Southern Catchments and the Evolution of New Zealand’s Environmental Law

Nicola R. Wheen

Introduction

‘Environmental law’ is the law about environmental problems.1 Like most law, environmental law develops over time as society evolves and as environmental problems emerge. This chapter describes how environmental problems in the southern catchments have impacted – and continue to impact – on the evolution, form and content of New Zealand’s environmental law over time.2

Environmental history can be defined as “a kind of history that seeks understanding of human beings as they have lived, worked and thought in relationship to the rest of nature through changes wrought [by the actions of human and non-human agents over] time”.3 In this environmental history of the southern catchments, environmental law provides the record of the past. The law’s purpose and content tells us about how people have lived and worked in the southern catchments, about the environmental problems they have faced, and how they have responded to those problems. In so doing, it reveals how New Zealanders’ perspectives on their relationship with the rest of nature have changed over time. Pawson and Brooking remind us that in studying history, we must consider both the past and how it and “present behaviours shape environmental futures.”4 This chapter shows how the law acts as a conduit that has enabled our past to affect our present (for good and bad) but which also enables us, living in the present, to shape a better future.

This chapter focuses on four human activities and their associated environmental problems: resource gathering from the twelfth or thirteenth century AD;5 gold mining during the early 1860s; hydro-electric generation between the 1960s and 1980s; and irrigation for farming. These activities exploit(ed) key natural resources of the southern catchments: birds (originally including moa), fish and eels for food, rivers and their energy, watercourses and valley systems for movement of people and goods, freshwater, and alluvial gold. The fact that these activities have so clearly affected the form and content of this country’s environmental law demonstrates
the importance of the southern catchments to the social and economic development of New Zealand.

**The Goldrush and Water**

Released from quartz veins in schist rock ground down by advancing and retreating glaciers, and washed with gravel into the beds, banks and tributaries of the streams and rivers of southern New Zealand, gold lay undisturbed for hundreds of thousands of years. Passed over by Māori engaged in seasonal hunting or en route to and from Te Poutini (the West Coast) on the pounamu trails, the gold waited until 1861, when it was first discovered by Europeans at Gabrielle’s Gully near the Tuapeka River, and New Zealand’s first big goldrush began. The Otago goldrush peaked in 1863, when the goldfields population reached an estimated 24,000, but from 1865 many miners were already moving on to new goldfields on Te Poutini and in Nelson, and settlers’ interests in the southern catchments had turned towards farming.

Early prospectors arriving in the southern catchments simply picked up gold nuggets from the surface of riverbeds and banks, and most early diggers were armed with just a shovel, pan and cradle to work the surface gravels. But miners in Otago soon turned to ground and hydraulic sluicing, and hydraulic elevating. After 1900, dredging flourished, especially of the bed of the Mata-au and in the areas around Cromwell and Alexandra. The environmental demands of these mining methods are significant: they use a lot of water, displace a lot of gravel and rock, and create a lot of tailings. Hence, Otago’s miners sought to take water from local watercourses, to dam and divert water through races to supply their works, and to discharge water and tailings back into rivers and streams or just into piles nearby.

To manage the competing claims between miners to gold, and among and between miners and other settlers to freshwater resources, English laws and legislation made by New Zealand’s fledgling Parliament were applied. These laws established systems, principles and approaches many of which can still be observed in New Zealand’s mining and water law today.

Crown ownership of all natural deposits of gold was established in English common law by the *Case of Mines* in 1567, and this rule was assumed to apply in New Zealand even though this was not confirmed until 1875. The discovery of a small amount of gold in Collingwood/Takaka in 1857 had prompted the government to legislate in anticipation of further discoveries, and the resulting Gold Fields Act 1858 aimed to promote private mining of the public estate in the interests of the developing national economy. While access to land with gold deposits had presented challenges in the north, where Māori still owned and occupied much of the affected land, most land in Otago had already been acquired or assumed by the Crown by 1861, allowing for the unimpeded application of the Act.

The Act authorised the Governor to proclaim goldfields on “any portion of the Colony” and lease auriferous Crown-owned land to others for mining purposes. Within goldfields, “the social choice mechanism employed to allocate resources was the ... principle of ‘first in time, first in right’”. Miners could obtain rights to mine gold and occupy Crown-owned “waste lands”, and were entitled to apply for and obtain rights to use water for mining purposes. From 1865, an amendment to the Act made it clear that miners’ rights included rights to cut, construct and use water races through any land that was included in a gold field, to divert and
use water for mining purposes, and to deposit gravel and soil removed from water races on the
land adjoining the races. Mined gold belonged to miners. Mining law thus “facilitated mining
by creating clearly defined user rights and establishing rules governing ... the allocation, use
and transfer of the relevant material resources”. The Gold Fields Acts either ignored the environmental problems of mining, or resolved
them in mining’s favour. Mining operations were allowed to consume the entire flow of
streams, as were dams and races to bring water from other rivers and streams, often from
many kilometres away. Tailings and sludge were discharged into rivers and streams, or
dumped nearby in great piles, many of which still exist today. Small farmers with leaseholds in
goldfields were expressly prevented from making claims for damage caused by the diversion
or pollution of rivers or streams flowing through or along the land. Some headway was made
in 1875, when judges in two Otago cases upheld the rights of landowners in, and neighbouring,
goldfields to receive the unpolluted flow of natural streams running through or past their land.

However, given the serious implications for mining, Parliament amended the Gold
Fields Act, empowering the Governor to proclaim any watercourse to be a sludge channel
open for unlimited dumping of mining debris. Existing riparian rights to unpolluted water
were extinguished (though landowners were entitled to compensation for losing these rights),
and no new rights would be allowed to arise. Miners were absolved of any responsibility to
landowners for polluting “sludge channels”, and no attention at all was paid to the rivers or
their ecology, or to any pre-existing rights or interests Kai Tahu had in them. As it turns out,
the 1875 amendment was taken to imply that miners were not entitled to discharge tailings into

Figure 1: ‘The Dredging industry in Otago: Dredges at work on the Clutha River two miles from Cromwell
township’. Otago Witness 22 April 1908 page 49. Reproduced with permission Hocken Collections - Uare Taoka o Häkena, University of Otago. S18-034a
watercourses unless they had been proclaimed to be sludge channels and, once the true costs of compensation to landowners were realised, the Governor became reluctant to make such proclamations.\textsuperscript{23} Sadly, none of this actually stopped sludge from being discharged into rivers, and in the south; the Kawarau and Mata-au rivers were long used to carry off mining waste.\textsuperscript{24}

Today, the prerogative assumption that the Crown owns all natural deposits of gold is stated outright in legislation, as is the general goal of promoting mining of Crown-owned minerals.\textsuperscript{25} Mined gold belongs to miners. Gold prospecting, exploration and mining require permits under the Crown Minerals Act 1991 ("CMA").

Today’s mining permits under the CMA do not carry with them rights to access, occupy or use land, or use, take, dam or divert water for mining purposes. These rights must be obtained from access arrangements with landowners and under the Resource Management Act 1991. Even though mining legislation still fails to directly address the environmental effects of mining, access arrangements can include conditions prescribing what miners must do to protect the environment,\textsuperscript{26} and the Resource Management Act aims to promote sustainable management of land and water, which includes avoiding, remedying and mitigating the adverse effects of mining-related activities on the environment. Furthermore, mining law since 1997 has listed conservation areas – including all national parks and marine reserves – where mining is not permitted at all.\textsuperscript{27} Today’s environmental law is very much more responsive than yesterday’s to the environmental effects of mining.

The pattern of common law water rights being incrementally removed by legislation, first displayed to facilitate gold mining by removing downstream landowners’ rights to receive unpolluted water from their mining neighbours in the Gold Fields Act and its amendments, has been extended to cover any use, taking, damming or diversion of water for any purpose. These rights were assumed in two steps by the Crown. First, the Water-power Act 1903 vested "the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power" in the Crown. Then, in the Water and Soil Conservation Act 1967, the Crown assumed the sole right to dam any river or stream, divert, take, or use natural water, or discharge natural water or waste into natural water, along with the authority to confer those rights on others on application. This separation of rights and interests in water from ownership of land was implemented expressly to promote multiple use – exploitation – of freshwater.\textsuperscript{28} Rights to use water have been allocated – like rights to mine gold for most of the last 170 years – on a first come, first served basis under legislation since 1967. This is an issue that re-emerges later on in this chapter.

The apparent willingness of central government to trump existing rights to enable particular activities for economic gain but to the detriment of the natural environment, which emerged in the Otago gold rush with the sludge channels amendment in 1875, has also been a persistent feature of New Zealand’s environmental law since, as the next section of this paper explains.

\textbf{Hydroelectricity, Manapouri, Te Anau and Te Mata-au}

No account of the development of environmental law in New Zealand would be complete without a mention of the law surrounding the construction and operation of the Manapouri and
Clyde hydro-power schemes. The law surrounding these schemes provides dramatic examples both of the willingness of central government to sweep community and environmental goals aside in pursuit of economic gains, and the resolve of environmental groups to resist and insist on measures that have resulted in developments in our environmental law.

After World War II, state development priorities here and elsewhere focussed on industrialisation. During the period 1945 to 1984, successive governments in New Zealand fully used – and even abused – Parliament’s legislative powers to pursue industrial development to the apparent detriment of environmental and community concerns. Two of the most controversial examples, with the most impact on the development of environmental law, relate to two of the largest catchments in the south: the catchments of the Waiau and Mata-au rivers. In both cases, special legislation was enacted to enable the construction and operation of the power schemes – for Manapouri in the absence of an existing legal and planning regime to manage the process, and subsequently for Clyde in apparent defiance of the existing systems and wider constitutional rules. In both cases, the public’s response to the government’s heavy-handedness reflected the burgeoning environmental movement taking place overseas in other parts of the Western world, and led to major changes in New Zealand’s environmental law.

The Waiau river catchment lies on the eastern edge of Fiordland, and the river’s upper reaches run from Lake Te Anau into Lake Manapouri. The river then flows down to the sea at Te Waewae Bay, and is joined along its way by the Mararoa river and other tributaries. Manapouri and Te Anau were first officially earmarked for hydro-electric development in 1903, but nothing happened until 1959 when the government announced it had agreed with an Australian company to develop a power scheme on the lakes to supply electricity for a proposed aluminium smelter at Bluff. When the company subsequently withdrew for financial reasons, the government forged ahead, securing the enactment of the Manapouri-Te Anau Development Act 1963, and reverting the water rights to the Crown so that it could develop the hydro resource itself.

The Manapouri-Te Anau project involved the construction of an underground power station “of a scale unprecedented in the southern hemisphere”, and as proposed would raise the levels of Manapouri and Te Anau by eight to ten metres. Nevertheless, the need for environmental impact assessment and monitoring was not realised until after the station’s turbines first turned in 1969. Then, public sentiment against the emergent effects of raised lake levels on shoreline habitats and the Waiau river itself, exploded into this country’s first large-scale environmental campaign. The existing government refused to budge, but the new Labour government elected in 1972 required the lakes to be kept within their natural levels and approved the appointment of Guardians, who were to devise and supervise the implementation of guidelines for the lakes’ management. The role of the Guardians was formalised in 1981 when the Manapouri-Te Anau Development Act was amended to provide for guidelines to protect the ecological stability and recreational values of the shorelines, at the same time as optimising energy production.

Statutory “guardians” have reappeared in environmental law in New Zealand three times since the Manapouri-Te Anau guardians were established in 1972. First, soon after Manapouri, came guardians to protect Lake Wānaka from the threat of raised levels caused by hydro-development of Te Mata-au. The Lake Wanaka Preservation Act 1973 charges Wanaka’s
Guardians with reporting and making recommendations to the Minister of Conservation on any matter affecting the purposes of the Act – which include preserving the lake’s water levels and shoreline in their “natural state” – and on the use of the lake for recreational purposes, and consulting the Otago Regional Council on any matter which may affect the lake.33

More recently, marine guardians have been established for the Fiordland (Te Moana o Atawhenua) Marine Area (in 2005) and Te Whata Kai o Rakihouia i Te Tai o Marokura–Kaikōura Marine Area (in 2014). The Fiordland Guardians advise and make recommendations to management agencies and Ministers responsible for biosecurity, marine reserves, fisheries, resource management and the environment on matters affecting the Fiordland Marine Area, its threats and management.34 Kaikōura’s Marine Guardians – who between them must represent Kai Tahu, community, biosecurity, conservation, education, environment, fishing, marine science, and tourism interests and areas of expertise – are responsible for advising relevant Ministers on “any biosecurity, conservation, or fisheries matter related to the marine and coastal environment within Te Whata Kai o Rakihouia i Te Tai o Marokura–Kaikōura Marine Area”, including the Hikurangi Marine Reserve, the Ōhau New Zealand Fur Seal Sanctuary, three mātātai reserves and two taiāpure-local fisheries.35

According to one of the original Manapouri-Te Anau Guardians, the public campaign to save Manapouri marked a “milestone in the transition from the pioneering era of resource exploitation to one aimed at integrating conservation with development, and associated with the sustainable management of our natural resources”.36 Indeed, there is little doubt that the campaign kick-started the environmental movement here, and that improvements to law and policy – including the introduction of environmental impact assessment processes for government projects (in 1973), and of legislation to improve the environmental and scientific priorities of public reserves and national parks legislation (in 1977 and 1980 respectively) and to establish marine reserves and protect marine mammals (in 1971 and 1978 respectively) – followed in its wake.

However, despite these environmental gains, most law continued to facilitate development.37 Rights to use, dam and divert freshwater were allocated to promote multiple uses of the resource, and although the courts determined that only beneficial uses of water could be authorised,38 the legislation provided no tools for river or lake conservation until 1981. Meanwhile, the global oil crisis of the 1970s had spurred Sir Robert Muldoon’s National government to enact the National Development Act 1979, creating a fast-track procedure for development proposals accepted by cabinet to be in the national interest and essential for the orderly production, development and utilisation of resources or the major expansion of exports.39 Several proposals for fast-track developments were made, including one for an aluminium smelter at Aramoana. And so another quest for cheap power to supply another proposed smelter began, and this time eyes turned to Te Mata-au.

Sourced in the three glacial lakes, Wakatipu, Hāwea and Wānaka, Te Mata-au has the largest catchment in New Zealand. The river is reputed to have the greatest volume of water of any river in New Zealand, with a mean annual flow greater than that of the Waikato and Whanganui rivers combined. Major tributaries including the Papapuni, Kimi-ākau, Arrow, Roaring Meg, Bannockburn, Cardrona, Lindis, Fraser, Manuherikia, Teviot, Pomahaka and
Waitahuna rivers feed into Te Mata-au below the lakes. Clearly, “the water energy resources of the Clutha Valley are of considerable magnitude”. Large-scale hydro-generation began on Te Mata-au with the commissioning of the Roxburgh Dam in 1956.

In 1972, new proposals for a dam at Clyde that would flood the valley floor upstream to Tarras, including part of the existing town of Cromwell were released. These plans faltered as public opposition to the proposal mounted, especially when it became apparent that part of the government’s goal was to generate cheap power for the proposed Aramoana smelter. “The smelter proposal was itself highly contentious: the intended site was … across Otago Harbour from Taiaroa Head, where the only mainland royal albatross colony in the world is situated. Both the dam and the smelter disputes moved into the courts.” Objectors successfully persuaded the High Court that the end use of the power to be generated by any dam was a relevant factor in the decision of whether (or not) to grant the water rights required to build the dam. Given that the consortium behind the Aramoana smelter proposal had by now withdrawn for financial reasons, this finding could make a decision against the high dam proposed the only reasonable outcome. Enabled by New Zealand’s constitutional structure, with its unicameral Parliament with unlimited legislative powers, a frustrated government again resorted to special legislation and enacted the Clutha Development (Clyde Dam) Empowering Act 1982. Questions were raised about the constitutional propriety of the government’s bullish actions in (ab)using Parliament’s law-making powers by interfering with the independent judiciary, but the project went ahead anyway.

There is “little doubt that ‘the perceived indifference, if not open hostility’ of the National government towards environmental interests was exploited by the Labour Party in the run-up to the 1984 election”. Although National had presided over a 1981 change to the Water and Soil Conservation Act to protect wild and scenic rivers of national importance, “Labour offered a marked shift in environmental policy, along with institutional reform to provide a more effective voice for conservation” and the environment. Thus, events surrounding the damming of Te Mata-au at Clyde contributed directly to the raft of changes improving conservation and environmental law that were made by the fourth Labour government between 1984 and 1989. These include the enactment of legislation establishing the Ministry for the Environment to provide policy advice to government on environmental matters, the Parliamentary Commissioner for the Environment to serve as a watch-dog over governments’ environmental performance, the Department of Conservation, the New Zealand Conservation Authority and conservation boards to manage land and resources for conservation purposes, and creating a statutory list of protected areas where mining is banned. This government was also responsible for the complete overhaul and integration of land, air and water law that resulted in the RMA, which put sustainable management into law for the first time ever, anywhere. Sustainability has subsequently become the statutory purpose of fisheries management, indigenous forests production and regulation of activities in the exclusive economic zone and continental shelf.

**Hydroelectricity and Irrigation – Competing Claims to Tekapo’s waters**

Despite many changes to environmental law, including the enactment of the Resource Management Act in 1991, the law on allocating rights to use water has remained essentially
A: **Statutory Guardians** – ‘The original Guardians of Lakes Manapouri, Monowai and Te Anau, appointed by the Prime Minister Norman Kirk in 1973, meet again in 1994 (from left) Wilson Campbell, Prof (later Sir) Alan Mark, John Moore, Jim McFarlane and Les Hutchins.’ (Photo courtesy of *Otago Daily Times*). Since 1973, statutory guardians have become a feature on New Zealand’s environmental management scene.


C: **Resource Management Act** – the RMA aims to promote sustainable management and mandates that decisions on resource development are to be made taking into account the actual and potential environmental effects of proposals. Some blame, others credit, the RMA with slowing down hydro development in the southern catchments. RMA processes and costs may well have contributed to the decisions by Contact Energy to shelve plans for further projects on Te Mata-au at Queensbury, Luggate, Beaumont and Tuapeka Mouth, and Meridian Energy’s ‘Project Aqua’ in the lower Waitaki valley. This picture shows the township of Beaumont, which would be flooded by Contact’s proposed Tuapeka Mouth dam (Photo courtesy of *Otago Daily Times*).
unchanged since 1967.\textsuperscript{50} All rights to use, take, dam or divert natural water must be secured [subject to rules in regional plans\textsuperscript{51} or] on application for statutory resource consent. Applications for consent are considered on a ‘first-in, first-served’ basis. Statutory consent authorities decide which applications are allowed. [Consent authorities are required to consider the actual and potential effects on the environment of allowing the activity, and promote the sustainable use, development and conservation of water.]\textsuperscript{52} Third parties with interests in the water that is subject to an application may make submissions on applications and, in some cases, appeal against decisions to grant applications.

The Waitaki catchment is second only to that of the Mata-au when it comes to size in the south, and culminates where the Waitaki river reaches the east coast, just north of Oāmaru. The Waitaki river has several major tributary rivers, including Tekapo, Pukaki, Ohau, Ahuriri, Hakataramea, and Otematata. The first three of these rivers are glacier fed in the Southern Alps and drain the south’s northernmost glacial lakes, Tekapo, Pukaki, and Ohau. Hydro-electric development in the Waitaki catchment began in the 1920s, and today comprises a scheme of eight major plants, including major dams and stations at Benmore and Aviemore, and smaller stations at lakes Tekapo, Ohau and Pukaki. The Waitaki scheme was originally developed and operated by government, but it is now owned and run by private power companies. To enable the operation of the scheme, the government and then the power companies have dammed, diverted and used water from the Waitaki river and lakes Tekapo, Pukaki and Ohau pursuant to a series of statutory consents granted since 1929.

The stations at the outlet of Lake Tekapo have a combined generation capacity of 187 megawatts of electricity, and provide water storage and flow control crucial to the operation of the larger power stations downstream. The existing consents entitle the holder, inter alia, to take water up to a maximum rate of 130 cubic metres per second (cusecs) from the lake, and were last issued by the Canterbury Regional Council in 1991 for a term of 25 years. Conflict arose in 2003, when the Aoraki Water Trust applied to take water from Tekapo to supply water for farm irrigation in the Mackenzie Basin. Meridian Energy – the company which then owned all eight plants in the Waitaki Scheme – opposed Aoraki, arguing that its own rights already exceeded Tekapo’s capacity (the lake has a natural mean water flow of 82 cusecs) and so there was no ‘surplus’ available for lawful use by third parties. Any additional permits “would derogate from, and devalue, [the company’s] existing rights.”\textsuperscript{53} The High Court agreed with Meridian that the Council could not lawfully diminish rights it had granted to Meridian in 1991 without express authority, and must keep its promises. The Court also held that the ‘first in, first served’ rule – which had been confirmed by the Court of Appeal to apply\textsuperscript{54} – would be “pointless” unless it meant that the first permit in time of grant had priority of right to use the resource.\textsuperscript{55}

The immediate result for Meridian was a declaration that the council could not grant new permits to use Tekapo’s fully allocated resource. But the Court’s finding that the first permit in time necessarily implies priority of right to use a resource also reignited debate about legal ownership of water and the ‘first in, first served’ rule.

The priority right to take water from Lake Tekapo vested in Meridian by the water rights is very close to being a property right in freshwater.\textsuperscript{56} But the question of whether strengthening rights in freshwater would be good or bad for the environment is open. So far, governments have
refused to discuss ownership of water either generally as a law reform option, or specifically in the context of negotiating and implementing its Treaty of Waitangi settlement process. The Crown’s view is that the common law asserts that no one owns water. This may be true, but the extent of any pre-existing Māori rights, which are also protected by common law unless they have been extinguished by legislation, has not been tested before a New Zealand court. It is more likely that competition over water resources will increase than decrease, in the future. It would seem prudent to resolve some of these issues about ownership and user rights so that they do not impede the development of a water allocation system that provides the flexibility and adaptability likely to be needed then.

The ‘first in, first served’ rule is used to determine priority between competing users of the same resource. It prescribes that ‘the first person to make a ‘complete application [for a resource consent] is presumptively entitled to the first hearing’, and that the second person to make a complete application regarding the same resource may only participate in the resource consent application process as a submitter.” The rule is administratively efficient, and coupled with priority of right to use the resource as established in the Aoraki case, clearly rewards investment and resource development. Of course, ‘first in, first served’ is not the only legal rule established to protect economic investments in natural resources – other examples under the Resource Management Act include the potentially long term of consents, the limited opportunities for review of consents, provisions creating priority for renewal applications for existing permits, and the continuation of historic consents under new environmental legislation when it is made.

An illustration of this last example is currently playing out in several of the southern catchments, including the Lindis and Manuherikia river catchments. Here, gold mining and water-race permits granted in the 1800s and carrying with them rights to take much more water than is available in the rivers, which therefore run dry most years, have been deemed to be resource consents under the RMA, and are valid through to 2021. Today, these consents are used for irrigation not mining, and deeming them to be current consents protects the irrigators’ investments. The consent holders are entitled to priority use of what water there is, but the Regional Council has stepped in and is introducing minimum flows for the rivers, which will limit the quantity of water that will be able to be taken when new consents are issued to replace the historic mining permits in 2021. Critics have argued that the Council’s limits are not low enough to protect the ecology of the rivers and, although not all existing irrigators will be satisfied because there will not be enough water to go around, they will still have priority rights to the water over other potential abstractors. Those who apply for renewal first, will have their applications considered first.

Given the increasing need for future environmental management (including legal) systems to allow for flexible and adaptive resource management, continuing with a system that focuses on protecting user rights and economic investments may not be our best option.

Furthermore, it is clear that ‘first in, first served’ is not a strongly comparative rule for allocating increasingly scarce water resources. The statutory framework ensures that decisions on applications for consents are determined taking the environmental effects of the activities proposed into account, and approved where proposals promote sustainable resource management. Although this inevitably compares the positive and negative effects of
proposals, it does not involve direct comparison of the relative merits of proposals against each other. Although the Resource Management Act makes some provision for some comparative elements, overall this is minor. Lack of direct comparison between possible users of resources matters, especially given that the application of sustainable management under the Resource Management Act is a largely qualitative exercise involving an “overall broad judgment”. The possibility that regional councils will adopt rules other than ‘first in, first served’ to determine priority of use to resources exists, but seems remote. Arguably, this is an important enough matter for change or guidance at the national level.

**Kai Tahu and the Southern Catchments**

Ever since English law was first applied, and New Zealand law first created, to respond to environmental problems in the southern catchments, that law has, with a handful of exceptions, failed to recognise or protect Kai Tahu rights and interests in the catchments’ natural resources. This, and other failures by the Crown to comply with the Treaty of Waitangi, were the subject of the 1986 Ngai Tahu claim, the first comprehensive claim lodged in the Waitangi Tribunal. The Tribunal claim had nine “tall trees”. There was one tall tree for each of the eight major land purchases through which Kai Tahu had been rendered largely landless. Kai Tahu contended that much of the area that includes the southern catchments was wrongfully included in two of these purchases. There was one more tall tree to represent Kai Tahu’s loss of access to and protection of mahinga kai throughout southern New Zealand.

Many of the rivers and lakes of the southern catchments are named in the claim as having been significant mahinga kai for traditional Kai Tahu, including Taieri, Papapuni, Mata-au, Waitaki and Waiau rivers and Wakatipu and Manawapōpōre and Hikuraki (the Mavora Lakes). Moa were extinct by the time Kai Tahu people first crossed Cook Strait, but the “swamps,
lakes and rivers writhed with fish life, especially tuna – once a staple diet – and yielded other food sources such as weka, pukeko and whio.”65 People, goods and resources were transported between the interior and coastal settlements along the rivers in purpose-built mōkihi. The valley systems that glaciers, streams and rivers carved through the southern mountains and hills provided pathways for the “elaborate system of trails” developed by Kai Tahu “to link various … settlements into the social and economic life of the tribe and tied them into networks of trade which extended well beyond the South Island.”66

The Tribunal found that almost all aspects of Kai Tahu’s claims were well-founded, and recommended a negotiated solution. Negotiations between Kai Tahu and the Crown resulted in a settlement that was implemented in stages via legislation. First,67 the parties agreed to a Deed On Account of settlement, to stimulate negotiations that had stalled. The resulting legislation returned Tutaepatu (Woodend Lagoon) near Kaiapoi in North Canterbury to Kai Tahu ownership and co-management, and returned the taonga mineral pounamu to Kai Tahu ownership, management and control.68

The main parts of the settlement were implemented in the Ngāi Tahu Claims Settlement Act 1998. In Chapter 2 of this book, Williams describes the mechanisms employed by this Act to recognise Kai Tahu perspectives, rights, interests and practices associated with natural resources: deeds of recognition, statutory acknowledgments, nohoanga, and tōpuni. Some specific sites were also returned to Kai Tahu ownership and management (the Tītī Islands, for example), and in some sites were identified for special co-management arrangements but retained in Crown ownership (for example, Whenua Hou).

Significantly for this chapter, the mechanisms devised for the 1998 Act were used again in later settlements with other claimant groups.69 The Ngāi Tahu settlement provided the precedent, and together the Treaty settlements have added an important dimension to environmental law. New mechanisms to implement claimants’ perspectives and rights in natural resources have also started to appear in more recent settlements, in a process of evolution that is inevitable in a system which only responds to Treaty grievances on a claim by claim basis.70 It is possible, for example, to see progression in the weight given to iwi voices in the settlements over time. Two recent settlements have recognised Te Urewera and the Whanganui River as legal persons in their own right.

In 2011, the Waitangi Tribunal criticised the ad hoc nature of the settlements process:

… settlements cannot deliver a transparent, nationally consistent approach to iwi involvement in environmental management because settlements are, by their nature, local, ad hoc, and subject to high levels of political pragmatism. When kaitiaki control and partnership are delivered only through historical settlements, this is a recipe for unfairness and inconsistency, both in terms of the forms of power-sharing that result and the environmental outcomes that follow. …

… Iwi should not have to spend their Treaty settlement credits in this way, and nor should those who have not yet settled have to wait before they get a say in decision making about environmental taonga. Nor, indeed, should smaller iwi have to settle for less in the way of influence over taonga simply because they lack political leverage to win seats on conservation boards or influence around the Cabinet table, nor iwi who reached settlements some time ago get less than those who have settled more recently. If innovative approaches
to land ownership and power sharing can be achieved under the intense pressure of Treaty settlements, they ought also to be possible in the ordinary course of … business.\textsuperscript{71}

The Tribunal’s call was for less reliance on settlements to provide mechanisms supporting Māori environmental co-management, and more emphasis on improving ‘mainstream’ legislation.

First, it is important to understand that the legal position is that Māori rights in the Treaty of Waitangi are unenforceable unless or until Parliament recognises those rights in legislation. ‘Mainstream’ environmental legislation is indisputably better at recognising Māori perspectives and rights, and the Treaty of Waitangi’s principles, than it was before the fourth Labour government took office in 1984. This government included wide duties on Ministers and agencies to recognise (and give effect to) Treaty principles – including the principle of partnership between the Crown and Māori (imputing duties to act reasonably, and in good faith, on both parties), and the Crown’s duty to actively protect Māori rights and interests – in its environmental legislation, and authorised the Waitangi Tribunal to hear claims dating back to 1840.\textsuperscript{72} Nevertheless, Māori were still relegated to, at best, a participatory role, and were seldom allowed to manage, or even co-manage, natural resources. Since then, negotiated settlements have become the preferred mode for advancing Māori interests and addressing historic Treaty grievances, and the most recent environmental legislation suggests that governments have become less open to recognising Māori perspectives, rights and practices in mainstream legislation.\textsuperscript{73}

\textbf{Conclusion}

The environmental problems caused by the gold rush in Otago were managed by law that favoured mining, and protected investments and economic interests. Beginning in the gold rush, but also since, New Zealand governments have been ever ready to legislate across customary and common law rights and constitutional rules, to promote economic and industrial development. Dramatic examples are provided by the construction of hydro-projects at Manapouri and Clyde in the 1960s and 1980s. Since the 1980s, there has been a turning of the environmental tide, evident both in the explosive development of environmental law since the 1980s, and in the improved recognition of Māori perspectives, rights and interests in environmental legislation. But the legacy of the early law is still evident in environmental law’s on-going emphasis on protecting investments and economic interests, illustrated in examples like the ‘first in, first served’ rule applied to allocated freshwater resources and the legal protection of historic permits and existing uses. These legal rules have come to a head in disputes concerning the waters of Lake Tekapo and the Lindis river. New Zealand’s abject failure to properly recognise Kai Tahu rights and interests in the southern catchments has been addressed through the settlement process, but the unfairnesses apparent in this process will surely affect the durability of settlements, and should not be allowed to diminish the need for mainstream environmental law to measure up in Treaty of Waitangi terms.
Endnotes


2. In this chapter, “southern catchments” means the catchments east of the Southern Alps, and south of and including the Waitaki catchment. Rivers I have discussed or mentioned are Te Mata-au (Clutha), Kawarau, Papapuni (Nevis), Kini-ikau (Shotover), Manuherikia, Waitai, Arthurs, and Taieri; lakes I have discussed or mentioned are Wakatipu, Manawāpōpōre and Hikuraki (Mavora Lakes), Te Anau, Manapouri, Tekapo, Pukaki and Ohau.


5. Atholl Anderson, ‘A Fragile Plenty: pre-European Māori and the New Zealand environment’ in Eric Pawson and Tom Brooking Making a New Land – Environmental Histories of New Zealand (Otago University Press, Dunedin, 2013) at 40 dates the arrival of people in southern New Zealand to the twelfth or thirteenth century.

6. On the trails generally, see Basil Keane, ‘Te ohanga onamata a rohe – economic regions - Te Wāhi Pounamu – hunting and gathering’, Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/map/23612/pounamu-trails (accessed 9 November 2017). Speaking of Te Papapuni (the Nevis river), Edward Ellison, a Kai Tahu kaumātua of the Ōtākou Rūnanga on Otago Peninsula, said in 2009: “Tribal history is embedded in Te Papapuni; both the river and the valley it flows through.” For many generations, the river and its tributaries, as well as the surrounding valleys and mountains had provided people with abundant natural resources and food, he said. The valley had been an important route for those traveling from Southland into Central Otago and the Queenstown area, and was used well into the 19th century. Evidence suggested there was also seasonal settlement by Kai Tahu in the valley during the early moa-hunting period” (Lynda van Kempen, ‘Area “was the beaten track” for Māori’, Otago Daily Times (30 May 2009).


10. The English Laws Act 1858 declared that all the other laws of England applicable to the circumstances of New Zealand and in existence on 14th January 1840 had also applied in New Zealand since that same date in 1840, and continued to do so.


14. Gold Fields Act 1858, ss 2, 3, 4 and 7.


20. Plots of land no bigger than 10 acres could be leased for agricultural purposes, Gold Fields Act 1858, as amended in 1860, s 3.

21. Leaseholds also required open access to the land for gold prospecting, and could be terminated if the land was subsequently discovered to be highly auriferous. Gold Fields Act 1858, as amended in 1860, s 4 and T J Hearn, ‘After the Gold Rush: Economic Change
and Resource Use Conflict in Central Otago’, above n 9 at 63, 66, 67 and 68.


23. Terry Hearn ‘Mining the Quarry’, above n 22 at 118.

24. Terry Hearn ‘Mining the Quarry’, above n 22 at 110.


35. Kaikōura (Te Tai o Marokura) Marine Management Act 2014, ss 6(4) and 7(1) and (2).


38. *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA).


41. R J Calvert, ‘History and Background of the Clutha Schemes’ (1975) 14(2) *Journal of Hydrology* (NZ) 76 at 76.


46. The water conservation scheme was enacted in response “to the impacts of increasing development pressures and the shortcomings of the Water and Soil Conservation Act 1967”. The final straw was yet another controversial hydro-project, this time on the Rangitaiki and Wheao rivers in the North Island. See New Zealand Conservation Authority *Protecting New Zealand’s Rivers* (New Zealand Conservation Authority, Wellington, 2011).


50. In the summary that follows, the text in square brackets indicates aspects of the law that have been added or adjusted after 1967. Provisions enabling regional councils to make rules about taking, using, damming or diverting water in plans were introduced by the Resource Management Act. In 2005, the Resource Management Act was amended to expressly and specifically allow regional councils to make rules about allocating water (s 30(1)(fa) and (fb)). Under the Water and Soil Conservation Act, all uses of water were required to be beneficial, and decision-makers balanced the benefit of a proposed use against its detriments, see *Keam* above n 38. Under the RMA, decision-makers must consider the environmental effects of proposed uses of water (s 104(1)), promote sustainable resource management (s 5), and consider all of the matters listed in ss 6, 7 and 8 (including the principles of the Treaty of Waitangi).

51. RMA, ss 14 and 30(1)(c) and (fa).

52. RMA, ss 5 and 104.


54. *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257.


57. Trevor Daya-Winterbottom, ‘Sustainability, governance and water management in New Zealand’ in Michael Kidd, Loretta Firis, Tumai Murombo and Alejandro Iza (eds) *Water and the Law* (IUCN Academy of Environmental Law Series, Edward Elgar, Cheltenham UK and Northampton USA, 2014) 167 at 188, summarising the rule following the Court of Appeal’s decisions in *Fleetwing Farms v Marlborough District Council* above n 54, Central
58. The maximum term possible is 35 years, unless the activity is a reclamation or a subdivision, Resource Management Act s 123.

59. RMA, ss 128-133. In Aoraki Water Trust v Meridian Energy Ltd above n 53 at [52], the Court agreed that “where Parliament has conferred power on a consent authority to interfere with an existing grant, it has acted expressly and for very limited purposes”.


65. Waitangi Tribunal, Ngai Tahu Land Report (Department of Justice, 1991) at [2.1.2].

66. Waitangi Tribunal, Ngai Tahu Land Report at [3.2.7].

67. Actually, the first stage implemented in legislation was the creation of a body to receive and administer settlement assets in the Te Runanga o Ngai Tahu Act 1996.


70. The two first large, modern-day settlements – Ngāi Tahu and Waikato-Tainui – include “relativity clauses” that some may think provide parity between these two settlements and others over time. However, the clauses were specifically negotiated to recognise that these two groups were willing to proceed with negotiations and settlement despite the government having unilaterally announced a $1 billion fiscal envelope for all settlements. The clauses only address parity of the fiscal, or dollar value, of the settlements, and do not respond to any of their cultural aspects. The clauses only apply to Ngāi Tahu and Waikato-Tainui because of the fiscal envelope policy – none of the other settlements address the fiscal parity of settlements.


72. Conservation Act, s 4; Environment Act 1986, s Long Title; Resource Management Act 1991, s 8, for example. The Tribunal’s jurisdiction was extended back to 1840 from the original cut off date of 1975 in 1985.

73. For example, Climate Change Response Act 2002, s 3A and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 12.