheries, Western Samoa, in supra n 265 at 154.
• Training Aboriginal Park Managers in Australia;\textsuperscript{269} and
• Traditional Rights and Protected Areas - the New Zealand Experience.\textsuperscript{270}

The Department of Lands and Survey presented the ‘New Zealand Experience’ - a paper which proved to be an interesting account of our inclusive measures as at the mid-1980s. The paper began by posing two questions:\textsuperscript{271}

How has the protected areas system catered for the traditional rights and uses in New Zealand?

Are present policies of means flexible, sensitive and adaptable enough bearing in mind the renaissance in Māori values and culture?

The presenter of the paper stated:\textsuperscript{272}

The National Parks Act recognises that Māori cultural, historical and spiritual perspectives are significant. In two instances, Tongariro and Egmont National Parks, specific provision for Māori representation on the appropriate ... Board has been made.... There is support in Government for Māori representation as of right on all other ... Boards to provide the same dimension.

This paper was encouraging in that the government department responsible for administering and managing national parks was asking, for the first

\textsuperscript{269} Presented by Peter Taylor, Australian National Parks and Wildlife Service, Australia, in supra n 265 at 192.
\textsuperscript{270} Presented by the Department of Lands and Survey, New Zealand, in supra n 265 at 144.
\textsuperscript{271} Idem.
\textsuperscript{272} Ibid at 147.
time, the right questions. But the statement suggesting that the NPA 1980 recognises nga iwi Māori relationships as being 'significant', and that the Government supports Māori representation, is an exaggeration. Recognition had only transcribed into legislative form for two (of the then ten) regional management boards. And in regards to those two 'inclusive' boards, one did so because it had a contractual responsibility to do so (the Tongariro National Park Board), and the other had been doing so for less than a decade (the Egmont National Park Board).

Hearings before the Waitangi Tribunal were, however, of more direct effect, and should in particular be credited as the catalyst for the attitudinal change apparent in the Working Party's report. Three claims of particular relevance were the Motunui, Kaituna, and Manukau claims. Each brought to light, in a public forum, the relationship Māori have with natural resources, in particular with water and fisheries. In each report the Waitangi Tribunal criticised the government-sanctioned degradation of these resources. It classified the actions as breaches of te Tiriti o Waitangi, and, in particular, ko te Tuarua, Article II. Common themes throughout the reports were that existing structures were "... unacceptably monocultural ...", and thus any reform of the environmental system must take into account the concerns of nga iwi Māori as rightful partners in the

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273 The Tongariro National Park.
274 The Egmont National Park.
277 Waitangi Tribunal, Finding of the Waitangi Tribunal on the Manukau Claim. (Wai 8, 1985).
management of natural resources. Even though the recommendations for change made by the Waitangi Tribunal had no binding force, the government became acutely aware of the issues.

The link between the Waitangi Tribunal and the explanation for why the Working Party took a uniquely inclusive approach to nga iwi Māori concerns is transparent in the Working Party’s report itself. For example, the Working Party recommended the creation of a new position that would include ensuring that the “... concerns of the Waitangi Tribunal are covered in planning for resource allocation and use....”\textsuperscript{279} This was a poignant recommendation considering the immense dissatisfaction that the Waitangi Tribunal had voiced in regards to the environmental and legislative system.

The Government accepted the recommendations made by the Working Party to establish two new institutional bodies. The Ministry for the Environment was established in 1986 and the Department of Conservation in 1987. The legislation which established these two bodies directed that those acting under its provisions give some level of consideration to the principles of the Treaty of Waitangi.\textsuperscript{280}

2. **An Examination of its Terms**

The principles of the Treaty of Waitangi are incorporated into the Conservation Act. This raises a number of issues. For example, should the NPA 1980, as an Act listed in the First Schedule of the Conservation Act,

\textsuperscript{279} Environment 1986 supra n 258 at 24.
\textsuperscript{280} See Long Title to the Environment Act and section 4 of the Conservation Act.
be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi in accordance with section 4 of the Conservation Act?

And, if the NPA 1980 is to be interpreted and administered in this manner, what is the significance of the Treaty reference, and how should that section correspond to the practicalities involved in administering and managing national parks?

In order to discuss these issues it is necessary, and possible, to closely examine the wording of section 4 by breaking it into four parts: "This Act", "shall be so interpreted and administered", "as to give effect", "to the principles of the Treaty of Waitangi."

**a. "This Act"**

For section 4 to apply to the NPA 1980, its words "This Act" must include those statutes listed in the First Schedule of the Conservation Act. While there exists no judicial authority as to whether the NPA 1980 is to be read subject to section 4 of the Conservation Act, other statutes of a similar nature have been considered.

The leading case on this issue is *Ngai Tahu Māori Trust Board v Director-General of Conservation*[^281] (the whale watch case). Despite it concerning

[^281]: [1995] 3 NZLR 553. Note, prior to this whale watch case, the Parliamentary Commissioner for the Environment had stated: "The courts have not yet clarified the precise application of this section, nor whether it applies to other Acts administered by the Department of Conservation...", Office of the Parliamentary Commissioner for the Environment, *Environmental Information and the Adequacy of Treaty Settlement Procedures* (1994) Office of the Parliamentary Commissioner for the Environment, Wellington at 36. For example, see the debate that took place at a conference which celebrated a centenary of national parks in New Zealand: *100 Years in National Parks in New Zealand: Centenary Seminar: Proceedings 24-28 August 1987* (1987), North Canterbury National Park and Reserves Board,
the Marine Mammals Protection Act 1978, and not the NPA 1980, the two statutes are of a like nature in that both are administered by the Department of Conservation pursuant to the Conservation Act.

The whale watch case was brought by the Ngai Tahu Māori Trust Board. The Board argued that the Director-General, when considering whether to issue further permits for commercial whale-watching from boats off the Kaikoura coast, must act in accordance with section 4 of the Conservation Act. This meant interpreting and administering the Marine Mammals Protection Act so as to give effect to the principles of the Treaty of Waitangi. The Crown, arguing on behalf of the Director-General of Conservation, supported the claim in part: "... s 4 is applicable but only to the extent consistent with the Marine Mammals Protection Act....".282

The Court of Appeal held, in accordance with the Crown's argument:283

Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed. We accept that s 4 of the Conservation Act requires the Marine Mammals Protection Act and Regulations to be interpreted and

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283 Idem.
administered to give effect to the principles, at least to the extent that the provisions of the Marine Mammals Protection Act and Regulations are not clearly inconsistent with the principles.

Despite the then President of the Court of Appeal concluding that the "...precedent value of this case for other cases of different facts is likely to be very limited..." ²⁸⁴ this case can, and does, support a claim that section 4 of the Conservation Act is applicable to all statutes listed in the First Schedule of the Conservation Act. Cooke P's warning was in relation to the facts of the case, not to the substantive issue of statutory interpretation. In fact, in the paragraph preceding this comment, the President stated (and I put it in full so as to give the context of the statement):²⁸⁵

In light of the positive duty there recognised, and of the statutory incorporation of the principles of the treaty in the conservation legislation, it is plain that on the particular facts of this case a reasonable treaty partner would not restrict consideration of Ngai Tahu interests to mere matters of procedure.

This statement, being in part the conclusion reached by the Court, refers not narrowly to the specific statute, the Conservation Act, but widely in terms of "conservation legislation". This first point thus suggests that the whale watch case can be used as authority for the proposition that section 4 is applicable to all those statutes listed in the First Schedule.

The second point concerns the comments made in relation to the statutes listed in the First Schedule that themselves incorporate the principles of the

²⁸⁴ Ibid at 562.
²⁸⁵ Ibid at 561, emphasis added.
Treaty. Two statutes of this nature were discussed: the Foreshore and Seabed Endowment Revesting Act 1991 and the Harbour Boards Dry Land Endowment Revesting Act 1991. Both of these statutes state that persons exercising powers or functions under the Act must "have regard to the principles of the Treaty of Waitangi".286 The Historic Places Act 1993 was also discussed in this context.287 Section 4(2)(c) of that Act states that all persons exercising functions and powers under it shall recognise the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.288 The Court of Appeal held that statutes of this nature, that is those listed within the First Schedule of the Conservation Act but also having their own Treaty or Māori reference, "... would have to be considered in the light of s 4 of the Conservation Act. Any question of reconciling them therewith, if there is an apparent difference, will have to be determined if and when it arises....".289 By setting aside these statutes with internal references, the Court's comments suggest that statutes like the Marine Mammals Protection Act which have no internal references, must be interpreted and administered so as to give effect to the principles of the Treaty.

In combination, these two points suggest that the ability to read these words "This Act" to include the Marine Mammals Protection Act can be extended to all other statutes in the First Schedule, if they are of a like nature, that is they contain no internal Treaty references.

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286 See section 3 of the respective Acts.
287 This statute was administered by the Department of Conservation up until 2000.
288 Note that since 2000 the administration of the Historic Places Act has been administered by the Ministry for Culture and Heritage, not the Department of Conservation: see section 115(1) of the Historic Places Act 1993.
289 Supra n 281 at 558.
The precedent established in the whale watch case should apply to the NPA 1980. This is because the NPA 1980 is a statute that is listed in the First Schedule of the Conservation Act, and has no internal references to the Treaty or Māori in the nature of the 1991 and 1993 statutes discussed above.

Therefore, in applying the precedent of the whale watch case, those empowered to interpret and administer the NPA 1980 must give effect to the principles of the Treaty of Waitangi, at least to the extent that the provisions of the statute are not clearly inconsistent with the principles of the Treaty of Waitangi.

Following the whale watch case, the judiciary has had few opportunities to discuss section 4 of the Conservation Act in any detail, and has had no opportunity to discuss it in relation to a statute of a like nature to the Marine Mammals Protection Act (and the NPA 1980). For instance, the proceeding that reached the Court of Appeal, McRitchie v Taranaki Fish and Game Council\(^{290}\) (McRitchie), concerned the interpretation and administration of sections within the Conservation Act, while the proceedings heard in the High Court, Ngatiwai Trust Board v New Zealand Historic Places Trust (Pouhere Taonga),\(^{291}\) and Ngatiwai Trust Board v Pouhere Taonga/New Zealand Historic Places Trust\(^{292}\) (the Pouhere Taonga cases), dealt with the rightful placing of section 4 of the Conservation Act alongside a statute that has internal references to nga iwi Māori, here the

\(^{290}\) [1999] 2 NZLR 139.
\(^{291}\) HC Auckland, 3/97, 29 August 1997, Greig J.
Historic Places Act 1993. In both the Court of Appeal and the High Court proceedings section 4 was undermined. Nonetheless, these decisions can be distinguished from the whale watch case and its line of reasoning on the basis that these cases concerned different statutory interpretation issues.

In comparison to these judicial decisions, discussion has taken place in Parliament that lends support to the conclusion that the precedent established in the whale watch case should apply to the NPA 1980. Last year a Supplementary Order Paper was tabled, and accepted, which concerned the Archives, Culture, and Heritage Reform Bill. This Bill sought to create a Ministry of Culture and Heritage. Part of its new responsibilities would be to interpret and administer the Historic Places Act 1993. The Bill sought to amend the Historic Places Act by inserting this provision:

This Act must continue to be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires, even though this Act is no longer -

(a) administered by the Department of Conservation; or
(b) included in the First Schedule of the Conservation Act 1987.

The Supplementary Order Paper explained the rationale for the insertion:
In *Ngai Tahu Māori Trust Board v Director-General of Conservation* ... it was held by the Court of Appeal that, in general, and subject to the provisions of the particular Act, every Act listed in the First Schedule of the Conservation Act 1987 (as well as the Conservation Act itself) is subject to the requirement in section 4 of the Conservation Act 1987 that the Act be interpreted and administered to give effect to the principles of the Treaty of Waitangi. The purpose of the amendment contained in this Supplementary Order Paper is to preserve the existing role played by the Treaty of Waitangi in relation to the interpretation and administration of the Historic Places Act 1993, even though that Act will no longer be administered by the Department of Conservation or included in the First Schedule of the Conservation Act.

While little weight can be given to Parliamentary material on contested matters of statutory interpretation, this Paper clearly suggests that it is Parliament's intention that section 4 of the Conservation Act be read as applying to those statutes listed in the First Schedule of that Act.

On this basis section 4 of the Conservation Act is to be read into the NPA 1980. This means that the Department of Conservation has the responsibility to administer the NPA 1980 in a manner that gives effect to the principles of the Treaty of Waitangi. This chapter now turns to discuss the remaining phrases used in section 4.

**b. "interpreted and administered"**

In order to understand the ramifications of section 4 the expression "interpreted and administered" must be understood. The most detailed discussion of this expression as used in section 4 of the Conservation Act is found in the minority *McRitchie* Court of Appeal judgment. In this case,
Kirk McRitchie was charged under section 26ZI of the Conservation Act with fishing for trout without a licence. McRitchie argued that he was exercising a traditional Māori fishing right and therefore did not need a licence to fish for trout in that part of the Mangawhero river. McRitchie relied on sections 26ZH ("Nothing in this Part of this Act shall affect any Māori fishing rights") and 4 of Conservation Act. But the argument was not accepted. By a majority, it was held that he had no right to fish without a licence since: "... trout are and always have been part of a separate regime exclusively controlled by legislation and the only fishing rights are those available under those provisions....". Thomas J, dissenting, argued that the majority had failed to discuss the issue in light of the current legislation; that is sections 26ZH and 4. It had instead concentrated on the legislative history of trout related statutes.

Thomas J stressed that section 4 requires that the entire Conservation Act not only be administered so as to give effect to the principles of the Treaty, but also be "... interpreted ..." so as to give effect to those principles. Interpretation is obviously the first step involved in invoking powers or rights under legislation. By section 4 explicitly requiring the Act (and all those statutes listed in the First Schedule) to be interpreted so as to give effect to the principles of the Treaty, the Treaty becomes relevant in the first instance. This, according to Thomas J, is significant, and should have influenced the majority decision more than it did. He said: 

\[\text{References}\]

295 Supra n 290 at 154, original emphasis.
296 Ibid at 155-156.
297 Ibid at 162.
To my mind, ss 4 and 26Z4 of the Act must be taken to reflect Parliament’s current attitude and intention in respect of Māori fishing rights and the rights or interests secured by the Treaty. Section 4 recognises the fundamental constitutional status of the Treaty, and it and s 26ZH are not to be demeaned. Parliament should not be thought to have enacted these provisions as mere window-dressing. If ... it is found that the guarantee of "their fisheries" to Māori under the Treaty includes the right to fish for food, irrespective of the species inhabiting the particular fishery, s 4 requires effect to be given to that guarantee. It requires the Act to be "interpreted" as well as administered to give effect to the principles of the Treaty.

As far as I am aware, this judgment by Thomas J is the only judicially recorded discussion of the significance of the expression "administered and interpreted" as used in section 4 of the Conservation Act. It is of limited precedent value, however, because it is a minority judgment.

And, while the Court of Appeal in the whale watch case obviously thought that sections 5(7) and 6 of the Marine Mammals Protection Act were capable of being interpreted and administered so as to give effect to the principles of the Treaty of Waitangi, no discussion occurred around the expression "administered and interpreted".

No help is to be had from proceedings brought under like legislation. Only two other statutes have used this expression in the context of the principles of the Treaty: the amended 2000 version of the Historic Places Act 1993.

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298 This conclusion is based on having used the search engines of Brookers (http://www.brookers.co.nz/) and Lexis (http://www.lexis.com/), June 2001.
299 Section 115(2).
and the Hauraki Gulf Marine Park Act 2000. Proceedings have yet been brought under these new enactments.

So, although the term must have a specialist meaning, in that it must mean something different to the more common expression "all persons [or specifically named persons] exercising functions and powers under this Act must", it is decidedly unclear just what significance it should have. But, as Thomas J has indicated, because interpretation is a key requirement of section 4, this suggests that those acting under the Conservation Act (and those applicable statutes in its First Schedule) is greater. Interpretation is, after all, a preliminary step that must occur before it is possible to determine if, and how, the statute allows one to act, and what functions and powers it confers. Of course, interpretation has its own limits. For instance, the NPA 1980 should be interpreted and administered as to give effect to the principles of the Treaty, but only to the extent consistent with its other provisions.

c. "to give effect to"

Today a total of twenty two statutes refer to "the principles of the Treaty of Waitangi". Thirteen of these use this phrase in the context of requiring

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300 Section 6(1).
those acting under its terms to give some level of consideration to the principles of the Treaty of Waitangi. The different expectations required by each statute make for an interesting observation. The Table below has been devised by taking from these thirteen statutes the four most common expressions that are attached to the phrase "the principles of the Treaty of Waitangi."

Table 5.1 Common legislative expressions attached to the phrase "the principles of the Treaty of Waitangi."

<table>
<thead>
<tr>
<th>(not) &quot;to act in a manner that is inconsistent&quot;</th>
<th>&quot;to give effect to&quot;</th>
<th>&quot;have regard to&quot;</th>
<th>&quot;take into account&quot;</th>
</tr>
</thead>
</table>


| Section 6(3) of the Hauraki Gulf Marine Park Act 2000 | Section 10 of the Crown Research Institutes Act 1992 |

Each of the provisions identified in the above Table must mean something different, otherwise a generic expression would have been adopted by
Parliament. The issue for this paper is the significance of the Conservation Act adopting the expression "to give effect to".

Some help can be obtained from the whale watch case. The Court of Appeal held that the term "to give effect to the principles of the Treaty of Waitangi" was "... subject to the primary consideration of the preservation and protection of the whales ...".\(^ {304}\) The Court accepted this constituted the primary consideration because the first article of the Treaty of Waitangi "... must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources...".\(^ {305}\) Bearing this in mind, the Court then stated: "... the Director-General of Conservation should take into account ... protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles...".\(^ {306}\)

This comment suggests that the section 4 duty "to give effect to" the principles of the Treaty of Waitangi may be watered down to merely "take into account" so as to avoid a negative impact on the primary purpose of the statute: in this context the preservation and protection of whales. The decision establishes that if there is potential for conflict between the primary purpose of the relevant statute and giving effect to the principles of the Treaty of Waitangi, then that duty to give effect to may be replaced with a duty to show that the principles of the Treaty of Waitangi have been taken into account in interpreting and administering the statute. And the Court of Appeal is not alone in referring to the section 4 duty in terms of

\(^{304}\) Supra n 281 at 561.
\(^{305}\) Ibid at 558.
"taking into account" rather than "giving effect to". The same was done in the Pourere Taonga High Court proceedings. It also seems that Parliament supports this restricted reading of section 4. In recent Treaty of Waitangi statutory insertions it has added such a qualifier. For example, section 115(2) of the Historic Places Act 1993 now reads: "This Act must continue to be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires ...".

Applying this reasoning to national parks, the conclusion must be that the principles of the Treaty must be given effect to in interpreting and administering the NPA 1980, but only so long as it does not affect the primary purpose of that Act, being preservation, protection and public use of land and resources within the boundaries of national parks.

The only other case that can provide assistance in assessing the phrase "to give effect to" is McRitchie. But, as has already been explained, the majority judgment in that decision did not consider the effect of section 4. Thomas J certainly did but his judgment was not supported by the majority. Instead the majority glossed over section 4 and focused instead on the legislative history of trout fishing. This decision suggests that

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306 Ibid at 561, emphasis added.
307 For instance see comments made by Hammond J, supra n 292 at 3, "... there was some argument as to whether the principles of the Treaty of Waitangi are required to be taken into account by the Historic Places Trust...." (emphasis added). The appellants themselves, in this case, posed the issue using this expression: "Whether the High Court erred in law in failing to take into account the principles of the Treaty of Waitangi as it was required to do in the administration and interpretation of the Historic Places Act 1993, in accordance with s 4 of the Conservation Act 1987...." at 4, emphasis added.
308 Thomas J interpreted section 4 to mean that if a Tiriti principle is relevant it must be given effect to, see supra n 297.
section 4, although worded in mandatory terms, can be avoided by justification of historical legislation.

d. *"the principles of the Treaty of Waitangi"

(i) A brief background

Since it was first incorporated into legislation the phrase "the principles of the Treaty of Waitangi" has been subject to much interpretation and application. By way of background, the Treaty of Waitangi, for most of its existence, was regarded by most in this country as a "... simple nullity...".\(^{309}\) It was established that to acquire legal character the Treaty of Waitangi must be incorporated into legislation.\(^{310}\) And the incorporation must be express. There could be no implied reading of the Treaty into existing legislation. Consequently, because few statutes historically made reference to the Treaty, it has been by and large a document without legal standing. But, in recent years, this has changed. It has become an important focal document, not only politically, but also legally. This is primarily because Parliament has been more willing to incorporate the Treaty into statutes.

In 1984 the Labour government came into power and began revolutionary reform of the public sector, departing radically from the centralisation schemes that had been pursued by the National-led government of the late 1970s and early 1980s. A fundamental statute designed to allow for

\(^{309}\) *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur 72.

\(^{310}\) See *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (Privy Council).
deregulation, which was the new policy of the Labour-led government, was
drafted and presented to the House in 1986. Provision was made in the
State Owned Enterprises Bill for ten million hectares of government-owned
land to be transferred to State-owned enterprises. The move angered Māori
as the provision posed as a fundamental threat to their Treaty of Waitangi
rights since only Crown-owned land was likely to be used to settle Treaty of
Waitangi claims. This Bill had the potential to threaten the settlement
process. Angered, Māori argued the point before the Waitangi Tribunal.
The Tribunal responded with concern. The Government heeded its warning
and added the clause that became known as section 9 of the State Owned
Enterprises Act 1986, and in doing so made history. The section dictates:

Nothing in this Act shall permit the Crown to act in a manner that is
inconsistent with the principles of the Treaty of Waitangi.

The significance of this provision in the State Owned Enterprises Act
became apparent soon after it became law. An argument was made to the
Court of Appeal that, despite the section 9 provision in the State Owned
Enterprises Act, the government had proposed to transfer significant
amounts of land, some subject to claims before the Waitangi Tribunal, to
the state-owned enterprises. The Court of Appeal decision, reported as New
Zealand Māori Council v Attorney General311 ("the Lands case"), became
the landmark case to consider the meaning and significance of prohibiting
the Crown to act inconsistently with the "the principles of the Treaty of
Waitangi". Cooke P, concluded.312

311 Supra n 22.
312 Ibid at 667.
It will be seen that approaching the case independently we (each of the five judges presiding in this case) have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality.

Partnership, reasonableness and good faith, according to this case, are the hallmarks of the expression "the principles of the Treaty of Waitangi." Each of the terms were elaborated by the five judges to include such notions as active protection, acting in an honest manner to ascertain facts before a decision is made, consulting one another, and recognising the right of the Crown to govern and the right of nga iwi Māori to exercise, in certain circumstances, tino rangatiratanga. Still, no finite 'list' of Treaty principles was produced by the Court. As of today there still exists no list. And, although it can make it difficult to construct a concise meaning of the expression, it is probably entirely appropriate for, as Cooke P in the Lands case stressed: "What matters is the spirit.... The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas....".\(^{313}\)

Since the Lands case, the judiciary has had numerous opportunities to interpret and apply the expression "the principles of the Treaty of Waitangi", with the main forums being the Court of Appeal, the High Court and the Environment Court.\(^{314}\) The Waitangi Tribunal over the years has

\(^{313}\) ibid at 663.

\(^{314}\) A search on Lexis, June 2001 (at New Zealand case law level) (address: http://www.lexis.com) concluded that 65 cases have considered in some manner the term "the principles of the Treaty of Waitangi".
also contributed immensely to the growing jurisprudence surrounding this expression. On occasions the Government of the day has also issued statements as to its thoughts in regards to the meaning of the principles of the Treaty.

Rather than canvassing all these discussions in any detail, this paper focuses on the meaning of the expression in the context of conservation legislation. Unfortunately, it is not possible to focus even more directly on national park legislation, due to the lack of jurisprudence.

(ii) A specific overview

As has been alluded to above, the judiciary has had few opportunities to discuss Treaty principles in relation to conservation legislation. The whale watch case is obviously an exception. A number of principles can be extracted from the Court of Appeal's decision in this whale watch case, including:

1. The Crown has a right and duty to govern;
2. Māori have a right to exercise the unqualified exercise of their chieftainship over their lands, villages and all their treasures;

See also Hayward supra n 24.

In 1989 the Labour Government released: Principles for Crown Action on the Treaty of Waitangi. Other government bodies have also issued statements: see for example the recently published Māori Custom and Values in New Zealand Law supra n 55 at 79 - 82.

This narrow approach is appropriate considering the narrow focus of this paper, and the fact that many excellent secondary sources exist on the general meaning of this expression, whereas little exists on the conservation legislation perspective. Richard Boast has discussed the implications of te Tiriti o Waitangi for conservation law in "The Treaty of Waitangi. A Framework for Resource Management Law" (1989) 19 VUWLR Monograph 1 469. But Boast's primary focus in this monograph was its implications for resource management law.
3. But the rights and interests of everyone in New Zealand, Māori and Pakeha and all others alike, must be subject to that overriding authority that lies with the Crown to govern;
4. The relationship between the Crown and Māori is one of a fiduciary relationship and ought to be based on reasonableness;
5. The Crown has a duty to actively protect Māori which means more than consultation; and
6. Māori have a right to development.

There is also Re Pouakani Block Application, a decision made by the Māori Land Court in 1988.\textsuperscript{318} This case concerned a dispute between a Māori land-owning trust and the Department of Conservation, as to land block boundaries bordering a Forest Park. Hingston J concluded:\textsuperscript{319}

\begin{quote}
I am of the view that s 4 of the Conservation Act 1987 imposes an obligation on the Crown to ... act fairly, to ensure that the Māori people to be effected by any negotiations are properly represented. This at the very least, would require the Crown undertaking to meet the applicants legal and other costs irrespective of the outcome of negotiations. As well "partnership" means both parties together strive for an equitable solution and not approach the discussions as opponents. It may be difficult for those of us born to, and trained in the adversary method of solving problems to accept that there is another way - be that as it may - it has to be tried.
\end{quote}

As to the Waitangi Tribunal, in many ways it is the principal body concerned with interpreting the phrase "the principles of the Treaty of

\textsuperscript{319} Ibid at 11.
Waitangi”. For instance, the Long Title to the statute that established the Tribunal reads: "Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty....". In summary, the Tribunal's position manifests in two parts. 320 First, according to the Waitangi Tribunal, this expression means that while the Crown has a right to govern, that right is qualified by a nga iwi Māori right to exercise rangatiratanga. Although in exceptional circumstances the Crown may override this fundamental right of rangatiratanga, it may only do so as a last resort and if it is in the national interest to do so. The "... national interest in conservation is not a reason for negating Māori rights of property...." 321 Second, if the resource in question is highly valued and of great spiritual and physical importance, then it is to be considered a taonga and the Crown is under an affirmative obligation to ensure its protection to the fullest extent reasonably practicable. 322

No Government, however, has issued a statement clarifying what the principles mean in regard to managing the conservation estate. It has, however, issued a number of documents that discuss the principles and the conservation estate in relation to settling Treaty of Waitangi claims. Some of these documents are discussed later in this paper, in Chapter Eight. Additionally, the Department of Conservation has discussed the Treaty

320 Refer to Chapter One of this paper for a more detailed discussion.
principles in relation to managing conservation lands, including national parks. These discussions constitute the basis for Chapter Eight of this paper.

Therefore, the phrase the principles of the Treaty of Waitangi as used in the Conservation Act, is encompassing of both the Crown's right to govern the conservation estate and nga iwi Māori right to exercise rangatiratanga over resources which are considered taonga within the conservation estate. In providing for these two rights, both the Crown and nga iwi Māori are bound by a number of duties including that to act in good faith towards each other.

The principal changes therefore effected by the Conservation Act in relation to the management of national parks included the creation of the Department of Conservation and the, albeit indirect, direction that the NPA 1980 be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. This applies to the extent, at least, that there are no inconsistencies between the Treaty principles and the provisions in the NPA 1980.

3. **Its Potential Impact for National Park Management**

Preservation of natural resources so as the public can receive "... in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features...."323 is obviously the ultimate goal in regard to

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323 Section 4(2)(e) of the NPA 1980.
managing national parks. Human use in any other form is not desired. The NPA 1980 clearly states that if any person wants to "... cut, destroy, or take ... any plant ..."324 or "... disturb, trap, take, hunt, or kill ... any animal ..."325 that is indigenous to New Zealand within a national park, they must first have written consent from the Minister of Conservation. And the Minister is not to give his or her consent unless the act consented to is consistent with the management plan for the park.326 These directions are fundamental to the NPA 1980.327 But what of section 4 of the Conservation Act?

Applying the judicial directions contained in the whale watch case, section 4 of the Conservation Act cannot be "... narrowly construed ..."328 and can only be ignored if giving effect to it would create a "... clearly inconsistent ..."329 outcome to that contemplated by the specific provisions in the Act in question. Assuming that no management plan allows the Minister of Conservation to give consent to a person to take or kill plants and animals indigenous to New Zealand found in a national park, should the Minister nonetheless be able to allow nga iwi Māori to take, for instance, the leaves from an indigenous tree growing in a national park? Section 4 of the Conservation Act, remember, is not to be construed narrowly. Section 4 is a clear direction to the managers of national parks that they must give effect to the principles of the Treaty of Waitangi. Integral to the expression "the principles of the Treaty of Waitangi" are notions of rights to exercise

324 Section 5(1), ibid.
325 Section 5(2), ibid.
326 Section 5(3), ibid.
327 They come within the "Principles to be Applied to National Parks" part of the Act, and thus represent the underlying philosophies of the Act.
328 Supra n 281 at 558.
rangatiratanga over taonga. Section 4 is not, however, absolute. The Court of Appeal has held that it can only be applied if it does not create a clearly inconsistent outcome. This, surely, would be the outcome of allowing nga iwi Māori to take such a resource. Taking may be an integral part of the nga iwi Māori conservation ethic and tino rangatiratanga, but it is not endorsed in the NPA 1980 and therefore cannot be given effect to, even by making arguments centred around the Treaty of Waitangi. Nga iwi Māori have no right to exercise the fundamentals of their conservation ethic even though the expression "the principles of the Treaty of Waitangi" has been deemed to mean nga iwi Māori have a right to exercise rangatiratanga.

However, this effect may not be as fatal as this discussion suggests. As was discussed in Chapter Four there exists a General Policy statement directive to managers of national parks to provide, in their respective management plans, provision for nga iwi Māori to take indigenous plants or animals. The direction is, however, very limiting. The taking must be traditional, it must be for food or cultural purposes, it must not be excessive and it must only concern plants and animals that are not protected under other legislation. This thus raises the issue of the content of national park management plans in that the General Policy statement directs the use of these plans to establish policy concerning this issue. Chapter Eight of this paper returns to this issue in detail.

329 Idem.
330 See supra n 216.
IV. Conclusion

This chapter has focused on the implications of the Conservation Act in relation to the management of national parks. It has attempted to illustrate that while significant changes were implemented by its enactment, it failed to align with the guarantees provided to nga iwi Māori in te Tiriti o Waitangi. For instance, it fails to recognise nga iwi Māori as the rightful partners to the Department of Conservation, it endorses a monocultural view of conservation, and in so doing allows the Treaty of Waitangi direction "to give effect to" to be watered down to "take into account".

This paper now turns to discuss subsequent statutes which have since brought further change to the management of national parks: the Conservation Law Reform Act 1990, and the Ngai Tahu Claims Settlement Act 1998.
Chapter Six

A National and Regional Restructure: the Conservation Law Reform Act 1990

The next major statute to be enacted in the conservation reform process was the Conservation Law Reform Act 1990 (CLRA 1990).\(^{331}\) It sought to "... amend the law relating to conservation organisations ... [and] conservation management planning ...".\(^{332}\) It was heralded as putting "... together some of the final pieces of the jigsaw...." and moulding the "... partnership between the Department of Conservation and the community....".\(^{333}\) In particular, it abolished the National Parks and Reserves Authority and the national parks and reserves boards. To replace these bodies, the Act established the New Zealand Conservation Authority (NZCA), and several conservation boards.\(^{334}\) Numerous amendments to both the NPA 1980 and the Conservation Act obviously resulted from this CLRA 1990. Of significance to this paper are the several provisions it introduced which directly concern the role of nga iwi Māori in the management of national parks.

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\(^{331}\) It followed the Environment Act and the Conservation Act.

\(^{332}\) Long Title of the CLRA 1990.

\(^{333}\) Hon. Philip Woollaston, Minister of Conservation, (505) NZPD 498 (8 March 1990).

This chapter is divided into three parts. The first part discusses the political scene in which the Act was formulated, a scene uniquely receptive to nga iwi Māori rights. The second part concerns the provisions in the CLRA 1990 which established the NZCA and the conservation boards. The responsibilities of these bodies are examined in light of te Tiriti o Waitangi guarantees. The third part concerns the make-up of these new bodies, and argues that while the measures to include nga iwi Māori are especially welcome, pitfalls continue.

I. The Political Background

For the first time significant attention was being paid to the right of nga iwi Māori to be included in the management of national parks. Conference proceedings, more than ever before, were confronting the role of te Tiriti o Waitangi in the management of conservation lands. For instance, in 1987 it was the Minister of Māori Affairs, Hon. Koro Wetere, who gave the opening address to the Centennial National Park Conference. At this Conference delegates discussed the "Interpretation of Māori Values" and "The BiCultural Challenge to Management". Later that same year, at another national park conference, two papers were presented, one entitled "Today's Problems - Tomorrow's Demands, a Māori Perspective of the Environment"; the other, "Plants of Spiritual, Cultural and Medicinal Use".

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336 Steven (Tipene) O'Regan, in ibid.
to the Māori and their Conservation". The presenter of this first paper urged conservation estate administrators and managers to act in accordance with te Tiriti o Waitangi principles, pressing, in particular, consultation, representation and understanding of te Tiriti o Waitangi and Māori culture. But, it was also stated:

It must not be tokenism. Token appointments like token consultation are belittling to all parties involved. If the only interest is to deepen the complexion of your committee for the look of it - get a tan, not a Māori!

The presenter of the second paper pronounced: Māori views of conservation have “... never been considered ...” in national park management; Māori have “... always been constantly refused admission into the Parks ... to gather these resources [for traditional medicine] ...”, and “... attempts we have had to provide solutions for the conservation in National Parks ... have been rejected....” This presenter added:

Māori culture is a vital force and should be nourished and for that to happen it must have something to feed it, it must have the natural resources to feed it.... our culture at this point is in the hands of DOC and Forestry, because our culture and the survival of it is dependent on those resources that are in those forests and DOC is the guardian of those forests and therefore the guardian of our culture and of us, because we cannot separate ourselves from the natural resources.

338 Presented by Te Aue Davis, in ibid at 171-179.
339 Supra n 337 at 22.
340 Supra n 338 at 177.
341 Idem.
342 Idem.
343 Idem.
... traditional sites within National Parks ... the spiritual value of those places ... are important, important to our people.... It is important that they [National Park Directors] know that a few hundred years ago people lived there, died there, buried there, worked there and those things are important to our people.

Aside from conference proceedings, Government was committing itself to gaining an understanding of Treaty of Waitangi implications. For instance, in April 1988, a Minister of Māori Affairs publication, *Partnerships Perspectives*, outlined a number of policy objectives. Three of these included, to:

1. honour the principles of the Treaty of Waitangi through exercising its powers of government reasonably, and in good faith, so as to actively protect the Māori interests specified in the Treaty;
2. deal fairly, justly and expeditiously with breaches of the Treaty of Waitangi and the grievances between the Crown and Māori people which arise out of them;
3. encourage Māori participation in the political process.

That same year the Parliamentary Commissioner for the Environment’s investigation into how the Crown was responding to the recommendations

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344 Ibid at 178.
of the Waitangi Tribunal was published. The objective of the investigation was to assess the relationship between the Crown's management of natural and physical resources and the principles of the Treaty of Waitangi:346

If a claim is found by the Tribunal to be a valid grievance, it can be taken as evidence that the Crown’s past environmental management has not taken the principles of the Treaty into full and balanced account. A measure of whether present environmental management is giving full and balanced account to the principles of the Treaty can be found in the way the Crown provides redress for those grievances.

The report concluded that:347

The Crown has been remiss in the past in not acknowledging the essential validity (or otherwise) of the grievances investigated by the Tribunal, in not fully informing the public of why some form of redress is required, and in not explaining what approach to redress it has taken and why.

The Commissioner made a number of recommendations, including:348

Departments are presently monocultural in outlook and in decision-making structure. In order to implement the principles of the Treaty the Crown needs to ensure that it not only improves understanding of Treaty issues amongst officials ... but also obtains in-house and external advice from Māori people and pursues bicultural decision-making structures.

347 Ibid at 2.
348 Ibid at 4.
Later in that same year, as a response to the resource management law reform process, the Government, in 1988, agreed that:349

... new legislation should provide for more active involvement of iwi in resource management, including statutory requirements for consultation, and noted that the question of opportunity for greater Māori participation in local and regional government is still to be looked at in the context of the reform of local and regional government:

... legislation should provide for the protection of Māori cultural and spiritual values associated with the environment.

While this particular Government initiative was directed towards the resource management law reform process, it did act as an important backdrop to the Government’s overall policy, including conservation policy. It was in this political realm that the CLRA 1990 was drafted.

During the reform process, while the Conservation Law Reform Bill was at the select committee stage, many iwi and individuals took the opportunity to articulate their rights to exercise rangatiratanga in regards to conservation lands. For instance, Hohepa Rupene began his submission by stating:350

Existing natural resource laws do not safeguard the cultural rights of Māoridom sufficiently to provide lawful protection and guardianship rights according to

This chapter now turns to examine the amendments made to national park management by the CLRA 1990.

II. The Management Regime

The CLRA 1990 created a national body named the NZCA. The NZCA is an independent statutory body appointed by the Minister of Conservation to advise on the Department's policy and activities at the national level. Hence, for the first time a single management system was put in place to cover the entire conservation estate providing "... an integrated approach to management planning in all protected areas administered by the Department of Conservation...." The NZCA is intricately involved in conservation planning, policy and management advice. In general its responsibilities can be summarised as including:

- investigating any nature conservation matters that it considers are of national importance and advising the Minister on such matters;
- considering and making proposals for the change of status of areas of national or international importance;
- encouraging and participating in educational and publicity activities for the purpose of bringing about a better understanding of nature conservation in NZ;
- advising the Minister annually on priorities for the expenditure of money.

351 See section 6A of the Conservation Act.
Conservation boards were also created by the CLRA 1990.\textsuperscript{355} The Act gave the Minister of Conservation the ability to divide the country into up to nineteen regions, with each under the jurisdiction of a Conservation Board. These bodies provide for interaction between the community and the Department of Conservation. Like the NZCA, the boards are independent statutory bodies appointed by the Minister of Conservation. But, in comparison to the NZCA, conservation boards operate at the \textit{regional} level. Their principal role is advisory in nature. Each board, for example, has the responsibility of:\textsuperscript{356}

- reviewing, amending and recommending the approval by the NZCA of conservation management strategies;
- approving, reviewing and amending conservation management plans;
- advising the NZCA on the implementation of such plans for areas within their jurisdiction; and
- advising the NZCA on any proposed change of status of any area of national or international importance.

Table 6.1 depicts the specific responsibilities given to the NZCA and conservation boards in relation to managing national parks. In many respects the NZCA and conservation boards adopted the functions of the National Parks and Reserves Authority and the national parks and reserves

\textsuperscript{354} See section 6B of the Conservation Act.
\textsuperscript{355} See section 6L, ibid.
\textsuperscript{356} See section 6M, ibid.
boards. The table conveys this by italicising the functions which are new under the CLRA 1990 to national park management.\textsuperscript{357}

Table 6.1 Statutory responsibilities of the NZCA and Conservation Boards

<table>
<thead>
<tr>
<th>Conservation Management Strategies\textsuperscript{360}</th>
<th>New Zealand Conservation Authority Section 18/NPA 1980\textsuperscript{358}</th>
<th>Conservation Boards Section 30/NPA 1980\textsuperscript{359}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approve\textsuperscript{361}</td>
<td>Approve and recommend approval by the NZCA\textsuperscript{362}</td>
<td></td>
</tr>
<tr>
<td>National Park Management Plans</td>
<td>Recommend, review and amend</td>
<td></td>
</tr>
<tr>
<td>Approve</td>
<td>Determine priorities for implementation</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Advise Commissioner\textsuperscript{363} or the NZCA on interpretation</td>
<td></td>
</tr>
<tr>
<td>General Policies</td>
<td>Prepare and approve statements of general policy</td>
<td></td>
</tr>
<tr>
<td>Review and report to the Director-General or the NZCA on the effectiveness</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{357} This table follows the same format as Table 4.1 in Chapter Four of this paper.

\textsuperscript{358} As amended by section 111 of the CLRA 1990.

\textsuperscript{359} As amended by section 113, ibid.

\textsuperscript{360} See section 44A of the NPA 1980, inserted by section 117 of the CLRA 1990: "... conservation management strategies establish objectives for the management of national parks ...".

\textsuperscript{361} See section 6B of the Conservation Act.

\textsuperscript{362} See section 6M, ibid.

\textsuperscript{363} ‘Commissioner’ in relation to national parks means the Commissioner of Crown Lands for the land district in which the park is situated; see section 2 ‘Commissioner’ of the NPA 1980.

\textsuperscript{364} Director-General means the Director-General of Lands appointed under the Land Act 1948; see section 2 “Director-General” of the NPA 1980.
### Establishing and enlarging national parks

Consider and make proposals

Advise Director-General or the NZCA

### Finance

Advise Minister or Director-General on the priorities for expenditure

### Employment

Recommend to the Minister the appointment of honorary rangers

### Whanganui National Park

have regard to the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi, and seek and have regard to the advice of the Whanganui River Māori Trust Board on any matter that involves the spiritual, historical, and cultural significance of the park to the Whanganui iwi.

Of obvious interest is the insertion concerning the Whanganui iwi. For the first time legislation directs a national park management body to have
regard to tangata whenua. Nonetheless, the positive significance of this provision is somewhat lessened when one understands its background. The Whanganui River Māori Trust Board did not support the wording of this provision. The Trust Board preferred a much wider duty to rest with the Conservation Board. To capture this wider duty, the Trust Board suggested that the provision be expressed as (note in particular the italicised expressions):365

have regard to the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi, and seek and have regard to the advice of the Whanganui River Māori Trust Board on any matter that involves the Park, and especially the spiritual, historical, and cultural significance of the park to the Whanganui iwi.

Despite the Trust Board making its concerns known to the Government,366 its preferred choice of wording was not adopted. Thus, the Trust Board has only a limited right to have its views considered by the Whanganui Conservation Board, in that it applies only to the Whanganui River, and any matter that involves the Trust Board's relationship with the Park. It does not relate to any matter that involves the Park.

The Whanganui iwi insertion is also interesting in that it is iwi specific. This raises the question of why other iwi were not given the same recognition in respect to national parks in their rohe? That is, why were conservation boards throughout the country not being directed in a similar

365 R Henry, Chairman, Whanganui River Māori Trust Board, Submission to the Conservation Law Reform Bill. 7 September 1989 (PD/90/152), emphasis added.
366 Via the select committee process, see ibid.
manner to the Board responsible for managing the Whanganui National Park? The Government was able to justify the Whanganui National Park distinction on the basis that the operative management plan for the Park already took such an inclusive approach. A principal management objective of the Whanganui National Park Management Plan is to: 

\[367\]

...recognise the spiritual and cultural significance of the park and the Whanganui River to the Whanganui Māori people, and to consult with and give full consideration to the views of the Whanganui River Māori Trust Board on park management issues of concern to the Māori people.

The Plan rationalises this position by stating that the area: 

\[368\]

...has traditional and spiritual significance to local Māori people and they will be involved, through the Whanganui River Māori Trust Board in all aspects of park management. The park will be managed in a spirit of co-operation with the tangata whenua.

The Government thus sought to explain the inclusion of this provision by stating that it was a policy already in existence and therefore would not dramatically the change the management of the park. But why, therefore, did this same rationale not extend to, in particular, the tangata whenua of the Tongariro National Park? The plan for this Park had become operative prior to 1990, and it recognised cultural and spiritual values in an identical manner to the Whanganui National Park Management Plan!

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This insertion is, therefore, a good example of legislative inconsistency in recognising and providing for tangata whenua in the management of national parks. While the insertion can be explained in that it statutorily endorsed what was already occurring in practice, it did so only in part.

III. Representation Issues

It is useful to begin the discussion of the make-up of the newly established NZCA and conservation boards with a table depicting the historical legislative progression towards incorporating nga iwi Māori onto national park management bodies. The table clearly depicts two important points: the first being that the progression has been incredibly slow; and secondly, that the CLRA 1990 marked a radically new approach to including nga iwi Māori in the management of national parks.

Table 6.2 Legislative provision for nga iwi Māori on national and regional national park management bodies (1894 - 1990)

<table>
<thead>
<tr>
<th>Statute</th>
<th>National</th>
<th>Regional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tongariro National Park Act 1894</td>
<td></td>
<td>Ngati Tuwharetoa have a statutory right to one seat.</td>
</tr>
<tr>
<td>National Parks Amendment Act 1977</td>
<td></td>
<td>Taranaki iwi have a statutory right to one seat.</td>
</tr>
</tbody>
</table>

308 Ibid at 18.
As Table 6.2 shows, up until 1990 nga iwi Māori had no statutory right to sit on the national body that managed national parks. And, of the twelve national parks that existed in 1989, only two of the regional boards had a statutory duty to provide a seat to a nga iwi Māori member. The passing of the CLRA 1990 obviously changed that particularly depressing picture. For the first time legislation provided for the potential inclusion of nga iwi Māori representatives to sit on the national body charged with managing national parks, the NZCA. Three of the twelve boards now had a statutory duty to provide membership to the local iwi. And for the first time legislation stipulated that regard must be had to the tangata whenua when members were appointed to conservation boards.

Hence, the provision to incorporate two Māori representatives on the NZCA effectively displaced a long-standing theme in national park management:

369 See section 6P(7)(b) of the Conservation Act. This achievement partly rests in the fact that the park was established in 1993 at a time when the Whanganui River Māori Trust Board were politically mobilised to play an active role in its creation; see supra n 25 at 241-246.
being that it is worthy to provide a statutory right of representation to non-government organisations such as Forest and Bird and the Federated Mountain Clubs, but not to nga iwi Māori.

To summarise, the CLRA 1990 provided three new avenues for nga iwi Māori representation:

1) The appointment of two persons to the NZCA after consultation with the Minister of Māori Affairs;
2) The direction to appoint members to conservation boards having regard to a number of matters including the tangata whenua of the area; and
3) The specific direction giving the Whanganui iwi a right to sit on their local Conservation Board.

But representation rights alone do not necessarily equate with how national parks should be managed. The CLRA 1990, despite being more inclusive than past legislation, remains aloof to te Tiriti. The CLRA 1990 conveys no intention on part of the Crown to share in the management of natural resources within the conservation estate to the level required by te Tiriti o Waitangi. In order to substantiate this, consider the three examples below.

1. **NZCA**

The Minister of Māori Affairs has the right to direct the appointment of two persons to the NZCA. These two Māori appointees sit alongside ten others. Nga iwi Māori therefore constitute a minority voice. In order to conceptualise this point, consider the early 1990s proposal to establish the
Northland Kauri National Park. Dr Margaret Mutu, a Māori representative on the NZCA, gave specific instructions to the other NZCA members not to visit the Northland iwi to discuss this proposal "... for to do so would be to trample on the mana of the tribes ...". Yet, the NZCA did not heed her advice. Dr Mutu has described this experience as being diametrically pulled between NZCA responsibilities and nga iwi Māori responsibilities. She consequently felt that she had to distance herself from the NZCA - an experience, she says, that she hopes she will not have to go through again.

This experience illustrates the limited role nga iwi Māori can play if mere representative rights are being provided on a board where those members can be overruled. Either increasing Māori representation on the NZCA and/or giving the Māori representatives more weight in the decision-making process would see this body becoming more aligned with the Tiriti model of national park management. This should be especially so in respect of issues which directly concern tangata whenua.

On a different tangent, Dr Mutu has recalled experiences of witnessing, in the mid 1990s, superficial lip-service to section 4 of the Conservation Act responsibilities, misapprehension that quantity and not quality of consultation with nga iwi Māori is what is important, and denial of iwi anger at the manner in which the Department of Conservation conducts itself on tangata whenua issues. Mutu's comments are reinforced by many others. For example, a Tuhoe descendant, Taiarahia Black, declared

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370 Mutu supra n 61 at 15.
371 Idem.
372 See Dr Margaret Mutu, Report to the Minister of Māori Affairs on the New Zealand Conservation Authority, 1995.
the Department to be unacceptably monocultural in the mid 1990s, whereby Kaupapa Atawhai Managers find their advice on Māori custom ignored or ridiculed by senior Department management.373

Supporting these criticisms is a study which was conducted in the mid-1990s by the NZCA. The study revealed that many Māori were strongly dissatisfied with the provisions for representation, consultation and involvement in conservation management systems.374 These Māori respondents argued that if national management was to become reflective of Māori needs then a reconsideration of power structures would have to occur:375

... a genuine partnership requires full participation from the outset of any initiative. Māori must be involved in determining the whole kaupapa or project, not merely brought in once objectives and frameworks have already been established and conditions and constraints already imposed.

Additionally, a similar argument was put to the select committee charged with reviewing the Conservation Law Reform Bill in early 1990:376

373 Taiarahia Black, "Tuhoe and the Conservation estate" a paper presented at Environmental Conference, University of Otago, 1996, (copy obtained personally, Māori Studies Department, Massey University).
376 Te Runanganui O Ngati Kahungunu, Submission to the Conservation Law Reform Bill. (PD/90/83) at 3, original emphasis.
Māori need to be part of the decision-making, policy-making process....Without this process Māori will always only ever be relegated to the powerless position of providing the MAORI PERSPECTIVE, which only effects as much change as Pakeha will allow.

The current Ngai Tahu representative on the NZCA, Edward Ellison, has also expressed scepticism at the NZCA's understanding and commitment to te Tiriti o Waitangi. He has been particularly critical of the procedures adopted in regard to the proposed new Stewart Island/Rakiura National Park: "Far from providing "inclusiveness", the process for identifying the values and the criteria for investigation of new national parks in fact disengages the iwi customary interest...."[^377] - it seems little has changed since Mutu's experiences in the early 1990s!

2. Conservation Boards

While the general provision making tangata whenua concerns relevant in the appointment of members to conservation boards is a welcome addition in regards to te Tiriti, it is of interest to note that this provision, in its draft form, was significantly stronger. The original clause stated that the Minister must appoint every member after consultation with the NZCA and having regard to:[^378]

The particular relationship of the tangata whenua of the region ...; and
The particular features of land administered by the Department in the area ...; and

[^377]: Supra n 243.
[^378]: Clause 5 of the Conservation Law Reform Bill.
The interests of nature conservation, natural, earth and marine sciences, recreation, tourism, and the local community.

But, when the Bill came before the House for the first time, opposition Members strongly criticised the clause. Mr Young, National Party's spokesperson for conservation (who had also held the position of Minister of Lands and Survey when National was last in Government), stated:\footnote{379 Member for Waitotara, (500) NZPD 11851-52 (10 August 1989).}

I am sure that national parks and reserves and conservation areas are for all New Zealanders, and I am sure that we want all New Zealanders to be conservationists in their outlook. The stipulation seems to be just one more of those unnecessary provisos that the Government is increasingly including in legislation. The Government knows to its detriment that there is a rather unfortunate backlash as a result of the constant representation of or for one particular ethnic section of the community. After all, the record of conservation of the indigenous people is not as impressive as all that. Indeed, a large number of indigenous species departed this land during their time, and large areas of New Zealand were burnt for various reasons that were considered necessary at the time. Many New Zealanders would find offensive the suggestion that those people have some special relationship with conservation.

The Minister of Conservation countered the attack by stating:\footnote{380 Hon. Woollaston, ibid at 11852.}

To suggest that the recognition of that relationship will result in a kind of takeover that will exclude all others except the tangata whenua is alarmist, and could possibly have a tinge of racism about it if it were developed too far.
Widespread support existed for Mr Young's comments. Many of the public submissions received by the select committee charged with reviewing the Bill were critical of this particular clause. For example: "Māori interests should not be seen as being more important than conservation or use of the Department of Conservation estate...."³⁸¹ and "Inequities of Māori representation ... should be resolved as they continue the myth of Māori concern for the conservation...."³⁸² And, as Mr Storey, Minister of Conservation, summarised: "Rightly or wrongly, many of the people and organisations making submissions believed that that gave undue weighting to Māori interests...."³⁸³ Accordingly, the clause was amended. The final enacted version reads:³⁸⁴

... the Minister shall appoint every member of a Board ... having regard to -

(a) The particular features of land administered by the Department in the area of the Board's jurisdiction; and

(b) The interests of nature conservation, natural earth and marine sciences, recreation, tourism, and the local community including the tangata whenua of the area.

This final version is a clear watering down of the rights of nga iwi Māori. It clarifies that the particular relationship of Māori people to conservation is

³⁸² Ibid.
³⁸³ (504) NZPD 14461 (12 December 1989).
³⁸⁴ See section 6P(2)(b) of the Conservation Act, emphasis added. Note that subsection (3) directs that before making any appointment representing the interests of tangata whenua of an area, the Minister of Conservation has to consult with the Minister of Māori Affairs about those interests.
only one of the interests which should be considered in making appointments to conservation boards.

3. **The Whanganui Conservation Board**

Another obvious pitfall of the CLRA 1990 is its inconsistency. Although it must be credited with extending the statutory right to a third iwi to sit on a particular conservation board, it is curious that the Act did not go further and give all iwi a statutory right to sit on their respective boards if within that board’s jurisdiction is a national park which tangata whenua have exercised traditional control over. The experiences of Tuhoe in relation to the Urewera National Park is a prime example of the possible ramifications of legislative inconsistency. Tuhoe are an iwi that enjoy no statutory right to sit on their respective conservation board. But:385

Te Urewera is our home, our church, our cathedral, it is our sacred shine in order to restore our mental, physiological and physical recreation sustenance.... It is our identity, it is OUR body, it is our mother.... The congregation of mountainous peaks and ridges, rivers, creeks, that stretches the boundaries of our tribe include our fisheries areas, hunting grounds, papa kāinga, marae, cultivation areas, ancient battle fields, burial places.... And there is not a hill or gully, or ridge or creek, scares even tipuna a stone or mighty rimu tree or small seedling that does not have a name and has been consecrated into a haka, waiata tawhito, pātere, kōrero taunahanaha which draws its sources from the philosophical, historical contemporary oral narratives of Tuhoe.

385 Black supra n 373 at 1.
Even so, Tuhoe have been alienated from the management of this land. Consider, for example, this experience which has been highlighted by Taiarahia Black. In 1995, the Department of Conservation East Coast Conservancy released two management-related draft documents for public comment. The submission made by Tuhoe was critical of the two documents primarily because they failed to appreciate the natural links that Tuhoe have with the environment. However, the Tuhoe submission was not well received by the Conservancy. For instance, Tuhoe argued the need for a joint management plan to be devised for the Urewera National Park. The Conservancy responded: "Present legislation for management of this nature does not allow for this kind of arrangement...",\(^{386}\) but added as a pacifier "We could have informal co-operation..."\(^{387}\) Whilst this may be true (national park legislation does not expressly encourage joint management), other options were available. In particular, it could have adopted a similar approach to the Board responsible for managing the Whanganui National Park. That Board had made it a management objective to recognise, and consult with, tangata whenua in its national park management plan. Instead, Tuhoe were left feeling distressed and angry: "The scenario as we see it effectively shuts Tuhoe out of its land and resources and philosophical base where the Crown through the DOC creates a 'Zoo-like mentality of Te Urewera'..."\(^{388}\)

Such a response by a Board illustrates the important influential nature of legislation, especially the need for legislation to recognise and endorse the position of tangata whenua in the management of national parks. Without

\(^{386}\) Ibid at 23.
\(^{387}\) Idem, emphasis added.
such recognition tangata whenua can so easily be undermined in their pursuit to participate in national park management. The response also gives weight to the argument which has been made in this paper: the present monocultural structures that are responsible for managing our national parks need to be reconsidered. That is, until tangata whenua are recognised by management bodies as a Tiriti partner, as more than a special interest group, reconsideration of management structures will continue to be called for. And, whilst it is apparent that change is occurring, albeit slowly, and the legislative provisions relating to the Whanganui National Park are a good example, change is not occurring across the board. The legislative changes to date have been ad hoc and inconsistent.  

IV. Conclusion

While the CLRA 1990 strengthened both recognition and representation measures in regard to nga iwi Māori, these provisions remain far removed from how our national parks should be managed: "It still treats Māori as an interest group with whom the Crown will consult rather than as a partner....". The provisions introduced by the CLRA 1990 remain in force. The only legislative amendments to have since been made concern national parks within the Ngai Tahu takiwa as is explained in the following chapter.

388 Ibid at 25.
389 The recently notified Department of Conservation, Te Urewera National Park Management Plan Draft. (June 2001) Department of Conservation, is in comparison more inclusive of Tuhoe. This document is discussed in Chapter Nine of this paper.
390 Tuwharetoa Māori Trust Board, Submission to the Conservation Law Reform Bill. (PD/90/87) at 3.
Chapter Seven

A Regional Shake-Up: the Ngai Tahu Claims Settlement Act 1998

In the late 1990s, the Ngai Tahu Treaty of Waitangi grievance was settled in legislative form. The resulting agreement between Te Runanga o Ngai Tahu and the Crown is encapsulated in the Ngai Tahu Claims Settlement Act 1998 (NTCSA). This statute introduced new, and in some instances unique, provisions that challenge the existing national park management regime.

When it was in its Bill form before the House, the then Minister of Conservation described it as the “... most important legislation we have had before this House this century....” and credited as going to the “... core of who we are as New Zealanders, and what sort of nation we want to be....”. The NTCSA records an expansive apology by the Crown to Ngai Tahu and provides Ngai Tahu with a property settlement that involves land, cash and new legal provisions. It aims “... to restore the mana of Ngai Tahu and restore the honour of the Crown ...”.

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391 The body corporate that represents Ngai Tahu Whanui: see Te Runanga o Ngai Tahu Act 1996.
393 Idem.
Conservation lands became a necessary focal point in this settlement for three principal reasons: the Crown took the position it could only use assets in its ownership for settlement purposes; the conservation estate (including eight national parks) constitutes a significant portion of the Ngai Tahu takiwa\textsuperscript{395}; and Ngai Tahu value this protected land highly. Many provisions in the NTCSA thus concern Ngai Tahu’s ability to be involved in the management of conservation lands.

This chapter focuses on discussing the NTCSA and its national park provisions within two contexts: those that attempt to provide recognition to Ngai Tahu of their relationship with land within national parks, and those that attempt to provide Ngai Tahu with representation on the bodies which are statutorily responsible for managing national parks. This chapter concludes that the NTCSA caused an important regional shake-up of national park management.

I. Recognition Measures

1. Topuni

The most significant new provision introduced by the NTCSA in relation to national parks is the new Topuni device. According to the Act, this concept means an area of land which has "Ngai Tahu values".\textsuperscript{396} The term "Ngai Tahu values" is defined to mean the Ngai Tahu cultural, spiritual, historic, 

\textsuperscript{395} This means the area identified as the takiwa of Ngai Tahu Whanui in section of Te Runanga o Ngai Tahu Act 1996: see section 8 of the NTCSA.

\textsuperscript{396} Section 237.
and traditional association with a Topuni. Only land which is administered under the National Parks Act 1980, the Conservation Act 1987, or the Reserves Act 1977 is capable of becoming a Topuni. Only under the NTCSA can an area acquire the status of a Topuni. Several Topuni have been declared in national parks in the Ngai Tahu takiwa. The Kahurangi Topuni which lies within the Kahurangi National Park is one example. To illustrate how this area is valued by Ngai Tahu, Schedule 81 of the NTCSA states:

Kahurangi is a tremendously significant landmark to Ngai Tahu ... It is a distinctive and easily recognisable physical boundary marker.... Kahurangi was a natural landing point for seafarers travelling south by waka .... Such tauranga waka (landing places) represent the intimate knowledge the tupuna (ancestors) had of navigation, river routes, safe harbours and landing places, and the locations of food and other resources.... Kahurangi is an important expression of the iwi’s mana over the vast tract of land to the south.

The legal significance of a Topuni is that Ngai Tahu values are afforded a certain measure of protection. In particular, this means that when the NZCA or any conservation board approves or considers any general policy, conservation management strategy, conservation management plan, or national park management plan in respect of a Topuni, it must “... have particular regard ...” to the Ngai Tahu values. As part of this process both the NZCA and the boards must consult with Te Runanga o Ngai Tahu.

397 Ibid.
398 Ibid.
399 Section 241.
and "... have particular regard to its views as to the effect on Ngai Tahu values of any policy, strategy, or plan ...".  

Another aspect of a Topuni is that it allows Te Runanga o Ngai Tahu and the Crown to enter into agreements as to specific principles. Specific principles are directed towards the Minister of Conservation avoiding harm to, or the diminishing of, the Ngai Tahu values. Specific principles have been developed for a number of Topuni that lie within the boundaries of the national park estate. For instance, the specific principles that apply to Tititea (Mount Aspiring) promote the:

(a) Encouragement of respect for Ngai Tahu's association with Tititea;  
(b) Accurate portrayal of Ngai Tahu's association with Tititea; and  
(c) Recognition of Ngai Tahu's relationship with wahi tapu and wahi taonga, including archaeological sites.

The Tititea (Mount Aspiring) Topuni specific principles agreement further records that the Director-General has determined a number of actions that will be taken by the Department of Conservation in relation to these specific principles. Some of these actions include: making educational material available to climbers which explains the Ngai Tahu view that standing on the very top of the mountain denigrates its tapu status; and attempting to ensure that human waste is disposed of in a way that minimises the risk of contamination of waterways.

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400 Section 242.  
401 Section 240(1).  
Not all welcomed the addition of the Topuni device in the realm of conservation management. In particular, many groups and individuals protested that the Topuni concept gives Ngai Tahu a special status in the management of conservation lands. A dominant view articulated in many submissions received by the Māori Affairs Select Committee (the Committee responsible for reviewing this Bill) concerned the phrase “have particular regard to” in the context of requiring consultation with Te Runanga o Ngai Tahu. Many stated that this phrase: “... gives an unjustified dominance to Te Runanga o Ngai Tahu’s advice and interests....”404 For example, the NZCA stated, in its submission, that no one party, including Ngai Tahu, should be given “... a dominance of view point....”405 Similarly, the Tararua Tramping Club commented: “Weight should not be given to any such advice or request simply on the basis that it is Ngai Tahu’s.... their input should be pooled with all available input ...”.406 At a more critical level was the submission made by Public Access New Zealand. This body submitted that the phrase is unjustified and undemocratic.407

However, the Māori Affairs Select Committee accepted advice that the phrase should be retained as it represented arguments carefully negotiated

403 See ibid at 12.133-2 and 12.133-3.
405 “Submission by New Zealand Conservation Authority to the Select Committee on the Ngai Tahu Claims Settlement Bill" NTS/162, at 8.
by the Crown and Te Runanga o Ngai Tahu.\textsuperscript{408} The meaning of the phrase, according to the select committee, is that:\textsuperscript{409}

... the views of Ngai Tahu will be given, all other things being equal, somewhat more weight than the views of parities that the law requires the administering authority only to have regard to. So it falls short of being a veto, but it rides higher than simply having one's views considered.

Or, as the Member for Aoraki, Jim Sutton, stated: "It means that a lot more notice has to be taken of those views than of the views of other people ... but [it] does not constitute a right of veto for Ngai Tahu in the administration...."\textsuperscript{410} of the area. It thus does not mean the same as to "give effect to" or to "recognise and provide for". These expressions require more than to have "particular regard to", but they too do not translate into a veto right. Still, the phrase "to have particular regard to" does mean that if a decision has been made without having particular regard to Ngai Tahu's position then it can be challenged by judicial review.\textsuperscript{411} The implementation of the Topuni device is significant in that it encourages notions of co-management in the conservation management sphere. Ngai Tahu now have a right to expect that their values will be given particular regard in the development of policy for managing specific areas within the conservation estate.

\textsuperscript{408} Supra n 404 at 6.
\textsuperscript{409} As recounted by Hon. Jim Sutton, Member for Aoraki (571) NZPD 12141 (17 September 1998).
\textsuperscript{410} (571) NZPD 11943 (10 September 1998).
\textsuperscript{411} Supra n 404 at 6.
2. **Statutory Acknowledgements**

The Act also adopts the statutory acknowledgement device which recognises the "... cultural, spiritual, historic, and traditional ..." association Ngai Tahu have with certain areas of conservation land. Just over sixty areas, some of which fall within the boundaries of the national park estate, come under this statutory acknowledgement device. The NTCSA records Ngai Tahu’s association with each of the areas. For instance, Schedule 14, which provides a statutory acknowledgement over the Aoraki/Mount Cook area, explains the genealogical traditions that link Ngai Tahu with Aoraki and the continued special importance that the area has to Ngai Tahu:

The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its ‘special’ waters, back to other parts of the island for use in ceremonial occasions.

A statutory acknowledgement has the legal effect of requiring consent authorities to "have regard" to the association Ngai Tahu have with the area. It also allows Te Runanga o Ngai Tahu to cite the acknowledgments as evidence of their association with the area. And, it empowers a Minister of the Crown to enter into deeds of recognition. If such a deed is entered into then the Minister responsible for managing the statutory acknowledged area (most likely the Minister of Conservation) must consult with Te Runanga o Ngai Tahu and have particular regard to their views in relation

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412 See section 206.
413 See ibid and Schedules 14 to 77 of the NTCSA.
414 Section 215.
to the management or administration of such areas.\textsuperscript{415} Therefore, it is the entering into of a deed of recognition that imposes the duty on the Minister to have particular regard to Ngai Tahu views in respect of land subject to a statutory acknowledgement. In this way statutory acknowledgements have similar potential to Topuni to affect the management of national parks.

However, the Act makes it very clear that statutory acknowledgements do nothing further than what is expressly provided for in the Act. For example, they do not mean that every decision maker:\textsuperscript{416}

\ldots may give any greater ... weight to Ngai Tahu's association to a statutory area ... than that person or entity would give ... if no statutory acknowledgement or deed of recognition existed in respect of that statutory area.

The Environment Court has also stressed "While recognising the real psychological and cultural importance of these statutory acknowledgements their main legal purpose seems to be procedural and/or consultative \ldots."\textsuperscript{417}

3. \textbf{A Special Area: Aoraki/Mount Cook}

Aoraki is the highest mountain in New Zealand. Known to many as Mount Cook, it lies within the Aoraki/Mount Cook National Park. It is the tupuna of Ngai Tahu, representing to them their "... most sacred of ancestors ...".\textsuperscript{418} The NTCSA recognises the special relationship Ngai Tahu have with the mountain in a number of ways. Both a statutory acknowledgement and a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{415} Section 216.
\item \textsuperscript{416} Section 217(b).
\item \textsuperscript{417} Kemp & Billoud \textit{v} Queenstown Lakes District Council [2000] NZRMA 289 at 310.
\end{itemize}
\end{footnotesize}
Topuni sit over the mountain which act to protect Ngai Tahu values. The national park in which it lies has been renamed Aoraki/Mount Cook National Park to reflect its original Aoraki name. A further measure is adopted in the NTCSA concerning the ownership of the mountain. It provides the means by which ownership in fee simple can vest with Ngai Tahu for up to seven days. Upon the expiry of those seven days Te Runanga o Ngai Tahu is to gift the mountain back to the Crown. Te Runanga o Ngai Tahu have yet to action the seven day vestment. There is a suggestion that it will not do so until all parts of the settlement have been effected. Others have even commented that Ngai Tahu ought to action only part of the statutory provision - the taking of the mountain. For instance, at the time the statute was being debated in the House, Joe Hawke, stated:

If ... the Crown gave back Maungakiekie [One Tree Hill] to Ngati Whatua Orakei ... if I had it for 7 minutes they would never get it back again, never.

I am not giving ideas to Ngai Tahu about becoming deliberate breakers of a deed of settlement, but that is how I feel.

Perhaps the Government foresaw this possibility, for the NTCSA states that if the deed of gift is not returned to the Prime Minister by 3.00 pm on the gift date (the day which is seven days after the vesting date) then an escrow

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418 See Schedule 80.
419 See section 206 and Schedule 14 for the Statutory Acknowledgment and section 238 and Schedule 80 for the Topuni declaration.
420 See section 162.
421 See sections 13 - 18.
422 Justine Inns (Legal Division, Te Runanga o Ngai Tahu), Guest Speaker, LAWS 459 Treaty of Waitangi, Faculty of Law, University of Otago, 11 May 2001.
423 (571) NZPD 11945 (10 September 1998).
agent will be appointed.\textsuperscript{424} It then becomes the responsibility of the escrow agent to deliver the deed of gift to the Prime Minister.

It is interesting, from an historical perspective, to compare the provisions in the NTCSA regarding Aoraki/Mount Cook with the experiences the Taranaki iwi have had in regard to their special maunga, Taranaki/Mount Egmont. Taranaki iwi have successfully had the mountain integral to Egmont National Park renamed "Taranaki/Mount Egmont". To little avail however have been their calls for the Park to be renamed Taranaki/Egmont National Park. Moreover, whilst back in 1978, Mount Egmont was returned to the Taranaki Māori Trust Board, it was returned purely as a symbolic gesture. The same statute that returned the mountain simultaneously gifted the mountain back to the Crown (the Mount Egmont Vesting Act 1978). While the NTCSA is similar in that it too provides for both a vestment and a return, it does at least provide Ngai Tahu with a sense of mana in that they will be able to claim authority over their special mountain for a period of seven days. The NTCSA reflects a significant change in attitude towards the potential role tangata whenua can have in the management of conservation lands, including the ‘jewels’ of this estate, the national parks. Even if the measures amount to merely symbolic gestures, they are still significant in the history of national park management.

\textbf{4. Department of Conservation Protocols}

The NTCSA also introduced "Department of Conservation protocols".\textsuperscript{425} This device provides Ngai Tahu with the potential to become more involved

\textsuperscript{424} Section 16(3).
in the management of certain national parks. Protocols are statements in writing issued by the Crown, through the Minister of Conservation, to Te Runanga o Ngai Tahu. Protocols can be used to establish how the Department will exercise its functions, powers and duties in relation to specified matters within the Ngai Tahu takiwa. It can also address how the Department will interact on a continuing basis with Te Runanga o Ngai Tahu, and provide for Te Runanga o Ngai Tahu’s input into its decision-making process.\(^{426}\) When a protocol is issued it must be notified in the *Gazette*.\(^{427}\) Once issued, protocols must also be noted in conservation management strategies, conservation management plans, and national park management plans affecting the Ngai Tahu claim area.\(^{428}\)

A proposed Protocols document has since been issued pursuant to the NTCSA.\(^{429}\) It runs for some eleven pages and covers numerous subjects, including cultural materials, freshwater fisheries, culling of species of interest to Ngai Tahu, historic resources, and visitor and public information. Reproduced below are three specific policies stated in this document which illustrate the general nature of this device:

4.3(b) The Department will (c)onsider requests from members of Ngai Tahu Whanui for the customary use of cultural materials in accordance with the appropriate legislation.

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\(^{425}\) See sections 281-286.
\(^{426}\) See sections 281-286.
\(^{427}\) See Section 281.
\(^{428}\) See Section 282(4).
\(^{429}\) See Section 284.

\(^{426}\) Section 281.

\(^{427}\) Section 282(4).

\(^{428}\) Section 284.

\(^{429}\) It has not been noted in the *Gazette* because, according to Martin Rodd (Head Office, Department of Conservation), a "... gazette reference is not possible at this time...." (personal email correspondence, 18 July 2001).
7.3(a) The Department will work with Te Runanga at Regional and conservancy levels to: (e)nsure, as far as reasonably practicable, that Ngai Tahu values attaching to identified wahi tapu, wahi taonga and places of historic significance to Ngai Tahu managed by the Department are respected by the Department ...

8.2(a) The Department will work with Te Runanga at Regional and conservancy levels to encourage respect for Ngai Tahu values by: (a)s far as reasonably practicable, seeking to raise public awareness of positive conservation partnerships developed between Te Runanga, the Department and other stakeholders ...

These Protocols apply across the Ngai Tahu takiwa. And, as will be shown in Chapter Nine, this Protocols document is having a significant affect on the management of national parks. Those conservancies in the Ngai Tahu takiwa that are currently reviewing national park management plans are, in particular, being confronted with this document, and how best to incorporate it into proposed new management plans.

Finally it is interesting to note that the NTCSA makes it clear that if the Minister of Conservation unreasonably fails to comply with a protocol, Te Runanga o Ngai Tahu can seek a public law remedy, but not damages.430

5. Taonga Species

The NTCSA records that the Crown acknowledges the cultural, spiritual, historic, and traditional association of Ngai Tahu with taonga species such

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430 Section 285.
as birds, plants, animals and fish. The legal significance of doing so has meant that since the passing of this Act, the Minister of Conservation must advise Te Runanga o Ngai Tahu in advance of any review or preparation of a policy or management plan or strategy that relates to taonga species. It also means that the Minister must consult with, and have particular regard to the views of, Te Runanga o Ngai Tahu when making policy decisions concerning the protection, management, or conservation of taonga species. The statute makes it very clear that the acknowledgement "... does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, any taonga species...". Customary use rights are discussed further in this paper, in Chapter Nine.

II. Representation Measures

1. Statutory Advisor

The NTCSA appoints Te Runanga o Ngai Tahu as a statutory adviser to the Minister of Conservation in respect of certain sites. As such Te Runanga o Ngai Tahu may provide advice to the Minister when the Minister is considering any draft conservation management plan, conservation management strategy or any national park management plan, and/or formulating written recommendations to the NZCA. The same threshold standard is applied as with Topuni and Statutory Acknowledgments in that

431 Sections 288 and 298.
432 Section 293. In regard to fish, see sections 303 and 304.
433 Section 292. See also section 302.
434 Section 231.
435 Section 232.
the Minister must “have particular regard” to the advice given by Te Runanga o Ngai Tahu.\textsuperscript{436} A number of the sites identified in the Act concern land within national parks including areas within Aoraki/Mount Cook National Park, Kahurangi National Park, Mt Aspiring National Park and Fiordland National Park.\textsuperscript{437} The creation of this position is unique to conservation areas within the Ngai Tahu takiwa and it helps to reinforce the recognition measures that have been introduced under the NTCSA.

2. **NZCA**

Prior to 1998, a total of twelve members were appointed to the NZCA. That number increased to thirteen with the passing of the NTCSA. The NTCSA statute dictates that the Minister of Conservation is to appoint a person to the NZCA who has been nominated by Te Runanga o Ngai Tahu.\textsuperscript{438} This provision is unique in two ways. It is the only iwi specific provision that dictates NZCA membership. It is also the only mandatory appointment - the Minister \textbf{must} appoint the person nominated by Te Runanga o Ngai Tahu, whereas in making all other appointments the Minister must merely consult with certain persons or entities.

3. **Conservation Boards**

Section 273(1) of the NTCSA states that a conservation board whose jurisdiction is wholly within the Ngai Tahu claim area must consist of not more than twelve persons including at least two persons appointed on the

\textsuperscript{436} Section 233.  
\textsuperscript{437} See section 230 and Schedule 79.  
\textsuperscript{438} Section 272(1); see section 6D(1) of the Conservation Act.
nomination of Te Runanga o Ngai Tahu. A conservation board whose area of jurisdiction is partly within the Ngai Tahu claim area must consist of at least one person appointed on the nomination of Te Runanga o Ngai Tahu.

This representative provision has the effect of bringing conservation boards in the Ngai Tahu takiwa into line with the conservation boards that manage the Tongariro, Egmont and Whanganui National Parks. These Boards have a duty to ensure that tangata whenua are represented. The NTCSA provision is, however, unique in that in some instances Te Runanga o Ngai Tahu have a right to not one, but two, seats. The explanation for this unique measure has been that more than half of all conservation lands in New Zealand lie within the Ngai Tahu takiwa.

III. Comment

Whether the NTCSA creates a closer alignment with te Tiriti in regard to managing national parks is debatable. One author has recently expressed scepticism. This author points out that "... no large tracts of the conservation estate have been made over to Māori management....", and that this will never occur because there exists in government "... the perception that the granting of any significant level of national management...".

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439 See section 7B, ibid.
440 Section 273(1), see also section 7C, ibid.
authority to tribal groups is a fundamental threat to national security and identity...". 442

Another sceptical commentator has been Joe Hawke, a Member for Parliament. He has questioned the narrow focus of the NTCSA, especially because it has been touted as a statute concerned with honouring Ngai Tahu. This comment below was made in the context of the recognition and representation measures in respect of Aoraki/Mount Cook: 443

... why could not the Crown have given the authority and the right to Ngai Tahu to make a management plan by themselves, with the communities involved in the precincts of the maunga and with all the organisations, and make a management plan by themselves, for themselves, and manage the taonga of the maunga tapu? That is my plea. Why did not the Crown do it that way? Then I would have said there would be more mana on the part of the Crown.

This criticism may be misplaced - Ngai Tahu themselves may not wish to take on the responsibility that this would entail. After all there is a big difference between being involved in the management of a national park and having full responsibility to manage a park. In other words, having responsibility to eradicate stoats and gorse, and having a right to have one's views respected and given effect to, create very different expectations. 444

Nonetheless, the NTCSA only provides partial recognition and representation measures to Ngai Tahu. The measures themselves are very

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442 Idem.
443 (571) NZPD 11945 (10 September 1998).
narrow. Topuni and Statutory Acknowledgments, for instance, only go to specifically defined areas. Even within such areas Ngai Tahu have no right to direct how the areas will be managed, their only right being that the decision-makers have particular regard to their values. But even so the NTCSA must still be regarded as representing a significant milestone in the history of conservation management in New Zealand. It does give Ngai Tahu a place to stand in the conservation realm. And, the measures are significant especially when compared to the general exclusive nature that has dominated conservation management in this country. Additionally, the NTCSA was enacted in a political climate that strongly believed nga iwi Māori have little right to conservation lands. Hon. Nick Smith, the then Minister for Conservation, noted this when the Act was in its second reading before the House: “From listening to talkback radio and a few of the conservation organisations, one would think that Ngai Tahu had horns, tails, and probably a fork....” At the time it was Government policy that the conservation estate "not be readily available" for Treaty settlement claims. The Government had taken this position because:

The Crown considers that it administers the conservation estate on behalf of all New Zealanders and that the rights of the general public to use the conservation estate should not be affected as a result of Treaty settlements. It also believes

\[444\] See Inns supra n 422. Inns raised this particular point in her presentation.

\[445\] (567) NZPD 7947 (31 March 1998).


that it has a responsibility to protect the natural and historic values of the land
(including wahi tapu sites).

Sharon Vogel has since commented on this stance:448

This view reflects a paternalistic approach to the conservation estate. The Proposal seems to suggest that only the Crown is capable of protecting conservation estate lands. It ignores Māori obligations as tangata whenua with respect to conservation issues and the wording of the Treaty of Waitangi. The Crown's approach also ignores the reality that the conservation estate forms a cultural landscape for Māori.

This climate helps to explain the limited nature of the new provisions in the NTCSA which should nevertheless be regarded as immensely valuable additions to conservation management in the most part of the South Island. Or as Hon. Nick Smith stated when this statute was in its Bill form:449

I say that this Bill is bold and, yes, it does mean that there will be changes and new challenges for the Department of Conservation. But I say that it removes a dark cloud that has been over 80 per cent of the South Island. As I look to the future and welcome the introduction of this Bill, as a member of Parliament in the top of the South I look forward to the day when there may be a Bill for the remaining parts of the South Island so that, indeed, we can look forward and be proud of our past.

449 Supra n 445 at 7948.
Nick Smith is not the only Member for Parliament who has expressed desire to see similar provisions introduced in other parts of the country.\textsuperscript{450}

I ask ... whether the same relationship that Ngai Tahu have with those taonga is duplicated in the same way for ... the iwi of Te Ika-a-Maui. There are no differences, but this Bill gives Ngai Tahu recognition by way of the statutory acknowledgement over and above the majority of Māori people and iwi who live in the North Island - Te Ika-a-Maui. They do not have the same privilege or the same consideration as Ngai Tahu, yet their relationship with the taonga that we are talking about here is exactly the same.

In recent years, as many more Tiriti settlements have been finalised, nga iwi Māori are being recognised as having a special status with conservation lands. Besides Ngai Tahu, the plight of the Taranaki iwi is especially relevant in this context, for integral to their claim is the Egmont National Park, in particular Taranaki/Mount Egmont. The Taranaki iwi are currently negotiating with the Crown. But the context of this claim is slightly different to the Ngai Tahu claim. The Taranaki iwi are claiming ownership of the mountain, rather than simply management rights.

Settlements other than Ngai Tahu and Taranaki are of less relevance in that while many parts of the respective settlements do concern conservation lands, they do not concern the national park estate. To comment too broadly on these settlements would mean going beyond the scope of this particular paper. Suffice to say that many settlements are attempting to introduce measures that recognise the importance of lands and resources to the respective tangata whenua. In some settlements: small parts of the

\textsuperscript{450} Mr Samuels, (571) NZPD 12162 (17 September 1998).
conservation estate are being transferred to tangata whenua; name changes are being made to reflect the area's association with tangata whenua; protocols are being developed as a basis for the Department of Conservation and tangata whenua co-operation; and measures are being implemented that reflect the Topuni and Statutory Acknowledgement concepts. These approaches suggest that the measures found in NTCSA may, one day, become the norm in conservation management. Future legislation may endorse the rights of all tangata whenua to be included in the management of conservation lands, including national parks.

Of course, the future may also see a more inclusive approach being taken to the rights of tangata whenua in national park legislation. Although the political climate remains similar to that in 1998, future claims may present different options. After all, the settlement of the Ngai Tahu claim covered a very large land area.

IV. Conclusion

The NTCSA caused a regional shake-up that not only brought Ngai Tahu up to speed with statutory measures that are in place for Ngati Tuwharetoa (Tongariro National Park), Taranaki (Egmont National Park) and

451 See: Department of Conservation website: www.doc.govt.nz/commu/Māori/settlements.htm. This site provides an excellent summary of the settlements in respect to how they affect the Department of Conservation and the land that it manages.

452 For instance, mid way through last year the Government released a set of principles to guide the settlement of Tiriti claims, which encorced its prior stance that: "... public conservation land is not readily available for settlement of Treaty claims...." (Press Release, New Zealand Government, 20 July 2000).
Whanganui (Whanganui National Park), but put Ngai Tahu ahead to a unique level of participation in national park management.

This chapter marks the end to the examination of national park legislation. It is thus appropriate at this point in this paper to summarise the current legislative stance. The table below attempts to do this.

<table>
<thead>
<tr>
<th>Of nga iwi Māori application</th>
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<tr>
<td><strong>Recognition measures:</strong></td>
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<tr>
<td>• a right to see that national parks are administered and managed according to the principles of the Treaty of Waitangi (so long as the principles of the NPA 1980 are not clearly inconsistent with the principles of the Treaty of Waitangi).(^{453})</td>
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<tr>
<td><strong>Representation measures:</strong></td>
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<td>• a right to two of the thirteen positions on the NZCA;(^{454}) and</td>
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<tr>
<td>• the Minister of Conservation in appointing members to conservation boards must have regard to a number of interests including the interests of tangata whenua of the area.(^{455})</td>
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\(^{453}\) Section 4 of the Conservation Act and supra n 281.  
\(^{454}\) Section 6D(1)(a), ibid.
Recognition measures:

- the Minister of Conservation must have particular regard to the advice given by Te Runanga o Ngai Tahu when he/she is considering national park management plans, other conservation management plans, and when formulating written recommendations to the NZCA;456
- the NZCA and conservation boards must consult, and have particular regard to, Ngai Tahu values of a Topuni,457 and any specific principles agreed to between Te Runanga o Ngai Tahu and the Crown;458
- the Minister of Conservation must have particular regard to the views of Te Runanga o Ngai Tahu if a deed of recognition has been entered into in regard to a Statutory Acknowledgement area within a national park;459
- Te Runanga o Ngai Tahu have a right to claim ownership of Aoraki/Mount Cook for up to seven days;460
- Te Runanga o Ngai Tahu have the right to amend or cancel 'Department of Conservation protocols';461 and
- Te Runanga o Ngai Tahu have a right, when the Minister of Conservation makes policy decisions concerning the protection, management or conservation of certain taonga species, to be advised, consulted with, and to have the Minister take particular regard of their views.462

455 Section 6P(2)(b), ibid.
457 A Topuni is an area of land, which can include land administered under the NPA 1980, has Ngai Tahu values, and has been declared a Topuni under the Ngai Tahu Claims Settlement Act 1998.
458 Sections 241 and 242, ibid.
459 See sections 212, 213, 215 and 216, ibid.
460 See sections 15 and 16, ibid.
461 Department of Conservation protocols are statements in writing, issued by the Crown through the Minister of Conservation to Te Runanga o Ngai Tahu which set out how the
Representation measures:

- Te Runanga o Ngai Tahu have a right to nominate one person as a member to the NZCA;463
- a lineal descendant of Te Heuheu Tukino must be appointed to the conservation board responsible for managing the Tongariro National Park;464
- the Taranaki Māori Trust Board have a right to recommend one person to be appointed to the conservation board responsible for managing the Egmont National Park;465
- the Whanganui River Māori Trust Board have a right to recommend one person to be appointed to the conservation board responsible for managing the Whanganui National Park;466 and
- Te Runanga o Ngai Tahu have a right to nominate two persons to become members of conservation boards that are responsible for managing a national park that is wholly within their takiwa,467 and one person to those conservation boards that are responsible for managing a national park that is partly within their takiwa.468

No new statutory measures have been enacted since the passing of the NTCSA. Most of the measures illustrated above have been implemented in

462 Section 293 ibid. "Taonga species" means species of birds, plants and animals described in Schedule 97 and found within the Ngai Tahu claim area: see section 287 of this 1998 Act.
463 Section 6D(1)(ca) of the Conservation Act.
464 Section 6P(5)(b), ibid.
465 Section 6P(6)(b), ibid.
466 Section 6P(7)(b), ibid.
467 Section 6P(7B)(a), ibid.
468 Section 6P(7C)(a), ibid.
the past fifteen years. The legislative provisions traced in this paper show that recent statutory initiatives represent some progression towards a realisation that nga iwi Māori have a right to be included in the management of special areas like national parks. Inconsistency, however, continues to haunt national park legislation. Some iwi continue to have no specific statutory rights of recognition or representation. In the final part of this paper some recommendations will be made as to how national park legislation could become more consistent in its approach. Before doing so, the final chapter in this part of this paper, Chapter Eight, moves to study the documents that dictate the day to day management of national parks, in particular, national park management plans.
Chapter Eight

The Management of National Parks: a Document Analysis

This chapter provides a comparative analysis of national park management plans (NPMPs), and a brief discussion of some reports, plans and strategies that operate alongside NPMPs. The aim of this analysis is to assess the effect that legislative reform over the past fifteen years has had on the day to day management of national parks as reflected through these documents. The first part examines the effects of: section 4 of the Conservation Act, the NTCSA, the General Policy direction concerning indigenous use of plants and animals, and the General Policy direction concerning consultation with tangata whenua where they have a spiritual or cultural association with national park land. The second part focuses on how the principal bodies responsible for managing national parks have expressed their commitment to giving effect to section 4 of the Conservation Act. This chapter concludes that, while there seems to have been a progression towards co-management at the ground level, inconsistency between national park management documents remains prevalent.
I. A Comparative Study: Operative and Draft NPMPS

It is a statutory requirement that a management plan be in place for each national park. Twelve operative plans exist. They all came into operation between 1985 and 1994:

- Abel Tasman NPMP (1986); 470
- Aoraki/Mount Cook NPMP (1989); 471
- Arthur's Pass NPMP (1994); 472
- Egmont NPMP (1985); 473
- Fiordland NPMP (1991); 474
- Mount Aspiring NPMP (1994); 475
- Nelson Lakes NPMP (1988); 476
- Paparoa NPMP (1992); 477
- Te Urewera NPMP (1989); 478

469 Operative plans do not exist for the Kahurangi National Park, or the Stewart Island/Rakiura National Park due to their recent establishment.
Seven of the twelve operative NPMPs are currently being reviewed. As part of this process, five draft NPMPs have been published:

1. Abel Tasman Draft NPMP (1996);^482
2. Egmont Draft NPMP (2000);^483
3. Nelson Lakes Draft NPMP (1995);^484
4. Te Urewera Draft NPMP (2001);^485 and

A working draft for Aoraki/Mount Cook National Park is currently circulating. The Fiordland NPMP is still at the preliminary review.
stage. In addition, the first NPMP for the recently established Kahurangi National Park is circulating in its draft form, and is expected to become operative this year.

This part of this chapter attempts to provide a comparative study of both operative and draft NPMPs. The discussion below focuses on the recognition in these plans of the legal duties raised by: section 4 of the Conservation Act, the NTCSA, the General Policy direction concerning the provision of customary use, and the General Policy direction concerning the need to consult with those tangata whenua that have a spiritual or historical association with national park land.

1. The Treaty of Waitangi and Section 4 of the Conservation Act

A legal duty to give effect to the principles of the Treaty of Waitangi in the management of national parks has existed since the Conservation Act was passed in 1987. This part asks two questions: is the Treaty of Waitangi recognised in NPMPs, and, if so, how do the NPMPs explain this duty?

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488 See Department of Conservation, Fiordland National Park Management Plan. Review Discussion Document. (1999) Department of Conservation, Southland Conservancy, Invercargill. In the next year or two it is expected that the Paparoa and Whanganui NPMPs will be reviewed: according to Anne McLean, Head Office, Department of Conservation, Wellington, email correspondence, 16 February 2001.

489 It is currently awaiting NZCA approval. See Department of Conservation, Kahurangi National Park Draft Management Plan. (Oct 1997) Department of Conservation, Nelson/Marlborough Conservancy, Nelson. Note that a preliminary document has been published which provides some suggestions as to how the Stewart Island/Rakiura National Park will be managed: see Department of Conservation, Stewart Island/Rakiura National Park Investigation Discussion Document. (July 1999) Department of Conservation, Southland Conservancy, Invercargill.
a. *Is it recognised?*

Ten of the twelve NPMPs in operation today became operative after 1987. Yet only half of these plans expressly mention "the Treaty of Waitangi"! Those that do are the:

- Te Urewera NPMP (Feb 1989),
- Fiordland NPMP (1991),
- Paparoa NPMP (1992),
- Mount Aspiring NPMP (1994), and

While four of these five are our most recent, it is unclear why no mention is made of the Treaty of Waitangi in the plans which became operative after the Te Urewera NPMP, or for that matter those plans which became operative in the period from 1987 to 1989. What is clear, though, is that section 4 of the Conservation Act was the catalyst for the inclusive approach. In any case no reference had been made to the Treaty in a NPMP prior to this enactment.

But how far do these five Treaty-inclusive plans go in regards to understanding and actioning Treaty rights and obligations?

b. *How is it recognised?*

The first NPMP to refer to the Treaty did so by stating: "The Department of Conservation in the management of the park will *have full regard* to the
Treaty of Waitangi and the traditional rights of the tangata whenua....". The subsequent four plans refer to "the principles of" the Treaty of Waitangi. Three of these state that the principles of the Treaty must be "given effect to", while the other opts for the "have regard" approach - an inconsistency which is also prevalent in the judicial discussions concerning the section 4 duty (see Chapter Five of this paper).

All five of the Treaty-inclusive plans discuss the duty in the context of consultation. For example:

An important aspect of Treaty relationships between the Crown and Māori concerns a duty of consultation. This duty is not a casual one. It applies to the functions of the Department.

By far the most detailed of the five is the Arthur's Pass NPMP. It specifically identifies which Treaty principles are relevant to national park management. For this reason several parts of the plan are reproduced in this discussion. To begin, it identifies the Treaty principles by stating that:

The 'essential bargain' principle gives the Crown power to legislate for National Parks thereby ensuring a legal requirement, if needs be, to support the active involvement and participation of the Crown's Treaty partners in the management of parks.

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490 Supra n 478 at 56, emphasis added.
491 Supra n 474 at Appendices page 5. Unique to Te Urewera National Park is a direction that links the Treaty with dogs: "Dogs will be permitted for pig hunting under strictly controlled conditions. Tuhoe rights, under the Treaty of Waitangi, will be taken into account when conditions are set....", supra n 478 at 61.
492 Supra n 472 at 19.
The principle of ‘partnership’ and its implementation must involve the Crown’s Treaty partners to a greater extent in the policy, planning, and decision making process of the park estate.

The principle of ‘active protection’ requires the Department to protect taonga within the park, and to provide for access to resources for traditional purposes within the constraints of the National Parks Act 1980.

‘Tribal Rangatiratanga’ is a principle not well understood but includes the recognition, and acknowledgement that the Crown’s Treaty partners have a right to exercise authority over their traditional resources and to manage them in a way the iwi consider appropriate. The extent to which rangatiratanga can be actively exercised within the national park is a matter still to be resolved. Rangatiratanga is exercised by the iwi holding mana whenua over an area. Mana whenua can be defined as the customary authority exercised by an iwi or hapu in an identified area.

These principles are further explained and developed. For instance, Ngai Tahu must be included in the management of the park "to a greater extent" because:493

In recognising the Crown's responsibilities under Section 4 of the Conservation Act it is clear that past arrangements for representation by and consultation with Ngai Tahu did not adequately provide a basis for developing a management partnership for the park.

and:494

493 Ibid at 25.
494 Ibid at 26.
Current management attitudes have a philosophical base that is exclusive of any conservation concepts of Māori and therefore some recognition and understanding of these concepts is essential if the park management philosophy is to truly reflect the bicultural nature of the country.

Partnership, according to the Arthur's Park NPMP, must encompass tino rangatiratanga.495

A new framework based on a negotiated partnership will have to be developed to meet the Crown's obligation inherent in the treaty principle to protect Ngai Tahu's rangatiratanga and provide Ngai Tahu with opportunities for participation in all aspects of the park's management.

Reconciling cultural differences is recognised in the plan as integral to a partnership relationship:496

The park itself contains features and resources that are central to the identity of Ngai Tahu... land and people are inseparable. There are cultural differences in how the resources within the park are perceived by Māori and Pakeha and the management structure will have to be able to reconcile these differences.

Many of Ngai Tahu's present concerns are centred around the failure of the national park system to reflect the needs and values of their culture. Ways to address these concerns will have to be developed.

Provision for the practice of tikanga Māori is also specifically recognised.497

495 ibid at 25.
496 Idem.
Māori, over many centuries, had developed a sophisticated relationship with Te Taiao - the natural world or the environment.... What emerged was a tradition of 'tikanga' ... The re-introduction of 'tikanga Māori' to management practice in the park is seen as essential and desirable and adding a new/old dimension to management philosophy. The uniqueness of introducing tikanga Māori is poorly understood and the development of a philosophy to meet all aspirations will be a major challenge during the plan’s lifetime.

The Arthur's Pass NPMP adopts an expansive approach to the Treaty. By attempting to explain the implications of giving effect to the principles of the Treaty in a national park context, this plan represents a closer alignment to the Treaty than do the other four Treaty-inclusive NPMPs.

c. Draft NPMPs: future trends

 Quite a different picture is presented in the study of the draft NPMPs; all five draft NPMPs acknowledge, to varying degrees, the importance of the Treaty in the management of national parks; one even directly refers in te reo Māori to "te Tiriti o Waitangi".

The earlier Abel Tasman (1996) and Nelson Lakes (1995) draft plans discuss, in one instance indirectly and in the other expressly, the principles of the Treaty in the context of kaitiakitanga: "To recognise the kaitiakitanga of the iwi that claim mana over their traditional spiritual and cultural values

497 Ibid at 26.
within the park by giving effect to the principles of the Treaty of Waitangi.\textsuperscript{498}

Recognising the role of kaitiakitanga as an integral part of giving effect to the Treaty of Waitangi is commendable. These two draft plans represent, thankfully, a new approach to recognising kaitiaki. The Fiordland NPMP, which became operative in 1991, refers to kaitiaki, but identifies the Southland Conservation Board as the kaitiaki of the public estate!\textsuperscript{499} To be a kaitiaki does not simply mean to be a 'caretaker'. The term is intricately linked with spiritual beliefs that are peculiar to a Māori understanding of the world order.\textsuperscript{500} It is thus inappropriate for a Crown managing board that is based on non-Māori philosophies to be referring to itself as a kaitiaki. The Abel Tasman and Nelson Lakes draft plans mark a shift away from this approach.

However, the more recent draft NPMPs have adopted a common approach to recognising the Treaty. These plans, being the Kahurangi, Egmont, Te Urewera and Westland/Tai Poutini drafts, list "giving effect" to "the principles" of the Treaty as an objective. Three of these drafts, however, add a qualifier: the Treaty objective should be pursued, but only so long as

\textsuperscript{498} Supra n 484 at 16. The Abel Tasman draft does something similar, but in a less Treaty-direct fashion - it is an objective: "To recognise the kaitiaki role of the iwi who have mana whenua status over traditional spiritual and cultural values within the park....", supra n 482 at 16.

\textsuperscript{499} "The department and the Southland Conservation Board are nga kaitiaki (caretakers) of the public estate, with an obligation to have regard 'or and protect Māori interests...." supra n 474 at 9.2

\textsuperscript{500} For a discussion of the term kaitiakitanga in a legislative framework: see Tomas, and Hayes supra n 58; and Māori Custom and Values in New Zealand Law supra n 55.
it will not create any inconsistencies with the NPA 1980.\textsuperscript{501} This suggests that this is a definitive trend. The qualifier, no doubt, results from the Court of Appeal's 1995 whale watch decision.

Another apparent trend appearing in these recent drafts is a tendency to list "the principles" of the Treaty. The appendix section of each of these drafts includes a very similar statement which states the exact same eight Treaty principles. The Te Urewera draft plan's version is reproduced below. It is slightly different, but only in that it gives a Māori expression to each of the eight principles:\textsuperscript{502}

\begin{quote}
\textbf{THE PRINCIPLES OF THE TREATY OF WAITANGI}
\end{quote}

The New Zealand Court of Appeal has determined that the Department's obligations to give effect to the principles of the Treaty of Waitangi includes notions of reasonableness, awareness of other Treaty partner's views, willingness to accommodate those views, fairness and good faith. As the Court of Appeal has stated: "It is the principles of the treaty which are to be applied, not the literal words". The Privy Council has characterised the principles as dynamic: "They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty ... with the passage of time the principles which underlie the Treaty have become much more important than its precise terms". The principles are still evolving through the pronouncements of the Courts and the Waitangi Tribunal. The principles to date are as follows:

\textsuperscript{501} The Egmont, Westland/Tai Poutini, and Te Urewera draft NPMPs. The Aoraki/Mount Cook working draft adopts this same approach.

\textsuperscript{502} Supra n 485 (page reference unavailable as copy downloaded from the internet). It is common for the appendices of this drafts to cite the Lands case (1987), supra n 22.
THE ESSENTIAL BARGAIN

**Principle 1 - Kawanatanga**
To recognise the Crown's authority to make laws for the good order and security of the country (This will include conservation related purposes).

**Principle 2 - Rangatiratanga**
To recognise the right of Māori to exercise Iwi authority and control over their own land resources and taonga.

**Principle 3 - Oritetanga**
To recognise the rights of Māori and non-Māori alike to equality of treatment and privileges of citizenship.

**CO-OPERATION**

**Principle 4 - Whakawhanaungatanga**
To act reasonably and in good faith.

**DUTY TO BE INFORMED**

**Principle 5 - He here kai mohio**
To make informed decisions.

**ACTIVE PROTECTION**

**Principle 6 - Tautiaki ngangahau**
Where appropriate and to the fullest extent practicable, to take active steps to protect Māori interests.

**AVOID PREJUDICIAL ACTIONS**

**Principle 7 - Whakatūia i te mea he**
To avoid action which would create new Treaty grievances.
Principle 8 - Whakatia i te mea he
To avoid actions which would prevent redress of claims.

d. Summary
The recently published draft NPMPs suggest that concepts such as partnership, recognising and providing for tangata whenua values, and consultation will become recurrent themes in future NPMPs. Yet, not one of the drafts adopt an approach akin to the Arthur's Pass NPMP. The new drafts do not expressly recognise the inadequacy of past practices, nor the difficulties that may be associated with implementing rangatiratanga and tikanga Māori. The Arthur's Pass NPMP is the only plan that recognises the practicalities associated with committing to giving effect to the principles of the Treaty of Waitangi in the management of national parks. This is disappointing.

Nonetheless, this study of operative and draft NPMPs has highlighted the important effect legislation can have on the day to day management of national parks. Conservancies have become more acutely aware of the need to recognise the importance of the Treaty of Waitangi in the management of national parks since the enactment of section 4 of the Conservation Act. No doubt references to the Treaty of Waitangi, and even "te Tiriti o Waitangi" and other Māori expressions such as tino rangatiratanga and kaitiakitanga, will become commonplace in all plans.

The current commonality between the Treaty-inclusive operative and draft plans is to recognise the importance of consultation. Other plans also refer
to consultation and this is more than likely in response to the *General Policy* consultative directive of 1983. This consultation requirement is thus returned to under the *General Policy* directive.

2. **Ngai Tahu and NTCSA 1998**

A recent trend appearing in draft NPMPs is the use of protocols to define the relationship between a conservancy and tangata whenua. In particular, the management plans for national parks in the Ngai Tahu takiwa are beginning to provide for this type of relationship - no doubt in accordance with the NTCSA. For example, in Appendix 2 of the Westland/Tai Poutini draft is a lengthy statement of how the Director-General will provide Te Runanga o Ngai Tahu with the opportunity for input in its policy, planning and decision-making processes.

The Aoraki/Mount Cook working draft has also formulated policy that requires consultation with Ngai Tahu on each concession application. This is again in response to the Protocols document being developed pursuant to the NTCSA. The working draft states that applicants must have regard to a number of issues including the outcome of consultation with Ngai Tahu interests, and measures to avoid, remedy or mitigate potential adverse effects on Ngai Tahu values.\(^{503}\) It adds that if the Department issues concessions that seek to use or promote Ngai Tahu cultural information, the Department must request that the concessionaire consult with Te Runanga o Ngai Tahu through its Papatipu Runanga before using that information.\(^{504}\)

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\(^{503}\) Supra n 487 at 91.

\(^{504}\) Idem. In a similar fashion, the Aoraki/Mount Cook working draft suggests that it will be policy "To acknowledge the cultural, spiritual, historic and traditional association of Ngai Tahu
This development is a positive example of how legislation can affect the management of national parks on a day-to-day basis.

3. **Traditional Use and the General Policy Statement**

The majority of the NPMPs provide policy on the traditional use of indigenous plants and animals. This is not surprising since the *General Policy for National Parks* document directs that management plans provide for such traditional uses.\(^{505}\) Some of the NPMPs simply reproduce the *General Policy* statement, while others provide certain criteria that must be fulfilled before permission will be granted. The common criteria points include:

- there must be no alternative source outside the park;
- no rare, endangered or locally uncommon species or species protected under other legislation must be concerned;
- there must be a justified need to use the resources from within the park (eg there must be no other sources available or suitable);
- use must not be excessive;
- sustainability of the resource must be retained;
- gathering must be supervised by the department and iwi;
- there must be no intention to derive commercial gain or reward; and
- there must little impact on other park visitors.

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with taonga species and when managing indigenous plants and animals have particular regard to the Department's Protocols with Ngai Tahu for freshwater fisheries and culling of species....", supra n 487 at 41. Likewise, the Westland/Tai Poutini draft has a similar policy, see Supra n 486 at 43.  
505 See supra n 216.
The draft NPMPs adopt a similar approach. However, the Kahurangi draft plan adds that there must have been historic use of that species in the Park, and that the species must be of high importance to the iwi. Only one draft plan identifies the conflict between preservation - the goal national park management is supposed to aspire to - and customary use:

There is, however, some conflict between the Department’s legal requirements to preserve native species and their habitats in the national park and fulfilling Treaty obligations. The national park status... provides a high degree of protection to plants and animals within the park. The harvesting of plants and animals is generally inconsistent with the preservation of the park and Ngai Tahu will be encouraged where possible to harvest traditional material from areas outside the park. However, some harvesting from within the park may be required for carrying out tikanga, but will not be permitted where materials are to be sold for commercial gain.

Some NPMPs extend specific support to traditional use of fish and certain minerals. For instance, two operative management plans have specific policies concerning traditional fishing rights. The Paparoa NPMP states:

The tino rangatiratanga of Poutini-Ngai Tahu over the fisheries of the park, as guaranteed by the Second Article of the Treaty of Waitangi, is recognised. A number of factors must be taken into consideration, however, before any fishing for indigenous species would be allowed.

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506 Supra n 489 at 80.
507 Westland/Tai Poutini supra n 486 at 75.
508 Supra n 477 at 83.
The Whanganui NPMP states that it is a policy: "To support the continuance of the traditional fishing practices of the Te Atihau nui a papa rangi people in the Whanganui River....". And, the Kahurangi draft plan has developed a policy specifically concerning eeling. It states that: "... the cultural harvest of eels for non-commercial purposes in specific areas where there is a tradition of such use and the catch is sustainable...." is allowable.

The Mount Aspiring NPMP is the only operative plan that specifically recognises the special value of pounamu. This plan provides:

The Waitangi Tribunal’s recommendation that pounamu (greenstone) be recognised as belonging to the Kai Tahu iwi will, if adopted by the Government, be given effect in this plan, subject to the plan’s policies and principles.

The Mount Aspiring plan has developed this particular policy because: "Pounamu is different from other minerals on account of its great cultural significance for the Māori people." Of course, legislation has since been enacted specifically providing for the relationship between Ngai Tahu and pounamu, the Ngai Tahu (Pounamu Vesting) Act 1997.

The Egmont draft allows for the extraction of "... kokowai and other mineral deposits used for traditional purposes with consent from the

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509 Supra n 481 at 78.
510 Supra n 489 at 80.
511 Supra n 475 at 82.
512 For a discussion on this Act: see Meredith Gibbs "Legislation Note: The Ngai Tahu (Pounamu Vesting) Act 1997" (2000) 4 NZJEL 257.
Department, provided the extractions are of a small scale, and the impacts of extractions are minimal...." 513

Consistency, in regard to recognising future customary use of plants and animals, is becoming evident. But similar recognition for other resources, such as minerals, is less consistent. The inconsistency is more than likely linked to the fact that the General Policy statement directs that policy be made in regards to customary use of plants and animals, but not other resources such as minerals. This distinction thus illustrates the importance of national measures, such as General Policy directives, on the day to day management of national parks.

4. Consultation and the General Policy Statement

The General Policy statement directs that "consultative procedures" with tangata whenua who have "historical or spiritual ties" be fostered. This part thus asks: do NPMPs recognise that tangata whenua have such ties to land in national parks, and, if so, in what policy areas do they visualise consultation? Note that this analysis is linked to the above Treaty of Waitangi discussion since the interpretation of the section 4 duty concerns consultation. However, remember only five operative NPMPs recognise the Treaty of Waitangi, whereas, as will be illustrated, many other NPMPs simply recognise the need for consultation.

513 Supra n 483 at 98. Kokowai is the Māori name for iron oxide.
a. *Is association recognised?*

(i) **Historical association**

All but one of the NPMPs recognise, to some extent, the historical association Māori have had with land that is now included in the national park estate.\(^{514}\) Most of the plans refer to how Māori used the land, for instance: "The pre-European Māori used the coast extensively....".\(^ {515}\) Some plans go further and recognise the time span of the association, for example: "The general region of the park has probably been known to the Ngati Tuwharetoa for a thousand years....".\(^ {516}\) A number of these plans recognise that the association goes back further than human occupation: "The Māori history of Fiordland reaches back more than one thousand years into creation mythology of the Kai Tahu iwi....".\(^ {517}\) Creation mythology, however, is discussed in few plans. One that does is the Whanganui NPMP. It recounts the legend surrounding the formation of the Wanganui River. This traditional story centres around the attraction felt by Tongariro, Ngauruhoe, Ruapehu and Taranaki (mountains personified in the male form) for the nearby Pihanga (a female personified mountain). Likewise, the Paparoa NPMP states:\(^ {518}\)

> Paparoa is an example of the works undertaken by the atua. They have created an extremely beautiful and bountiful place which people can enjoy and where they can cherish the whakapapa beginnings of Ngai Tahu and their relationship with Te Taiao - the universal cosmos.

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514 The exception being the Nelson Lakes NPMP.
515 *Abel Tasman* supra n 470 at 11.
516 *Tongariro* supra n 479 at (v).
517 *Fiordland* supra n 474 at 3.
518 Supra n 477 at iii.
Other plans, such as the Mount Aspiring NPMP, begin with an introduction expressed in te reo Māori that identifies the tangata whenua of the park:519

Ko Aoraki te mauka  Aoraki is the Mountain
Ko nga waihuka e rere ana  The snow-fed rivers
Ko nga waitapu  are the sacred streams
Ko Kai Tahu te iwi  Kai Tahu are the people.

All released draft plans expressly address Māori historical association. This suggests that historical recognition will become widespread over the years as the process of implementing new plans occurs.

(ii) Spiritual association

In comparison, spiritual ties to land in national parks are expressly recognised in only four of the twelve NPMPs: Paparoa, Tongariro, Whanganui and Arthur's Pass.520 An examination of the draft plans suggest that there remains a resistance to acknowledging the spiritual and cultural values of tangata whenua in an encompassing way. The Nelson Lakes draft plan shies away from the phrase altogether. The drafts for Aoraki/Mount Cook and Westland/Tai Poutini use the phrase, but in specific contexts, for example: in relation to indigenous plants and animals, and waste disposal.

519 Supra n 475 at Title page.
520 The common phrase in these four is to make it an objective to "... recognise the spiritual and cultural significance of the area ... to Māori ...", Paparoa supra n 477 at 15. In contrast, the Egmont NPMP recognises spiritual and cultural significance as an objective, but not in a way that directly relates to the tangata whenua. Instead it reads: "To recognise and maintain the cultural and inspirational heritage of the mountain and the park....", supra n 473 at 23.
The Abel Tasman draft uses it, but in the context of kaitiakitanga.\textsuperscript{521} In contrast, however, is the Egmont draft which proposes to make it goal to recognise tangata whenua specifically. It reads: “To recognise the range of spiritual and cultural values that people, particularly Tangata Whenua, place on the park....” \textsuperscript{522}

Recognising spiritual association thus seems more problematic for conservancies than historical association. However, the inconsistency in recognising both associations in an encompassing manner is both prevalent and disappointing. It does little to encourage the General Policy directive for consultation - consultation need only occur if a historic or spiritual association has been recognised. The inconsistency is also disappointing especially when one recounts the experiences of tangata whenua who have little statutory recognition and thus are reliant on conservancies taking a proactive approach. The story recounted in Chapter Six of this paper concerning the tangata whenua of the Urewera National Park comes to light as an apt example of this point.

\textit{b. When is consultation required?}

The following is a comparative analysis of the policy areas where NPMPs identify the need for consultation with tangata whenua. The policies identified tend to range from interaction with natural resources such as mountains and water, to the appropriate construction of buildings, to waste disposal and biodiversity issues. Yet not one NPMP consistently recognises

\textsuperscript{521} “To recognise the kaitiaki role of the iwi who have mana whenua status over traditional spiritual and cultural values within the park....”, supra n 482 at 16, emphasis added.

\textsuperscript{522} Supra n 483 at 33, emphasis added.
all such policy areas as being important. This analysis simply brings together the best from each NPMP. However, the inconsistency between the conservancies is still made apparent.

(i) Archaeological and historic features

Even though eleven NPMPs recognise an historical association between tangata whenua and national park land, only seven NPMPs have formulated consultation policy with tangata whenua concerning archaeological and historic features, such as wahi tapu and burial sites. These seven are in no way consistent in their approach. Some recognise the sensitivity of making public the information surrounding such sites, just as many do not.

The draft NPMPs suggest a more definite approach - all but one of the draft plans have developed consultation policy concerning archaeological and historic features (the odd draft being the Nelson Lakes NPMP). The draft NPMPs tend to emphasise the need to preserve sites of significance to Māori, and as stated in the Egmont draft: “To investigate mutually acceptable agreements for levels of active involvement in the protection and management of Wahi Ta(p)u, as defined by Tangata Whenua....”

(ii) Education and park interpretation

A number of the plans recognise the importance of consulting with tangata whenua in national park promotional material. Several plans state that the tangata whenua must be involved in presenting an interpretation of their

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Supra n 483 at 40.
historical and cultural relationship. One explains: "An important cultural experience for visitors is a positive outcome that recognises the distinctiveness of Māori culture to New Zealand...". Consultation is the principal method ascribed to in this process, although one plan goes further and states: "Ngai Tahu traditions will only be told when and how Ngai Tahu feel is appropriate....".

Several plans also recognise the importance of using original Māori names for national park landmarks. For instance, the Mount Aspiring NPMP states: "Appropriate Māori names and greetings will be included in literature on the park. A Kai Tahu perspective will be presented in new material....". The Fiordland NPMP extends support to using names of "... long established usage or otherwise being of cultural or historic significance...." to name unnamed sites or features. The renaming of parks to reflect their dual history should be regarded as a simple step in this process of understanding and giving effect to te Tiriti o Waitangi.

524 Arthur's Pass supra n 472 at 98.
525 Mount Aspiring supra n 475 at 64. Another adds that "... technical support ..." will be offered to the tangata whenua in the interpretation process, Arthur's Pass supra n 472 at 99.
526 Mount Aspiring ibid at 87.
527 Supra n 474 at 96. Similarly, Te Urewera NPMP has made it an express policy to use Māori place names "... wherever possible ...", supra n 478 at 56. It has even added the prefix 'Te' to the official name of the park.
528 Note also that the draft Westland/Tai Poutini plan opts to refer to the park as the Westland/Tai Poutini National Park. Interestingly, the Egmont draft continues to refer simply to the Egmont National Park, even though the mountain integral to this Park is referred to as Taranaki/Mount Egmont.
(iii) Foot access and climbing

The Arthur's Pass NPMP states that it is policy "... to encourage climbers to respect the natural and cultural values of mountains in the park..." because:

Various mountains are regarded by Ngai Tahu as Atua (Gods), Tupuna (Ancestors), Tipua (Monsters) and are the waahi taoka or treasured places and therefore deserving of special protection. To climb onto the top of these mountains would be disrespectful under tikanga Māori.

The plan adds:

Ngai Tahu will be invited to provide the names of the specific mountains regarded by them as Atua and Tipuna and to outline the specific information on the cultural values of these mountains to park management for subsequent distribution to the climbing fraternity.

In regard to foot access, the Egmont plan states: "... in places sacred to the Māori people their interests will be considered to reduce the likelihood of disturbance...." Similarly, the Arthur's Pass NPMP states that the cultural significance of ancient trails through the park are to be recognised, because "The old Māori pathways that traverse sections of the park are of

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529 Supra n 472 at 66.
530 Idem.
531 Ibid at 67. The working draft for Aoraki/Mount Cook notes that discussions will take place with Ngai Tahu in regards to climbing to the summit of Aoraki/Mount Cook, supra n 487 at 75.
532 Supra n 473 at 54. The Egmont draft proposes a slight change in wording: "Respect the interests of Tangata Whenua when developing access to or near places sacred to Māori, to avoid the likelihood of disturbance....", supra n 483 at 74.
special significance in that they provide a material link with the traditional past as well as sustaining the culture that developed around them." 533

(iv) Water

The Mount Aspiring NPMP states that maintaining the high natural quality of water in the park is important because: "To the tangata whenua water represents the life blood of the environment, therefore every effort will be made to maintain its purity....". Most of the draft NPMPs endorse this relationship. The Egmont draft adds that tangata whenua must be consulted over applications for collection of water for spiritual reasons by groups other than tangata whenua of Taranaki.535 The Aoraki/Mount Cook working draft even notes that policy may need to be included to educate the inappropriateness of bathing in water.536

(v) Shingle and rock

The Paparoa NPMP has a unique stance in regard to the removal of shingle and rock. The plan states:537

533 Supra n 472 at 60.
534 Supra n 475 at 49. Likewise, the Paparoa plan recognises that water is "... a taonga in its own right ...", and acknowledges the "... traditional Ngai Tahu states of water....", supra n 477 at 51.
535 Supra n 483 at 98.
536 Supra n 487 at 35. Some other examples: the Westland/Tai Poutini draft concludes that management practices must reflect and acknowledge the cultural values associated with water being a taonga and having mauri (supra n 486 at 17); and the Nelson Lakes draft states that is an objective: "To preserve the integrity of the natural features of the park....", because "Māori and other New Zealanders place great emphasis on the maintenance of the purity of water...." (supra n 484 at 11).
537 Supra n 477 at 101.
The department will respect the traditions of Ngai Tahu and the conflict identified between Takaroa and Tane the children of Raki and Papatuanuku. As a consequence material from the realm of Takaroa (ie sand from the beach) will not be used in works associated with the realm of Tane (ie walks and tracks in the forest).

The Westland/Tai Poutini draft states: 'Consultation with Te Runanga o Ngai Tahu through its Papatipu Runanga should be undertaken before shingle and rock extraction sites are determined....".538

(vi) Construction

Some plans state that the design, location, service and landscape of buildings and services are to "... have regard for tikanga Māori....".539 The rationale, as put by one plan, is that: "Māori input into the design and location of new buildings will assist to ensure that these are culturally friendly to Māori and encourage greater use of the park and its facilities by Māori in general....",540 and therefore Ngai Tahu will be consulted in the siting of new or replacement buildings and service projects.541

(vii) Draft NPMPs: new policy trends

A set of new policies which contain a link between association and consultation are becoming apparent in the proposed draft NPMPs. For instance, waste disposal: the Westland/Tai Poutini draft makes it policy to

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538 Supra n 486 at 100.
539 Arthur's Pass supra n 472 at 102. See also Paparoa supra n 477 at 66.
540 Arthur's Pass idem.
541 Ibid at 103.
“Take into account the values of Ngai Tahu when managing waste within the park....”\textsuperscript{542} The rationale is that:\textsuperscript{543}

... waters within the park are considered by Ngai Tahu to be tapu/sacred. It is therefore appropriate that applications for the disposal of waste into any waters of the park, whether frozen, still or flowing, be assessed in consultation with Ngai Tahu.

The Nelson Lakes draft, as part of its biodiversity objective, recognises:\textsuperscript{544}

The invasion by alien plants and animals and the loss of the native components of the ecosystems has been a continual assault on the integrity of the ecosystems and on the mana of the iwi who are their kaitiaki. Anything which leads to the restoration of the viability of the current species also enhances the mana Māori.

The Egmont draft states, under policy concerning mineral exploration, that tangata whenua will be consulted in the investigation of whether there is any merit in seeking a prohibition of access to the park for the exploration and/or mining of minerals.\textsuperscript{545}

c. Summary

It is apparent that there is a developing trend for NPMPs to become more inclusive of tangata whenua values. The \textit{General Policy} statement foresaw this development when it required consultation between a conservancy and

\begin{footnotes}
\item[542] Supra n 486 at 63.
\item[543] Ibid. The Aoraki/Mount Cook working draft adopts a similar policy, but emphasises instead human waste, see supra n 487 at 86-87.
\item[544] Supra n 484 at 13.
\item[545] Supra n 483 at 101.
\end{footnotes}
tangata whenua if there exists either a historical or spiritual association by tangata whenua with national park land. As recognition of a wider spectrum of values continues to develop, the need to consult with tangata whenua will, no doubt, become an integral component in the day to day management of all national parks, though this is certainly not the situation today. The enactment of the section 4 duty to give effect to the principles of the Treaty of Waitangi will no doubt hasten this progression towards the development of consultation procedures with tangata whenua.

II. Other Management Documents: A Brief Consideration

The three principal bodies responsible for managing national parks: the Department of Conservation, the NZCA, and those conservation boards with national parks in their jurisdictions, have published numerous documents that record their missions, visions and goals in regards to managing the conservation estate. This part of this chapter provides a brief consideration of some of these documents, concentrating on those that are relevant to this discussion of managing national parks in alignment with te Tiriti o Waitangi. This discussion, while brief, is necessary for NPMPs do not exist in a vacuum; rather they are part of a wider conservation philosophy. It is hoped that this discussion will illustrate the content differences between these documents, and NPMPs.
1. The Treaty of Waitangi and the Department of Conservation

a. Head Office

While its current mission is to conserve our heritage for all to enjoy - a goal consistent with the Conservation Act - one of its key steps to achieving this is to promote effective partnerships with tangata whenua. The Department justifies partnership by stating:

It helps to protect and enhance the environment by providing Māori with opportunities to become involved in conservation management. It strengthens national identity by involving Māori more in the conservation of natural and historic heritage ... helps to uphold the principles of the Treaty of Waitangi. It also helps to grow an inclusive, innovative society for the benefit of all. It improves New Zealanders' skills by providing for transfer of knowledge about conservation management.

The Department hopes to achieve this goal of partnership by working in the long term towards a situation where tangata whenua "... are able to maintain

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547 Statement of Intent 2001-2004, ibid at 27.
their cultural relationship with their natural and historic heritage ...", and in the short term:

Give priority to building and supporting more effective partnerships with tangata whenua at the local level to achieve enhanced conservation.
Create new opportunities for Māori to be involved in and benefit from conservation.

This goal of partnership coincides with the Department's attempts to give effect to the policies captured in the *Kaupapa Atawhai Strategy* document which was published in 1997. This document has a vision of cooperation, and that its staff should:

- [adopt] customary management practices where these are applicable,
- [support] iwi development of a Māori customary approach to conservation, and
- [integrate] iwi initiatives into the programmes of the department

The document states that this will be achieved by:

- being willing to embrace another cultural perspective;
- developing our capacity and confidence to listen and work together; and
- ensuring that we are treading a path of steady development which is transparent and able to be monitored.

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548 Ibid at 27-28. Other ten year goals include giving effect to the principles of the Treaty in their work an partnerships which achieve enhanced conservation of our natural and historic heritage.
549 Ibid, original punctuation.
551 Ibid at 2.
552 Ibid, punctuation added.
Partnership is recognised in the *Strategy* as the paramount principle of the Treaty. It adds:553

A co-operative relationship with iwi, recognising both kawanatanga and tino rangatiratanga requires agreement by both parties on the conditions to be applied. The department seeks a relationship with iwi in which:

- both parties act independently;
- both parties are committed to a cooperative relationship;
- the relationship is based on a shared understanding;
- the relationship is based on a common goal;
- both parties engage in purposeful activity;
- the relative roles and responsibilities of both parties are clear and agreed to;
- the respective capabilities of the two parties are recognised;
- the actions of both parties are coordinated.

This co-operative relationship, according to the *Kaupapa Atawhai Strategy*, sets the benchmark for how Department of Conservation staff are to engage with Māori. Acting reasonably and in good faith; making informed decisions; considering whether active steps are needed to protect Māori interests; recognising that the Government must be able to govern; and recognising that tangata whenua are also associates is integral to this co-operative relationship.554

Whether the Head Office is putting into effect these commendable aims is more difficult to assess, although the most recent Annual Report (1 July

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553 Ibid at 10-11, punctuation added.
554 Ibid at 21-24.
1999 - 30 June 2000)\(^{555}\) for the Department provides some insight into its practices. It states that the Department piloted an in-depth training programme to improve staff understanding of Māori perspectives.\(^{556}\) It also states that the Department aims to have Māori staff totalling thirteen per cent by 2005, and eighteen per cent by 2010\(^{557}\). Only ten per cent of the Department’s current staff identify as being of Māori ethnicity. How this increase will occur is not explained.

In addition, this Annual Report states that the Department: consults extensively, fosters relationships, and is working to develop more opportunities for Māori to be involved in conservation through co-operative conservation management projects.\(^{558}\) Money is being budgeted to increase iwi and hapu participation in managing biodiversity in ways that are consistent with customary knowledge, and to provide opportunities for tangata whenua involvement in conservation management.\(^{559}\) Recorded in the Annual Report is also an awareness of practical Treaty obligations. It states that the Department must work with iwi to develop polices and procedures that provide them with:\(^{560}\)

- input into the management of specified parts of the public conservation estate in their rohe
- access to cultural materials managed by the Department
- assurances that iwi values are respected and protected


\(^{556}\) Ibid at 36.

\(^{557}\) Ibid at 39.

\(^{558}\) Ibid at 12.

\(^{559}\) See ibid at 13-16.

\(^{560}\) Ibid at 127, original punctuation.
• ability to exercise kaitiakitanga over their land.

These documents represent a fundamental progression towards recognising the importance of te Tiriti o Waitangi in conservation management. While many of these commitments have yet to be reflected in NPMPs per se, it is encouraging to see that the principal manager of national parks, the Department of Conservation, is at least aware of the need for a partnership relationship.

Before concluding this discussion concerning the Head Office, some discussion on the recently released A Conservation Partnerships Toolbox561 draft document must be made. It is currently being proposed for adoption by the Department of Conservation, and aims to provide guidance to the Department's managers on the "... ways and means to forge effective and successful partnerships with tangata whenua...."562 It will thus be a very valuable document for the Head Office in regards to its duty to give practical effect to the Treaty of Waitangi. The Toolbox document states that the staff need:563

... an understanding of and commitment to applying the principles of the Treaty of Waitangi to their work, and a flexible approach to seeking the best arrangements with tangata whenua site by site, or case by case, in the circumstances of the particular time.

562 ibid at 3.
563 Idem.
five CMSs recognise that the Treaty of Waitangi imposes a number of responsibilities on the Department. Creating a co-operative relationship with tangata whenua is recognised as fundamental in each of these strategies. For instance, the CMS for Mainland Southland/West Otago recognises the need for: regular consultation; building tikanga Māori into conservation management; providing on-going cultural awareness programmes for staff; increasing the Department's knowledge of sites of cultural importance; protecting those sites of importance in accordance with tikanga and in partnership with the iwi; considering and providing for customary use of cultural materials, and assisting Ngai Tahu to interpret their values to all visitors.⁵⁷¹

The CMS for Canterbury recognises that past Ngai Tahu involvement has been limited. It states that this will be rectified in that the Conservancy now seeks a relationship with Ngai Tahu in which there is: independence; commitment to a co-operative relationship; and shared understanding.⁵⁷²

The CMS for the Wanganui Conservancy recognises the challenge imposed by the Treaty obligation, it: "... is one of finding a common ethic, of meeting Māori aspirations within the legal constraints under which the Department operates...."⁵⁷³ It also recognises that in carrying out its statutory obligations the Department cannot treat Māori as "... just another

⁵⁷⁰ Department of Conservation, Conservation Management Strategy Wanganui Conservancy 1997 - 2007. (1997) Department of Conservation, Wanganui Conservancy, Wanganui. ⁵⁷¹ Supra n 566 at 15-16. The CMS for Nelson/Marlborough Conservancy similarly states the need for: consultation; cultural awareness programs for staff; and systems that will make it easier for iwi to bring their views before the Department, see supra n 567 at 112. ⁵⁷² Supra n 568 at 121. ⁵⁷³ Ibid at 181.
interest group...". It also identifies the need to understand Māori conservation values and have a mutual acceptance of conservation objectives.

c. Summary and critique

These documents published by the Department convey that it is committed to its Treaty obligations. The commitment is undoubtedly a reflection of the duty imposed on it by section 4 of the Conservation Act. Creating a co-operative relationship with tangata whenua is a recent initiative and is undoubtedly having the effect of changing the processes involved in managing the conservation estate, especially on the consultation front.

However, it is more difficult to judge whether this commitment is being put into practice, and to what effect. There definitely remains a sense of ongoing problems. For instance, the Department's latest Annual Report states that, while an average of seventy-three per cent of those surveyed by the Department thought that the Department was doing an excellent or a good job, the favourability rating by Māori for the same period was much lower.

Moreover, a review was conducted in 1998 by Te Puni Kokiri into the Department's internal processes for the provision of services to Māori, and its relationship with iwi and hapu in managing the conservation estate.

574 Ibid at 183.
575 Ibid at 187.
576 Supra n 555 at 45.
The review included interviewing a number of Māori (termed 'Key Stakeholders'). In its report it reproduced the following comments made by Māori:578

We are just being treated just like anybody else who makes a submission - not a Treaty party.

DOC haven't designed processes to give effect to Treaty of Waitangi principles.

It is disappointing that we always have to take the initiative. DOC have never come to ask us to help them solve a problem.

DOC think that they are kaitiaki - but they're wrong.

DOC don't take any notice of Māori spiritual concerns.

There is a mindset that they (DOC) are the only ones who can manage conservation estate. They don't believe that Māori have a conservation ethic.

They have an obligation to consult. They should resource our side of the consultation.

Te Puni Kokiri concluded:579

While the overall findings of this report describe a department that has taken positive steps to improve its working relationships with iwi and hapu, the Stakeholder Research suggests that the impact of these steps at the local level is varied. The research highlighted continued concerns regarding the nature of

578 See Te Papa Atawhai Service Delivery to Māori Key Stakeholder Interviews supra n 375.
579 Supra n 577 at 10.
relationships between iwi, hapu and the department. The research suggests that a significant barrier to developing these relationships is the limited number of opportunities for iwi and hapu to contribute to, and be actively involved with, the department in the co-operative management of the public conservation estate across the range of the department's activities.

This Report no doubt created an impetus for the Department to become more Treaty-oriented in recent years. It explains to some extent why the CMSs are better aligned to the Treaty than NPMPs. The CMSs studied in this paper have all been published relatively recently. It also explains the inclusive nature of the Partnerships Toolbox document, the Department's most recent publication.

2. **Independent Bodies: NZCA and Conservation Boards**

In regard to nga iwi Māori initiatives, the NZCA's most recent Annual Report (July 1999 - June 2000) records that it is taking the potential obligations raised by section 4 of the Conservation Act seriously. It held a special workshop that focused on establishing how it might best give effect to section 4. It has identified the need to clarify the relationship between the requirement of section 4 and the public ownership of conservation land as a strategic area requiring further investigation. The Report also records a number of its other initiatives, such as the conference it held for

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581 Ibid at 7.

582 Ibid at 6.
Māori members on conservation, and its funding of documents to be translated into, and published in, te reo Māori.

As to some of its publications, in 1996 the NZCA published a handbook for its members and members of conservation boards.\textsuperscript{583} It explains that persons acting under the Conservation Act must "give effect" to the principles of the Treaty of Waitangi, which means that every member must:\textsuperscript{584}

- have a thorough knowledge of the Treaty of Waitangi itself and of the competing claims of Māori and Pakeha versions of that Treaty;
- be aware of the development of a distinct body of Treaty jurisprudence by the New Zealand Courts over the last 10 years or so; and
- be prepared to read widely and become familiar with the history of particular issues where Treaty of Waitangi claims and conservation interests touch.

The Handbook goes on to warn members:\textsuperscript{585}

In ordinary meetings any or all of the following might be expected:
- karakia (prayer) at the beginning and end of the meeting and before meals;
- mihi (formal address of welcome) to distinguished visitors;
- waiata (singing) following mihi; and
- hongi (pressing of noses) when members of iwi visit.

\textsuperscript{584} Ibid at 26.  
\textsuperscript{585} Idem.
In 1997 the NZCA published an interim report and discussion paper entitled *Māori Customary Use of Native Birds, Plants and other Traditional Materials*. This is a valuable study providing insight into this controversial issue of customary use versus the ultimate goal pursued in conservation legislation: preservation. It discusses Treaty rights and obligations, including how Māori and Western conservation ethics derive from different philosophical bases, and demands we consider the role Māori should play in conservation.

It is encouraging that the independent bodies responsible for managing national parks are similarly aware of Treaty obligations. Again the commitments do not align with the Treaty benchmark discussed at the beginning of this paper, but at least there is awareness and a commitment to give effect to the Treaty that has not historically been evident.

### III. Conclusion

This chapter has examined many documents in an effort to assess what effect legislative reform in the past fifteen years has had on the day-to-day management of national parks. The principal conclusion must be that the effect has been immense. Tiriti rights and obligations are becoming fundamental management objectives and philosophies of the Department of Conservation, the NZCA and conservation boards. While there is still much that NPMPs need to address, the foundations for the alignment of national park management with te Tiriti are undoubtedly evident. The recently published Department of Conservation documents, like the CMSs, will no

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586 Supra n 374.
doubt influence the future direction of NPMPs. The primary criticism is the inconsistent approaches taken by the Conservancies. Tactics to overcome inconsistency are the focus of the next part of this paper, which looks to the future management of the national park estate.
PART FOUR

NATIONAL PARKS: THE FUTURE
Chapter Nine

Co-Management: an End Goal

The argument developed in this paper has been relatively simple: national park legislation does not provide for national park management as it should, that is, according to the Waitangi Tribunal's interpretation of te Tiriti o Waitangi. This chapter concludes this argument by considering how our legislation could become more aligned with Tiriti aspirations. The Tiriti benchmark model canvassed in Chapter One, including the 'nine-step' co-management continuum model, is returned to in this chapter, and used to assess the progression of existing national park legislative provisions, and the possibilities for proposed reform. This chapter concludes that co-management should be the end goal in the movement towards recognising the rights of nga iwi Māori to be included in national park management.

In this context co-management means simply the realisation of a management regime that respects the right of tangata whenua to exercise rangatiratanga over their taonga. Accordingly, the common yardstick that should be aimed for is respecting and providing for one another as Tiriti partners in the management of national parks. This chapter thus

587 Co-management is also known as collaborative management, joint management, and co-operative management. Todd Taiepa expands on these terms in a conservation estate context: see "Collaborative Management: Enhancing Māori Participation in the Management of Natural Resources" (1999) 4 He Pukenga Kōrero 27; and "Māori Participation in Environmental Planning: Institutional Reform and Collaborative Management" (1999) 5 He Pukenga Kōrero 34.
suggests several legislative measures that, if adopted, could allow a further shift towards attaining this endpoint.

I. Aligning Current Legislation with the Continuum Model

As discussed in Chapter One, Tania Ruru has presented a continuum model consisting of nine levels reflecting ways in which legislation could provide for nga iwi Māori participation in the management of natural resources.\footnote{See supra n 59.}

The model can be summarised as:

<table>
<thead>
<tr>
<th>Level One:</th>
<th>General Interest Group only</th>
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<tbody>
<tr>
<td>Level Two:</td>
<td>Special Interest Group</td>
</tr>
<tr>
<td>Level Three:</td>
<td>Discretionary Consultation/Consideration</td>
</tr>
<tr>
<td>Level Four:</td>
<td>Mandatory Consultation/Consideration</td>
</tr>
<tr>
<td>Level Five:</td>
<td>One Māori Vote</td>
</tr>
<tr>
<td>Level Six:</td>
<td>Fifty Percent Representation</td>
</tr>
<tr>
<td>Level Seven:</td>
<td>Equal Status to national park management bodies</td>
</tr>
<tr>
<td>Level Eight:</td>
<td>Māori Veto subject to Judicial Review</td>
</tr>
<tr>
<td>Level Nine:</td>
<td>Māori Veto subject to Māori Review</td>
</tr>
</tbody>
</table>

National park legislation currently provides for nga iwi Māori participation in the realm of the first five levels of this model. For instance, at level one is section 4 of the NPA 1980 which merely regards nga iwi Māori as a general interest group. The section articulates the importance of national...
parks, stressing both preservation and public use principles in a manner that fails to expressly mention nga iwi Māori interests. Further along the continuum model, at level four, are provisions such as the Topuni device and its requirement that particular regard be had to Ngai Tahu values, and provisions relating to the Whanganui National Park requiring that the Whanganui River Māori Trust Board's advice be sought, and had regard to, in certain circumstances. Many of the provisions contained in the NPMPs are also indicative of level four characteristics. The General Policy requirement to foster and fully consider the views of local Māori groups in formulating management policies is also typical of level four attributes. Section 4 of the Conservation Act possibly falls within this level too, as consultation is an important Treaty principle.

Representative provisions concerning some conservation boards provide apt examples of level five: the 'One Māori Vote' step. Tangata whenua have a right to one of twelve seats on the Conservation Boards whose areas of jurisdiction include: the Tongariro National Park, the Egmont National Park, the Whanganui National Park, and also on those Boards that have part jurisdiction over a national park in the Ngai Tahu takiwa. The representative provisions concerning the NZCA, and those conservation boards whose whole jurisdiction covers one or more of the national parks in the Ngai Tahu takiwa, are better classified as falling midway between the fifth and sixth level. Their representative provisions amount to more than one seat, but less than fifty percent.

Inconsistency is made clear through this analysis. While several provisions designed to include tangata whenua in the management of national parks...
exist, other provisions undermine that progress (for example, section 4 of the NPA 1980). Overall, the model also reinforces this paper's principal argument that the current management of national parks falls short of the Waitangi Tribunal interpretation of te Tiriti. That is, as was discussed in Chapter One of this paper, te Tiriti o Waitangi promised to Māori "te tino rangatiratanga ... o ratou taonga katoa" for so long as it was their desire to retain. Many natural features which lie within the boundaries of the national park estate continue to be regarded as taonga by tangata whenua. Similarly, tangata whenua continue to express their desire to retain tino rangatiratanga over such taonga. As was also argued in Chapter One, tino rangatiratanga must mean something more than the mid-points of consultation and single rights to representation. And, as was concluded in Chapter One, level seven aspirations align best with the common yardstick that we should be aiming for: respecting and providing for one another as Tiriti partners.

Bearing this in mind, this chapter now turns to discuss possible legislative provisions for future implementation. Three action plans are proposed. The first plan relies on making better use of current national park legislation. The second plan requires several legislative amendments to the current legislation. The third plan suggests a complete overhaul of the current legislative regime.
II. A Way Forward: Several Action Plans


The following are examples of how the current legislative regime could be utilised and developed to create a more inclusive management of the national park estate. If the Department of Conservation was truly committed to co-management, as its missions and visions suggest, then one would expect to see these suggestions outlined below actioned in the very near future.

• **Introduce new statements of General Policy**

Section 44(1) of the NPA 1980 allows the NZCA to adapt statements of general policy for national parks to changing circumstances or in accordance with increased knowledge. The NZCA could thus introduce a new statement that recognises the right for nga iwi Māori to be accorded special status in the management process. Additionally, present policy statements could be amended to better reflect nga iwi Māori aspirations. After all, providing for better inclusion of tangata whenua is supposed to be a key goal of the Departments, and supported by the NZCA.

• **Encourage a more consistent NPMP approach**

This might be achieved by publishing all measures relating to nga iwi Māori as exist in current and draft NPMPs. By making the comparative information readily available, conservation boards could be encouraged to adopt inclusive provisions practised in other conservancies. Section 46 of the NPA 1980 allows amendments or reviews of management plans to take place so that account can be taken of "... increased knowledge or changing
circumstances...". Hence, streamlining inclusive provisions is possible under existing legislation. There would be no need for conservation boards to wait until respective NPMPs became due for replacement (a ten year cycle).

- **Support the appointment of Māori onto national park management bodies**

The Minister of Conservation has an unfettered right to appoint four persons onto the NZCA; the Minister could be encouraged to favour Māori in that selection process. A similar practice could be encouraged in making appointments to conservation boards, although this may not be as successful as the Minister has less discretion - a number of interests have to be considered. Tangata whenua interests are stipulated as one of many interests.

- **Provide adequate resources and encourage further education**

For nga iwi Māori to be successful partners in managing the national park estate they should be adequately resourced. The Department of Conservation should therefore provide resourcing to nga iwi Māori. This could be by way of finances, access to training schemes and further education, and access to Department resources such as meeting rooms, libraries, and equipment. Several policies, particularly those encapsulated in the *Kaupapa Atawhai Strategy*, ought to be adequately financed and supported so as to ensure their realisation. The Department of Conservation and the NZCA could strengthen their commitment to providing education seminars, workshops, hui and retreats which focus on understanding Tiriti o Waitangi responsibilities.
To summarise this first plan; while the implementation of these measures would result in little movement along the nine-step continuum model, it would strengthen the current position of nga iwi Māori to participate in national park management as a Tiriti partner. The implementation of these provisions would, at least, give some practical substance to the mission and vision statements endorsed by national park managers: the Department of Conservation, NZCA and conservation boards.

2. **Amend Current Legislation**

The following measures are examples of how the NPA 1980 and the Conservation Act should be amended to encourage a real progression towards the co-management of our national park estate.

**a. The NPA 1980**

- Amend section 4 to reflect the importance of protecting national parks as a taonga to nga iwi Māori.

Section 4 of the NPA 1980 currently explains the use of the national park device in terms of being able to provide people the opportunity to experience land and resources in their natural state. This section could be amended to reflect the importance of preserving land to provide for the historic, traditional, cultural, and spiritual relationship tangata whenua have with this land.
If tangata whenua interests were recognised in section 4, further opportunities could arise for tangata whenua to be included in national park management.\(^{589}\) For instance, it would be more difficult for the Minister of Conservation, the NZCA and the conservation boards to deviate from giving effect to the principles of the Treaty of Waitangi on the basis that the outcome would be inconsistent with the principles of the NPA 1980. By amending section 4, tangata whenua interests would become integral to this Act. Another example concerns the Governor-General’s ability to set aside any part of a national park as a specially protected area. The Governor can only do this if it can be shown to enhance the purpose of the NPA 1980. Once an area has special protection no person can enter the area unless they have a permit issued by the Minister of the Conservation. The device could therefore be introduced to ensure the protection of special sites to Māori. It could also be used to implement tikanga Māori concepts such as rahui.

The effect of this amendment would not make the NPA 1980 comparatively unusual. Other statutes including the Hauraki Marine Gulf Park Act 2000\(^ {590}\) and the Historic Places Act 1993\(^ {591}\) expressly recognise the importance of nga iwi Māori interests as fundamental to achieving their respective purposes.

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\(^{589}\) In addition, it could make tangata whenua feel more content with the use of the national park label. For instance, in the mid 1980s members of the Tuhoe tribe rejected the idea of their traditional lands in the Urewera region being turned into a national park. Although there was no conflict between the Māori of Te Urewera and the Pākehā conservationists about preservation of the indigenous forests, Māori saw the forest as a place for them to live and hunt in, and they viewed “Pākehā laws” and regulations as unwarranted restrictions on their life style and traditions: see Roy Perrett, “Indigenous Rights and Environmental Justice” *Environmental Ethics* 20 (1998) 377 at 381.

\(^{590}\) See sections 7(2)(a)(i) and 8(c).

\(^{591}\) See section 4(2)(c).
• Insert a new section that requires adherence to the principles of the Treaty of Waitangi

A new section could be inserted that requires the Department of Conservation, the NZCA and conservation boards to give effect to the principles of te Tiriti o Waitangi when interpreting and administering the NPA 1980 - a reflection of section 4 of the Conservation Act. It would be advantageous to have a direct reference to te Tiriti in the NPA 1980 to clarify, and encourage the application of, this duty in the management of national parks. It would also encourage the development of our understanding of the meaning of the phrase "the principles of the (te Tiriti o Waitangi) Treaty of Waitangi" in relation to national parks specifically. It would also create an impetus to overcome the inconsistency that pervades current NPMP references to te Tiriti. The insertion would also follow the current trend for conservation related statutes to incorporate a Tiriti reference.\textsuperscript{592}

• Insert a new subsection requiring all Boards to seek and have regard to the advice of tangata whenua

Section 30 could be amended by adding this subsection:

Every Board whose area of jurisdiction includes a national park must seek and have regard to the advice of the tangata whenua of the area on any matter that involves the spiritual, historical, and cultural significance of the park to the tangata whenua of the area.

This wording adopts the expression currently in place for the Conservation Board that has jurisdiction in respect of the Whanganui National Park (section 30(2)(b)). This is the only Board that is currently obliged under statute to consult with the tangata whenua. Ngai Tahu have a similar right, but it is restricted to specific areas within national parks - it does not go to national parks per se. This insertion would emphasise the standing that tangata whenua should have in regard to national park management. It would create a minimum consistent right for all tangata whenua who have a national park within their rohe. It would not affect the duty required by respective conservation boards to “have regard to” the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi nor to “have particular regard to” to Topuni and Statutorily Acknowledged areas in South Island national parks. These are site specific and require a different standard of consultation. Section 30(2)(b), however, would become redundant.

b. The Conservation Act

- Amend section 2 "Conservation" to reflect a bicultural approach.

The definition of conservation in the Conservation Act should be amended to reflect both Tiriti partner’s conservation values.

Alternatively, a conservation definition unique to national parks could be inserted into the NPA 1980. The Historic Places Act 1993 is an example of

Wellington at 33 and 57 (it suggests the inclusion of a Treaty of Waitangi direction in the Marine Reserves Act 1971).
where this has been done. Some conservation boards are already investigating ways in which Māori conservation values can be introduced into national park management practices (as the study of NPMPs illustrated).

An amendment to either the Conservation Act or the NPA 1980 would encourage a consistent approach between all national park managing bodies. It would also better place nga iwi Māori as a partner to the Department of Conservation.

- Amend section 6P to reflect compulsory nga iwi Māori representation on conservation boards

A new subsection could be inserted following section 6P(1):

(2) The Minister must appoint at least one person to every Board whose area of jurisdiction includes a national park on the recommendation of the tangata whenua of the area.

Even if this insertion was made, the current statutory rights should not be affected. That is:

- the Minister must still have regard to tangata whenua interests (along with several other interests) in making all other appointments to boards;
- a person of lineal descent of Te Heuheu Tukino must still have a right to sit on the Board whose area of jurisdiction includes the Tongariro National Park; and

593 The Department of Conservation was responsible for administering the Historic Places Act 1993 from 1993 until 2000.
• the Taranaki Māori Trust Board, the Whanganui River Māori Trust Board, and Te Runanga o Ngai Tahu must still have a right to recommend the appointment of one/two person/s to Boards whose jurisdictions include the Egmont National Park, Whanganui National Park and national parks in the Ngai Tahu takiwa.

These rights should be retained because they reflect special agreements between tangata whenua and the Crown - a fundamental expression of partnership. However, the amendment, if made, would mean that tangata whenua would have at least one, and up to three, statute-protected opportunities to sit on respective boards. This would be a marked improvement on the current inconsistent legislative approach to representation.594

If these amendments were made a marked progression towards including tangata whenua in national park management would occur. Measured against the continuum model, management would fall consistently within its mid-realm. Although these measures may not meet the full aspirations of tangata whenua as Tiriti partners, they would at least create a consolidated management regime that respected and included those tangata whenua who have had their taonga deemed national park land.

594 The proposition would link with movements to secure Māori representation on health boards and regional councils.
3. **Replace the Current Legislation**

Integral to any overhaul of the current legislative regime could be the creation of a new management structure. Several management options exist including:595

- the placing of iwi Authorities, where they exist, alongside the Department of Conservation;
- establishing a nga iwi Māori body to mirror the functions of the NZCA;
- establishing tangata whenua bodies to sit alongside conservation boards; and/or,
- creating a neutral Tribunal endowed with the responsibility to resolve specific conservation issues brought to it by either Māori or the Crown.

Thus, many options are available for changing the currently monoculturally structured management regime. Which option, or combination of options, each national park management body should adopt is dependent on which model would best suit the tangata whenua of each park. Different needs and aspirations are obviously held by tangata whenua throughout the country. For instance, not all would wish to be exposed to the operational matters of managing a national park such as gorse clearing, fence erecting and stoat killing. And not all have the resources, including people, to constitute the creation of separate but equal conservation boards.

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Perhaps a similar model proposed some years ago by Te Runanganui o Ngati Kahungunu could be adopted. This model, which is reproduced below, conceptualises a structure with te Tiriti o Waitangi as its foundation:

Diagram 9.1 Reconciliation⁵⁹⁶

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Note that this model is directed towards the conservation estate generally, not national parks specifically, because there are no national parks within the rohe of Ngati Kahungunu.
Alternatively, or in addition, replicating the NZCA (but not conservation boards) could suffice as meeting the co-management benchmark. It would avoid the re-creation of a plethora of management bodies at the regional level at least. It would also give tangata whenua discernible power to influence the management of individual parks. For instance, a nga iwi Māori body, which mirrored the NZCA, would be responsible for: approving NPMPs and statements of general policy; advising the Minister of Conservation or the Director-General on the priorities for the expenditure of money; reviewing and reporting to the Minister or the Director-General on the effectiveness of the administration of the general policies for national parks; and considering and making proposals for the addition of lands to national parks and the establishment of new national parks.

Such a body could also be responsible for adopting an advocacy role by encouraging, and participating in, educational and publicity activities for the purposes of bringing about a better understanding of Māori conservation values in national park management. In addition, such a body could have the power to make direct recommendations to conservation boards. The recommendations could concern appropriate ways in which to: “seek and have regard to” tangata whenua interests; “give effect to” the principles of te Tiriti o Waitangi; and incorporate Māori conservation values into national park management practices. As to membership, selection and appointment would be for tangata whenua to decide. It should also be left to tangata whenua to decide on the process associated with selection and appointment. To be successful in fulfilling its functions, government would have to adequately fund this national body.
The options for structural reform, however, are for tangata whenua to assess for themselves. Ngai Tahu in particular may be perfectly happy with their placement in the management of national parks and, therefore, have no desire for an overhaul of the current management structures. Te Runanga o Ngai Tahu and the Crown have already reached agreement as to how the conservation estate should be managed (see the NTCSA). Yet, tangata whenua, like Ngai Tahu, may still find value in the creation of a nga iwi Māori oriented national body. Just as Ngai Tahu argued pre 1998: "The only area that Ngai Tahu has consistently sought control over in national parks is that of interpretation of our own unique heritage in myth and history in the southern parks...." This same view is no doubt shared by many other tangata whenua. The creation of a national body would at least give tangata whenua a starting ground to end this struggle.

If a national restructure was to eventuate it would also be of value to implement a regime that consistently reflected the importance of "giving effect to" Māori views and values. This would create a single standard to which the activities of management bodies could be measured. No longer would there be the inconstant obligation to either "have regard to", "have particular regard to", or "give effect to" depending on the circumstance. A single standard would create a consistent and consolidated approach to including tangata whenua and would make them better able to be regarded as viable partners to the Department of Conservation at all levels of management. The consequence would be to fundamentally change the purpose of protecting land as a national park. For instance, the ideals of
preservation and public access currently associated with national parks would have to be adjusted to incorporate preservation for spiritual, historical, and cultural rationales.

Recognising and providing for the Māori conservation ethic must also be viewed as integral to any structural management changes. The model above conveys this point well, giving both Māori and Pakeha values and policies equal status. Perhaps some of the principles developed by the Whanganui River Māori Trust Board in respect to the Whanganui River could be adopted in such a process. After all, the basis of their Charter is tino rangatiratanga. It incorporates notions of providing for kaitiakitanga and intergenerational responsibility, and recognising interdependency and the mauri of all taonga.

In summary, an overhaul of national park legislation, including a restructure of management bodies and recognition measures, would mark a clear progression along the continuum model to reflect level seven characteristics: equal status. If the overhaul was coupled with the suggested amendments to the NPA 1980 and the Conservation Act, then a real sense of partnership between the two Tiriti partners might appear. Better still, the partnership would equate to the Waitangi Tribunal benchmark of how te Tiriti o Waitangi should be guiding national park management.

597 Tipene O'Regan, "A Great Sadness" (Feb, 1994) Forest & Bird 18, at 19.
III. Conclusion

Several options are available to the Crown if it wished to bring about better provision for the co-management of national parks. The end result of any change to conservation legislation should, at the very least, lead to consistent representation and recognition of nga iwi Māori interests. Whilst some options may prove more aligned to the Tiriti benchmark than others, each step forward would be viewed historically as both promising and significant.
General Conclusion

Since 1840 there has existed a model as to how natural resources in New Zealand should be managed. This paper has sought to show that in regard to the establishment, and subsequent legislative provision for, the management of the national park estate, that model has for the most part been ignored.

Part One of this paper put forward a basis for how national parks in New Zealand should be managed. This model is premised on the importance of recognising and respecting both Tiriti o Waitangi partners: the Crown and Māori. Parts Two and Three substantiated the thesis of this paper being that our national parks have not, and continue not to be, managed in accordance with te Tiriti o Waitangi. Part Four applied the Tiriti model to illustrate the gap between 'how should' and 'how are' our parks being managed. This final part outlined several measures as to how the Crown could overcome the gap between this Tiriti ideal and legislative reality.

In the end it is hoped that this paper has brought to light a part of our legal history that has been little known, and created a better understanding of how te Tiriti o Waitangi should, and indeed could, be used in New Zealand to manage our national parks in a manner that better reflects "... what our ancestors envisaged ..."\textsuperscript{599} when they signed te Tiriti o Waitangi all those years ago.

\textsuperscript{599} Mutu supra n 61.
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APPENDICES

Appendix One
National Park boundaries
Source: Department of Conservation website

LAND ADMINISTERED BY THE DEPARTMENT

- National Park
- Forest Park
- Other land administered by DOC
HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First
The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second
Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.
Article the Third
In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc]

THE TEXT IN MĀORI

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawh kia nga Rangatira me nga Hapu o Nu Tirani i tana hiahia kia tohungia kia ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite kia Tangata Māori o Nu Tirani-kia wakaetia e nga Rangatira Māori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahaia ania kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Māori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hophihona he Kapitana i te Roia Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka koreroaia nei.

Ko te Tuatahi
Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.
Ko te Tuatoru
Hei wakaritenga mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata Māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

THE MĀORI TEXT TRANSLATED BY PROF. SIR HUGH KAWHARU

Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness. So the Queen has appointed "me, William Hobson a Captain" in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The First
The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.
The Second
The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The Third
For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

[signed] William Hobson Consul & Lieut. Governor

So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.
Correspondence concerning the Gifting of the Tongariro Summits

Source: AJHR (II) 1887 G-4

Sess. II.—1887.

NEW ZEALAND.

TONGARIRO AND RUAPEHU NATIONAL PARK
(CORRESPONDENCE RELATIVE TO A GIFT OF PORTION OF).

Presented to both Houses of the General Assembly by Command of His Excellency.

No. 1.

Te Heuheu Tukino to the Hon. the Native Minister.

E Pa,—

Tapaeharuru, Taupo, Hepetema 29, 1887.

Tana koe. He kuku ahu tana ki a koe, ari, he whakakura kua mahia nga ra a korecoraro ana matou ko Te Ruihi me te Rahui whenna ka whakataupua nei mo te Iwi ki Tongariro, notemena e moho ana matou he mea nui rawa tatau mea, a i te mea hoki kihai ano nga whakairo o etahi o nga tangata o taku iwi i tino marana ki tana mea.

Na kua ott te wehe atu o tana whenus e te Koeti Whakawe Whanna Maori, a kua whakataua nga tihi o Tongariro me Ruapehu ki toku ingoa asake, ki te tangata nona tenei whakatauki, "Ko Tongariro te maunga, ko Taupo te meana, ko Ngatiwharetoa te iwi, ko Te Heuheu te tangata." E koe, kua hainatia e abau te pukapuka i homai nei e Te Ruihi ki toku aoaro hei whakakuraun i te tokanga atu o tata whenus kei whenna tapu mo te iwi katoa kia rite ai ki te hiahia o te Kawarataenga me taku kuku hoki i whakapaupina nei i aki ki a koe i Rotorua. Engari e rua aku kuku ko Te Ruihi, he whakakura ki a koe. Tautahi—"Ko taku papa ko Te Heuheu Tukino i horonga nei ki te Rapa kei runga i tana maunga e takoto ana, a, e mea ana abau me whakaneke mai ia ki tetahi wahi ke atu. Ko tinua tangata, ohira e moho ana koe he rangatira nui rawa, a, te mea tika kia mahia e te Kawarataenga tetahi utupu kohatu moana, i te mea kakore abau me toku iwi e kaha ki te mahi mea pera moana. Kua whakae atu a Te Ruihi ki tetahi kuku aku, ana whakae ma hoki te a. Taku kuku tuarua—kois tanei—Kua haunui tatuaiah, a ko nga whakahaere mo toku iwi ki taku tama kopa ki a, Tureiti te Heuheu Tukino, ko taku hiahia me whakamanua, ara, me whakahua tenu tonu ingoa ki roto ki Te Ture whakamana, i te whenua a te whakatipua nei mo te Iwi ara, ko te Te Ruihi he iwi kahore me toku tuaranga kai-iaki i runga i taku maunga ana mate aho, a kua whakaae mai hoki e Te Ruihi ki tetahi kuku aku, ana whakaae ma koe.

Koa eka aku kuku ko Te Kawanatanga i taku tuhunga, ara i taku hainatanga i te pukapuka taku atu i Tongariro me Ruapehu hoki whenua tapu mo te Iwi katoa. Pakeha me te Maori, Hece aho, Na te hoa ma, Ki a Te Paranihi, ki te Minita mo te Taha Maori, Kei Poneke.

[TRANSLATION.]

Sir,—

Greeting. This is to inform you that my people and I have spent several days in talking over with Mr. Lewis the subject of making Tongariro a national park, because we regard it as a matter of great importance, and, besides, the minds of some of my people were not clear on the subject.

A division of that land has been made by the Native Land Court, and the same Court has awarded the tops of the mountains Tongariro and Ruapehu to me alone, because I am the person to whom the following proverb applies: "Tongariro, the mountain; Taupo, the sea (lake); Ngatiwharetoa, the tribe; Te Heuheu, the man."

Friend, I have signed the deed laid before me by Mr. Lewis for the purpose of confirming the gift of that land as a national park, in accordance with the wish of the Government, and to fulfill my word spoken to you at Rotorua. I have, however, two words to make known to you—First: My father, Te Heuheu Tukino, who was overwhelmed at Te Rapa, is laid on that mountain, and it is my wish that he be removed to some other place. He was, as you know, a chief of very high rank, and it is right that the Government should erect a tomb for him, because both my people and I are unable to do so. Your friend Mr. Lewis has agreed to this word of mine, subject to your approval. The second word is, that I am an old man and the affairs of my people are conducted by my only son, Tureiti te Heuheu Tukino: it is my wish that he be authorised, that is to say, that his name be inserted in the National Park Act; that is, that he be the trustee appointed to succeed me after my death. Mr. Lewis has also agreed to this word of mine, subject to your approval.

Te Heuheu Tukino.
These are my requests to the Government on my signing the deed giving Tongariro and Ruapehu to the Government as a national park for the use of both the Natives and Europeans. That is all.

From your friend,

The Hon. Mr. Ballance, Native Minister, Wellington.

Te Hauheu Tukino.
Appendix Four
Department of Conservation Regions, Conservancies and Areas
Source: Department of Conservation website