

MAORI CULTURAL RIGHTS IN AOTEAROA NEW ZEALAND: PROTECTING THE COSMOLOGY THAT PROTECTS THE ENVIRONMENT

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*Kei raro i nga tarutaru,
ko nga tuhinga a nga tupuna*
Beneath the herbs and plants,
are the writings of the ancestors.¹

I. INTRODUCTION

Indigenous views of their relationship with the natural world differ from those of the states within which they live. Such different views stem from different cosmologies and religions that define the appropriate place of humankind within nature. They give rise to different understandings of human rights and responsibilities in relation to the natural world and what people can and cannot do with it. This difference goes to the heart of disputes between indigenous peoples and settler states over the use and occupation of land and natural resources. The forcible and growing dominance in most states of a Western, liberal construction of nature has led to the near exclusion of indigenous cosmologies and peoples from mainstream law and policy, which has enabled the destruction of much of indigenous societies as well as of the natural environment worldwide.

The field of indigenous rights has been developed over the last century to address the situations faced by indigenous peoples worldwide, with particular

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¹ WAITANGI TRIBUNAL, *KO AOTEAROA TĒNEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY, TE TAUMATA TUARUA*, WAI 262, at 237 (2011), *available at* www.waitangitribunal.govt.nz. The paragraph in which it appears further elaborates on its meaning:

The environment, therefore, cannot be viewed in isolation. There is an old saying: 'Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna' (beneath the herbs and plants are the writings of the ancestors). Mātauranga Māori [Maori traditional knowledge] is present in the environment: in the names imprinted on it; and in the ancestors and events those names invoke. The mauri [spirit or life-force] in land, water, and other resources, and the whakapapa [genealogy] of species, are the building blocks of an entire world view and of Māori identity itself. The protection of the environment, the exercise of kaitiakitanga [guardianship], and the preservation of mātauranga [knowledge] in relation to the environment are all inseparable from the protection of Māori culture itself.

growth over the last ten to twenty years.² The recognition of indigenous rights has become much more accepted in international law as well as within state domestic laws in many nations worldwide, perhaps because indigenous rights are seen largely as elaborations of existing but more general human rights instruments.³ I suggest that indigenous rights are in fact also helping to protect the environment; therefore, in addition to upholding indigenous human rights for the sake of indigenous peoples, it is worth upholding indigenous human rights for the sake of all peoples, including for the better protection of the natural environment.

Human rights law can be utilized, not so much to protect directly a human right to a healthy environment, but to better protect the cultural and religious rights of indigenous and tribal peoples who hold more protective cultural views about the environment.⁴ If protective environmental views are respected, then the environment itself is more likely to be better respected and protected. As indigenous cosmologies are very different from the dominant, liberal views of humans' place within the environment, it is harder to uphold them in practice than it may sound in theory; but it is not impossible. This paper provides some examples from Aotearoa New Zealand, which has upheld (minority) indigenous Maori cultural rights, including the right to have

² Indicators of such growth include the establishment in 2000 of the United Nations Permanent Forum on Indigenous Issues (a United Nations advisory body, reporting to the Economic and Social Council) and the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples. Establishment of a Permanent Forum on Indigenous Issues, E.S.C. Res., U.N. Doc. E/RES/2000/22 (July 28, 1990); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007).

³ See, e.g., S. James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* ¶ 40, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008) stating:

The Declaration [on the Rights of Indigenous Peoples] does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These include the basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health or property, which are recognized in other international instruments and are universally applicable.

⁴ For example, the UN Human Rights Committee has recognized that indigenous culture has such a connection with their traditional territories and natural features, that indigenous peoples' right to protection of their culture under Article 27 can encompass rights to protection of their connection with these lands and features, including resources. Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, General Comment 23, art. 27, at ¶ 7, I HRI/GEN/1/Rev. 9 (May 27, 2008). The Committee on the Elimination of Racial Discrimination has similarly interpreted the International Convention on the Elimination of All Forms of Racial Discrimination to protect effective participation and rights of indigenous peoples over lands, territories and resources. Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of Indigenous Peoples*, U.N. Doc. A/52/18, Annex V, at 122 (1997).

their special relationship with the natural world recognized and upheld in law, within a Western, liberal democratic legal system.

This paper first addresses indigenous beliefs about humans' relationship with nature and, thus, their place in the world and how the indigenous cosmology contrasts with the dominant and prevailing Western and liberal ideas. The dominant view in most states is anthropocentric, whereby humans are considered rightfully dominant over nature. Nature is seen as being only good insofar as it serves a useful purpose for humans and can be civilized to that end. In contrast, the indigenous cosmology considers humans as being part of nature and that the world is an interdependent whole. Under this cosmology, there is no right of any one part of that whole to dominate another part. Instead, methods of equal co-existence are prized.

The paper next addresses the New Zealand examples of the recognition of the right of Maori to have their cosmology upheld in NZ law. In order to understand the current position and how it arose, the history of the Treaty of Waitangi⁵ is first explained, as is the mechanism adopted to address the Maori grievances arising from its many breaches by the New Zealand government. Next, different aspects of NZ law are addressed, from recognition of Maori interests and thus cosmology in mainstream resource management decision-making, to special arrangements designed specifically to implement Maori cosmology in the management of NZ's natural resources. It is these special arrangements in particular which environmentalists have focused on because some recent examples have recognized in law the Maori view that the natural environment should be treated more as a person—indeed, as a relative—rather than simply as a resource.

These examples from New Zealand illustrate ways in which the law can be used to implement and incorporate indigenous cosmologies with a Western society and legal system and better protect the natural environment in the process. I suggest that it may even alter the mainstream constructions of nature, through normalizing the indigenous constructions. Thus, the protection of indigenous rights to culture and religion could better protect a healthy environment for everyone.

⁵ The Treaty of Waitangi is the Treaty between the British Crown and the indigenous Maori that was agreed to in 1840 in order to enable British settlement of New Zealand. *The Treaty of Waitangi*, NEW ZEALAND MINISTRY OF JUSTICE, <http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi> (last visited Mar. 20, 2015). It is discussed in detail in Part III, below, nn. 46-61 and accompanying text.

II. INDIGENOUS RELATIONSHIPS WITH THE NATURAL WORLD

*"We are part of everything that is beneath us, above us, and around us. Our past is our present, our present is our future, and our future is seven generations past and present."*⁶

Originally we were all hunter-gatherers, and we knew that we depended on nature for survival. Our societies depended on acquiring extensive knowledge about the natural world and developed related spiritual or religious beliefs linking humans to their environment and venerating nature, commonly labeled as animistic and/or pagan. These hunter-gather societies were most likely the only social form, which existed for an estimated 160,000 years, until the development of agriculture approximately 11,000 years ago.⁷

The transition to the practice of agriculture and domestication of animals gave rise to changes in people's constructions of nature.⁸ Agriculture requires that nature be controlled: that land be cleared, water flows redirected, the breeding and behavior of animals controlled, only what is useful be kept, what is not useful be eliminated (weeds, pests, predators, vermin); the determinant is utility to humans. To support these activities, beliefs about humankind's relationship with nature changed over time to justify the dominance over nature. Humanistic gods were placed above nature instead of being dependent on it. For example, under the views of Christianity, God is nature's creator.⁹ It then was extended further than simple dominance to beliefs that the natural world existed purely for the sake of humans and/or that humans were entitled to rule over nature like despots.¹⁰ Elements of the Bible reflect both this view of instrumental purpose and design¹¹ and the human despotic

⁶ WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* (1999).

⁷ Catherine Iorns Magallanes, *Native American Values and Laws of Exclusion*, in *ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVE APPROACH* 200, 201 (Keith H. Hirokawa ed., 2014). The change has been termed the Neolithic Revolution, or the Agricultural Revolution. See CHILDE V. GORDON, *MAN MAKES HIMSELF* 66 (1936). For a summary of the impact on population growth, see, e.g., Bocquet-Appel Jean-Pierre, *When the World's Population Took Off: The Springboard of the Neolithic Demographic Transition*, 333 *SCIENCE* 560, 560 (2011).

⁸ Cf. MAX OELSHLAEGER, *THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY* (1991) (arguing that the original changes to ancient views can be traced back to the Neolithic revolution in the Fertile Crescent of the Mediterranean).

⁹ *Genesis* 1:26 (King James) (stating "And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over the fowl of the air, and over every creeping thing that moveth upon the earth.").

¹⁰ JOHN PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE; ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS* 13-14 (1974). "Aristotle argues in his *Politics* that 'plants are created for the sake of animals, and the animals for the sake of men; the tame for our use and provision; the wild . . . for our provision also, or for some other advantageous purpose, as furnishing us with clothes, and the like.'" *Id.*

¹¹ See, e.g., *Genesis* 9:3. ("Every moving thing that liveth shall be meat for you . . .").

rule over nature.¹² This approach has been described throughout history as the Greco-Christian arrogance.¹³ A combination of this Christian view and the Greco-Roman views of rationality and order gave rise to what has been labeled as the Classical construction of nature, which has provided the basis for Western civilization. Of key importance is the anthropocentric view of domination, including that nature is only good insofar as it serves a useful purpose for humans.

The Classical construction has waxed and waned, even within the last 2,000 years of increasingly agriculturalist societies. For example, during the Middle Ages, animism coexisted with Christianity until the scientific Enlightenment.¹⁴ However, thinkers particularly from the Enlightenment and then later the Industrial Age supported and justified the Classical ‘natural’ hierarchy with complete human dominance over the natural world. Influential scientists and philosophers who reinforced this view include Aquinas,¹⁵ Calvin,¹⁶ Bacon,¹⁷ Descartes,¹⁸ Hobbes,¹⁹ Locke,²⁰ Montesquieu,²¹ and Adam Smith.²² In

¹² See, e.g., *Genesis* 9:2. (“And the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered.”).

¹³ PASSMORE, *supra* note 10, at 5, 9. For further Biblical and other examples of this view, see *id.* at 6-14.

¹⁴ Iorns Magallanes, *supra* note 7, at 203. In the Middle Ages Europeans believed in animal consciousness and that all animals had spirits, while at the same time believing in human domination. See, e.g., EP EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 5-6 (1987); see also Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 702 (1915-1916). Hyde demonstrates that there were many different reasons for putting animals on trial, from the Ancient Greek ceremony of retaliation for the purpose of natural harmony (or else the “Furies would be aroused and misfortune would befall the State”), to simple revenge and retribution, to religion (as a misbehaving animal must have embodied Satan), to full responsibility and therefore justice. *Id.* at 702, 705, 717. This occurred in all the countries in Europe from antiquity, through the Middle Ages, and even in early colonial America. It occurred across different religions, including Jewish, other Christian, Muslim, and pagan hunter-gatherer societies worldwide. Whatever the reason, a common feature was the “personification” of the animal (Hyde, at 719), whether it was believed they were rational (*Id.* at 722) or irrational (such as Aquinas), or they had souls or not. Hyde notes that the personification of ships is the last remaining vestige of this approach. *Id.* at 720.

¹⁵ ST. THOMAS AQUINAS, SUMMA THEOLOGICA Q. 75, Art. 3 (1947). For example, Aquinas argued that animals have no souls. *Id.*

¹⁶ NORM PHELPS, THE LONGEST STRUGGLE 60 (2007). For example, John Calvin argued, “True it is that God hath given us the birds for our food, as we know he hath made the whole world for us.” *Id.*

¹⁷ PASSMORE, *supra* note 10, at 19-20. For example, Bacon stated that he wanted to restore man’s dominion over nature through scientific discovery. *Id.* at 19. Bacon also aimed to elevate the status of scientists—replacing craftsmen as creators of the ideal world, and as re-creators of the Garden of Eden. *Id.* at 19-20.

¹⁸ Descartes, who is most famous for arguing that there was a distinction between the mind and body, distinguished humans from nature. RENE DESCARTES, PRINCIPLES OF PHILOSOPHY 5-6, 40 (N. Kretzmann et al. eds., 1983); see Rene Descartes, *The Description of the Human Body*, in THE WORLD AND OTHER WRITINGS 170-71 (Karl Ameriks & Desmond M. Clarke eds. 1998). Animals were argued to lack any volition or free will and were, instead, solely instinctual beings.

addition, the Enlightenment focus on rational, autonomous individuals and their free choice entailed a particular set of values and relationships between individuals, as well as between individuals and the state—one that was largely based on contract. These views justified human ownership of land and natural resources through the institution of private property and established the basis of the modern nation-state that we have today.²³

The Scottish Enlightenment thinkers took these ideas and developed a history of humanity as involving progress through four stages, from hunter-gatherer primitivism at the bottom to full agricultural and industrial civilization at the top.²⁴ Determination of progress through the stages was based on the adoption of different property and contract regimes, which both defined and were defined by humankind's role in society and relationship with nature. These scientific ideas were transferred to other countries, even those such as China who did not share in the Christian or Greco-Roman origins.

While there have been critics and minority views which have objected to the arrogance,²⁵ it has become the dominant construction of nature held by at least Western liberal societies.²⁶ Indeed, this construction and “the very

RENE DESCARTES, DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING ONE'S REASON AND SEEKING TRUTH IN THE SCIENCES 1 (2007).

¹⁹ See generally THOMAS HOBBS, HOBBS'S LEVIATHAN: REPRINTED FROM THE EDITION OF 1651 (1929).

²⁰ See John Locke, TWO TREATISES OF GOVERNMENT 23-24 (Thomas I. Cook ed., 1947). Locke reinforced the utilitarian view of nature and of property, arguing that humans should be entitled to own any product that is the fruit of their labour, including natural products where man has tamed the animal or worked on the land. *Id.* at xxvi-xxvii, 134. Indeed, according to Locke, animals were “perfect machines” for use by humans. *Id.* at 23-24. I note that Locke utilized the example of the American Indian as being at the lowest stage of human development. *Id.* at 125.

²¹ See generally CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., 2001).

²² See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1799).

²³ See MONTESQUIEU, *supra* note 21, at 512-13. Hobbes and Montesquieu argued that the only way to arise out of the (undesirable, uncivilised) state of nature—where, as Hobbes put it: where people were in a perpetual “condition of warre” and where life was “solitary, poore, nasty, brutish, and short” (HOBBS, *supra* note 19, at 96-97), into a civilised society was via the institution of private property, including over land and natural resources.” See generally MONTESQUIEU, *supra* note 21.

²⁴ Most notable was Adam Smith who relied heavily on Locke and Montesquieu and created the most popular four-stage theory of progress. Adam Smith adopted these views of progress as the basis for his influential economic theory, expounded in his famous *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776). Smith is still considered to be the most influential economist today as well as the father of modern economics. See, e.g., William L. Davis et al., *Economic Professors' Favorite Economic Thinkers, Journals, and Blogs (along with Party and Policy Views)*, 8 ECON. J. WATCH 126, 127-28, 132 (2011).

²⁵ See, e.g., PASSMORE, *supra* note 10, at 21-22. Henry More argued that creatures are also “made to enjoy themselves” and Linnaeu argued that all parts of ecosystems coexist to benefit the whole. *Id.* at 22.

²⁶ See ROBERT A. WILLIAMS JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 210, 215-17 (2012). This construction, including the Scottish view of progress in

process of civilization” have been argued to be “at the heart of man’s ecological problems.”²⁷

In deep contrast with this Western, liberal view, indigenous views of the environment continue the most ancient hunter-gather traditions of considering humans as being part of nature and acknowledging and reflecting humankind’s interdependence with nature.²⁸ The indigenous histories and stories embodying their beliefs have been handed down and maintained over thousands of years, and are evident in and maintained by their religions today. For example, indigenous Creation and other stories typically tell of how people today descended from, are part of and are genealogically related to the natural world, and are dependent on it.²⁹ For example, the traditional Maori view is:

All the elements of the natural world, the sky father and earth mother and their offspring; the seas, sky, forests and birds, food crops, winds, rain and storms, volcanic activity, as well as people and wars are descended from a common ancestor, the supreme god. These elements, which are the world’s natural resources, are often referred to as taonga, that is, items which are greatly treasured and respected. In Maori cultural terms, all natural, and physical elements of the world are related to each other, and each is controlled and directed by the numerous spiritual assistants of the gods.³⁰

particular, was the one held by the Founding Fathers of America and became the construction implemented in American law and policy. WILLIAMS, *supra*, at 215-17.

²⁷ See PASSMORE, *supra* note 10, at 25. For example, Engels argued that only communism could save the world from the ravages of nature committed under capitalism and Christianity together. *Id.*

²⁸ See HUSTON SMITH, *THE WORLD’S RELIGIONS* 365-83 (1991). For example, Huston Smith, in his now-classic discussion of the world’s religions, calls indigenous religions “primal.” *Id.* at 365. They are characterized by all humans, animals, plants, the land itself, all possessing the same spirit of the Creator. *Id.* at 375.

²⁹ See generally RICHARD ERDOES & ALFONSO ORTIZ, *AMERICAN INDIAN MYTHS AND LEGENDS* (1984). This book contains 166 such stories, covering Creation, the sun, moon and stars, heroes, warriors, love, the Trickster, “Animals and Other People,” ghosts and the spirit world, and “Visions of the End.” *Id.*

³⁰ DEREK NOLAN, *ENVIRONMENTAL AND RESOURCE MANAGEMENT LAW* 878-79, para. 14.2 (LexisNexis NZ 4th ed., 2011) (quoting DEPARTMENT OF CONSERVATION, *REPORT AND RECOMMENDATIONS OF THE BOARD OF INQUIRY INTO THE NEW ZEALAND COASTAL POLICY STATEMENT* (Feb. 14, 1994)).

Another illustrative description is provided by the Waitangi Tribunal:

In te ao Maori [the Maori world], all of the myriad elements of creation – the living and the dead, the animate and inanimate – are seen as alive and inter-related. All are infused with mauri (that is, a living essence or spirit) and all are related through whakapapa [genealogy]. Thus, the sea is not an impersonal thing but the ancestor-god Tangaroa, and from him all fish and reptiles are descended. The plants of Aotearoa are descendants of Tāne-mahuta, who also formed and breathed life into the first woman, and his brother Haumia-tiketike. The people of a place are related to its mountains, rivers and species of plant and animal, and regard them in personal terms. Every species, every place, every type of rock and stone, every person (living or dead), every god, and every other element of creation is united

Importantly, “the spiritual and physical realms are not closed off from each other, as they tend to be in the European context.”³¹ The indigenous gods and spirits represent and inhabit the natural world, from the mountains, rivers and other landscape features, to the animal and plant world.³² Their spiritual beliefs are still, today, entwined with stories and rituals that venerate all aspects of their natural world; as a consequence, they instill respect through the generations for all of nature.³³ Typically, the animals, plants and land are imbued with spirits, while these spirits also inhabit the people and look after them. Thus the people in return treat the animal, plant or other natural feature as kin, and look after them respectfully. An example of Maori cosmology is:

Often translated as ‘kinship’, *whanaungatanga* does not refer only to family ties between living people, but rather to a much broader web of relationships between people (living and dead), land, water, flora and fauna, and the spiritual world of atua (gods) – all bound together through *whakapapa* [genealogy]. In this system of thought,

through this web of common descent, which has its origins in the primordial parents Ranginui (the sky) and Papa-tu-ā-nuku (the earth).

WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI, *supra* note 1, at 17. This interconnectivity was highlighted by the Waitangi Tribunal’s discussion of the meaning of the Maori word “*whenua*” in the *Muriwhenua Land Report*:

“Whenua” means both “land” and “placenta” or “afterbirth”. Similar to a placenta, the land nourishes the people who live on the land. Human beings are children of the land who have obligations of care and responsibility for Mother Earth and all its natural assets. The tribe itself identifies with the land, as their ancestral land is seen as the “living body of the tribe.

WAITANGI TRIBUNAL, MURIWHENUA LAND REPORT, WAI 45, at 23 (1997), *available at* www.justice.govt.nz. For a North American example: “They arise out of the earth – the plants, herbs and animals which are integral parts of the human realm.” ERDOES & ORTIZ, *supra* note 29, at xi.

³¹ *Ngati Rangī Trust v. Manawatu-Wanganui Reg’l Council* A67/2004 NZEnvC 172, 18 May 2004, at para 26.

³² For Maori, rivers are considered Papatuanuku’s arteries, each with their own *mauri* (spirit or life-force), which may be lessened if humans interfere with that flow. WAITANGI TRIBUNAL, TE KAHUI MAUNGA: THE NATIONAL PARK DISTRICT INQUIRY REPORT, WAI 1130, at 93 (2013), *available at* www.justice.govt.nz. Ngati Rangī of the central North Island region liken the rivers flowing off the mountains “to an umbilical cord connecting [them] to the spiritual essence of their ancestors’ existence.” *Id.* at 92-93. Mountains too are locations of great spiritual significance. *See, e.g.*, the evidence in the *Ngati Ruahine* case about Mount Maunganui, or Mauao. *Ngati Ruahine v. Bay of Plenty Reg’l Council* NZHC 2407, 18 September 2012, at para 174. The ocean too is revered, being the domain of the god, Tangaroa, as described above in n.30.

For North American First Nations, “Rivers, lakes, waterfalls and mountains are the abodes of spirits and often appear as living characters in stories The ancient tokens and symbols still exist and are carefully preserved.” ERDOES & ORTIZ, note 29, at p.xii.

³³ For a North American example: “Mysterious but real power dwells in nature – in mountains, rivers, rocks, even pebbles. White people may consider them inanimate objects, but to the Indian, they are enmeshed in the world of the universe, pulsating with life and potent medicine.” ERDOES & ORTIZ, *supra* note 29, at xi.

a person's mauri or inner life force is intimately linked to the mauri of all others (human and non-human) to whom he or she is related. This explains why iwi [tribes] refer to mountains, rivers, and lakes in the same way as they refer to other humans, and why elders feel comfortable speaking directly to them

Any kinship bond implies a set of reciprocal obligations, and these are encompassed in the concept of *kaitiakitanga* – the obligation to nurture and provide care. *Kaitiakitanga* is often translated as 'stewardship', but this term does not encapsulate its spiritual dimension, which is expressed as a responsibility to nurture the mauri of people, flora and fauna, landforms and waterways, that collectively form one's whakapapa *kaitiakitanga* is a community-based concept. It is not the obligation of an individual but of an entire tribal community. While the community exists, the obligation exists.³⁴

This construction of the relationship between people and their environment is one that enables humans to continue to live as peoples in and as part of the natural world.³⁵

In terms of a hierarchy, the indigenous construction of nature effectively reverses the Western hierarchy: humans are not seen as having any right or even ability to completely dominate nature and are instead, seen as its guardians.³⁶ Some indigenous stories refer to animals or natural features as

³⁴ WAITANGI TRIBUNAL, *KO AOTEAROA TĒNEI*, *supra* note 1, at 237.

³⁵ A more detailed explanation of this aspect of traditional Maori cosmology is summarized by the Waitangi Tribunal as:

The defining principle of that culture was kinship – the value through which the Hawaiians expressed relationships not only with each other but also with ancestors and with the physical and spiritual worlds. The sea, for example, was not an impersonal thing, but an ancestor deity. [The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right.] Kinship was . . . [the] revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. [These people had their own ways of producing and distributing wealth, and of maintaining social order.] . . . [They] emphasised individual responsibility to the collective at the expense of individual rights, yet [they] greatly valued individual reputation and standing. [They] . . . enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) [they] . . . also emphasised human responsibility to nurture and care for it (known in te ao Māori as *kaitiakitanga*).

Id. at 13.

³⁶ *Id.* at 269. *Kaitiakitanga*, or guardianship or stewardship, is one of the fundamental principles underlying Maori society, beliefs and practices, as noted above, in the quote accompanying n.34. Waitangi Tribunal reports abound with claimant evidence of their status and traditional practices as *kaitiaki* (guardians) in the past and continuing today. *Id.* at 252. For a summary of 'Kaitiakitanga today,' see *id.* at 244-48.

guardians of the people³⁷ or even as their masters.³⁸ One related belief is that if people do not behave in the right way with respect to nature then nature will take its revenge—for example, the animals might not offer themselves up for food or it might not rain when needed.³⁹ Unsurprisingly, such a relationship does not envisage humans owning nature in the Western, liberal sense.⁴⁰ As has been described in respect of Maori:

The kaitiaki relationship with the environment is not the transactional or proprietary kind of the Western market, and does not rest on ‘ownership’. Rather, like a family relationship, it is permanent and mandatory, binding both individuals and communities over generations and enduring as long as the community endures.⁴¹

This indigenous cosmology and construction of nature is so different from the liberal (Enlightenment) construction that it has frequently been thought of as unable to coexist with and within a liberal society. This is the case even though liberalism proclaims tolerance for the coexistence of different views within a society, especially religious views. For example, the Native American beliefs about their relationship with the environment constitute their religion, yet it has had difficulty being recognized as such or respected by American law.⁴² Indeed, legally, it has been considered acceptable to completely destroy

³⁷ See generally WAITANGI TRIBUNAL, TE KAHUI MAUNGA, *supra* note 32, at 95-98. The Waitangi Tribunal describes a *kaitiaki* [guardian] spirit who appeared in the form of a seagull. *Id.* at 97.

³⁸ See, e.g., WINONA LADUKE, *supra* note 6, at 51. Daniel Ashini, chief land rights negotiator for the Innu, describes the Innu religion as:

based on a belief in animal masters and other forest spirits. When we hunt we must show respect for animal masters We do not overhunt or overtrap areas where animals are scarce. If we do not show respect in this way, the animal masters get angry and punish us by not giving us any animals at a later date.

Id.

³⁹ THE WHANGANUI RIVER REPORT 1997, WAI 167, at 108 (1999), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68450539. For example, the Whanganui River is described as “an ancestral treasure handed down as a living being related to the people of the place . . . It governed their lives, and like a tupuna [ancestor], it served both to chastise and protect.” *Id.* at 46.

⁴⁰ See, e.g., evidence of Turama Hawira of the Maori tribe Ngati Rangi: “we are defined by our ancestral mountain, our ancestral rivers and our ancestral land. They are the source of our wellbeing - spiritually, intellectually and physically. We do not separate our wellbeing from the wellbeing of our taonga tupuna [natural treasures handed down from our ancestors]. Nor can we possess them. They do not belong to us - we belong to them.” *Ngati Rangi Trust v. Manawatu-Wanganui Reg'l Council* A67/2004 NZEnvC 172, 18 May 2004, at para 29. For a North American example: “The four leggeds came before the two leggeds. They are our older brothers, we come from them We cannot say that we own the buffalo, because he owns us.” LADUKE, *supra* note 6, at 135 (quoting Birgil Kills Straight, Oglala Lakota).

⁴¹ WAITANGI TRIBUNAL, KO AOTEAROA TĒNEL, *supra* note 1, at 269.

⁴² See, e.g., *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 95 F.2d 688, 692 (9th Cir. 1986), where the court in its initial decision describes eloquently the religious views held of the

the basis for the local Native American religion—including sacred sites—for the greater dominant social purpose of exploiting the resources of that environment.⁴³ This clash of cosmologies—between seeing the natural world as a slave or as kin—has made it difficult for those who hold one view to understand the other. Because the indigenous view has not been the dominant social view in most countries, it is the indigenous which has been forced to give way. The end result has been the omission of the indigenous cosmologies from most countries' laws.⁴⁴

Despite such difficulties, and despite a historical position that has similarly excluded Maori cosmology from New Zealand's law, New Zealand has in fact been recognizing Maori cosmology in law, particularly since the 1980s, and this recognition is increasing.⁴⁵ New Zealand laws and policies have recognized the rights of Maori to hold such views of their relationship with the environment and to have those relationships protected. This recognition has been undertaken in a wide variety of ways, from simply acknowledging that a view exists, to legally requiring it to be upheld, to implementing fundamental aspects of that view in law. Thus, for example, decision-makers might have to take such views into account and even uphold them in the face of competing interests. The rights of Maori to practice and fulfill their guardianship or *kaitiakitanga* role have been recognized through co-governance regimes of the natural estate. These forms of recognition are

Californian tribes in relation to the Siskiyou mountains in northwest California, and the practices they carried out there. The judge upheld the importance of protection of their religion under the First Amendment by refusing to allow a logging road to be built through their sacred sites, as it would “virtually destroy the Indians’ ability to practice their religion.” *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 95 F.2d. at 693. While this was upheld on first appeal, it was overturned by the Supreme Court in an opinion delivered by Justice Sandra Day O’Connor, on the basis that the First Amendment may protect religions from legal restriction on their exercise but construction of the proposed road did not violate the First Amendment regardless of its effect on the religious practices of the respondents because it compelled no behavior contrary to their belief. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441-42, 458 (1988).

⁴³ See, e.g., *Lyng*, 485 U.S. at 439-58 (1988). Note that, as a result of public interest in the result, Congress subsequently designated the area in question “wilderness” under the Wilderness Act, thereby preventing the road from being actually built. See Amy Bowers & Kristin Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Ass’n*, in *INDIAN LAW STORIES*, 513-15 (Carole Goldberg et al. eds., 2011). For more information about the decision, see *id.* at 489-533; see also WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 325-56 (2010).

⁴⁴ For another example, see Echo-Hawk, who also adopts this ‘clash of cosmologies’ approach in commenting on the US Supreme court case of *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955). ECHO-HAWK, *supra* note 43, at 359-79. The *Tee-Hit-Ton* case concerns the logging of the Alaskan Tongass forest. See *Tee-Hit-Ton Indians*, 348 U.S. 272 (1955). Echo-Hawk describes in detail the origin and modern manifestations of the different cosmologies involved in the dispute. See ECHO-HAWK, *supra* note 43, at 368-79.

⁴⁵ *Legal Research Guide: Maori Customary Law*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/maori-customary-law.php> (last updated Nov. 3, 2014).

addressed in the remainder of this paper, starting with how the need for recognition arose in New Zealand law and politics.

III. THE TREATY OF WAITANGI⁴⁶

A. *Creation and Status of the Treaty*

New Zealand was settled by the British and the basis for that settlement was the Treaty of Waitangi, signed between them and Maori in 1840.⁴⁷

That Treaty has formed the basis for the Maori rights recognized today, so it is essential to understand the Treaty itself and its legal and political significance before discussing the Maori rights that have ensued.

Prior to signing the Treaty of Waitangi the British government recognized the sovereignty of Maori over New Zealand.⁴⁸ This recognition placed Maori in a unique position as one of the very few indigenous peoples worldwide to have had their territorial sovereignty or land ownership acknowledged, as well as their independent sovereign statehood acknowledged by such a major world power. Ostensibly in order to protect Maori, British government decided to acquire, via a negotiated treaty of cession, part of New Zealand for the

⁴⁶ This section draws some information from my chapter “Reparations for Maori Grievances in Aotearoa New Zealand” contained in *Reparations for Indigenous Peoples*. See generally Catherine Iorns Magallanes, *Reparations for Maori Grievances in Aotearoa New Zealand*, in REPARATIONS FOR INDIGENOUS PEOPLES 523-64 (Federico Lenzerini ed., 2008). Further detail on this topic is provided in that chapter. A helpful online, government resource on the Treaty of Waitangi is provided at *Treaty of Waitangi*, NEW ZEALAND HISTORY: NGA KORERO A IPURANGI O AOTEAROA, <http://www.nzhistory.net.nz/politics/treaty-of-waitangi> (last visited Mar. 18, 2015). Copies of the Treaty may be viewed online at the NZ Archives site: *Treaty of Waitangi - Te Tiriti o Waitangi*, TE RYA MAHARA O TE KAWANATANGA ARCHIVES NEW ZEALAND, <http://archives.govt.nz/exhibitions/treaty> (last visited Mar. 18, 2015), with more information on its history provided there as well.

⁴⁷ Iorns, *supra* note 46, at 532. The Dutch Abel Tasman gave New Zealand its name in 1642; however, the explorer Captain James Cook provided Europeans with the most information about the country. *Id.* at 524 n.1. He made 3 visits in the late-1700s, mapped the coastline, and he took scientists to record information about the country. *Id.* “In the late-1700s and early-1800s, early contact with Maori was primarily with European traders (including whalers and sealers) and Christian missionaries.” *Id.* at 524. Maori-European contact was then seen as mutually advantageous. Notably, the “missionaries settled among Maori, teaching Christianity and teaching many Maori to speak English and to read and write in both Maori and English (using the Bible, in Maori and English, as the primary means of instruction).” *Id.* For further historical information on the Treaty, before and after its signing, see CLAUDIA ORANGE, *THE TREATY OF WAITANGI* 12 (Bridget Williams Books Ltd. 1987).

⁴⁸ *Declaration of Independence*, NEW ZEALAND HISTORY: NGA KORERO A IPURANGI O AOTEAROA, <http://www.nzhistory.net.nz/culture/declaration-of-independence-taming-the-frontier> (last visited Aug. 18, 2015). For an extract of Lord Glenelg’s reply (to Major-General Sir Richard Bourke, New South Wales, dated Downing Street, May 25, 1836), see *Declaration of Independence*, WAITANGI ASSOCIATES, <http://www.waitangi.co.nz/declarationindependence.htm> (last visited Sept. 30, 2014).

purposes of establishing a Crown colony, with the rest of the country governed by Maori.⁴⁹

The preamble of the English version of the Treaty of Waitangi recited the purposes for making the Treaty, including the protection of “the native population” from the “evil consequences” of the lack of laws governing settlers.⁵⁰ The first article stated that the Maori Chiefs cede sovereignty to the Queen of England.⁵¹ The second article guarantees to Maori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . . as long as it is their wish and desire to retain [them].”⁵² This article also included a British right of pre-emption over Maori lands—i.e., if they wanted to sell their lands, Maori could only sell them to the British Crown, not to settlers directly.⁵³ The third article grants to Maori all the rights and privileges of British subjects.⁵⁴

This English text was meant to be translated into Maori.⁵⁵ Unfortunately, the result was a Maori text which was essentially opposite in meaning to the English text: under the Maori *Tiriti*, Maori gave away only limited rights of government under Article 1 and retained sovereignty under Article 2.⁵⁶

⁴⁹ See Treaty of Waitangi, Lord Normanby's Brief, <http://www.treatyofwaitangi.net.nz/LordNormanbysBrief.html> (last visited Mar. 22, 2015). Lord Normanby's issued instructions to Captain Hobson that explicitly acknowledged “New Zealand as a Sovereign and independent State” and that “the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.” *Id.* Captain Hobson was authorized to acquire authority over the whole or any part of those Islands, which they then be willing to place under Her Majesty's Dominion. *Id.* Any negotiations for land were to be conducted on the “principles of sincerity, justice, and good faith,” and the “official protector” was required to ensure that Maori did not “enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves” such as the sale of lands “the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence.” *Id.*

⁵⁰ *Read the Treaty*, NEW ZEALAND HISTORY: NGA KORERO A IPURANGI O AOTEAROA, <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text> (last updated Dec. 20, 2012).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ ORANGE, *supra* note 47, at 39. It has been noted that the most experienced translators were unavailable at short notice, so this translation was undertaken by a missionary and his son who both spoke Maori but who were not experienced at translating, and likely made mistakes. *Id.* Yet it has also been suggested that the difference was not accidental but deliberate “in order to secure Maori agreement.” *Id.* at 41.

⁵⁶ *Id.* at 40. In the first article, the Maori version of the Treaty stated that the Chiefs ceded to the Queen only government, not sovereignty. *Id.* The Maori word chosen is “*kawanatanga*,” which refers literally to governorship—the term comes from “*kawana*,” which is a Maori transliteration of the English word “governor.” *Id.* at 41. Maori knew this term both from reference to the governors of the Australian colonies and from the Bible (Pontius Pilate was a *kawana*). *Id.* This is to be contrasted with reference to kings and their authority (“*kingitanga*”) or chieftanship (“*rangatiratanga*”). *Id.* In missionary-Maori “*rangatiratanga*” was used to refer to the kingdom of God. In the 1835 Declaration of Independence, “*rangatiratanga*” was used to refer to sovereignty. *Id.* “It was also used in an 1840 notice by Captain Hobson to refer to the sovereignty of the Queen.” Iorns, *supra* note 46, at 530.

(Article 3 remained the same, granting to Maori all the rights and privileges of British subjects.) Further, it was not stated in the Treaty how the government would relate to Maori authority over themselves. For example, British government would clearly extend over settlers and include authority over settler crimes against Maori, and probably Maori crimes against settlers. But it did not clearly extend British authority to govern relationships among and between Maori, and Maori understood that it would not do so.⁵⁷

In addition, the English reference to the right of “pre-emption” was not translated into Maori. The Maori text only referred to the purchase and sale of land that Maori was willing to sell; it did not refer to the Crown's exclusive right to buy from Maori. Indeed, the reference in Article 3 to Maori having the rights of British subjects would suggest that they had the same right as any other landowner to sell to whomever they wished.

At a gathering of chiefs on February 5, 1840, the British negotiator, Captain Hobson, with the assistance of the same person that wrote the Maori version, effectively presented only the Maori version, reading out the Maori text and emphasizing the protection of Maori by the Queen, both by having the authority to control British subjects and by preventing entrance by other foreign powers.⁵⁸ The British concept of the cession of sovereignty was not described. The Treaty was described as “an act of love” towards Maori by the Queen, and as creating a spiritual equality, which was particularly relevant for those who had converted to Christianity. An additional promise was made in response to questioning from Maori, that “the several faiths of England, of the Wesleyans, of Rome and also the Maori custom, shall alike be protected.”⁵⁹

Maori believed the promises of the benefits under the Treaty and the majority accordingly signed the Treaty. As each signed, Hobson shook their hand and proclaimed in Maori “We are [now] one people.”⁶⁰ Unfortunately, Hobson was unaware of the differences and believed they were all of the same understanding. However, it is clear that the Crown and Maori had completely different understandings of the contents of the Treaty and the historical

In the second article, whereas the English version refers to Maori retaining “full exclusive and undisturbed possession” of their lands and resources, the Maori version refers to Maori retaining “*te tino rangatiratanga*” over their lands, villages and treasures. ORANGE, *supra* note 47, at 40. This phrase refers to the highest or absolute chieftainship, and would be the best Maori term to use to refer to sovereignty. *Id.* at 59.

⁵⁷ ALAN WARD, A SHOW OF JUSTICE: RACIAL AMALGAMATION IN NINETEENTH CENTURY NEW ZEALAND 46 (1995). In April 1840, Hobson circulated an official notice to northern chiefs, which was translated into Maori. It guaranteed that the assurances given at Waitangi would be honored: that Hobson would “ever strive to assure unto you the customs and all the possessions belonging to Maori.” *Id.* at 45.

⁵⁸ JAMES BONWICK, GEOGRAPHY OF AUSTRALIA AND NEW ZEALAND 184 (3d ed. 1856).

⁵⁹ W. COLENZO, THE AUTHENTIC AND GENUINE HISTORY OF THE SIGNING OF THE TREATY OF WAITRANGI, NEW ZEALAND, FEBRUARY 5 & 6, 1840, at 31-32 (1890).

⁶⁰ *Id.* at 35; see also Iorns, *supra* note 46, at 531. After this signing, many more signatures were obtained around the country and Hobson proclaimed sovereignty over New Zealand in May 1840. English and Maori signed copies of the Treaty were sent back into the Colonial Office in England. Ironically, the Maori copy was said to be the Treaty and the English copy purported to be a direct translation of it. Iorns, *supra* note 46, at 532.

evidence suggests that only the missionaries clearly knew of the differences between the versions at the time.⁶¹

The Privy Council has ruled that the Treaty of Waitangi is a valid treaty of cession of sovereignty.⁶² Thus, Maori were legally considered capable of holding sovereignty and ceding it to another power but, once ceded, Maori are no longer recognized as a sovereign power and cannot enforce the Treaty in international legal fora. Unfortunately for Maori, under the constitutional system of parliamentary sovereignty adopted in Aotearoa New Zealand, and pursuant to the dualist approach to international law, the Treaty of Waitangi is unable to be enforced directly in New Zealand courts.⁶³ The only way to enforce any rights accorded under the Treaty are where those rights are enshrined in domestic legislation by the New Zealand Parliament.⁶⁴ Thus, Maori have no enforceable legal forum to take claims of breaches of the Treaty itself, even to enforce the English-version guarantees to Maori.⁶⁵ Notably, this approach only takes account of the English text of the Treaty; it has ignored the Maori text. Under the Maori text, Maori would have retained sovereignty and thus still, in theory, possess international standing. “Accordingly, Maori continue to argue for the recognition of the Maori text and for a re-interpretation of the standard legal approach.”⁶⁶

Despite the Treaty being unable to be directly enforced without legislative reference, even without such a reference New Zealand courts have upheld the

⁶¹ But the British negotiator Captain Hobson was apparently unaware of these differences; only the missionary translators would have known. *Id.* The missionaries who did the translation certainly believed that Maori would be better off under British sovereignty and that it was their task “to help influence the Maori people to surrender sovereignty.” *Id.* at 39.

⁶² *Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] NZLR 590, AC 308 (PC).

⁶³ *Id.* at 590-97; see also *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) 623.

⁶⁴ *Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] NZLR 590, AC 308 (PC); see also *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) 623.

⁶⁵ As discussed below, even the English text has been breached, particularly in respect of the guarantees given to Maori about what they would retain under Article 2. If the English text cession of sovereignty is relied upon by the New Zealand government to uphold its constitutional legitimacy (via Article 1), it is unfair to Maori that the enforceability of even the English guarantees to Maori is denied under both domestic and international law.

⁶⁶ CATHERINE IORNS MAGALLANES, REPORT ON THE TREATY OF WAITANGI, VICTORIA UNIVERSITY OF WELLINGTON, LEGAL RESEARCH PAPER NO. 492012, 6 (Nov. 1, 2009), available at <http://ssrn.com/abstract=2175890>. “[T]his approach also ignores the fact that some Maori chiefs deliberately did not sign the Treaty because they rejected British rule. They question the legality of the acquisition of New Zealand by Britain and Maori argue that they should be able to maintain their own governmental authority.” *Id.*

I note that the United Nations Special Rapporteur on Indigenous Peoples confirm the claims of Maori in relation to Treaty validity and enforcement. Miguel Alfonso Martínez, Special Rapporteur, *Human Rights of Indigenous People, Comm'n on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1999/20 at 42-43 (June 22, 1999). The Special Rapporteur has expressed the opinion that treaties with indigenous peoples, such as the Treaty of Waitangi, “maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.” *Id.* He adds that he “has not found any sound legal argument to sustain the argument that [indigenous peoples] have lost their international juridical status as nations/peoples.” *Id.* at 265.

Treaty as having an important status as a founding constitutional document, such that it is “perceivable, whether or not enforceable, in law.”⁶⁷ This status has enabled it to pervade other areas of public and private law such as statutory interpretation,⁶⁸ administrative law,⁶⁹ and family law.⁷⁰ Importantly, this approach has assisted with reparations for existing Maori grievances⁷¹ plus it is a useful method for ensuring that the Treaty principles continue to be respected in relation to current policy and practice, thereby resolving current difficulties before they result in major grievances. Under the New Zealand doctrine of parliamentary sovereignty, this is as far as the courts are able to go where the Treaty is not directly incorporated in statute.

B. Breaches and Promises of the Treaty

In the 1840s and 1850s, British government was not strong within New Zealand, and Maori still largely governed themselves.⁷² This was particularly so for Maori who had not signed the Treaty and considered themselves not bound by it. Maori were dominant numerically and could have ousted the British should they have chosen to do so. There were many incidents and activities that caused Maori concern about the intentions of both settlers and

⁶⁷ *Huakina Development Trust v. Waikato Valley Auth.* [1987] 2 NZLR 188 (HC) 206. The court held that “the Treaty was essential to the foundation of New Zealand” and “[t]here can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.” *Id.* at 210.

⁶⁸ See, e.g., *Barton-Prescott v. Director-General of Social Welfare* [1997] 3 NZLR 179 (HC). The New Zealand Courts have determined that the Treaty can be relevant to the task of statutory interpretation, where the Treaty may be used as an extrinsic aid to help choose the correct interpretation to be given to the provisions in question. *Id.* This approach suggests that the court chooses the interpretation which best upholds the principles of the Treaty. *Id.*

⁶⁹ For example, in *Attorney-General v. New Zealand Maori Council* [1991] 2 NZLR 129 (CA)—known as the *Radio Frequencies* case—the Court of Appeal held that the Crown was required under the Treaty of Waitangi to protect and promote the Maori language and culture and thus to consider this when making its decision to allocate radio frequencies. *Id.* at 139-40. Thus, the protection of the Treaty was considered to be a mandatory relevant consideration in administrative decision-making. *Id.* This approach was maintained in the *Privatisation of Radio New Zealand case. New Zealand Maori Council v. Attorney-General* [1996] 3 NZLR 140 (CA). The ‘mandatory relevant consideration’ requirement has been applied in a range of other situations, including fishing rights. See, e.g., *New Zealand Fed’n of Commercial Fishermen Inc. v. Minister of Fisheries* (unreported) HC Wellington CP237/95, 24 April 1997 (N.Z.).

⁷⁰ See, e.g., *Barton-Prescott*, 3 NZLR 179 (HC). This case challenged the method of decision-making under the Guardianship Act 1968 concerning the adoption of a Maori child. *Id.* at 181-82. Even though the Treaty was not mentioned in the relevant legislation, the court agreed that Maori interests and culture needed to be considered in the decision, akin to a mandatory relevant consideration under administrative law. *Id.* at 184-85.

⁷¹ For example, in the *Radio Frequencies* case, *Attorney-General*, 2 NZLR at 139-40, the Minister was required to wait for a Waitangi Tribunal report on consistency of the frequency allocation process with the principles of the Treaty before the Minister allocated the frequencies. *Id.* This was considered an important part of the resolution of the grievance in relation to the survival of the Maori language. *Id.* at 135.

⁷² See ORANGE, *supra* note 47, at 112-13, 123, 139-40.

the British authorities, especially in relation to land restrictions and confiscation. Each time Maori expressed concerns, they were reassured by the British authorities that the guarantees in the Treaty would be honored and that Maori land and resources would be protected.⁷³ Notably, it was the Maori version of the Treaty that was promised, even when the missionaries doing the translating knew they were actively lying to Maori.⁷⁴ All officials, missionaries, and settlers wanted to avoid a Maori uprising because Maori would clearly win at that stage.⁷⁵

In 1852, New Zealand was granted self-government, but this was a settler government without participation from Maori; Maori continued to maintain their autonomy.⁷⁶ In the 1860s, the settlers maintained a numerical majority in the country and Britain devolved more control over Maori affairs to the settler government. The settler government and Maori went to war over violations of the Treaty, particularly in relation to land uses and sales.⁷⁷ Upon winning the war, the government confiscated large amounts of Maori land.⁷⁸

It was not until 1865 that the discrepancies between the English and Maori texts were understood or explicitly considered by the government.⁷⁹ However, despite now knowing that Maori understanding was very different, the government merely retranslated the English version of the Treaty into Maori and circulated that new text among Maori as the official Treaty.⁸⁰ Maori were forced to accept the settler government's authority over them—even where they had not signed the Treaty—and the government continued to pass laws governing all aspects of Maori affairs. Not only did the government continue to breach the Maori text, they also breached the English text guarantees of possession of their lands, estates, forests, and fisheries.⁸¹

⁷³ ORANGE, *supra* note 47, 120-21. An example of the reassurances given by the NZ-based officials is that made in 1844 at a major meeting in the north in response to Maori challenges to displays of British sovereignty. *Id.* The Governor, officials and prominent missionaries (including Williams, the translator at Waitangi) emphasized the reasons the treaty was signed and the protections that Maori received. *Id.* Cession of sovereignty was played down and retention of *rangatiratanga* was emphasized. *Id.* Hundreds of copies of the Maori version of the Treaty were distributed with promises that it would be upheld. *Id.* at 121.

⁷⁴ *Id.* at 122. Years afterwards, the missionary who had been the translator at Waitangi admitted lying to Maori about the extent of the transfer of sovereignty under the Treaty in order to keep the peace. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 139; see also TREATY OF WAITANGI QUESTIONS AND ANSWERS 16 (Network Waitangi 2012), available at <http://now.org/nz/files/QandA.pdf>.

⁷⁷ ORANGE, *supra* note 47, at 140-41; see also TREATY OF WAITANGI QUESTIONS AND ANSWERS, *supra* note 76, at 48.

⁷⁸ See ORANGE, *supra* note 47, at 228.

⁷⁹ *Id.* at 182. There was much dissent among government officials—including the then Attorney-General, the British Home Office and Secretary—who all argued in favour of protecting Maori rights and argued that the settler interpretations were breaches of the Treaty. *Id.* This prompted a NZ Parliamentary consideration of the Treaty in 1865. *Id.* The Maori text was translated into English for this Parliamentary consideration. *Id.* at 182-83.

⁸⁰ *Id.* at 182-83.

⁸¹ *Id.* at 189-204.

By 1900 Maori had lost most of their land, their natural resource uses were restricted, as was their autonomy. Throughout the first half of the Twentieth Century Maori were encouraged to assimilate with the rest of New Zealand society.⁸² Many Maori agreed that this was the path to Maori advancement and advocated that government and politics become more relevant to Maori through Maori participation. In the 1950s an annual commemoration of the Treaty signing commenced with the theme of forging one nation.⁸³ Maori participated in the Second World War and afterwards also participated in the increased opportunities for work in the towns and cities. There was increasing intermingling and intermarriage between the races and increasing belief on both sides that Maori were being assimilated and that that would be good for Maori. Unfortunately, not all Maori agreed with assimilation, and government policies and legislation of the day were still contravening the Treaty. It was known that Maori had grievances about the upholding of the Treaty, but most people thought that they had been addressed (with some earlier settlements) and would go away with assimilation, when Maori became 'better off'. These issues only began to be better addressed in the 1970s and 1980s.

In the 1960s and 1970s, race consciousness gained particularly from the U.S. civil rights movement led to Maori disquiet and protest at their social and economic conditions⁸⁴ as well as the breaches of the Treaty and their lack of self-determination.⁸⁵ One protest march in particular over the loss of Maori land, which attracted 30,000 marchers, was unable to be ignored and reinforced a government promise to enquire into Maori grievances about breaches of the Treaty.⁸⁶ This promise was upheld and gradually led to a transformation in New Zealand law, policy, and practice of the respect for the Treaty and for Maori and their culture. The current recognition of Maori cosmology in New Zealand law and practice stemmed from these events in the 1970s.

IV. UPHOLDING MAORI COSMOLOGY IN NEW ZEALAND LAW

Maori cosmology has been incorporated or upheld in New Zealand law in various ways, including via Court decisions, legislative incorporation in general statutes, and negotiated grievance settlements between Maori and the government (or 'the Crown'). All methods of upholding Maori cosmology in law stem from the Waitangi Tribunal and its reports on the breaches of the Treaty of Waitangi. Therefore, before addressing these methods, the Tribunal and its reports, particularly in relation to Maori cosmology, are addressed first.

⁸² ORANGE, *supra* note 47, at 228.

⁸³ *Id.* at 241.

⁸⁴ *See, e.g.*, ANDREW SHARP, JUSTICE AND THE MAORI: MAORI CLAIMS IN NEW ZEALAND POLITICAL ARGUMENT IN THE 1980s 5-8 (1990).

⁸⁵ *See* ORANGE, *supra* note 47, at 244-45.

⁸⁶ *See* SHARP, *supra* note 84, at 8; *see also* GISELLE BYRNES, THE WAITANGI TRIBUNAL AND NEW ZEALAND HISTORY 35 (2004).

*A. The Waitangi Tribunal*⁸⁷

The Waitangi Tribunal was established in 1975 to determine whether NZ government action breached the Treaty of Waitangi and to make recommendations for redress for any breaches.⁸⁸ Initially, the Tribunal was established to inquire into complaints made only about current and future Crown actions, but, in 1986, its jurisdiction was expanded to also inquire into complaints about historical grievances back to 1840.⁸⁹ The Tribunal issues comprehensive reports on the interpretation of the relevant Treaty duties, on the surrounding facts, on determinations of any breaches, and recommendations to the Crown for redress or reparations for those breaches.⁹⁰

Over the years the Tribunal has produced many significant reports and positive results for Maori.⁹¹ Notably, the Tribunal has facilitated significant

⁸⁷ For more detailed information on the Tribunal, see generally WAITANGI TRIBUNAL: TE ROPU WHAKAMAN I TE TIRITI O WAITANGI, <http://www.justice.govt.nz/tribunals/waitangi-tribunal> (last visited Mar. 19, 2015); Waitangi Tribunal, THE WAITANGI TRIBUNAL (Janine Hayward & Nicola R. Whéen eds., 2004); ALAN WARD, AN UNSETTLED HISTORY: TREATY CLAIMS IN NEW ZEALAND TODAY (1999); BYRNES, *supra* note 86.

⁸⁸ TREATY OF WAITANGI ACT 1975 § 6(1, 3) (N.Z.), *available at* <http://www.legislation.govt.nz>. The Tribunal currently consists of up to seventeen members, appointed with “regard to the partnership between the two parties to the Treaty.” *Id.* at § 4(2A)(a). In practice, approximately half of the Tribunal members are Maori and the members’ backgrounds range widely, including different professional groups as well as political views. The number of members started small and was increased in size as the workload increased.

⁸⁹ Treaty of Waitangi Amendment Act 1985 (1985 No. 148), § 3(1), amending § 6(1) Treaty of Waitangi Act 1975.

⁹⁰ *See* Treaty of Waitangi (State Enterprises) Act 1988, § 8B (N.Z.). These recommendations are not binding upon government, except for some decisions made in relation to particular types of Crown owned land. *Id.*

⁹¹ Claims for a wide range of matters have been submitted to the Tribunal and many of these have been upheld and protected. *See, e.g.*, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE TE REO MAORI CLAIM, WAI 11, at 1 (1993) (protecting the Maori language); WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON CLAIMS CONCERNING THE ALLOCATION OF RADIO FREQUENCIES, WAI 26, WAI 150 (1990) (an interest in broadcasting frequencies); WAITANGI TRIBUNAL, PRELIMINARY REPORT ON THE TE ARAWA REPRESENTATIVE GEOTHERMAL RESOURCE CLAIMS (1993); WAITANGI TRIBUNAL, NGAWHA GEOTHERMAL RESOURCE REPORT, WAI 304 (1993), *available at* https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68348162 (representation in government decision-making; rivers and lakes; geothermal energy); WAITANGI TRIBUNAL, THE PETROLEUM REPORT, WAI 796, at 1 (2003), *available at* https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68187177 (petroleum reserves); WAITANGI TRIBUNAL, AHU MOANA: THE AQUACULTURE AND MARINE FARMING REPORT, WAI 953, at 1 (2002), *available at* https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68004143 (modern aquaculture); WAITANGI TRIBUNAL, THE NAPIER HOSPITAL AND HEALTH SERVICES REPORT, WAI 692, at xxiii (2001), *available at* https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68596252 (equity in healthcare provision); WAITANGI TRIBUNAL, THE WANANGA CAPITAL ESTABLISHMENT REPORT, WAI 718 (1999), *available at* https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68595986 (education funding); WAITANGI TRIBUNAL, KO AOTEAROA TĒNEL, *supra* note 1 (intellectual property and governance authority over all of New Zealand’s indigenous flora and fauna and the natural environment).

reparations for Maori grievances in relation to both current and historical breaches of the Treaty. Through the Tribunal's substantive findings on Treaty guarantees and breaches, as well as the procedures used, the Tribunal has upheld equality of respect, for both Treaty partners and, most importantly, for Maori culture.

The findings of the Waitangi Tribunal relevant to Maori cosmology are numerous and this is addressed in every report. For example, every report into a historical land or resource claim includes a summary of the evidence about the claimants' (ancestral) relationship with their traditional territories and natural resources.⁹² Their legends and the stories of their gods are recited and the maintenance of their connections with the natural world even after contact and confiscation is discussed.⁹³ In respect of any breaches, the loss of Maori governance authority over the lands and resources in question is discussed in terms of the loss of relationships more than the loss of resource value. It is thus perhaps unsurprising that the recommended remedies are ones that restore the relationship rather than simply compensate for an equivalent monetary loss.

In some reports, violations of Maori cosmology are considered breaches of the Treaty in their own right.⁹⁴ For example, because water has its own spirit and life force, it needs to be carefully maintained so as not to diminish or lose that spirit.⁹⁵ Thus, for example, Maori have strict rules on not mixing human waste with water, which might be a source of food or drinking water.⁹⁶ Even if it might be in quantities which modern science says will be diluted and dispersed and thus rendered clean when measured scientifically, the mixing of the two spirits—the unclean with the clean—diminishes the life force of the

An example of a claim that the Tribunal considered not covered by the Treaty or the right to development under it in relation to the modern kiwifruit export trade. WAITANGI TRIBUNAL, KIWIFRUIT MARKETING REPORT, WAI 449 (1995), available at https://forms.justice.govt.nz/search/WI/reports/reportSummary.html?reportId=wt_DOC_68337677.

⁹² For more information on the receipt, evaluation and reporting of historical evidence by the Waitangi Tribunal, see, e.g., Grant Phillipson, *Talking and Writing History: Evidence to the Waitangi Tribunal*, in THE WAITANGI TRIBUNAL (Janine Hayward & Nicola Wheen eds.), *supra* note 87, at 41-52. For a discussion of the Tribunal's reports into land claims, see Tom Bennion *The Lands Reports*, in THE WAITANGI TRIBUNAL, *supra* note 87, at 67-82.

⁹³ See, e.g., Nicola Wheen & Jacinta Ruru, *The Environmental Reports*, in THE WAITANGI TRIBUNAL, *supra* note 87, at 100-02.

⁹⁴ See WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, WAI 6 (1983), available at https://forms.justice.govt.nz/search/WI/reports/reportSummary.html?reportId=wt_DOC_68496669 (planned Motinui waste outfall was shelved as a result of the report); WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE KAITUNA RIVER CLAIM, WAI 4 (1984), available at https://forms.justice.govt.nz/search/WI/reports/reportSummary.html?reportId=wt_DOC_68496990 (proposal to build a pipeline to take untreated sewage from a large town to a river was similarly abandoned); WAITANGI TRIBUNAL, TE IKA WHENUA RIVERS REPORT, WAI 212, at 59-60 (1998), available at https://forms.justice.govt.nz/search/WI/reports/reportSummary.html?reportId=wt_DOC_68382633.

⁹⁵ This has been previously discussed in Part II. See *supra* note 32.

⁹⁶ See GISBORNE DISTRICT COUNCIL, TANGATA WHENUA PERSPECTIVES OF WASTEWATER 10 (2000).

clean, life-giving water. Thus, the discharge of a town's sewage into an ancestral river is considered a breach of the tribe's cultural relationship with the river and thus of the Crown's duties to protect Maori interests under the Treaty. Two early Tribunal reports into such matters effectively forced the relevant New Zealand authorities to change their proposals for sewage treatment and discharge.⁹⁷ Notably, the spirit of a river can be adversely affected by forcing it to mix with the spirit of another river, even where a scientifically-recognized pollutant is not involved. So, for example, a proposal to divert waters from one river through a hydro-electric power station and discharge it into another river extinguished the life force of both rivers (quite apart from the consequent destruction of eel habitat, shellfish beds, and the like).⁹⁸ Such violations of Maori cosmology damaged the tribe's authority and prestige, which was further diminished by the loss of their rights for control and responsibilities over the resources.

Key to determining breaches and making recommendations has been the Tribunal's approach to interpretation of the Treaty, given the difficulty in reconciling the two texts.⁹⁹ While the Tribunal has upheld the cession of

⁹⁷ See WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, *supra* note 94 (planned Motinui waste outfall was shelved as a result of the report); WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE KAITUNA RIVER CLAIM, *supra* note 94 (proposal to build a pipeline to take untreated sewage from a large town to a river was similarly abandoned).

⁹⁸ See generally WAITANGI TRIBUNAL, TE IKA WHENUA RIVERS REPORT, *supra* note 94, at 59-60.

⁹⁹ TREATY OF WAITANGI ACT 1975, § 6(1). The Waitangi Tribunal has exclusive jurisdiction to determine whether the Crown behavior complained of is or is not in breach of "the principles of the Treaty." *Id.* While this does not stipulate reference to the provisions of the Treaty, the Act includes both versions of the Treaty as appendices. In exercising its functions under the Act, the Tribunal has the "exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them." *Id.* at § 5(2). The Tribunal thus has had to consider how to reconcile the two texts and has paid considerable attention to defining the Treaty principles so as to provide meaningful standards by which to judge Crown action. See generally, e.g., WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, *supra* note 94, at 45-52.

The Waitangi Tribunal has determined the principles of the Treaty by first looking at the words used in the texts and "the evidence of the surrounding sentiments, including the parties purposes and goals" at the time. WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM, WAI 22, at 388 (1988). It considered in detail the precise meanings of the Maori words, in order to elucidate the differences. It adopted McNair's rules on the equality of texts of bilingual treaties as well as the principle that treaties should be interpreted against the power that drafted them—the rule of *contra proferentem*. WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, *supra* note 94, at 49. It took the approach that:

A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the treaty transcends the sum total of its component written words and puts literal or narrow interpretations out of place.

Id. at 47. The Tribunal has accordingly taken a broad approach to both texts, focusing on the spirit of the Treaty to be derived from the texts and their surrounding circumstances.

sovereignty contained in the English version, giving the government the right to make laws for the country, the Tribunal also considers that the principle of exchange is fundamental, whereby cession of Maori sovereignty was made in exchange for the protection of Maori authority over their lands and resources—*rangatiratanga* (chieftainship)—and thus protection of Maori interests.¹⁰⁰ There are numerous other key relevant principles,¹⁰¹ including the principle of partnership,¹⁰² a fiduciary duty to act fairly,¹⁰³ and Maori autonomy or self-management.¹⁰⁴ For example, one report notes:

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the *mana* [authority] to control

¹⁰⁰ See, e.g., WAITANGI TRIBUNAL, TURANGI TOWNSHIP REMEDIES REPORT WAI 84, at 12, (1998), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68455312. One early report states that the government must “accord the Maori interest an appropriate priority,” WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, *supra* note 94, at 23; another states that the Crown must “actively protect” these interests, WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MANUKAU CLAIM, WAI 8, at 95 (1985), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68495207. One report proposed a hierarchy of interests in natural resources: first is the Crown’s duty to govern and manage resources in the public interest, second comes the tribal interest, and third come those with commercial or recreational interests. WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON CLAIMS CONCERNING THE ALLOCATION OF RADIO FREQUENCIES, WAI 26 & 150, *supra* note 91.

¹⁰¹ Other principles not mentioned here are: the principle of mutual benefit, whereby both parties should gain from the Treaty; the principle of consultation, whereby the Crown should consult the other Treaty partner before making important decisions which concern them; the right of redress for past breaches; the right of development (*see generally* WAITANGI TRIBUNAL, TE IKA WHENUA RIVERS REPORT, *supra* note 94, at 134; WAITANGI TRIBUNAL, NGATI AWA RAUPATU REPORT, WAI 46 (1999), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68458811; WAITANGI TRIBUNAL, THE RADIO SPECTRUM MANAGEMENT AND DEVELOPMENT FINAL REPORT, WAI 776 (1999), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68205950; and biculturalism (*see, e.g.*, WAITANGI TRIBUNAL, THE WANANGA CAPITAL ESTABLISHMENT REPORT, *supra* note 91 at xi). These principles were determined in response to claims as they arose. It is reasonable to expect that new grievances will arise in the future, thus enabling the Tribunal to develop new principles in order to address them.

¹⁰² Whereby the partners “act toward each other reasonably and with the utmost good faith.” WAITANGI TRIBUNAL, THE NGAI TAHU REPORT 1991, WAI 27, at 242-43 (1991), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68476209. In another report partnership was said to be founded upon “reasonableness, mutual co-operation and trust.” WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MAORI ELECTORAL OPTION REPORT, WAI 413, at 15 (1994), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68338112.

¹⁰³ WAITANGI TRIBUNAL, INTERIM REPORT ON THE RANGITAIKI AND WHEAO RIVERS CLAIM WAI 212, at 4 (1993), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68383846.

¹⁰⁴ WAITANGI TRIBUNAL, TE WHANAU O WAIPAREIRA REPORT, WAI 414, at 22 (1998), available at https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68641192.

them and then in accordance with their own customs and having regard to their own cultural preferences.¹⁰⁵

The Tribunal's recommendations in relation to traditional territories and resources are thus aimed at recognizing and restoring the claimants' spiritual, cultural and/or traditional associations with them—especially in relation to spiritually and culturally significant sites and resources—as well as to recognizing and restoring their cultural authority. There are a wide range of particular measures recommended in order to achieve this, from recognizing traditional Maori names instead of solely the English names, to restoring tribal control and governance authority—sometimes shared, sometimes separate—to altering legislation to accord Maori cosmology and interests recognition and even priority over other interests.¹⁰⁶

The Tribunal, through its reports, has also provided a valuable public education function. The thorough reports have assisted wider public understanding of Maori grievances, their justification, and their need for reparation, and has thus facilitated public acceptance of any remedies eventually awarded.¹⁰⁷ For example, it has led to the development of a modern negotiated grievance settlement process whereby significant amounts of land and resources, financial and substantive have been transferred from the Crown to Maori tribes, as well as the transfer of governance functions of some of these resources and other measures designed to restore cultural authority and tribal relationships with their natural world, as recommended by the Tribunal.¹⁰⁸ Importantly, the publicity has produced wider public acceptance of the need not only to redress the past grievances but also to better respect and uphold the Treaty in current law and practice, so as to not produce future grievances. This has led to the explicit incorporation of reference to the Treaty and Maori cosmology in a wide range of legislation as well as the consideration of these matters by courts even where not legislatively incorporated.

¹⁰⁵ WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTINUI-WAITARA CLAIM, *supra* note 94, at 22 (emphasis added).

¹⁰⁶ The most notable example of recommendations of these latter aspects is the 2011 report into the governance of all of New Zealand's indigenous flora and fauna and the natural environment. WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI, *supra* note 1, at 2.

¹⁰⁷ See Andrew Sharp, *The Trajectory of the Waitangi Tribunal*, in THE WAITANGI TRIBUNAL, *supra* note 87, at 195-206. Perhaps the most important and least understood benefit has been what one commentator refers to as the de-politicization and depersonalization of race politics. *Id.* at 197. The Tribunal has managed to handle claims calmly, without political hyperbole, and “out of the inflaming public eye.” *Id.* at 196. The process itself ensures that grievances are seen to be against the Crown as opposed to against individual New Zealanders. *Id.* These aspects have ensured a more honest resolution of Maori grievances than might otherwise have been the case. *Id.* at 196-97.

¹⁰⁸ See *infra* sec. C, nn.175-94 and accompanying text.

B. Maori Cosmology Recognized in General Law

Largely as a result of the Waitangi Tribunal findings, the New Zealand courts and legislature both picked up on the need to better recognize Maori interests in law. Beginning in the 1980s, significant changes were made whereby Maori cosmology was given much greater recognition and prominence in both legislation and judgments. For example, in 1987, the courts required the Maori spiritual relationship with the environment to be considered in making water management decisions, even though the legislation did not specifically provide for this.¹⁰⁹ This decision resulted in an application to discharge animal effluent into a river being reviewed, because of the violation of relevant Maori spiritual interests.¹¹⁰ Another decision held that, in light of this greater knowledge about Maori interests and the importance of the Treaty of Waitangi, “the relationship of Maori with their ancestral land”¹¹¹ needed to be given greater recognition in environmental decision-making, and even “primacy” as a matter of national importance when balancing competing factors.¹¹²

From 1986, the need to consider Maori culture and the principles of the Treaty of Waitangi was made a core part of the development of all legislation, and it became part of policy development requirements within the executive.¹¹³ One result was the inclusion in the Conservation Act 1987 of an

¹⁰⁹ See *Huakina Dev. Trust v. Waikato Valley Authority* [1987] 2 NZLR 188 (HC). The decision acknowledged that, even though the Treaty was not enforceable in its own right, it had status as a foundational constitutional document and needed to be upheld as far as possible. The Judge held that Maori spiritual relationships with water needed to be considered:

[T]he Water Act is so deficient in guidelines that the Court has to resort to extrinsic aids. In this case those aids include the Treaty of Waitangi, the Treaty of Waitangi Act, the Waitangi Tribunal interpretations of the Treaty and the Planning Act. Through all those agencies a common theme is found. It follows that, in an application for the grant of a water right under ss 21 and 24 of the Water Act, the primary tribunal and the Planning Tribunal cannot rule inadmissible evidence which tends to establish the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori people. In terms of s 24(4) that evidence must be directed to establishing that the grant of the application would prejudice the objector’s interests in the spiritual, cultural and traditional relationships of the particular and significant group of Maori people with natural water or the interests of the public generally in those relationships.

Id. at 223.

¹¹⁰ *Id.* at 191.

¹¹¹ TOWN AND COUNTRY PLANNING ACT 1977, § 3(1)(g) (N.Z.).

¹¹² *Env’l Def. Soc’y, Inc. v. Mangonui Cnty. Council* [1989] 3 NZLR 257 (CA).

¹¹³ PHILIP JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 82 ¶ 4.9.4. (Brokers, 4th ed. 2014). Today any legislation proposal must specify whether the proposal complies with the principles of the Treaty of Waitangi and provide details of any relevant implications for compliance. See Cabinet Manual 2008, § 7.60-61 (NA) (N.Z.). A significant decision by New Zealand’s highest court in 1987 upheld the Waitangi Tribunal’s interpretation of the principles of the Treaty and thus the relevant duties upon parliament and

overarching rule that “This Act shall be so interpreted and administered to give effect to the principles of Treaty of Waitangi.”¹¹⁴ To “give effect” to the principles of the Treaty is still one of the strongest requirements in any New Zealand legislation, and it is significant that it is in respect of the management of the whole of the conservation estate.¹¹⁵

The next major legislative incorporation was in the Resource Management Act 1991, which governs environmental management in New Zealand.¹¹⁶ Its overriding purpose is “to promote the sustainable management of natural and physical resources,” which is widely defined.¹¹⁷ There is a hierarchy of provisions with the overarching decision-making guidance up front. Significantly, “matters of national importance” which all decision-makers under the Act¹¹⁸ must “recognise and provide for,” include “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu* [sacred sites], and other *taonga* [treasured things].”¹¹⁹ In addition, all decision-makers must “have particular regard to” “*kaitiakitanga*,” which is defined in the Act as “the exercise of guardianship by the *tangata whenua* [tribe from an area] of an area in accordance with *tikanga Maori* [Maori protocol] in relation to natural and physical resources; and includes the ethic of stewardship.”¹²⁰ Finally, a third layer of provision for the protection of Maori

the government to uphold them. See *New Zealand Maori Council v. Att’y-Gen.* [1987] 1 NZLR 641 (CA)—“the *Lands* case.”

¹¹⁴ Section 4 of the Conservation Act 1987 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1987/0065/latest/DLM103610.html?src=qs>.

¹¹⁵ WAITANGI TRIBUNAL, KO AOTEAROA TENEI, *supra* note 1, at 300. How well this has been achieved was the subject of Waitangi Tribunal enquiry and report. See *generally id.* at 294–382. A significant decision under this Act giving preference to Maori interests in the resource under dispute was the whale-watching decision. *Ngai Tabu Maori Trust Bd. v. Dir.-Gen. of Conservation* [1995] 3 NZLR 553 (CA) 561–62. The court held that the Act required more than mere consultation; the Maori tribe concerned was entitled to a “reasonable degree of preference” in relation to a commercial whale-watching operation, which was based on customary usage of ancestral territories—a combination of traditional title and spiritual connection. *Id.*

¹¹⁶ See Resource Management Act 1991 (N.Z.), available at <https://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html?src=qs>.

¹¹⁷ *Id.* at § 5(2), which provides:

In this Act, ‘sustainable management’ means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Id.

¹¹⁸ *Id.* at § 8. ‘Decision-makers under the Act’ is shorthand for “all persons exercising functions and powers under [the Act], in relation to managing the use, development, and protection of natural and physical resources.” *Id.*

¹¹⁹ *Id.* at § 6 (emphasis added).

¹²⁰ *Id.* at § 7, 9 (emphasis added).

interests is the requirement that all decision-makers under the Act “take into account the principles of the Treaty of Waitangi.”¹²¹

The application of these provisions has directly resulted in the consideration, recognition and even protection of Maori cosmology in decisions under the Act relating to the use, development, and protection of New Zealand’s natural and physical resources. There are certainly valid criticisms that there has not been enough such protection, whereby Maori interests have been outweighed by other interests also specified in the Act.¹²² Indeed, the inadequate protection has been the subject of a Waitangi Tribunal claim, report and various recommendations to strengthen the protection afforded to Maori cultural and other traditional interests under the Act – both

¹²¹ Resource Management Act 1991, at § 8.

¹²² For example, the lists of other factors in sections 6 and 7 of the Resource Management Act are:

6. Matters of national importance—in achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;

(f) the protection of historic heritage from inappropriate subdivision, use, and development;

(g) the protection of protected customary rights.

7. Other matters—in achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga;

(aa) the ethic of stewardship;

(b) the efficient use and development of natural and physical resources;

(ba) the efficiency of the end use of energy;

(c) the maintenance and enhancement of amenity values;

(d) intrinsic values of ecosystems;

(e) [repealed]

(f) maintenance and enhancement of the quality of the environment;

(g) any finite characteristics of natural and physical resources;;

(h) the protection of the habitat of trout and salmon;

(i) the effects of climate change;

(j) the benefits to be derived from the use and development of renewable energy.

Id. at §§ 6-7.

the legislation itself and its application.¹²³ However, despite its shortcomings, it has enabled attention to be paid to such Maori interests in decision-making under the Act. This has produced positive protection for such interests, from their accommodation during the planning and development process to being upheld by courts in reviewing decisions made against such interests. For example, it was decided early on that, where Maori had an ancestral relationship with a natural resources then, before any permit ('resource consent') could be issued in respect of that resource, decision-makers must recognize that ancestral link, provide for the maintenance of that relationship, and provide for the tribe's guardianship—in accordance with Maori culture—over that resource for the future.¹²⁴

The protection provided for has thus ranged from the need to consult with relevant Maori over the impact of a development proposal on their interests¹²⁵ to rejection of development proposals because they interfere with Maori values and their spiritual relationship with the site proposed to be developed. Cases rejecting such interference have concerned a wide range of matters, including the discharge of sewage effluent into the sea,¹²⁶ the location of a

¹²³ WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI, *supra* note 1 at 233. The Tribunal summarized that:

[W]hile the RMA originally promised considerable protection for *kaitiaki* interests in *mātauranga Māori* and *taonga Māori*, it has failed to deliver on that promise. Some significant gaps in the legislation and in its implementation have diluted that protection, so it today remains a shadow of what it should be (and of what it was intended to be).

Id. at 280 (emphasis added).

¹²⁴ See *Haddon v. Auckland Reg'l Council* [1994] 3 NZRMA 49 (PT) 52, 57-58. The Tribunal stated:

We hold that the hapu [sub-tribe] should be able to exercise Kaitiakitanga [guardianship] over the resource and give guidance on how it should be developed and to what extent.

We recommend that if ss 6(e) and 7(a) are to have any meaningful effect in Maori terms, then there should be a three step process with regard to your consent.

(a) Recognition in some form that these are the ancestral lands and waters of the hapu. The recognition will go some way to affirming the mana whenua [traditional authority over the land] of the hapu.

(b) Provision in some practical form, for the ancestral relationship with the coastal resources (for example as part of a team monitoring the resource).

(c) Provision in some form for Kaitiakitanga over the resource and its future.

Id. at 59.

¹²⁵ See, e.g., *Mason-Riseborough v. Matamata-Piako Dist. Council* [1997] 4 ELRNZ 31 (EC). The consent failed to recognize Maori concerns under §§ 6-8 of the Resource Management Act 1991. *Id.* at 45. The applicant was found to have had insufficient consultation with Maori, and recognition of their culture in the process was insufficient. *Id.* at 48.

¹²⁶ See *Te Runanga o Taumarere v. Northland Reg'l Council* [1996] NZRMA 77.

road being too close to old burial sites,¹²⁷ a television aerial being too close to and thereby interfering with Maori metaphysical relationships with a battle site,¹²⁸ and a wind farm being too close to—and interfering with Maori metaphysical relationships with—a mountain of spiritual significance.¹²⁹

While there are still many more examples of resource development decisions going against relevant Maori cultural and other traditional interests, the fact that their spiritual beliefs about their relationship with the natural world are upheld at all is worthy of note, especially when the legal system upholding them is based within a mainstream culture supposedly based on a different cosmology, and it is in the face of other competing interests. Indeed, even decisions where a Maori party has lost have recognized the metaphysical and intangible aspects of Maori culture, and the need to uphold them in law. For example, the Environmental Court has accepted extensive evidence on the Maori spiritual relationship with the natural environment (and the natural feature in question) and understood that the most important aspect of it is the intangible “connectedness.”¹³⁰ Thus, even if the particular challenge was eventually rejected, the courts have accepted that the mixing of the waters of different rivers diminishes the spiritual life force of the respective rivers, and thereby diminishes the spiritual life force of the tribes connected to them.¹³¹

Some instances of Maori culture have been more difficult to provide for than others. For example, while recognizing that metaphysical matters need to be taken into account under the Resource Management Act, the New Zealand

¹²⁷ See *Te Runanga o Ati Awa ki Whakarongotai, Inc. v. NZ Historic Places Trust* [2002] 8 ELRNZ 265 (EC) 272 (where the location of a proposed road was denied due to it going too close to—and possibly over—traditional Maori burial sites. The spiritual relationship was upheld over the public interest in the road (*Id.* at 121)).

¹²⁸ See *TV3 Network Servs. Ltd v. Waikato Dist. Council* [1998] 1 NZLR 360 (HC) 363-64. The Environment Court determined that a proposed TV aerial for a Maori sacred site would have minimal physical interference with the site but would interfere with the spiritual relationship that local Maori had with the site (the hill was part of a whole area where their ancestors had fought, died and were buried). *Id.* at 371. The Court upheld the Maori metaphysical relationships and denied the consent. *Id.* at 374.

¹²⁹ See *Outstanding Landscape Prot. Soc’y Inc. v. Hastings Dist. Council* [2007] NZRMA 8 (EC). The court declined a consent for a wind-farm due to its location near a key spiritual site that was a significant part of Maori lore. *Id.* at para 118. Tribes were distressed at the possible diminution and loss of the mountain’s spiritual authority. *Id.* at para 84.

¹³⁰ See, e.g., *Ngati Rangi Trust v. Manawatu-Wanganui Reg’l Council* (unreported) (EC), Auckland A067/2004, 18 May 2004, at paras 109, 320 (N.Z.).

¹³¹ See, e.g., *id.* at para 318, stating:

The most damaging effect of both diversions on Maori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people “grieving” for the rivers. One needs to understand the culture of the Whanganui River iwi [tribe] to realise how deeply ingrained the saying *ko au te awa, ko te awa, ko au* [I am the river, the river is me] is to those who have connections to the river. . . . Their spirituality is their “connectedness” to the river. To take away part of the river (like the water or the river shingle) is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people.

Id.

courts have discussed how far secular courts can accommodate Maori beliefs in *taninwa*—a serpent-like being of Maori lore, inhabiting particularly water-bodies, requiring appropriate behaviour by people so as to not disturb or damage the *taninwa*.¹³² The Court suggested that what needed to be recognized was not the effects of a proposed development on the metaphysical entity itself, but was the effects on the Maori beliefs about these entities.¹³³ Yet, despite such difficulties, it is significant that the courts have understood and held that the key to applying these provisions in the RMA is to properly understand the Maori “relationships” with the natural world. Within this cosmology, the courts have held there is “no rigid distinction between physical beings, *tipuna* (ancestors), *atua* (spirits) and *taninwa*”¹³⁴ and has applied it to the case, including assessing conflicting evidence from within Maori culture.¹³⁵ In relation to interpretation of another statute with similar incorporation of consideration of Maori interests, the courts have held similarly: that the effects of a proposal on Maori metaphysical values and their spiritual relationships must be considered.¹³⁶

The Historic Places Act 1993 was another piece of legislation that provided extensively for Maori cosmology and culture, and was recently replaced by the Heritage New Zealand Pouhere Taonga Act 2014. Under both of these Acts, in addition to the general protection of archaeological sites, Maori sacred sites and areas are also protected and listed on a register.¹³⁷ A key aspect of the Maori sacred sites is that physical (for example, archaeological) remains are not required in order to establish them, whereas this is required for the registration of general archaeological sites.¹³⁸ The Environment Court has defined such Maori sites as “sacred places with the same form of essential characteristics, i.e. sometimes death, sometimes association with people of note, sometimes activities, and sometimes resources.”¹³⁹ Thus this definition “can extend to

¹³² See *Friends & Cmty. of Ngawha Inc. v. Minister of Corrs.* [2002] NZRMA 401 (HC) para 46.

¹³³ *Id.*

¹³⁴ *Ngati Hokopu Ki Hokowhitu v. Whakatane Dist. Council* [2002] 9 ELRNZ 111 (EC) para 42 (italics added).

¹³⁵ See, e.g., *id.* at para 43 (for an explanation of how the court receives evidence of Maori cultural beliefs and practices) and para 53 (for how to assess conflicts within that evidence).

¹³⁶ See, e.g., *Bleakley v. Env'tl. Risk Mgmt. Authority* [2001] 3 NZLR 213 (HC) 215-16. This case was decided under the Hazardous and New Organisms Act 1996 (N.Z.), where § 6(d) requires decision-makers to take into account “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga.”

¹³⁷ See Historic Places Act 2003 (N.Z.). A Maori sacred site is a *wahi tapu*, which is defined as “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.” *Id.* at § 2. A “*wahi tapu* area” means an area of land that contains one or more *wahi tapu*. *Id.*; Heritage New Zealand Pouhere Taonga Act 2014, § 6 (N.Z.). Both Acts are available at legislation.govt.nz. The register is called the New Zealand Heritage List. See Heritage New Zealand Pouhere Taonga Act 2014, §§ 65-79 (N.Z.).

¹³⁸ See Heritage New Zealand Pouhere Taonga Act 2014, § 6 for the definition of “archaeological site.” See *id.* at §§ 65-68 concerning the Heritage List.

¹³⁹ *Te Runanga o Ahi Awa ki Whakarongotai Inc. v. Kapiti Coast Dist. Council* [2002] 8 ELRNZ 265 (EC) 281.

cover the whole of the relationship between the Maori people with lands and water.”¹⁴⁰

The Maori Land Act 1993¹⁴¹—or Te Ture Whenua Maori Act 1993—is another Act which explicitly recognizes and upholds Maori relationships with ancestral lands, although it has a restricted scope of application. This Act governs land that is not held under standard fee simple title, but land that is still held collectively by Maori—land that has not passed out of the hands of the traditional owners.¹⁴² This amounts to approximately only 6% of land in New Zealand.¹⁴³ Key to the operation of the Act and to decision-making under it are the principles specified in the Act that Maori land should be retained in Maori ownership, that ownership should follow bloodlines, and that the particular customs and traditions of tribal family groups be upheld and protected.¹⁴⁴ These are of fundamental importance to Maori “because it

¹⁴⁰ Nolan, *supra* note 30, at 914.

¹⁴¹ Te Ture Whenua Maori Act 1993 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1993/0004/latest/whole.html#DLM289882>.

¹⁴² RICHARD BOAST ET AL., MAORI LAND LAW 117 (LexisNexis, 2d ed. 2004). For an accessible summary of Maori land and its administration, see e.g., Controller and Auditor-General, *Māori Land – What Is It and How Is It Administered?*, available at <http://www.oag.govt.nz/2004/maori-land-court/part2.htm> (last visited Apr. 14, 2015). See also Maori Land Court, *About Maori Land Court*, available at <http://www.justice.govt.nz/courts/maori-land-court/about-us> (last visited Mar. 22, 2015).

¹⁴³ See, *Maori Land - What Is It and How Is It Administered?*, *supra* note 142, at § 2.13.

¹⁴⁴ See Te Ture Whenua Act 1993 (N.Z.). These principles are provided for in both the Preamble and Section 2 of Te Ture Whenua Maori Act. The Long Title of the Act itself is “An Act to reform the laws relating to Maori land in accordance with the principles set out in the Preamble,” where that Preamble provides (English version):

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

Id.; § 2 of the Act provides for “Interpretation of the Act generally”:

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.
- (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.
- (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

Id. at § 2.

is a resource which provides both an economic base and a source of spiritual *mana* (authority) binding the people together. It is essential . . . to preserve this base . . . thereby maintaining the identity, through land-based Whakapapa links, of its owners.”¹⁴⁵ One result of having this separate category of Maori land, governed by these rules, is that it has in fact typically been retained and not been subject to development. Its uses have thus been comparatively environmentally friendly.

In relation to the separate sphere of the marine and coastal area, there is extensive recognition in New Zealand law of traditional Maori interests in and special relationships with the marine and coastal area. There are six different ways in which these relationships have been recognized in legislation, each with a different level of protection for the relationship.

The most basic is the right of tribal and sub-tribal guardians to participate in decision-making processes in certain conservation-related applications or proposals for the coastal and marine area over which they exercise customary guardianship (*kaitiakitanga*).¹⁴⁶ The matters specifically mentioned are marine reserves, marine mammal sanctuaries, conservation protected areas, concessions, marine mammal standings and commercial watching permits.¹⁴⁷ Participation does not provide as strong a right as the other following options do, but the views of these guardians must be paid “particular regard” when decisions on such matters are made; this enables views that are more protective of relationships with the natural environment and thus of the environment itself to be given priority.¹⁴⁸

The second method is the establishment of local fishery areas—called *taiapure*—where Maori participate in the management, including in the formulation of regulations for the “conservation and management of the fish, aquatic life or seaweed.”¹⁴⁹ The area covered by a *taiapure* must be a traditional customary food gathering area and be of particular spiritual and cultural significance to the Maori group (tribal or subtribal).¹⁵⁰ A management committee is appointed, including relevant Maori representatives as well as local stakeholders, such as commercial and non-commercial fishers.¹⁵¹ The regulations that can be recommended by the Committee can only be related to

¹⁴⁵ D. C. Webster, *Te Ture Whenua Maori Act 1993*, 7 AUCKLAND U. L. REV. 715, 716 (1994). The requirement to effectively follow Maori cultural tradition in application of the Act has required the judges of the Maori Land Court to hear evidence—often in Maori—about relevant cultural traditions and to be well versed in Maori culture. Most Maori Land Court judges are now accordingly Maori themselves and are fluent Maori language speakers.

¹⁴⁶ These are called “participation rights.” See § 47(1)-(2) of Marine and Coastal Area (Takutau Moana) Act 2011, *available at* legislation.govt.nz.

¹⁴⁷ *Id.* at § 47(3).

¹⁴⁸ *Id.*

¹⁴⁹ Fisheries Act 1996, § 185 (N.Z.), *available at* legislation.govt.nz. *Taiapure* are established pursuant to the Fisheries Act 1996. *Id.* at § 174. Section 185 of the Fisheries Act, provides the power to recommend the making of regulations. See The Ministry for Primary Industries, *Taiapure - Local Fisheries*, *available at* [http://www.fish.govt.nz/en-nz/Maori/Management/Taiapu re/default.htm](http://www.fish.govt.nz/en-nz/Maori/Management/Taiapu%20re/default.htm).

¹⁵⁰ *Id.* at § 174.

¹⁵¹ Fisheries Act 1996, § 184.

fishing and fishing activities, such as restrictions on the species of fish (or seaweed, etc.) that can be taken, restrictions on the quality and sizes that can be taken, and the catch methods, areas and dates or seasons.¹⁵² As a July 2014, there were eight such *taiapure* in New Zealand.¹⁵³ One commentator has noted how several *taiapure* management committees are committed to using “indigenous values and knowledge systems as a basis for sustainable management of local fisheries.”¹⁵⁴

A third method is the ability for Maori to undertake customary food gathering under tribal authority and according to traditional tribal practices.¹⁵⁵ Tribal guardians appointed for this purpose may also participate in the wider fisheries management of their area,¹⁵⁶ including enforcement.¹⁵⁷ It is notable that this method was enacted as part of a settlement of Maori grievances in relation to commercial fishing rights.¹⁵⁸

The fourth method was also established as part of the grievance settlement in relation to commercial fishing rights and is akin to a combination of the second and third methods above, but with slightly more powers: the ability to establish a *mataitai* reserve over a traditional fishing ground.¹⁵⁹ Such a reserve is intended to recognize and provide for Maori customary marine management practices, including food gathering.¹⁶⁰ Establishing a *mataitai* reserve will exclude commercial fishing from the area but not recreational fishing, and it will allow the Maori tribe or subtribe on its own to recommend bylaws for the sustainable management of the reserve.¹⁶¹ Mataitai reserves are intended to recognize the “special relationship” that exists between the Maori tribe and the reserve area.¹⁶² It recognizes that they can effectively manage the reserve

¹⁵² Fisheries Act 1996, §§ 185(1), 186(c)-(d), 186(a).

¹⁵³ See legislation.govt.nz for the Orders establishing these reserves. See the Ministry for Primary Industries website for access to a map locating these reserves, <http://www.fish.govt.nz/en-nz/Maori/Management/Taiapure/default.htm>.

¹⁵⁴ P.A. Memon et al., *Strategies for rebuilding closer links between local indigenous communities and their customary fisheries in Aotearoa/New Zealand*, 8:2 LOCAL ENVIRONMENT, 205, 208 (2003).

¹⁵⁵ Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 11(1), (2) (N.Z.), available at legislation.govt.nz.

¹⁵⁶ *Id.* at reg 14.

¹⁵⁷ *Id.* at regs 12, 17.

¹⁵⁸ See the preamble of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 which describes the agreement and origin of the regulations. *Id.* at A-G.

¹⁵⁹ *Id.* at reg 23(1)(c). For more information, see generally the Ministry for Primary Industries website, <http://www.fish.govt.nz/en-nz/Maori/Management/Mataitai/default.htm>.

¹⁶⁰ As Preamble paragraphs B and E note, the aim of the regulations (covering both general customary fishing and the creation of *mataitai* reserves) is “to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mātaītai), to the extent that such food gathering is neither commercial in any way nor involves commercial gain or trade.” *Id.* at B, E.

¹⁶¹ Fisheries (Kaimoana Customary Fishing) Regulations 1998, regs 27-29.

¹⁶² *Id.* at reg 23(1)(a).

sustainably, both in terms of the creation of fishing rules for everyone, as well as the management of customary fishing for tribal purposes.¹⁶³

A fifth method of recognition of Maori spiritual and cultural relationships with the marine and coastal area is the category of “protected customary rights.”¹⁶⁴ These are activities, uses, and practices that have been exercised since 1840, and which continue to be exercised in accordance with traditional Maori culture today.¹⁶⁵ Notably, protection is for the activities themselves (such as harvesting seafood), not for governance of the area, such as for the *taiapure* and *mataitai* reserves, nor any ownership title. Yet significant privileges are accorded to such customary rights, including complete exemption from the key duties and responsibilities under the Resource Management Act, provided that the rights-holders act in accordance with Maori custom.¹⁶⁶ Notably, this privilege does not apply to any Maori customary activities on land; it is only provided for under marine and coastal legislation.

The final method of recognizing Maori relationships with the marine and coastal area and their traditional management of marine resources, is the establishment of “customary marine title.”¹⁶⁷ This title is based on—but is a legislative replacement for—common law indigenous customary title (often referred to as native or Aboriginal title). This is the most extensive of the six methods listed in that it carries the most extensive legal rights, namely a degree of ownership of the foreshore and seabed.¹⁶⁸ Associated rights include the ability to permit or veto activities requiring a resource consent,¹⁶⁹ as well as certain conservation processes in the customary marine title area.¹⁷⁰

Interestingly, customary marine title remains subject to Resource Management Act processes, yet a customary marine title group can prepare a planning document for the management of the area which must be recognized and upheld by local authorities and some central government bodies, and by the Ministry of Fisheries in respect of sustainability measures under fisheries legislation.¹⁷¹ As a customary title, based on customary title at common law, a customary marine title is inalienable and cannot be sold, nor can it be

¹⁶³ Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg. 23(1)(c). There have been 25 *mataitai* reserves established as of September 30, 2014. See maps identifying the reserves, <http://www2.nabis.govt.nz/Map.aspx>; see also Ministry for Primary Industries website, <http://www.fish.govt.nz/en-nz/Maori/Management/Mataitai/default.htm>.

¹⁶⁴ See § 51(e), subpart 2 of Marine and Coastal Area (Takutau Moana) Act 2011, available at legislation.govt.nz.

¹⁶⁵ *Id.* at § 51(1)(a)-(c).

¹⁶⁶ Note they must also act in accordance with any directions made by the Minister of Conservation. *Id.* at §§ 52(3)(d), 56(1).

¹⁶⁷ This is the third method created under the Marine and Coastal Area (Takutai Moana) Act 2011. Marine and Coastal Area (Takutai Moana) Act 2011, § 58 (N.Z.).

¹⁶⁸ *Id.* at §60(1)(a)-(c). Note that it is not a fee simple title; there are legislative restrictions on this customary marine title. *Id.* Section 64 of the Marine and Coastal Area (Takutai Moana) Act 2011 lists the rights conferred by customary marine title. However, it includes title, for example, to minerals such as iron sands in the area. *Id.* at §62.

¹⁶⁹ *Id.* at § 62(1)(a).

¹⁷⁰ *Id.* at § 60(a).

¹⁷¹ Fisheries Act 1996, § 11 (N.Z.).

converted into a freehold title.¹⁷² Further, the Act provides that it is subject to rights of public access to the beach and sea (except in respect of sacred sites and areas).¹⁷³ Yet, this method is probably the most significant statutory recognition of the special relationship between tribal groups and the marine environment enjoyed according to their culture and traditions.

I note that none of these methods were devised because they were seen as a way to achieve an environmental goal; all of them were negotiated (at different times) as methods of redress in the light of the promises made under the Treaty of Waitangi. For example, the rules enabling general customary fishing and the creation of *taiapure* and *mataitai* reserves were all established in response to Maori claims in relation to non-commercial fishing rights, in light of a grievance settlement in relation to commercial fishing. The other three methods were devised as alternative options for legislative replacement of common law title in response to a court decision upholding customary title at common law, when all other activities and legislation had previously proceeded on the basis that such common law title had been extinguished and did not exist anymore.¹⁷⁴ The government—indeed, two different governments—legislated for its replacement, with the statutory forms and rules for its establishment and exercise. Overall, the impetus for creation of these six methods can therefore be said to be fairness to people more than the protection of the natural environment. Yet, it was only because of the recognized special relationship of Maori with the natural world, and because of their traditional exercise of guardianship over it, that these precise methods were chosen.

C. Tribal cultural protection through direct negotiation with the Crown

Knowledge of the many and serious breaches of the Treaty of Waitangi has led to attempts by successive New Zealand governments (‘the Crown’) to make reparations for these breaches. Such reparations have been made both at a New Zealand-wide, pan-Maori level, as well as in respect of individual tribes, one at a time.¹⁷⁵ The largest of the pan-Maori settlements have been to restore assets lost through Treaty breaches more than to recognize a cultural

¹⁷² Marine and Coastal Area (Fakutai Moana) Act 2011, § 60(1)(a).

¹⁷³ *Id.* at § 26(1).

¹⁷⁴ *Ngati Apa v. Att’y-Gen.* [2003] 3 NZLR 643 (CA) 643.

¹⁷⁵ Office of Treaty Settlements, <http://www.ots.govt.nz/> (last visited Feb. 2, 2015). For a summary of the settlement process, see generally *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, available at Office of Treaty, *supra*. [hereinafter *Healing the Past, Building the Future*]. This publication is available electronically in four parts on the above website. Part 1, the “Settlement Framework” is at: <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookSettlementFramework.pdf>; “The Negotiations Process” is at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookTheNegotiationsProces.pdf>; “Settlement Redress” is at: <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookSettlementRedress.pdf>; and “Supporting Information” is at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookSupportingInformation.pdf>. See also TREATY OF WAITANGI SETTLEMENTS (Nicola Wheen & Janine Hayward eds., 2012).

relationship with the natural world.¹⁷⁶ While clearly some have focused on recognition and restoration of traditional cultural practices, such as the creation of the *taiapure* and *mataitai* reserves discussed in the previous section, the most significant reparations in terms of recognition of tribal special relationships with the natural world have been negotiated directly with individual tribes. These kinship-based grievance settlements consist of a package of measures that have been developed over the years. While they vary between different tribes, they always include three types of measures: an apology,¹⁷⁷ the transfer of cash and assets,¹⁷⁸ and non-financial cultural

¹⁷⁶ See, for example, the settlements in relation to commercial fisheries and the North Island commercial forests. For example, the pan-Maori fisheries settlement concerned grievances arising out of the more modern commercial development of New Zealand's fisheries, particularly on the then proposed environmental restrictions to be placed on it. This was the Quota Management System introduced in the Fisheries Amendment Act 1986. It was introduced in response to a crisis in the 1980s brought about by over-fishing throughout New Zealand's waters. However, 1986 was also when the backdated jurisdiction of the Tribunal was effective so that it could hear historical claims. Maori were just beginning to prepare Waitangi Tribunal claims concerning historical Treaty breaches. Maori were concerned that allocation of fish quota under the new system would prevent the government from being able to provide effective redress for these historical breaches, where they related to traditional fishing grounds and fishing activities themselves. Such a claim was submitted to the Tribunal for its determination. See WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM, *supra* note 99.

An interim commercial fisheries settlement agreement was enacted in the Maori Fisheries Act 1989. The final agreement provided Maori with half of New Zealand's largest fishing company and 23% of existing fishing quota, plus 20% of all new fishing quota issued in the future. A Maori Fisheries Commission would be responsible for holding these assets for the benefit of all Maori, and would determine how best to allocate the benefits. Due to many challenges to this agreement, it took until 2004 for it to be enacted: Maori Fisheries Act 2004. For more information in the history of the settlement, including its numerous challenges, see Iorns, *supra* note 46, at 558-60.

In contrast with the kin-based settlements, this pan-Maori fisheries settlement did not focus on cultural relationships with the natural world but instead focused on Maori economic development through exploitation of natural resources. Indeed, instead of offering increased environmental protection, Maori organizations have participated in activities, which have resulted in the reduction in fish stocks through commercial fishing, including the Antarctic toothfish.

¹⁷⁷ See generally Nagti Mutunga Claims Settlement Act 2006 (N.Z.) (these apologies are enacted in the legislation implementing the reparations agreement). The apology will typically contain a recital of the history and foundation of the grievances, a history of the claim, and a statement of the parties' view of their future relationship. The Crown will acknowledge its Treaty breaches and the pain and suffering caused to the claimants as a result, and will formally express its regret for these. *Id.*

¹⁷⁸ *Healing the Past, Building the Future*, *supra* note 175, at 87. The various different components of cash and assets to comprise the overall "redress quantum" are decided upon, and which particular Crown-owned lands and/or assets are to be returned. The aim is to contribute to providing an economic base for the tribe for their future financial security. *Id.*

It is widely acknowledged that it is difficult to put a precise value on economic losses resulting from Treaty breaches. Further, the best estimates of such losses are so huge—estimated to be in the tens of billions of dollars—that full compensation is impossible in that it would be politically unacceptable to most New Zealanders. Much negotiation is therefore focused on what is fair in all the circumstances. The circumstances to be considered in deciding what is fair will include the amount of land lost due to Treaty breaches, the manner in which it

measures.¹⁷⁹ While there have been some criticisms of the process and the results,¹⁸⁰ these settlements have resulted in extensive recognition and protection of Maori relationships with the natural world in New Zealand law.

The cultural redress component of the reparations settlement package is designed specifically to recognize and restore the claimants' spiritual, cultural and/or traditional associations with the natural environment—especially in relation to spiritually and culturally significant sites and resources—as well as to recognize and restore their cultural authority.¹⁸¹ Over the years, the Crown and claimants together have devised a wide range of options to satisfy cultural redress.¹⁸² They have included:¹⁸³

- replacing English place names with their Maori names;¹⁸⁴
- a special entitlement to use specific Crown-owned land for the purpose of gathering traditional foods and other natural resources;¹⁸⁵
- special protocols for input into the decision-making of relevant government departments—such as Conservation—in relation to specific matters in the claim area;¹⁸⁶

was lost, and comparison with the reparations provided in existing settlements. For example, the confiscation of land resulting from the land wars in the 1860s and subsequent legislation is treated a lot more seriously and compensated more generously than loss of land due to sale by Maori. *Id.* at 89.

¹⁷⁹ See *supra* note 175 and accompanying text (providing more information on the various settlements).

¹⁸⁰ Clare Charters, Experts Seminar on Treaties, Agreements, and Other Constructive Arrangements Between States and Indigenous Peoples, December 15-17, 2003, *Report on the Treaty of Waitangi 1840 Between Maori and the British Crown* 14-15, U.N. Doc. HR/GENEVA/TSIP/SEM/200/BP.15. A large criticism from Maori has been that the Maori understandings of the Treaty are not recognized such that, for example, Maori autonomy through self-governance is not able to be negotiated. Criticism has been leveled at the conditions the government imposes both in relation to process (e.g., who the government will negotiate with) and substance (e.g., the inclusion or not of certain resources in the settlement, and relativity with other settlements). *Id.*

¹⁸¹ *Healing the Past, Building the Future*, *supra* note 175, at 96 (detailing the aims of cultural redress measures).

¹⁸² *Id.* at 99-138 (for more detail on the range of measures).

¹⁸³ Ngai Tahu Claims Settlement Act 1998 (N.Z.). This is only an inclusive list. *Id.* A wide range of methods have been devised to satisfy cultural redress, some of which have only been devised to meet particular circumstances of one tribe and not found in other settlement agreements. *Id.* For example, the transfer of ownership and management of the Titi Islands and of the birds on that island, from the conservation estate to Ngai Tahu, has not been repeated in later settlements. *Id.* at §§ 333-37.

¹⁸⁴ *Id.* at part 3. This now occurs in every settlement agreement, including for significant geographical features. The most significant was the mountain Aoraki/Mt Cook (Ngai Tahu Claims Settlement Act 1998), partly because it is New Zealand's highest mountain and nationally iconic, and because the Ngai Tahu settlement was an early and thus precedent-setting settlement. *Id.* For more information on this method of 'visible recognition of a claimant group,' see *Healing the Past, Building the Future* ("Settlement Redress"), *supra* note 175, at 125.

¹⁸⁵ Ngai Tahu Claims Settlement Act 1998, at §§ 255-68 (establishing the method of Nohoanga entitlements to enable periodic, seasonal gathering of traditional natural resources). This method is now widely used. See also Ngati Awa Claims Settlement Act 2005, §§ 88-110 (N.Z.) (providing another example of Nohoanga entitlements).

- a Deed of Recognition of the tribe's associations with particular land and rights of consultation on matters specified in the Deed;¹⁸⁷
- appointment to governmental advisory bodies on relevant matters (such as the management of important natural resources in their area);¹⁸⁸
- statutory acknowledgements of the tribe's historical and spiritual associations with natural features and sites of cultural significance;¹⁸⁹
- the creation of joint tribal/Crown co-governance and co-management regimes for natural resources, including for their restoration;¹⁹⁰
- tribal ownership of reserve land for tribes to administer under the Reserves Act;¹⁹¹
- tribal ownership of natural sites of great cultural significance to the tribes, including the beds of rivers and lakes;¹⁹² and
- most recently, creation of separate legal personality for natural features with joint tribal/Crown representation of that feature's interests.¹⁹³

¹⁸⁶ Ngati Awa Claims Settlement Act 2005, at § 293 (requiring the Department of Conservation to “consult with, and have particular regard to the views of” Ngai Tahu in relation to the management and conservation of particular wildlife species). See *Healing the Past, Building the Future*, *supra* note 175 at 104, 133-34 (a case-study in relation to tribal fisheries management).

In addition, what has been referred to as ‘an overlay system’ has also been created in order to acknowledge traditional tribal associations with an area. This system also requires the Department of Conservation to have regard to tribal values and manage an area in accordance with those values. For a description of the system, see *Healing the Past, Building the Future* (“Settlement Redress”), *supra* note 175, at 131-32. For examples of where it has been used, see, e.g., WAITANGI TRIBUNAL, KO AOTEAROA TENEI - TUARUA, *supra* note 1, at 335.

¹⁸⁷ *Healing the Past, Building the Future*, *supra* note 175, at 133, 139 (providing details of Deeds of Recognition and an example of one).

¹⁸⁸ *Id.* at 121-22 (providing examples in relation to advice on specified treasured native flora and fauna).

¹⁸⁹ *Id.* at 132. Such acknowledgements formally identify tribal relationships with particular areas and natural features, and require them to be taken account of by other bodies having decision-making power over them. *Id.* For more description of statutory acknowledgements, see *id.* at 132-33. For examples of where it has been used, see, e.g., Ngai Tahu Claims Settlement Act 1998, §§ 205-226 (N.Z.).

¹⁹⁰ There are many examples of co-management and co-governance arrangements, with varying parties, containing varying terms and degrees of participation and of authority of the parties. For a brief summary of its availability in Treaty settlements, see *Healing the Past, Building a Future*, *supra* note 175, at 101. For more detailed description and analysis of a range of co-management agreements, see, e.g., LOCAL GOVERNMENT NEW ZEALAND, CO-MANAGEMENT: CASE STUDIES INVOLVING LOCAL AUTHORITIES AND MAORI (2007), available at <http://policyprojects.ac.nz/phillipanorman/files/2011/10/CoManagementCaseStudiesInvolvingLocalAuthoritiesAndMaoriJanuary2007.pdf> (last visited Feb. 9, 2015). For a discussion of possibly the most extensive such agreement, see *infra* sec. D nn.195-209 and accompanying text.

¹⁹¹ For more information on vesting as a Reserve, see, e.g., *Healing the Past, Building a Future*, *supra* note 175, at 130-31.

¹⁹² See, e.g., the ownership of lake beds vested in the Ngati Awa Claims Settlement Act 2005, §§52-53 (N.Z.); Ngaau Raurau Kaitaki Claims Settlement Act 2005, §29 (N.Z.); Ngai Tahu Claims Settlement Act 1998, §§167-200 (all available at www.legislation.govt.nz).

¹⁹³ See the Whanganui River and Te Urewera settlements, *infra*, secs. E, F.

Most aspects of cultural redress do not have monetary value. The exceptions are where money is awarded for the establishment and operation of co-governance and co-management bodies, and for restoration funds. Even where land might be transferred because of the highly significant cultural nature of the site, this is typically done by way of gift in order to recognize the cultural rather than commercial interests. Generally, and especially in the early years of settlements, natural resources themselves have not been available for use in reparations; but there have been exceptions and it is changing, evidenced particularly by the recent settlements granting legal personality and changing the legal status of the Whanganui River and Te Urewera National Park, as discussed below.¹⁹⁴

D. Waikato River Settlement Agreement

The Waikato River is New Zealand's longest river, flowing through the heart of the North Island of New Zealand and through the traditional territory of the Waikato Tainui Maori.¹⁹⁵ To them, the river is an ancestor; it embodies their tribe and they embody it. One cannot speak of the tribe without entailing its ties to and close relationship with the river, nor speak of the river without acknowledging Tainui as its descendants and thus rightful guardians.¹⁹⁶ The tribe suffered many losses of land and resources through colonization, including jurisdiction over and access to the river.¹⁹⁷ Over time, the river itself suffered in quality from the introduction of intensive uses, from reduction in water flows from hydroelectricity and agriculture, to pollution from agriculture and industry.¹⁹⁸ Yet Tainui maintained that they were still the rightful guardians of the river and of its life force, and that the right to control its management should be returned to them.¹⁹⁹ In 2010, the long-negotiated

¹⁹⁴ As of June 30, 2014, there have been 47 settlement agreements finalized and legislated for and another 55 are in process (from having their negotiation mandate recognized by the Crown, to signing the final Deed of Settlement). See OFFICE OF TREATY SETTLEMENTS, 12-MONTH PROGRESS REPORT 6-9 (2013-2014), available at <http://www.ots.govt.nz/>. It is not known how many other tribes are still to enter into the negotiation process, but there are still many claims that have been made to the Waitangi Tribunal awaiting report, so there may be many more settlements yet to be negotiated.

¹⁹⁵ See Waikato Regional Council, Waikato River, <http://www.waikatoregion.govt.nz/waikatoriver/> (last visited Aug. 21, 2015).

¹⁹⁶ See, e.g., Linda Te Aho, *Indigenous Challenges to Freshwater Governance and Management in Aotearoa New Zealand – The Waikato River Settlement*, 20 WATER LAW 1, 285, 285 (2010). The Environment Court (N.Z.) has recognized and recorded Waikato Tainui's spiritual and ancestral relationship with the river. *Mabuta v. Waikato Reg'l Council* (unreported), A 91/98, 29 July 1998, at para. 70, 74 (N.Z.).

¹⁹⁷ Te Aho, *supra* note 196, at 285.

¹⁹⁸ The history of the river is detailed in WAITANGI TRIBUNAL, REPORT ON THE WAIKATO RIVER CLAIM: WAITANGI TRIBUNAL THE POUAKANI REPORT, WAI 33 (1993). It is also referred to in the Preamble to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, pmbl. (9) (N.Z.), available at www.legislation.govt.nz. For a current concise summary of the Waikato River's health, see Waikato Regional Council Waikato Regional Council, Waikato River, *supra* note 195.

¹⁹⁹ Te Aho, *supra* note 197 at 285.

settlement of the tribe's grievance in relation to management of the river was enacted.²⁰⁰ This Act upholds a very different conception of the river, one that recognizes and provides for an indigenous Tainui cosmology.

The Act first acknowledges the personality of the river in the eyes of the tribe and the tribe's close spiritual relationship with the river:

To Waikato-Tainui, the Waikato River is a tupuna (ancestor) which has mana (prestige) and in turn represents the mana and mauri (life force) of the tribe. Respect for te mana o te awa (the spiritual authority, protective power and prestige of the Waikato River) is at the heart of the relationship between the tribe and their ancestral river.²⁰¹

It similarly recognizes the Maori view of the river as an indivisible whole:

The Waikato River is a single indivisible being that flows from Te Taheke Hukahuka to Te Puuaha o Waikato (the mouth) and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation, flood plains, wetlands, islands, springs water column, airspace, and substratum as well as its metaphysical being.²⁰²

It is highly significant that the personality and metaphysical being of the river is recognized in national legislation. This recognition does not extend to full legal personality; for example, the river is not a legal entity. However, the law recognizes that Tainui see the river as having personality. The law thus recognizes the indigenous cosmology, even while not giving that cosmology full legal effect. This enactment in national legislation makes the indigenous cosmology more visible nationally, with the potential of eventual normalcy in the eyes of the mainstream. It is also highly significant that the Maori words are used to best represent the full Maori concepts entailed in their relationship with the river. English translations of indigenous philosophical and spiritual concepts tend not to entail the full meaning, so using the Maori terms is likely to make them more effective as well as to not subject them to legal misinterpretation.²⁰³

²⁰⁰ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, at pt. 1, §§ 1-3. Note that Tainui achieved a negotiated settlement package with the government in 1995 in relation to their grievances over land confiscations, but this expressly omitted any agreement in relation to the river because the issue of control was too contentious (mainly due to the issues of ownership of the bed and the water). See Waikato Raupatu Claims Settlement Act 1995, pt.1, § 6(5), pt. 2, § 8(2) (N.Z.), available at www.legislation.govt.nz.

²⁰¹ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, at pmb1 (1). The Maori words for ancestor (“*tupuna*”) and for life force (“*mauri*”) are used in the Act. *Id.*

²⁰² *Id.* at pt. 2, § 8(3). The recognition of indivisibility is particularly significant because the standard legal position in New Zealand is that all these component parts may be treated separately—e.g., the bed of the river is considered legally separate from the water and from its banks. In the Waikato River settlement, indivisibility was stressed in order to better acknowledge the Maori view and better provide for the river's restoration. *Id.* at pt. 1, § 6, 8(3).

²⁰³ I note that the use of Maori terms in legislation is now quite common in Aotearoa New Zealand, with the modern use largely beginning with the Resource Management Act 1991. See

This recognition of Tainui's spiritual relationship with the river also underlies the powers given to Tainui for management and governance of the river. The legislation establishes a co-governance and co-management arrangement over the river that is integrated with national resource management legislation.²⁰⁴ A vision and strategy for management of the river was established,²⁰⁵ where the personification of the river and the spiritual relationships underlie the primary aspects of this shared vision: "(a) the restoration and protection of the health and wellbeing of the Waikato River" and "(b) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships."²⁰⁶

These aims will be achieved in a bicultural manner—i.e., one that respects mainstream science as well as Maori knowledge and cosmology. For example, in order to establish the current state of the health of the river, as well as to determine appropriate strategies for its restoration, both current science and traditional Maori knowledge are required to be used. This has already begun, with full respect being given to Maori knowledge through oral histories and experience; it is not mere lip-service consultation.

The legislation also explicitly recognizes the traditional "authority that Waikato-Tainui and other River tribes have established . . . over many generations to exercise control, access to and management of the Waikato River."²⁰⁷ The Act accordingly establishes a governance entity—the Waikato River Authority—in order "to achieve an integrated, holistic, and co-ordinated approach to . . . management of the Waikato River."²⁰⁸ This ten-member Authority has equal representation of Maori and government representatives and has high level powers, including under mainstream resource management legislation and procedures.²⁰⁹ For example, if the Authority determines more stringent water quality measures than is provided for in the regional planning documents, then the Authority's standards prevail in law. While the body

supra nn.116-22 and accompanying text. It has not been without pitfalls, but the issues involved in their interpretation are now better understood. See, e.g., Catherine Iorns Magallanes, *The Use of 'Tangata Whenua' and 'Mana Whenua' in New Zealand Legislation: Attempts at Cultural Recognition*, 42 VICTORIA U. WELLINGTON L. REV. 259 (2011).

²⁰⁴ See Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, at pt. 2, §§ 35-55. "Co-management arrangements" of the Waikato River Settlement Act provides for the creation of joint management agreements, the exercise of powers under which can replace that of the local government body. *Id.* See also *id.* at pt. 2, §§ 10-13, whereby the vision and strategy of the Act are integrated with the Resource Management Act 1991.

²⁰⁵ The vision and strategy is entitled *Te Ture Whaimana o Te Awa o Waikato* and is included in the Act as Schedule 2: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. It was established following extensive public consultation after the initial settlement. *Id.* at Sched. 2.

²⁰⁶ *Id.* at Sched. 2, § 1(3). There are 13 objectives in clause 3, but these are the first two and the most significant in terms of recognizing their cosmology. *Id.* I note the reference to "wellbeing" of the river reflects its personification. *Id.*

²⁰⁷ *Id.* at pmb. (2). The Maori term "mana whakahaere" is used to refer to this traditional authority.

²⁰⁸ *Id.* at pt. 2, § 23(2)(b).

²⁰⁹ *Id.*, at Sched. 6, § 2.

embodies a co-governance arrangement, with both Maori and non-Maori members, this power is expected to enable stronger legal respect for the environment, more in line with Maori cosmology.

E. Whanganui River Settlement Agreement

The Whanganui River is the other main river flowing through the heart of the North Island of New Zealand, through the traditional territory of the Whanganui Maori.²¹⁰ As with the Waikato River to the Waikato-Tainui, the Whanganui River is said to be “central to the existence of Whanganui Iwi and their health and wellbeing,” providing “both physical and spiritual sustenance to Whanganui Iwi from time immemorial.”²¹¹ The river is seen as the ancestor of the Whanganui tribes,²¹² and the concept that the people are inseparable from the river “underpins the responsibilities of the iwi [tribes] and hapū [subtribes] of Whanganui in relation to the care, protection, management and use of the Whanganui River in accordance with the kawa and tikanga” [protocols] of the tribes.²¹³ It is this that has given rise to the Whanganui saying “*Ko au te awa, ko te awa ko au*” (I am the river and the river is me).²¹⁴

Despite Whanganui tribes signing the Treaty of Waitangi, government breaches of the Treaty guarantees caused the Whanganui tribes to lose their legal and actual control over their river, including its navigation and use of river-based resources.²¹⁵ The various breaches would be considered breaches of property undertakings within Western, liberal democracies; for the Whanganui Maori it also went against their cosmology by violating the various spirits of the river as well as of the tribes’ duties as guardians. The New Zealand courts have agreed that such violations of Maori cosmology violated the Whanganui tribes themselves:

The most damaging effect of both diversions on Maori has been on the *wairua* or spirituality of the people. Several of the

²¹⁰ See Diana Beaglehole, *Whanganui Places: Whanganui River*, TE ARA THE ENCYCLOPEDIA OF NEW ZEALAND, <http://www.teara.govt.nz/en/whanganui-places/page-5> (last updated July 13, 2012).

²¹¹ *Ruruku Whakatupua: Whanganui River Deed of Settlement - Te Mana o Te Iwi o Whanganui*, cl. 1.4 (2014), available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/140805RurukuWhakatupuaTeManaOTeIwiOWhanganui.pdf> [hereinafter “*Te Mana o Te Iwi o Whanganui*”].

²¹² See, e.g., *id.* at cls 2.1-2.25 (for the Whanganui iwi account of the origins and the significance of the river). This account includes tribal lore about the river’s supernatural guardians and their relationship to the people. *Id.* at cls 2.19-2.20.

²¹³ *Id.* at cl 3.2.

²¹⁴ *Id.* at cls 2.98, 3.21.

²¹⁵ Activities that were determined to be breaches of the Treaty include riverbed works to improve navigability, gravel extraction, and the diversion of waters for a hydro-electric power scheme. The Whanganui tribes’ grievances about these activities have been the subject of petitions to parliament, of reports by a Royal Commission and the Waitangi Tribunal, as well as of numerous court cases from 1938 until 2010. Indeed, their legal proceedings objecting to the uses of the river—most notably diversion of the waters of the river for power generation—is often described as one of New Zealand’s longest running court cases. For a detailed history of their claim, see WAITANGI TRIBUNAL, THE WHANGANUI RIVER REPORT, *supra* note 39.

witnesses talked about the people “grieving” for the rivers. One needs to understand the culture of the Whanganui River *ivi* [tribe] to realise how deeply engrained the saying *ko au te awa, ko te awa, ko au* [I am the river, the river is me] is to those who have connections to the river. Their spirituality is their ‘connectedness’ to the river. To take away part of the river (like the water or the river shingle) is to take away part of the *ivi* [tribe]. To desecrate the water is to desecrate the *ivi*. To pollute the water is to pollute the people.²¹⁶

An agreement in resolution of these grievances was reached between the tribes and the government over future joint management of the river in 2012,²¹⁷ and finalized in 2014.²¹⁸ Significantly, this agreement also incorporates the personification of the river held by the indigenous tribes and upholds their spiritual relationship with it.²¹⁹ What it does differently from the Waikato River agreement is create a new legal entity for the river itself, *Te Awa Tupua*.²²⁰

As with the Waikato River settlement, the Whanganui River agreement recognizes the indivisible unity of the river and its metaphysical status as a living being. For example: “Te Awa Tupua comprises the Whanganui River as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.”²²¹

²¹⁶ *Ngati Rangī Trust v. Manawatu-Wanganui Reg'l Council* A67/2004 NZEnvC 172, 18 May 2004, at para 318 (italics added).

²¹⁷ Tutohu Whakatupua (2012) (N.Z.), available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/WhanganuiRiverAgreement.pdf> (last visited Sept. 30, 2014); *Te Mana o Te Iwi o Whanganui*, *supra* note 211.

²¹⁸ The 2014 agreement, entitled overall as *Ruruku Whakatupua - the Whanganui Iwi Deed of Settlement*, has more detail than the 2012 agreement. See generally *id.* The Crown and Whanganui Iwi negotiators initialed *Ruruku Whakatupua* on March 26, 2014, to signal the end to the substantive negotiations. The agreement was then discussed and ratified by the tribe, and the formal Deed of Settlement was signed by the Crown and the Whanganui Iwi on August 5, 2014. *Id.* at 76. The Deed of Settlement comprises two documents: *Ruruku Whakatupua - Te Mana o Te Iwi o Whanganui*, which includes the main elements of the settlement: apology, recitation of the history of the grievances and claims, *Te Mana o Te Iwi o Whanganui*, *supra* note 211, and all the elements of the settlement and *Ruruku Whakatupua - Te Mana o Te Awa Tupua*, which includes the agreed *Te Awa Tupua* framework for the status and management of the Whanganui River. *Ruruku Whakatupua: Whanganui River Deed of Settlement - Te Mana o Te Awa Tupua*, available at Office of Treaty Settlements, Deeds of Settlement, <https://www.ots.govt.nz> [hereinafter *Te Mana o Te Awa Tupua*]. For more information and the relevant documents, including a summary of the Whanganui River Deed of Settlement, see generally *id.*

²¹⁹ The frontpiece description of the document, *Te Mana o Te Awa Tupua*, *id.* at 2 (“This document, *Ruruku Whakatupua - Te Mana o Te Awa*, contains the agreed terms of a new legal framework for *Te Awa Tupua* which upholds the mana of the Whanganui River and recognises the intrinsic ties which bind the Whanganui River to the people and the people to the Whanganui River.”).

²²⁰ *Id.*

²²¹ Tutohu Whakatupua, *supra* note 217, at art. 2.4. This reflects one of the fundamental principles underpinning the negotiations: “*Te Awa Tupua mai I te Kahui Maunga ki Tangaroa* - an integrated indivisible view of *Te Awa Tupua* in both biophysical and metaphysical terms

The agreement also adopts the genealogical approach to describing the river. The famous saying “*Ko au te awa, ko te awa ko au*” (I am the river and the river is me) provided one of the “fundamental principles” which underpinned the negotiations and the resulting agreement itself: that “the health and wellbeing of the Whanganui River is intrinsically connected with the health and the wellbeing of the people.”²²²

These various aspects are reflected in the final agreement, in a set of overarching “intrinsic values,”²²³ called the *Tupua te Kawa*, described also as “the natural law and value system . . . which binds the people to the River and the River to the people”:²²⁴

1... *Ko te Awa te mātāpuna o te ora* (*The River is the source of spiritual and physical sustenance*)

Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and wellbeing of the iwi, hapū and other communities of the River.

2... *E rere kau mai te Awa nui mai te Kabui Maunga ki Tangaroa* (*The great River flows from the mountains to the sea*)

Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

3... *Ko au te Awa, ko te Awa ko au* (*I am the River and the River is me*)

The iwi and hapū of the Whanganui River have an inalienable interconnection with, and responsibility to, Te Awa Tupua and its health and wellbeing.

4... *Ngā manga iti, ngā manga nui e honobono kau ana, ka tupu hei Awa Tupua* (*The small and large streams that flow into one another and form one River*)

*Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively to the common purpose of the health and wellbeing of Te Awa Tupua.*²²⁵

There are a few significant measures used to implement this indigenous perspective of the river’s status. The first and possibly most significant is the agreement to statutorily recognize the river “Te Awa Tupua as a legal entity with standing in its own right.”²²⁶ This is expressly intended to “reflect the Whanganui Iwi [tribes] view that the River is a living entity in its own right

from the mountains to the sea . . .” Tutohu Whakatupua, *supra* note 217, at 1.8.1. This is the same as “the indicative wording” in cl 2.4 of the agreement. *Id.*

²²² *Id.* at art. 1.8.2.

²²³ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 2.6.

²²⁴ *Id.* at 6.

²²⁵ *Id.* at cl 2.7.

²²⁶ Tutohu Whakatupua, *supra* note 217, at cl 2.1.2. It is specifically an agreement to recognize because the Agreement itself has not yet been enacted as legislation. *Id.*

and is incapable of being ‘owned’ in an absolute sense” and to “enable the River to have legal standing in its own right.”²²⁷ Indeed, it is agreed to transfer the current ownership of the bed of the river from the Crown and to vest it in the name of the river itself, Te Awa Tupua.²²⁸ Thus, the agreement states that “The Awa Tupua is a legal person,”²²⁹ and that it “has the rights, powers, duties and liabilities of a legal person.”²³⁰

Legislation has not yet been drafted to implement the agreement, so precise details of implementation are not yet known. However, it has been agreed that legal effect will be given to this status as a legal person and to the four intrinsic values of *Tupua te Kawa* through requirements in other legislation.²³¹ For example, “any person exercising functions, duties or powers under” a list of twenty-five statutes related to the management of the environment must “recognise and provide for” both the status and the values of Te Awa Tupua, where it is relevant to the Whanganui River.²³²

In order to act in the name of Te Awa Tupua and to uphold and protect the “interests” of the river, an official Guardian will be established by legislation, comprising two persons “of high standing,”²³³ one appointed by the Crown and one appointed collectively by all tribes with interests in the river.²³⁴ This Guardian—called Te Pou Tupua—will “promote and protect the health and wellbeing of Te Awa Tupua,” “act and speak on behalf of Te Awa Tupua,” and uphold its status as well as the values contained in *Tupua te Kawa*.²³⁵ It will participate in relevant statutory processes and hold property or funds in the name of Te Awa Tupua.

²²⁷ Tutohu Whakatupua, *supra* note 217, at cl 2.7.

²²⁸ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, cl 8.

²²⁹ *Te Mana O Te Awa Tupua*, *supra* note 218, at cl 2.

²³⁰ *Id.* at cl 2.3.

²³¹ *Id.* at cl 2.15.

²³² *Id.* at cl 2.9. Clause 2.10 lists these statutes. *Id.* at cl 2.10. Clause 2.14 specifies when the requirement will apply:

The obligations under clauses 2.9 to 2.13 apply:

2.14.1 where the exercise of those functions, duties or powers relate to the Whanganui River, or relate to activities within the Whanganui River catchment that affect the Whanganui River;

2.14.2 to the extent that the Te Awa Tupua status or Tupua te Kawa relate to the function, duty or power being exercised; and

2.14.3 in a manner that is consistent with the purpose of the legislation under which the function, duty or power is being exercised.

Id. at cl 2.14.

²³³ *Id.* at cl 3.8; Tutohu Whakatupua, *supra* note 217, at cl 2.20.4. The high standing is so as to recognize “both the importance of the role and the need to interact with Ministers and other interested parties at a leadership level.” *Id.*

²³⁴ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 3.9 (See cl 2.9-3.19 for more details of the appointments process, term, and conditions and cl. 3.20-3.40 for the administrative and advisory support for Te Pou Tupua in carrying out its role.); Tutohu Whakatupua, *supra* note 217, at cl 2.19.

²³⁵ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 3.3; see also Tutohu Whakatupua, *supra* note 217, at cl 2.21.

Another key aspect of the agreement is the development of a “Whole of River Strategy,”²³⁶ “to address and advance the environmental, social, cultural and economic health and wellbeing of the Whanganui River.”²³⁷ To this end, the agreement defines the goals, status and parameters of a strategy to identify and address such issues of health and wellbeing, including recommending actions to address the identified issues.²³⁸ It establishes a Strategy Group to “act collaboratively” to develop the strategy²³⁹ and monitor its implementation.²⁴⁰ Local government and other decision-makers will be required to consider and take into account the strategy in relevant decisions. It has been noted that the Group and the strategy are intended to provide “strategic direction and the lens through which the River is viewed, not day to day management.”²⁴¹

In order to “support the health and wellbeing” of the river, a fund will be established with a Crown grant of NZD30 million.²⁴² This is not limited to implementation of the strategy but may be allocated “on a contestable basis” upon application (although the criteria have yet to be determined).²⁴³ At earlier stages of the negotiation, this was described as a clean up fund for the river, similar to that established for the Waikato River.

A final aspect of the agreement to note is that the agreement defines some of the legal aspects of implementing the establishment of Te Awa Tupua, including the vesting of the river bed in its name.²⁴⁴ While the vesting of fee simple title does not reflect traditional Maori concepts of responsibility and control within their overall relationship with the river, legal title is the tool that is available within the property laws and current system.²⁴⁵ It is also important

²³⁶ Tutohu Whakaturua, *supra* note 217 at cl 2.23.

²³⁷ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 4.1; *see also* Tutohu Whakaturua, *supra* note 217, at cl 2.23. In the 2014 agreement, this Strategy is called Te Heke Ngahuru. *Id.* at cls 4.1-4.23.

²³⁸ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 4.2.

²³⁹ *Id.* at cl 5.3.

²⁴⁰ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 5.4. *See* Part 5, cls 5.1-5.47 for functions, membership matters, procedures meetings, decision-making, and support. The Crown will support it financially. *Id.* at cl 5.45.

²⁴¹ Press Release, Hon. Finlayson, Attorney General of New Zealand, Whanganui River Deed of Settlement Initialed (Mar. 26, 2014), *available at* <http://www.beehive.govt.nz/release/whanganui-river-deed-settlement-initialledots.govt.nz>.

²⁴² *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 7.5.

²⁴³ *Id.* at cl 7.1.

²⁴⁴ *Te Mana o Te Awa Tupua*, *supra* note 218, at cl 6.1.

²⁴⁵ *See* WAITANGI TRIBUNAL, THE WHANGANUI RIVER REPORT, *supra* note 39, at 298-99. Whanganui tribes did not view the river as property in a Western sense. *Id.* at 35. As the Waitangi Tribunal noted, “A European might enquire of their territorial rights. Maori would enquire of the relationship between the [relevant] people.” *Id.* 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. . . . On this view of things, the river was not a commodity, not something to be traded. It was inconceivable that such a thing could be done.

to note that it is only the bed of the river that is being vested, not title to the water itself; thus the indigenous concept of the river being an indivisible whole is not being fully legally recognized.²⁴⁶ However, it is the interests of the whole river—not just its bed—which Te Pou Tupua has a duty to uphold, and the strategy will also address the whole of the river. So, while the Maori cosmology is reflected in the overall agreement, which sees the river—from source to sea, including water bed and banks—as one indivisible entity, the methods of legal implementation illustrate the perceived limits within this legal system.

F. Te Urewera

Te Urewera National Park was the largest national park in the North Island. It is all virgin, original forest or bush, but was created from most of the traditional lands of the Tuhoe people.²⁴⁷ As Tuhoe ancestral land, Tuhoe trace their connection to it back to their first arrival in Aotearoa New Zealand—it is described as “their place of origin and return, their homeland.”²⁴⁸ Tuhoe accordingly still have a deep spiritual attachment to the place, despite the fact that it has been a national park since 1954.²⁴⁹ Indeed, the fact that most of Tuhoe traditional lands were taken to create the park has been the subject of grievance against the Crown, which has only recently been settled.²⁵⁰

WAITANGI TRIBUNAL, THE WHANGANUI RIVER REPORT, *supra* note 39, at 48. Yet the Tribunal also noted that, despite this, previously, “as a matter of [English-derived, New Zealand] law, Maori had owned the riverbed” (even if tribal title had since been alienated). *Id.* at 195. Further, when it came to regaining Maori control over the river, the appropriate claim to make in order to achieve that was for ownership. *Id.* Thus ownership of the river was “the heart, the core, and the pith of this [Whanganui *imī*] claim.” *Id.* at 332.

²⁴⁶ This has been argued as being due to the fact that, in New Zealand law, water is not owned by anyone. *See* Resource Management Act 1991, cl 14(1)-(2) (N.Z.). However, this ignores the commercial value of water usage or allocation rights. It is thus more a failure of political will than of law. *Id.*

²⁴⁷ Tuhoe Claims Settlement Act 2014, cl 8(10) (N.Z.).

²⁴⁸ Te Urewera Act 2014, cl 3(5) (N.Z.).

²⁴⁹ Tuhoe Claims Settlement Act 2014, cl 8(10). Clause 8 contains a summary of the historical grievance against the Crown. In relation to the park, cl 8(10) continues: “The Crown neither consulted Tuhoe about the establishment of the park nor about its 1957 expansion and did not recognise Tuhoe as having any special interest in the park or its governance. National Park policies led to restrictions on Tuhoe’s customary use of Te Urewera and their own adjoining land.” *Id.*

²⁵⁰ *See* Tuhoe Claims Settlement Act 2014, cl 9(36)-(37). The detailed Crown acknowledgements of its actions in § 9 and the apology in § 10 provide excellent background to this settlement. For example, § 9 contains the acknowledgements in relation to Te Urewera:

(36) The Crown acknowledges that Tuhoe have a special relationship with Te Urewera National Park and the resources, wāhi tapu, and taonga that lie within.

(37) The Crown further acknowledges that—

(a) it neither consulted Tuhoe about the establishment of the park in 1954 nor about the expansion of the park in 1957; and

It is important to note that Tuhoe stress that they refused to sign the Treaty of Waitangi on the basis that they wished to retain their own sovereignty and control over their lands.²⁵¹ As a result, their grievance has stressed the need to regain ownership and control of Te Urewera National Park through the settlement process, and they refused to settle until that was agreed to by the Crown.²⁵² Tuhoe argue that it is only through the exercise of their traditional relationship with the land and its natural environment would they be able to exercise their spiritual authority through guardianship.²⁵³ The Crown was unable to agree to transferring ownership of a national park to a Maori tribe, but instead offered Tuhoe the solution of legal personality for the park, whereby no one owned the park but it owned itself.²⁵⁴ It would remain protected, with public use, akin to a national park, but it would maintain its own separate identity and be governed very differently, with significant Tuhoe input and in a way that better respects Tuhoe cosmology and relationship with the lands.²⁵⁵

This agreement was finalized in March 2013, and legislation to implement it passed in July 2014.²⁵⁶ Te Urewera itself is described very poetically, and its importance to Tuhoe and to New Zealand is expressed well:

Te Urewera

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri.

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- (b) the governance of the park severely restricted Tūhoe's ability to use and develop the resources of their land adjoining or enclosed by the park; and
 - (c) Tūhoe interests in Lake Waikaremoana were included in the park in 1954 without their consent; and
 - (d) its failure to respect Tūhoe mana motuhake and adequately provide for the interests of Tūhoe in the establishment and governance of Te Urewera National Park breached the Treaty of Waitangi and its principles.

Tuhoe Claims Settlement Act 2014, cl 9(36)-(37).

²⁵¹ See, e.g., *id.* at cl 8(1).

²⁵² See *Historic Treaty Settlement for Tuhoe*, TANGATAWHENUA.COM (Sept. 11, 2012), <http://news.tangatawhenua.com/2012/09/historic-treaty-settlement-for-tuhoe/>.

²⁵³ See, e.g., Tuhoe Claims Settlement Act 2014, cl 9(36).

²⁵⁴ See *Historic Treaty Settlement for Tuhoe*, *supra* note 252, regarding the distinction between control and ownership of the park. Concerning the solution of legal personality, see below, notes—and accompanying text.

²⁵⁵ See Tu Urewera-Tūhoe Bill Debate [2013] 694 NZPD 14129 (N.Z.), available at http://www.parliament.nz/en-nz/pb/debates/debates/daily/50HansD_20131023/volume-694-week-57-tuesday-22-october-2013continued.

²⁵⁶ Te Urewera Act 2014. Note that the Bill introduced in 2013 covered all aspects of the settlement. Tu Urewera-Tūhoe Bill Debate, *supra* note 255. During its passage through Parliament it was divided into two Acts, one concerning the overall grievance settlement—including history, apology, and most elements of the financial and cultural redress (see, *Healing the Past, Building a Future*, *supra* note 175 at 85)—and the other concerning the new arrangements for Te Urewera (see Tu Urewera-Tūhoe Bill Debate, *supra* note 255).

(3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Te Urewera and Tuhoe

(4) For Tuhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tuhoe.

(5) For Tuhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.

(6) Te Urewera expresses and gives meaning to Tuhoe culture, language, customs, and identity. There Tuhoe hold mana by ahikāroa [keeping the home fires burning]; they are tangata whenua [the people of that land] and kaitiaki [guardians] of Te Urewera.

Te Urewera and all New Zealanders

(7) Te Urewera is prized by other iwi and hapū [tribes and sub-tribes] who have acknowledged special associations with, and customary interests in, parts of Te Urewera.

(8) Te Urewera is also prized by all New Zealanders as a place of outstanding national value and intrinsic worth; it is treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection.

Tuhoe and the Crown: shared views and intentions

(9) Tuhoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, Tuhoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand's culture and values.

(10) The Crown and Tuhoe intend this Act to contribute to resolving the grief of Tuhoe and to strengthening and maintaining the connection between Tuhoe and Te Urewera.²⁵⁷

The purpose of the Act reflects these various aspects:

The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—

(a) strengthen and maintain the connection between Tuhoe and Te Urewera; and

(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and

²⁵⁷ Te Urewera Act 2014, cl 3.

(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.²⁵⁸

The principles governing the implementation of the Act focus primarily on different aspects of environmental protection, but are also protective of indigenous relationships with the park, and of public access for the benefit of all New Zealanders.²⁵⁹

As with the Whanganui River, the key means of upholding the Tūhoe view of Te Urewera as an ancestor is to declare it to be its own legal entity, with “all the rights, powers, duties, and liabilities of a legal person.”²⁶⁰ It will accordingly hold title to its own land (ie, title to itself),²⁶¹ where that land is inalienable.²⁶² Its status is unique and any previous status—as Crown, conservation, or reserve lands, or as a national park—is removed.²⁶³

²⁵⁸ Te Urewera Act 2014, cl 4.

²⁵⁹ *Id.* at cl 5. Sec. 5 provides:

- (1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—
 - (a) Te Urewera is preserved in its natural state;
 - (b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated;
 - (c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected;
 - (d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected;
 - (e) the historical and cultural heritage of Te Urewera is preserved;
 - (f) the value of Te Urewera for soil, water, and forest conservation is maintained;
 - (g) the contribution that Te Urewera can make to conservation nationally is recognised.
- (2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

Id.

²⁶⁰ *Id.* at cl 11(1).

²⁶¹ Te Urewera Act 2014, cl 12(3). “The fee simple estate in the establishment land vests in Te Urewera and is held under, and in accordance with, [Parts 5-7 of] this Act.” *Id.*

²⁶² *Id.* at cl 13. “Te Urewera land must not be alienated, mortgaged, charged, or otherwise disposed of, except [under 2 other sections in the Act].” *Id.*

²⁶³ *Id.* at cl 12(1)-(2). The relevant parts are as follows:

- (1) Te Urewera establishment land ceases to be vested in the Crown.
- (2) Any part of the establishment land that is—
 - (a) a conservation area under the Conservation Act 1987 ceases to be a conservation area;
 - (b) Crown land under the Land Act 1948 ceases to be Crown land;
 - (c) a national park under the National Parks Act 1980 ceases to be a national park;
 - (d) a reserve under the Reserves Act 1977 has the reserve status revoked.

The Te Urewera Board is established “to act on behalf of, and in the name of, Te Urewera” and “to provide governance for Te Urewera.”²⁶⁴ Tūhoe spirituality is directly provided for in Board decision-making, whereby:²⁶⁵ “In performing its functions, the Board may consider and give expression to—

- (a) Tuhoetanga [Tuhoe identity and culture];
- (b) Tuhoe concepts of management such as—
 - (i) rāhui;²⁶⁶
 - (ii) tapu me noa;²⁶⁷
 - (iii) mana me mauri;²⁶⁸
 - (iv) tohu.”²⁶⁹

The Board, “when making decisions,” must also “consider and provide appropriately for the relationship of iwi and hapū and their culture and traditions with Te Urewera.”²⁷⁰ This is expressly stated as being “to recognise and reflect” “Tuhoetanga” (Tuhoe identity and culture) and “the Crown’s responsibility under the Treaty of Waitangi.”²⁷¹ As with the other settlement legislation, as well as other legislation recognizing and protecting Maori culture, it is significant that these concepts are expressed in Maori and, in some cases, without translation, so that the Maori concept—rather than an English translation of a cultural concept—can be upheld.

The membership provisions are worth noting as being novel: for the first three years there will be eight members, four of which will be appointed by Tuhoe trustees and four of which will be appointed by the Crown.²⁷² After three years they increase to nine members, six of which will be appointed by Tuhoe trustees and three of which will be appointed by the Minister of

Te Urewera Act 2014, 12(1)-(2).

²⁶⁴ Te Urewera Act 2014, cl 16-17. The Board is established under cl 16 of the Act and cl 17 defines its purposes. *Id.*

²⁶⁵ *Id.* at cl 18(2).

²⁶⁶ *Id.* at cl 18(3) (defined in cl 18(3) as: “**rāhui** conveys the sense of the prohibition or limitation of a use for an appropriate reason . . .”).

²⁶⁷ *Id.* Defined in cl 18(3) as:

tapu means a state or condition that requires certain respectful human conduct, including raising awareness or knowledge of the spiritual qualities requiring respect

tapu me noa conveys, in tapu, the concept of sanctity, a state that requires respectful human behaviour in a place; and in noa, the sense that when the tapu is lifted from the place, the place returns to a normal state.

Id.

²⁶⁸ *See id.* (defined in cl 18(3) as: “**mana me mauri** conveys a sense of the sensitive perception of a living and spiritual force in a place . . .”).

²⁶⁹ *Id.* (defined in cl 18(3) as: “**tohu** connotes the metaphysical or symbolic depiction of things . . .”).

²⁷⁰ Te Urewera Act 2014, cl 20(1).

²⁷¹ *Id.* at cl 20(2).

²⁷² *Id.* at cl 21(1). The Crown appointees will be made jointly by the Minister of Conservation and the Minister of Treaty of Waitangi Negotiations.

Conservation.²⁷³ This is designed to accommodate the development of Tuhoe capacity post-settlement.

The Act contains an extensive list of powers and obligations of the Board, including the ability to make by-laws and to grant activity permits with Te Urewera.²⁷⁴ One function that is completely new to the park lands is the ability to grant permits for “taking, cutting, or destroying indigenous plants within Te Urewera” and for “disturbing, trapping, taking, hunting, or killing indigenous animals within Te Urewera.”²⁷⁵ This may only be undertaken where “the preservation of the species concerned is not adversely affected,” “the effects on Te Urewera are no more than minor,” and “the grant of a permit is consistent with the management plan.”²⁷⁶ Further, it must be considered whether “iwi and hapū support the application” and whether “the proposed activity is important for the restoration or maintenance of customary practices that are relevant to the relationship of iwi and hapū to Te Urewera.”²⁷⁷ Yet this is still significant because under other law, indigenous wildlife is absolutely protected,²⁷⁸ and neither plants nor animals (including birds) may be taken from a national park.²⁷⁹ These laws reflect the traditional wilderness conservation approach whereby nature is wholly protected from human activity within protected areas (such as national parks). The new Te Urewera law upholds the indigenous concept that nature can be protected in conjunction with human use, if managed properly, and thus that fauna may be able to be sustainably harvested, for example, while still being protected.

²⁷³ Te Urewera Act 2014, cl 21(2). For more details on membership and Board decision-making, see cls 21-37 and sched. 2.

²⁷⁴ *Id.* at cl 20(f), (h).

²⁷⁵ *Id.* at cl 58(a)-(b). “Further provisions relating to authorisations and administrative matters.” *Id.* at sched. 3.

²⁷⁶ *Id.* at sched. 3, cl 1(2).

²⁷⁷ *Id.* at sched. 3, cl 1(3). The other matters which must be taken into account in this section are whether “the proposed activity is essential for management, research, interpretation, or educational purposes,” whether “the quantity of indigenous plants or animals that will be affected is minor in relation to the abundance of the material,” and whether “the proposed activity could occur outside Te Urewera or elsewhere within Te Urewera where the potential adverse effects would be significantly less.” *Id.*

²⁷⁸ See Wildlife Act 1953, cl 3 (N.Z.).

²⁷⁹ See National Parks Act 1980, cl 5 (N.Z.).

V. CONCLUSION

[H]umanity has contracted a debt with indigenous peoples because of the historical misdeeds against them. Consequently, these must be redressed on the basis of equity and historical justice. . . . It is not possible to undo all that has been done . . . but this does not negate the ethical imperative to undo (even at the expense, if need be, of the straitjacket imposed by the unbending observance of the "rule of [non-indigenous] law") the wrongs done, both spiritually and materially, to the indigenous peoples.²⁸⁰

New Zealand law has been recognizing and taking account of Maori cosmology and cultural interests mainly since the 1980s. The most significant aspect of this that has been recognized in law has been Maori relationships with the natural world and the concomitant responsibilities to care for it as kin. This has produced many examples where consideration of Maori culture has resulted in better environmental protection outcomes that would be achieved without it, from the general provisions in the Resource Management Act to the specific settlement agreements in relation to particular natural features.²⁸¹

It is thus perhaps unsurprising that there are features of these laws that environmentalists champion. For example, the most recent agreements to establish legal personality for the Whanganui River and Te Urewera have been portrayed by environmentalists as examples of according rights to nature, as Christopher Stone argued for in 1972.²⁸² These two examples certainly fulfill that role, especially with the appointment of a body to advocate for and act in accordance with the interests of the river and the forest, respectively, as Christopher Stone argued was missing from U.S. environmental law.

Further, these two examples also both focus heavily on the protection of nature itself. A fundamental—though perhaps less obvious—aspect underlying these examples is the importance placed on the intrinsic value of nature itself. There are not many protections in environmental laws worldwide recognizing the intrinsic value of the environment.²⁸³ Legislation protecting national parks may be couched in the language of intrinsic worth, as opposed to their utility as resources, even while this intrinsic worth is typically for the ultimate benefit of humans under the Romantic view of wilderness.²⁸⁴

²⁸⁰ Martinez, *supra* note 66, at 40.

²⁸¹ *Cf. e.g.*, Resource Management Act 1991, cl 15 (N.Z.). *See* discussion of Resource Management Act and settlement agreements, *supra* Part IV.B, D & E.

²⁸² Christopher Stone, *Should Trees Have Standing?*, 45 S. CAL. L. REV. 450, 500-01 (1972).

²⁸³ *See, e.g.*, BEGONIA FILGUEIRA & IAN MASON, WILD LAW: IS THERE ANY EVIDENCE OF PRINCIPLES OF EARTH JURISPRUDENCE IN EXISTING LAW AND PRACTICE? 5 (UK Environmental Law Association & The Gaia Foundation Research Paper, 2009).

²⁸⁴ *See, e.g.*, New Zealand's National Parks Act 1980, § 4(1):

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, or natural features so

But most legislation concerning environmental management—even ones which provide biophysical bottom lines—balances the protection of natural resources with the interests of human use of those resources. When there is a collision between use and protection, use typically wins out over any intrinsic environmental protection.²⁸⁵ In contrast, in the Whanganui River agreement, for example, the “innate values” of the river will be recognized and provided for in legislation,²⁸⁶ and the “interests” and “status” of the river itself can be upheld and represented.²⁸⁷ This language of protection is for the benefit of the river itself as well as for the people. Similarly for Te Urewera: its “intrinsic worth” is explicitly identified,²⁸⁸ as well as protection of its own interests.²⁸⁹ This combination of formally legislating for a natural feature as a legal person and upholding its interests for its own sake suggests to all—not just to its Maori descendants—that it is more than just a resource to be exploited.

Yet, at the same time, these examples do not fit squarely within the standard environmental protection paradigm, whereby nature is protected apart from people. The Te Urewera legislation shows that people are considered part of forest management.²⁹⁰ Thus, while a forest may have intrinsic value, worthy of respect, it is also a place that people inhabit; its plants and animals are not off-limits as a resource, if used truly sustainably. This truly reflects the indigenous cosmological view of people as part of nature, not separate nor above it. Indeed, the legal recognition of personality in these examples also recognizes the Maori cosmology of ancestral nature and the indivisibility of the physical and metaphysical elements of the natural world. The appointment of a body to be an official guardian recognizes “the inseparability” of the people and the river or forest, respectively, as well as the responsibilities inherent in that relationship for taking care of them as kin.²⁹¹ In this sense, these examples emphasize the responsibilities to nature more than nature’s rights. But it is certainly possible to place this within a framework that emphasizes nature’s rights, viewing the responsibilities as the flip side of the human duties within a legal system that recognizes these rights.

It is interesting to consider how this experience of New Zealand in recognizing Maori cosmology might be relevant to recognition of a human right to a healthy environment. It is relevant that these changes have been

beautiful, unique, or scientifically important that their preservation is in the national interest.

²⁸⁵ For example, in New Zealand, even protection for reasons of Maori cultural values under the Resource Management Act 1991 are couched in the language of protection for the benefit of the human (Maori) value placed on that environment, not for the benefit of the environment itself. *See, e.g.*, Resource Management Act 1991, § 6(e): what must be recognized and provided for is “The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu [sacred sites], and other taonga [treasures].”

²⁸⁶ Tutohu Whakatupua, *supra* note 217, at art. 2.16.

²⁸⁷ *See generally* Marine and Coastal Area (Takutai Moana) Act 2011, cl 64 (N.Z.).

²⁸⁸ Te Urewera Act 2014, cl 3(8), 4 (N.Z.).

²⁸⁹ *Id.* at cl 18(1)(g).

²⁹⁰ *See supra* Part IV.F.

²⁹¹ *Te Mana o Te Inwi o Whanganui*, *supra* note 211, at cl 1.3.

agreed to for human rights reasons, not for environmental protection reasons. All of the measures mentioned in this paper that have recognized and provided for Maori cosmology have done so in order to better respect their human interests: justice for past wrongs done to Maori and present or continuing protection of Maori culture. It just so happens that Maori culture is based on a different cosmology and view of humans' relationships with the natural world, one that traditionally takes a more protective or sustainable view of nature's resources.²⁹²

It is thus certainly possible that a human right to a healthy environment can be defined to include the maintenance of spiritual relationships with the natural world, and therefore include the ability as part of that right to exercise guardianship duties over the natural feature in question. However, I also note that there are already human rights that can do this: indigenous rights. Indigenous cultural rights already exist in international human rights law and indigenous peoples the world over are already encouraging states to implement them fully in domestic laws. New Zealand has in fact been able to redress indigenous grievances without referring to—or waiting for legal recognition of—such human rights; redress has been acknowledged as the right thing to do for reasons of justice and fairness.²⁹³ Yet, as the New Zealand example shows, respect for the rights of indigenous peoples—including redress for wrongs suffered and maintenance of their culture—can give us laws that treat the environment in a way that environmentalists have been arguing for.

Further, such laws, with their emphasis on human responsibilities for or toward the natural world, could help overcome the widespread concern that human rights claims, couched in terms of self-interest, “may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for” the environmental protection in the first place.²⁹⁴ Thus indigenous rights offer us that “socio-psychic” element of an alternative paradigm that Christopher Stone argued was needed—a new “myth” and “consciousness,” “felt as well as intellectualized” that is not so obviously contained within a Western, liberal human right to a healthy

²⁹² I note that there is no guarantee that any indigenous people or person will manage a particular environment sustainably. This is especially the case for indigenous people operating within a mainstream culture that holds a very different cosmology. For example, in New Zealand, Maori development corporations have maintained capitalist, commercial enterprises that have harmed the environment and still propose to. See e.g., Collene Rigby et al., *The integration of Maori Indigenous Culture into Corporate Social Responsibility Strategies at Air New Zealand*, 5 J. MARKETING DEV. & COMPETITIVENESS 116, 118 (2011), available at <http://www.na-businesspress.com/JMDC/MuellerWeb5-6.pdf>. Some large iwi have separated off their tribal business arms from their culture arms, using the money earned from one for culture revitalization by the other. *Id.* at 116.

²⁹³ See *Healing the Past, Building a Future*, *supra* note 175 at 84-86. This acknowledgement is made through the apology made in every settlement agreement. *Id.*

²⁹⁴ Laurence H Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 Yale L. J. 1315, 1331 (1974).

environment.²⁹⁵ Both a human right to a healthy environment and rights of indigenous peoples aim to extend the ambit and reach of our human rights rhetoric and actual protections. But indigenous rights offer a more fundamental challenge to the mainstream culture with a vastly different view of humans' relationships with the natural world and thus perhaps a greater opportunity for meaningful change. As Maori recognize, "these relationships are so crucial to Maori culture and identity that their survival cannot be separated from the survival of the culture itself."²⁹⁶ Perhaps such recognition in law will help encourage us all to realise that these relationships with the natural world are actually crucial to every person's and people's identity and survival.

²⁹⁵ Stone, *supra* note 282, at 489.

²⁹⁶ WAITANGI TRIBUNAL, *KO AOTEAROA TENEI*, *supra* note 1, at 248.

