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# **The Use of the Conservation Estate in the Settlement of Treaty of Waitangi Claims**

**A Thesis  
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# 1 Abstract

The effect of the Treaty of Waitangi on New Zealand's conservation estate through the settlement of Treaty of Waitangi claims, and the Department of Conservation's requirement under the Conservation Act 1987 to have regard for the principles of the Treaty of Waitangi is introduced. The importance of the Treaty of Waitangi Settlement process and the controversy surrounding the role of the conservation estate in this process is also discussed.

A background to the Treaty of Waitangi settlement process is presented and three major land claims and their resulting settlements are examined as case studies. These are the Tainui-Waikato *raupatu* claim, the Whakatohea claim, and the Ngai Tahu claim.

The potential impact of each of these settlements on the ownership and management of New Zealand's conservation estate is discussed and compared with the impact of the Department of Conservation's current commitment to the Treaty of Waitangi through its *Kaupapa Atawhai Strategy* on the management of the conservation estate.

It was found that the settlement of Treaty of Waitangi claims has had little impact on New Zealand's conservation estate. Only very small areas of the conservation estate have had ownership transferred to claimants, and the area of land managed by the Department of Conservation has increased as a result of Treaty settlements. Treaty of Waitangi settlements have also had little impact on the management of New Zealand's conservation estate, as many of the redress instruments included in settlements are similar to the objectives and policies included in the Department of Conservation's *Kaupapa Atawhai Strategy*.

Future Treaty of Waitangi settlements are also unlikely to have a significant impact on New Zealand's conservation estate, and are likely to become more effective through improved consultation with the public and conservation interest groups and the closer involvement of the Department of Conservation's *Kaupapa Atawhai* section in the settlement process.

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### 3 Introduction

#### 3.1 The Conservation Estate and the Treaty of Waitangi

Since the National Government began a process of attempting to settle all outstanding Treaty of Waitangi claims in 1991, the role of the conservation estate in the settlement of Treaty of Waitangi claims has become a highly controversial issue. This controversy has highlighted the important implications that the Treaty of Waitangi has for the ownership and management of New Zealand's conservation estate.

The Treaty of Waitangi affects the conservation estate in two main ways. The first impact is through the requirement of Section 4 of the Conservation Act 1987 that this Act is to "be interpreted and administered as to give effect to the principle of the Treaty of Waitangi". The Treaty of Waitangi also affects the conservation estate through the settlement of Treaty of Waitangi claims that have implications for the conservation estate (Department of Conservation, 1997).

The requirement laid out in various pieces of legislation, such as the Conservation Act 1987, for various Government agencies, including the Department of Conservation, to have regard for the principles of the Treaty of Waitangi can be the subject of some confusion (Department of Conservation, 1997; Kenderdine, 1989). This is largely as a result of the requirement to have regard for the principle of the Treaty rather than the letter of the Treaty (Department of Conservation, 1997; Kenderdine, 1989).

However the Waitangi Tribunal and a number of court rulings, most notably the 1987 Court of Appeal ruling on *New Zealand Maori Council vs Attorney General*, have to a certain extent served to define the principles contained within the Treaty of Waitangi (Department of Conservation, 1997; Kenderdine, 1989).

The Department of Conservation has taken the principles of the Treaty of Waitangi to include;

- The Essential Bargain; meaning that the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects, in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated.
- The Treaty relationship; that the Treaty implies a partnership to be exercised with the utmost good faith
- Rangatiratanga; meaning that the Maori were guaranteed possession of lands, forests, fisheries and other possessions, promised Crown protection and granted the rights of British subjects
- Active protection; which implies that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable
- Duty to be informed: defined by the court of appeal as the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision. (Department of Conservation, 1995d)

The Department of Conservation's response to the requirement to have regard for these principles was the establishment of the Kaupapa Atawhai Strategy, and the establishment of a number of Kaupapa Atawhai staff throughout the country responsible for the liaison between the department and with iwi (Department of Conservation, 1997; Mansfield, 1997).

The 1997 *Kaupapa Atawhai Strategy* outlines eight goals aimed at ensuring that "the department, Maori and the community at large are working co-operatively to conserve the natural and historic heritage of New Zealand for present and future generations" (Department of Conservation, 1997).

These eight Kaupapa Atawhai goals were;

- To interpret and administer conservation legislation so as to give effect to the principle of the Treaty of Waitangi.
- To advise Government on conservation issues relating to the resolution of Treaty grievances and to implement settlements reached.
- To develop a relationship with Maori consistent with the status of the Crown and Maori as co-signatories of the Treaty of Waitangi.
- To work with Maori in the conservation of their cultural heritage on lands administered by the department.
- To work with Maori in the provision of services to visitors on department managed lands.
- To increase public awareness of the involvement of Maori in conservation raise Maori Awareness of current conservation issues and the department's role, and foster dialogue between Maori and other stakeholders in conservation.
- To reflect through staff the department's commitment to biculturalism and relationships with Maori (Department of Conservation, 1997).

The implementation of these goals has the potential to have a significant impact on the management of the conservation estate by the Department of Conservation.

The Treaty of Waitangi also has significant implications for the management of the conservation estate through the settlement of Maori grievances. These claims can have significant implications for both the ownership and the management of the conservation estate.

A number of claims to the Waitangi Tribunal concern specific areas of the conservation estate. For example the 1989 claim by the Ngati Koata *iwi* for the return of Stephens Islands (Stone, 1995a; Stone, 1995b)

Other Treaty of Waitangi claims, such as the claim for the return of confiscated land by various Taranaki *iwi* (Waitangi Tribunal, 1996), can also include significant areas of the conservation estate. This situation is compounded by the fact that only Crown owned land is available for the use in Treaty Settlements. In many cases the largest,

or sometimes the only, block of Crown owned land in an area is the conservation estate (Department of Conservation, 1997).

This situation largely resulted from the transfer of large areas of Crown owned land to State owned Enterprises, or the disposal of Crown land in other ways, since 1987.

This process meant that significant amounts of land became unavailable for use in the settlement of Treaty claims, and a large proportion of land that remained in Crown ownership was protected as part of the conservation estate (Department of Conservation, 1997).

Various issues relating to the management of the conservation estate are also the subject of a number of Treaty of Waitangi claims. These can include claims for traditional harvesting rights, to claims for a greater role in management of various area, and also objections to various management practices such as the culling of species, the use of 1080 poison (Land Information New Zealand, 1996), or the management of specific areas, such as the Urewera National Park (O'Malley, 1998).

The conservation estate is also highly valued by both the Maori and *Pakeha* communities for the scenic, historic and cultural values it contains (Alexander, 1994; O'Regan, 1994). As a result the debate on the impact of Treaty of Waitangi settlements on the conservation estate is a heated and emotional one, generating a great deal of controversy and complicating an already difficult settlement process.

In many cases Department of Conservation is also responsible for bearing the brunt of "demands for settlement, or frustration and protest at the lack of a settlement" (Department of Conservation, 1997), as it is the agency responsible for the management of a significant proportion of the land subject to the claim (Department of Conservation, 1997). The impacts of the Treaty of Waitangi on the Department of Conservation and the conservation estate are also compounded by the fact that in many areas the Department of Conservation is "one of the few government departments present in [the] local community" (Department of Conservation, 1997).

### 3.2 The Settlement of Treaty of Waitangi Claims

The Government's current commitment to the settling of Treaty of Waitangi claims is a continuation of the dispute that has surrounded the Treaty since it was signed on the 6<sup>th</sup> of February 1840. Today Maori/*Pakeha* race relations, and Treaty issues are perceived as one of the most important issues facing the country, and were a significant issue at the last election (Barr, 1996).

The controversy that has surrounded the Treaty of Waitangi since its signing largely stem from differences between the English and Maori translations of the each of three Articles which comprise the Treaty (Moon, 1994; Orange, 1987; Walker, 1989).

In first Article of the English version of the Treaty of Waitangi Maori cede sovereignty over their lands to the British Crown. However, in the Maori translation of the Treaty Maori cede *kawanatanga*, which can be translated as governorship (Orange, 1987; Walker, 1989).

The second Article of the Treaty guarantees Maori full and undisturbed possession, or *rangatiratanga* in the Maori version, of all their lands, estates, forests, fisheries, and other properties, which are translated as *taonga*. However *rangatiratanga* is often translated as chieftanship or sovereignty, and *taonga* as treasured possessions, giving the Maori translation of the Treaty a much broader meaning than the English text (Orange, 1987; Walker, 1989).

The distinction between sovereignty/*rangatiratanga* and governorship/*kawanatanga* and the definition of these terms has been the source of much controversy. For example *rangatiratanga* is often take to mean the right to self-determination, or the right of Maori to manage their own resources and affairs and *kawanatanga* as the right of the Crown to govern the country.

The result of these differences in the translations was that Maori believed that they were permitting the British Crown the right to govern *Pakeha* in New Zealand in exchange for the privileges and protection afforded to British subjects while retaining