

INDIGENOUS CLAIMS TO PETROLEUM RESOURCES

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Abstract

An introduction to the history and origins of the Petroleum Act 1937 is given noting the reasons for its enactment and the debate at the time in respect of the "confiscation" of the resource.

A brief survey is made of the land issues in Taranaki concerning confiscated lands together with a description of current Waitangi Tribunal claims and, in particular, the Taranaki Raupatu claim.

Similar developments in other jurisdictions are outlined with a discussion of how comparable they are to the New Zealand situation; in particular, the USA (Alaska) and Canada, with comments on the recent cases on tribal ownership of oil and gas on the US continental shelf. The implications for future Crown participation are examined and whether there could be any possible conflict between the Crown's commercial participation and its obligations as a Treaty partner.

The paper finishes with a review of the relevance of these indigenous claims to private sector involvement in petroleum exploration and development in New Zealand; concluding that from the private sector perspective, indigenous claims should not be regarded as a major source of concern or uncertainty.

Introduction

In a number of jurisdictions, the oil exploration industry is finding that it must come to terms with claims by indigenous people which have a bearing upon petroleum exploration and development¹. This is already the case in Canada and the United States. While such claims have certainly been made in New Zealand, they have so far been more a matter of concern to the government, rather than to the private sector. However, in my view, this situation is likely to change once the claimants in the Taranaki Raupatu (confiscation) claim begin to seriously engage with this issue. It is my view that the industry would be unwise to ignore the claims and their implications. It should be considering appropriate strategies as a response.

Little attention has so far been given to the possible legal bases for such claims in New Zealand². Therefore this paper will focus principally on the various legal bases for claims and will attempt to predict the likelihood of their success. It is important to emphasise at the outset, that traditional Maori use of the resource is not, in my view, an issue of much significance. It should not be thought that present day claims are undeserving of serious attention simply because the Maori did not have a petroleum industry at the time of the signing of the Treaty of Waitangi. Maori did not engage significantly in coal extraction in 1840 either. But that did not prevent the president of the New Zealand Court of Appeal from expressing the opinion in the case of *Tainui Maori Trust Board v Attorney-General*³, that Maori were entitled under the Treaty of Waitangi to a significant share of the coal reserves of the Waikato⁴. Much of what the Court of Appeal had to say can be applied with equal force to conflicts concerning the petroleum deposits of Taranaki.

Nor should it be thought that the issue of Maori property rights in petroleum deposits is novel. In fact, this very issue was debated extensively when the Petroleum Act 1937 was

going through parliament. In the debate on the Petroleum Bill, Sir Apirana Ngata said⁵:

"Did the Maoris know that there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses and so on. Is the argument now, that, because the poor savage was ignorant of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them today? If so, it will not hold water."

In fact, concern about the Treaty of Waitangi was such⁶ in 1937 that the opinion of the Solicitor-General was sought as to whether the legislation was in conflict with the Treaty. His opinion was that it was not, as its expropriatory provisions affected everybody regardless of race:

The legislation is comprehensive and treats equally all subjects of His Majesty⁷.

In this year's Budget, the Minister of Finance announced that the Crown's interests in "on-shore Taranaki petroleum mining licences will be offered for sale by a direct negotiation process"⁸. This sale process will be under the supervision of the Minister of Energy. In my view the process may well generate opposition from the Maori tribes of Taranaki, and possibly litigation. This makes it all the more important for the industry to consider its strategies.

The Taranaki Raupatu Claim and Petroleum

Taranaki was a rich and important region in pre-European times, and was the homeland of a number of important tribes - Ngati Tama, Ngati Awa, Taranaki, Ngati Ruanui, Nga Rau and others. The area has a rich archaeological and cultural heritage, and a complex mosaic of tribal relationships.

In 1860, following the government's efforts to purchase the Waitara block, open war broke out in the region between the Crown forces and the Maori. In 1863, extensive territory within Taranaki was confiscated by the government pursuant to the New Zealand Settlements Act 1863. Some of the land was returned (although not necessarily to its original owners). The total amount retained by the government was 462,000 acres. The government was not able to enforce the confiscation immediately, and a situation of extraordinary complexity and difficulty evolved in Taranaki between 1863 and 1880, the year of the government's forcible suppression of the resistance movement led by the Atiawa prophets, Te Whiti and Tohu. (For an excellent modern account of these events see Hazel Riseborough, *Days of Darkness: Taranaki 1878-1884* (1989)).

In 1928 the report of the Royal Commission, set up to inquire into grievances about confiscated lands (usually known as the Sim Commission), described the Waitara purchase as a "blunder"⁹ and concluded that the tribes of Taranaki "ought not to have been punished by the confiscation of any of their lands"¹⁰. It recommended that the Taranaki tribes should receive compensation of £5,000 per annum. This was agreed to by the government, and implemented by the Native Purposes Act 1931. This Act set up the Taranaki Maori Trust Board which continues to receive \$10,000 a year. In 1974, a major petition was presented by the Taranaki tribes to the Labour Government of the day. It received favourable consideration. The 1974 petition was particularly concerned about the adequacy of the \$10,000 per year payment. Despite the evident goodwill on both sides in 1931 and again in 1974-75, it cannot be claimed that the issue has been successfully resolved.

The Taranaki Raupatu claim is now being heard by the Waitangi Tribunal. Due to the complexity of tribal relationships in Taranaki, the claim is a complex one. It involves a number of tribal groups whose interests, moreover, do not necessarily coincide. The claimants are:

Wai 131	Taranaki Maori Trust Board	31 March 1987
Wai 133	Trustees of Kaipakopako 4A1B	
Wai 134	Milton Hohai/Taranaki Iwi Katoa Trust	3 August 1987
Wai 135	Stephen Taitoko White/Ngati Tama	17 Sept 1987
Wai 136	T Tokotaua, B H Orchard, P T Kopu for Ngati Maru Trustees	21 Sept 1987
Wai 137	G P Neilson/Nga Rauru	29 Oct 1987
Wai 54	M R R Love, R H N Love/Taranaki Maori Trust Board	23 Dec 1987
Wai 138	Te Wha Whanau Trust	
Wai 99	P R Parker/Pakakohi Iwi	
Wai 126	J H Paki/hapu Ngamahanga, Ngati Hamiti, Taranaki iwi	28 May 1990
Wai 139	Proprietors of Parinihi ki Waitotara Block	28 May 1990
Wai 132	E Taha/Ngaruahine	20 June 1990
Wai 140	W Kerepuru/Ngati Ruanui	21 June 1990
Wai 141	G Knuckey/Te Atiawa	July 1990
Wai 143	D Rangi/Tangahoe	
Wai 153	Te A H Tito, M M Hohai/Taranaki Tribe	

There are thus sixteen separate claimant groups, each with its own particular grievances and concerns. Not all of the claims mention petroleum reserves specifically, but three do. These being Wai 99, Wai 126 and Wai 143. The main,

or parent claim, that of the Taranaki Maori Trust Board, does not mention petroleum specifically. But a claim to it is implicit in the very broad language of its statement of claim, dated 31 March 1987. The issue raised by the Trust Board as its main grievance was simply:

"All confiscations of land and waters by the Crown in the years following the Waitara purchase and in respect of which there has been inadequate compensation."

For redress they seek:

"Compensation for the wrongful confiscation of such land and waters by the Crown, and land and waters which prior to confiscation belonged to the Taranaki tribes."

The importance of petroleum to the Taranaki claimants is shown in the decision made by Ellis J. in the High Court in 1988¹¹ concerning the *Love v Attorney-General* case. In this case the plaintiffs sought an injunction restraining the Crown's disposal of its shares in Petrocorp to a wholly-owned subsidiary of Fletcher Challenge Ltd. The application was opposed by the Crown and refused by the High Court on the grounds that the relevant legislation, the Ministry of Energy Act 1977 and the Finance Act 1982, contained no references to the Treaty of Waitangi. This aspect of the decision will be returned to later in this paper. For present purposes it is sufficient to note that the case documents very clearly that the Taranaki Trust Board sees the Crown's petroleum reserves in Taranaki as an important form of compensation should the confiscation claim be successful. In Ellis J.'s words¹³:

"...The essence of their claim is that the Taranaki Maori people are prosecuting a claim before the Waitangi Tribunal. Their claim relates to tribal lands running south from Mokau on the West Coast of the North Island, encompassing all lands commonly known as the Taranaki region, to and including parts of the lands in Wellington and areas of land in the northern portion of the South Island and the Chatham Islands. They claim that much of this land was wrongly taken from them by confiscation or purchase contrary to the provisions of the Treaty of Waitangi...The applicants maintain that they may be able to obtain a recommendation from the Waitangi Tribunal that substantial relief be granted to them by way of compensation. Indeed they maintain it is likely. They also maintain that they are likely to obtain recommendations that the relief take the form of a transfer of land and money by way of compensation. They maintain that they are likely to receive recognition from the Tribunal that their rights include rights to petroleum, gas and other minerals beneath the surface of the land as being a natural incidence and consequence of the rights guaranteed to them under the Treaty of Waitangi."

In 1990, two of the Taranaki Maori claimants, John Hanita Paki and Sir Ralph Love, appeared with their respective counsel at a special interim hearing of the Waitangi Tribunal concerning the disposal of Crown interests in the petroleum industry. The Tribunal issued an interim report dated 29 June 1990; a report which makes for rather confusing reading as it is not altogether clear which particular Crown interests are of concern. The report speaks of the disposal of "Maui gas rights" by the Crown and also of "the disposal of the Crown's shares in Petrocorp"¹³. My understanding is that in fact the Crown had already disposed of all its interests in Petrocorp by that time; and that the "Maui gas rights" were, only purchase rights. The series of transactions which took place involving the Crown, Petrocorp, Fletcher Challenge

Ltd and an SOE known as New Zealand Liquid Fuels Investment Ltd, were of such complexity that one certainly sympathises with the Tribunal, which clearly found the process extremely confusing. The Tribunal comments that it appears that:

"...existing Maori rights under the State-Owned Enterprise legislation in respect of the transfer of land and plant would not be jeopardised by the new arrangements"¹⁴.

This is, of course, quite correct, but as it happens the assets protected by the State-Owned Enterprises Act (and the Treaty of Waitangi [State-Owned Enterprises] Act 1988) are actually of marginal importance.

The 1990 report of the Tribunal at the very least documents once again the importance of the petroleum resources of the Crown to the claimants. The Tribunal said¹⁵:

"We are of opinion however that the claimants have a case to be argued, either to a share of the resource [i.e. petroleum] or to compensation from that resource as a local asset within the de facto control of the Crown."

In the next part of the paper I propose to identify the legal avenues by which such a case might be made.

Claims under the Treaty of Waitangi

Before dealing with this it is necessary to briefly traverse the legal position of the Treaty at present. The leading decision still remains that of the Judicial Committee of the Privy Council in **Hoani Te Heuheu Tukino v. Aotea District Maori Land Board**¹⁶, 1941, in which it was held that the Treaty of Waitangi - like any Treaty - is unenforceable in court unless, and except to the extent that, it is given effect in statute. To what extent this remains the position in the modern law is not altogether clear. In some cases, for example the **Love** decision referred to above¹⁷, the courts have firmly re-stated the orthodox rule of **Te Heuheu** as illustrating the present position. However, **Cooke P.** in the first **Maori Council v. Attorney-General**¹⁸ case, and **Chilwell J.** in **Huakina Development Trust v. Waikato Valley Authority**¹⁹ (both cases decided in 1987) have accepted that the Treaty may be relevant as a canon of statutory interpretation even when the legislation in question does not refer to it. The most recent decision of the Court of Appeal in this area, the 1990 decision in the broadcasting frequencies case, **Attorney-General v New Zealand Maori Council**²⁰, indicates that the Treaty may also have relevance in an administrative law sense. That is, as a criterion which is relevant to the lawful exercise of statutory discretionary powers; although the precise limits of this are rather uncertain. On this occasion the Court of Appeal split sharply, 3-2, with **Richardson J.** firmly believing that the Treaty can only be relevant to a decision-making power if it is specifically listed in the empowering statute. It is significant that a rather similar cleavage was apparent in the court in the recent **Petrocorp** case, where, of course, **Richardson J.**'s dissent was rather pointedly upheld by the Judicial Committee of the Privy Council²¹.

The Treaty of Waitangi Act 1975 is of course a form of statutory reference to the Treaty. It establishes as it does the Waitangi Tribunal and gives it the power to make recommendations based on whether acts or omissions of the Crown are contrary to the principles of the Treaty. The Tribunal's powers are of recommendation only with the important exceptions being the Treaty of Waitangi (State-Owned Enterprises) Act 1988 and the Crown Forest Assets

Act 1989. Neither Act appears to have a significant bearing upon issues in Taranaki, and thus the outcome of the current Taranaki Raupatu hearings will at most amount to a set of recommendations only. It is certainly not inconceivable that the Tribunal would recommend that Crown interests in the petroleum resource in Taranaki be vested in the claimants - although in its most recent reports the Tribunal has tended to avoid specific recommendations of that kind and has concentrated instead on reaching conclusions of fact which can then be used as a basis for negotiation²².

Such a recommendation would not need to be based on the status of petroleum as a taonga. Although it is possible that the claimants might attempt to construct an argument before the Tribunal along these lines, it is unlikely that this will be the principal one. It is more likely that the argument will be developed as indicated in the **Petrocorp** case - that the petroleum resource is a natural incident of the land that has been confiscated. If the land had not been unjustly confiscated, in other words, there would certainly be some petroleum under some Maori land today. The flaw in this reasoning is, of course that the whole of the resource was nationalised by the Crown in 1937 (unlike the coal reserves of the Waikato region). To this, the rejoinder would have to be that the 1937 Act was contrary to the Treaty as well, something which **Ngata** did in fact suggest in Parliament in 1937. Another argument would be quite simply that petroleum is a valuable resource which the Crown still happens to have in the region. Most of the confiscated land is now privately-owned and is therefore beyond reach, but this is not the case with petroleum. From the perspective of the claimants, it is far preferable that the resource be Crown-owned, rather than it be privatised, which is why I have suggested that attempts by the Crown to sell the resource are likely to meet with considerable resistance.

Whatever the recommendations of the Tribunal, they will remain just that - recommendations. However, it is not difficult to imagine a scenario in which the Tribunal's investigations could, at the very least, significantly complicate the sale process. If the government proceeds with sale before the Tribunal has completed its enquiry - which seems more than likely - the claimants might lodge proceedings arguing that the sale is unlawful, until the Minister has taken the Tribunal's conclusions into account. A similar situation arose in the broadcasting frequencies case. Should such an argument come before the Court of Appeal, it is likely that there will be a significant division of opinion. Judging by their remarks on earlier occasions, **Casey J.**²⁴ and **Richardson J.**²⁴ would reject the argument unless some kind of statutory reference could be found making the Treaty a relevant criterion of some kind; **Cooke P.** would be more likely to read such a requirement in unless the legislation had in some way excluded it. It is possible that S.4 of the Crown Minerals Act 1991 may amount to a statutory reference sufficient to satisfy the Court of Appeal that the principles of the Treaty are a relevant criterion.

Such litigation would do no more than force the government to accept that it has to consider its Treaty obligations before selling Crown interests in the petroleum resource. Assuming that such litigation would succeed, the Crown need do no more than satisfy the courts that it has considered its Treaty obligations and could then proceed with the sales.

Aboriginal Title

Quite separate from the possibility of a claim invoking the Treaty, is the possibility of invoking the common law doctrine of aboriginal title. This principle has been brought to the fore in recent years as a consequence of the many publications on the subject by Dr Paul McHugh of Sidney Sussex College, Cambridge²⁵, and by important decisions of the courts, principally in Canada and the United States, but also in this country²⁶. The aboriginal title rule requires that the property interests of "aboriginal" populations survive and remain enforceable after a transfer of sovereignty - unless the new sovereign power has extinguished them. Natural incidents of land ownership including mineral and (probably) petroleum ownership, are covered by the rule. The situation is rather more complicated in regard to water resources, geothermal energy and property interests akin to profits-a-prendre²⁷.

In common law, petroleum belongs, like ground water, to whoever extracts it. As with ground water, there is no equivalent to the surface-water doctrine of riparian rights. The key date is 1937: by S. 3 of the Petroleum Act of that year (now s.10 of the Crown Minerals Act 1991), the entire resource was expropriated and vested in the Crown. There is no doubt that S. 3 amounted to a valid extinguishment of the aboriginal title to petroleum. Two issues, however, remain. These concern, firstly, what the position is regarding petroleum beyond the limits of New Zealand, and secondly, whether the original expropriation involves an obligation to pay compensation.

The relationship between aboriginal title and petroleum reserves has become prominent in Alaska due to the litigation²⁸ brought by native Alaskan villages seeking to prevent the Secretary of the Interior from selling oil and gas leases on the outer continental shelf. The case was initially brought forth on a foundation of aboriginal title, principally on the footing that oil exploration would affect the Alaska natives' use of the lands for subsistence hunting and fishing, but also on a basis of "concomitant" rights of ownership. As Chief Judge Browning put it in 1984 (Ninth Circuit, United States Court of Appeals²⁹): "Appellants argue that oil and gas exploration and development in Norton Sound conflicts with their asserted aboriginal right to hunt and fish in these waters, and concomitant right to the minerals of the outer continental shelf underlying the Sound."

The litigation led to the production of three reasonably substantial judgments in the United States Court of Appeals and the United States Supreme Court. The focus was on the effects of legislation including the Alaska Native Claims Settlement Act, the Alaska National Interest Lands Conservation Act and the Outer Continental Shelf Lands Act. The case was decided in the end against the Alaska natives on the basis that the Alaska National Interest Lands Conservation Act (ANILCA), which contained certain procedural protections concerning the rights of Alaska natives, did not apply to the outer continental shelf. The area was outside the territorial limits of the state of Alaska and was under the jurisdiction of the United States. The possibility of a substantive aboriginal title claim to the petroleum was not discussed by the courts, but was certainly not rejected out of hand.

Could a claim to common law seeking enforcement of aboriginal title to petroleum underlying the continental shelf be advanced in the New Zealand courts? This seems to at least be possible, but such a case would involve so many

untested points of law that it is almost impossible to predict its outcome. The statutory context, at least, is reasonably clear: the expropriation of petroleum resources does not extend to lands beyond the 12-mile limit³⁰. The Continental Shelf Act 1964 stipulates that all the provisions of the Petroleum Act 1937, except s.3 (which vests ownership of the resource in the Crown), apply with respect to petroleum in the sea bed and subsoil of the continental shelf. It is probably the case that the legislation vests in the Crown a proprietary interest (albeit one short of full ownership) in the petroleum resources of the continental shelf. This is the view advanced by Professor Daintith in regard to the Crown's interests in petroleum in the continental shelf of the United Kingdom, where the statutory framework is the same as in this country³¹. However, it is my view that the legislation does not extinguish aboriginal title to petroleum in this area - supposing, that is, that such a title exists in the first place.

The New Zealand Case

Is there aboriginal title to petroleum? It appears that there might be. It could be based on the use of the adjacent land or sea. It is well known that the Taranaki tribes depended on fishing, and it is certainly not inconceivable that such fishing took place well beyond the outer boundaries of the twelve-mile limit. Traditional use of the fishing reefs (kawa) of North Taranaki was extensively documented by the Waitangi Tribunal in its Motunui report in 1983. Such a claim might be advanced on the basis that ownership of the soil conveys ownership of associated resources, including petroleum. It might even be based - although this would probably be of marginal importance - on an aboriginal use of petroleum, unlikely as that may seem. At the very least, the Taranaki tribes knew of the existence of petroleum. There are well-attested records of petroleum floating to the surface of the sea around the present site of the city of New Plymouth. Furthermore there are Maori legends which account for the phenomenon of surface manifestations of petroleum and natural gas³². It is difficult to say how the New Zealand courts would react to all of this. And there is no authority from overseas which offers guidance on the specifics of the nature of an aboriginal title claim to petroleum. It is worth reiterating that such a claim did not appear at all bizarre to the United States courts in the Alaska cases. My conclusion is that an aboriginal title claim to petroleum beyond the 12-mile limit is certainly possible here.

In any event such a claim could be brought on an interlocutory basis, seeking an interim injunction to restrain the Crown's disposal of petroleum interests in the continental shelf area. In such a case, the Taranaki tribes would need to show only that in respect of aboriginal title there was a serious issue to be tried. In my view they could meet this requirement without much difficulty. They might also be able to meet the test of "balance of convenience", the other principal requirement for the issuance of an interim injunction.

The other principal issue with regard to aboriginal title concerns whether the original expropriation in 1937 is worthy of compensation. This would appear to have been excluded by S. 39(5) of the Petroleum Act 1937, which provides that:

"Compensation shall not be payable under this or any other Act in respect of any petroleum existing in its natural state on or below the surface of any land."

This provision is not repeated in the Crown Minerals Act, which repeals S. 39 of the Petroleum Act. At present there does not appear to be any statutory bar to a claim for compensation, but there remains the wider issue as to whether statutory extinguishment of aboriginal title interests is deserving of compensation at all. In the United States, where the issue has been examined most frequently and in most depth³³ the courts have been firm in concluding that such extinguishment carries no right of compensation. In Canada, however, the possibility has been left open³⁴. This question is also one wholly unexplored by the New Zealand courts. No claim has ever been made that statutory extinguishment of aboriginal title such as S.155 of the Maori Affairs Act (which provides that customary title to land is unenforceable against the Crown in New Zealand courts) are deserving of compensation.

Summary

Maori claims to petroleum can be advanced on two bases; the Treaty of Waitangi, and the common law doctrine of aboriginal title.

At present, the Treaty could not be used to pursue a resource ownership claim in a New Zealand court. A claim on this footing would have to be made in the Waitangi Tribunal. It appears to be the case that the Taranaki claimants intend to pursue this option. Such a claim, if made, could only lead to non-binding recommendations. But the process could relatively easily be used to bring proceedings which could seriously delay Crown sale of publicly owned on-shore petroleum resources.

An aboriginal title claim for on-shore petroleum is extinguished by S.3 of the Petroleum Act 1937 and S.10 of the Crown Minerals Act. A claim for compensation is theoretically possible with the repeal of S.39(5) of the Petroleum Act. Another possibility is an aboriginal title claim to petroleum resources on the continental shelf, if the aboriginal title has never been extinguished by statute.

References

- (1) See the Alaska cases at note 29, below.
- (2) A valuable unpublished paper on the topic is M.H. Heron, "The Maori Right to Share in Oil and Gas", Research Paper for Indigenous Peoples and the Law LLM (Laws 546), Law Faculty, Victoria University of Wellington, Wellington 1989. As far as the authors are aware, this is the only other paper dealing with the topic.
- (3) [1989] 2 NZLR 513.
- (4) See *ibid.*, 527, 529 (per Cooke P.)
- (5) (1937) NZPD, 1044
- (6) Other MPs supported Ngata - see the remarks of the Member for Central Otago, Mr Bodkin, (1937) 249 NZPD 1048.
- (7) Cited at (1937) 249 NZPD-1236. See Heron *op. cit.*, 4-5.
- (8) Hon. Ruth Richardson, Budget 1991, 30 July 1991, p 52:
The government proposes to sell the following assets in accordance with the criteria set out above:
... The Crown's interests in on-shore Taranaki petroleum mining licenses will be offered for sale by a direct negotiation process. The Minister of Energy will be the Minister in charge with responsibility for the sale's day-to-day management.
- (9) Royal Commission on Confiscated Lands and Other Grievances, [Sim Commission], 1928, p. 10.
- (10) *Ibid.*, 11.
- (11) unreported, 17 March 1988, High Court Wellington Registry CP 135/88.
- (12) *Ibid.*, 2, 5.
- (13) Memorandum from the Waitangi Tribunal Concerning the Disposal of Maui Gas Rights to the Hon. K T Wetere Minister of Maori Affairs and others, Wai 143, 29 June 1990, p. 1.
- (14) *Ibid.*, 4.
- (15) *Ibid.*
- (16) [1941] AC 308.
- (17) *above*, n. 12.
- (18) [1987] 1 NZLR 641.
- (19) [1987] 2 NZLR 188.
- (20) [1991] 2 NZLR 129, 147.
- (21) [1991] 1 NZLR 1 [HC, CA]; [1991] 1 NZLR 641 [JC].
- (22) As in the Muriwhenua Fishing Report, Wai-22, 1988, and the Ngai Tahu Report, Wai 27, 1991.
- (23) See [1991] 2 NZLR 149: "Without accepting that the principles of the Treaty necessarily apply in areas of decision making where there is no statutory provision requiring them to be taken into account..."
- (24) See *Attorney-General v NZ Maori Council*, [1991] 2 NZLR 129.
- (25) P.G. McHugh, "Aboriginal Rights and Sovereignty: Commonwealth Developments" [1986] *New Zealand Law Journal* 57; *The Aboriginal Rights of the New Zealand Maoris at Common Law*, Ph.D. Thesis, Cambridge University, 1987; "Aboriginal Title in New Zealand Courts", (1984) 2 *Canterbury Law Review* 235. See also K McNeil, *Common Law Aboriginal Title*, Oxford, 1989; R.P. Boast, "Treaty Rights or Aboriginal Rights", [1990] *New Zealand Law*

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- (26) For Canada see *Calder v. Attorney-General of British Columbia*, (1969) 8 DLR (3d) 59 (BCSC); (1970) 13 DLR 3d 64 (BCCA); [1973] SCR 313 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs* [1980] 1 FC 518; and see generally B W Morse, (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985), ch. 3. For the United States see especially *County of Oneida v Oneida Indian Nation* 105 S. Ct. 1245 (1985). For New Zealand see *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, a case on s (88)2 of the Fisheries Act 1983. For a discussion of subsequent case law on this provision see Boast, above n.26.
- (27) On water, see R H Bartlett, *Aboriginal Water Rights in Canada*, (1988)
- (28) *People of Village of Gambell v. Clark*, 746 F2d 572 (1984); *People of Village of Gambell v. Hodel*, 774 F2d 1414 (1985); *Amoco Production v Gambell*, 480 US 531, 94 L Ed 542, 107 S Ct 1396 (1987).
- (29) 746 F 2d 572 (1984), 573.
- (30) *Crown Minerals Act 1991*, s.2 (definition of "land"):
"Land" includes land covered by water; and also includes the foreshore and seabed to the outer limits of the territorial sea.
S. 10 applies to all petroleum etc. "existing in its natural condition in land". "Territorial sea" is defined in the *Territorial Sea and Exclusive Economic Zone Act 1977*,
s. 3: The territorial sea of New Zealand comprises those areas of sea having the baseline [of the coast] measured 12 miles seaward... Note *Continental Shelf Act 1964*, ss 3 and 4.
- (31) *Daintith and Willoughby*, 1-232, 1333.
- (32) See J D Henry, *Oil Fields of New Zealand* (London, 1911), p.9
- (33) See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-85, 288-89, 75 S.Ct. 313, 317-20, 321-22, 99 L. Ed. 314 (1955); *Wahkiakum Band v. Bateman*, 655 F2d 176 (9th Cir.1981); *United States v. Dann*, 736 F.2d 919, 922 n.1; *People of Village of Gambell v. Clark*, 746 F2d 572, 574 (1984).
- (34) See Morse, *op. cit.*, (above, n.27) 116-118. Hall J. in his judgement in *Calder* (above, n.27) left this possibility open.

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