

# Proposing an Indigenous Power of Veto in Aotearoa New Zealand

LINDA TE AHO

Tom Fookes was an architect of New Zealand's Resource Management Act passed in 1991 (RMA). When interviewed about his life's work, Tom responded that he had sought to create a 'fair, integrated consideration of the decisions and policy to do with the social, economic and environmental conditions of our people'. I am told that he worked hard to provide a fair opportunity for all people to have a voice in decisions that affect them and places they care about. Processes were included in the RMA to allow this to occur, with particular provisions for a distinctive Māori voice. Because of these provisions, and the Act's lodestar of sustainable resource management, the RMA was promoted as one of the 'world's finest national environmental policies'.

In some ways the RMA has not delivered on its promise. Māori environmentalists claim that this can be attributed in part to the sidelining of laws and values that define ethical responsibilities of users to natural resources. Instead, decision-makers have leaned in favour of economic growth, sometimes generated by users who have acted irresponsibly. Climate change experts warn that New Zealand is on a development pathway that is unsustainable, that a new approach to resource management is required.

This essay explores the 'dangerous idea' of a power for Māori to veto development projects and processes that do not accord with traditional wisdom and laws designed to protect the integrity of

natural resources and to provide for future generations. The idea of a veto is not a new idea in some minds. It was envisaged by the Waitangi Tribunal in a landmark report on the Whanganui River and is embodied in a joint management agreement operating in Auckland. The idea of an indigenous veto was debated during the drafting of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and some would argue is implicit in the notion of free, prior and informed consent (FPIC). Though the idea of a veto is not new, it will be a real challenge for some to come to grips with. It would give credence to Māori proprietary rights and, in effect, give Māori the strongest voice in decisions that have potential to significantly impact upon them and their environment, and encourage the search for less harmful alternatives. It is argued here that a veto power would provide a more robust check on decision-makers that could in turn lead to the enhanced social, cultural, environmental and economic wellbeing of New Zealand as a whole. Simply debating the merits of an indigenous right of veto would promote better understandings of the value of indigenous conceptions of the environment, and the nature of Māori proprietary rights.

### **Māori environmental laws and values**

Māori are tangata whenua: people of the land who descend from Papatūānuku, the Earth Mother and Ranginui, the Sky Father. Māori genealogy is intimately linked to the environment. Traditional laws and values, developed over time, are sourced in the environment. According to these laws, all living things have a life-force, or mauri, and authority, or mana. Leaders or chiefs of hapū, or tribal groups, had authority to control the rights of members to use certain resources in certain ways, ensuring that the mauri and mana of those resources was maintained, and that future generations would be provided for. They were not always successful. Incantations were recited and permission sought from spiritual guardians of the forests

before felling trees to build canoes. Similar practices occurred when taking food from rivers and from the sea. When catching eels, little ones were thrown back. Food was not eaten right by the river, but taken home to eat. Elderly tribal members recall being taught not to be greedy, to take only enough food for a meal, and not to mistreat the river. Rāhui, or temporary prohibitions on fishing or other activities, were often imposed in defined areas to prevent fishing for a time to allow for food species to rejuvenate. This customary system of caring for and protecting the environment for its own sake, and for future generations, is now commonly known as kaitiakitanga. The right for hapū to continue exercising kaitiakitanga was guaranteed by the promise of tino rangatiratanga in Te Tiriti o Waitangi, the Treaty of Waitangi. The essence of tino rangatiratanga is captured in the following statement by Taiaho Hori Ngatai in 1885 in regard to fishing rights:

I have always held authority over these fishing places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the European that all the land below high-water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld.<sup>1</sup>

This passage shows that Māori once enjoyed a right of veto, the authority to prohibit and control certain actions. The Waitangi Tribunal has confirmed that Māori have continuing rights under Te Tiriti o Waitangi to exercise rangatiratanga in the management of their natural resources, whether they still own them or not.<sup>2</sup> The quote also highlights the tensions that arose when Māori laws collided with the laws introduced 'in consequence of the word of the European'. The inclusion of legislative provisions in the RMA promises considerable protection for Māori rights and

responsibilities.<sup>3</sup> Māori, in the context of the RMA, see themselves as kaitiaki: protectors and advocates for lands, waters and sacred sites as affirmed in Te Tiriti o Waitangi, and have long sought to participate fully at all levels of resource management decision-making.

The examples of kaitiakitanga above demonstrate a world view that is holistic and balanced, that looks beyond short-term gain and actively promotes the interests of present and future generations. It is not an aim of this essay to promote the worship of 'traditional wisdom', which in fact is far from the present practice for some Māori. Instead it promotes efforts to realize the principles of kinship among different living things, including society. It seeks possibilities within Western traditions for a more ethical engagement with Māori and indigenous thought and world views, in order to find ways to work constructively on shared goals and to set a course of being more aligned with the planet. The bases of Māori and indigenous world views differ from those of Western civilization. Of key importance in a Western world view is the human-centred view that nature is to serve humans.<sup>4</sup> It is often claimed that the prioritization of short-term human needs and wants has contributed to the extinction of indigenous fish and bird life and the degradation of lands and waterways. A current environmental challenge that we all face, for example, is how to mitigate the impacts of certain contaminants in freshwater streams and rivers. Councils, delegated to manage catchments, have not been able to keep up with the pace of wholesale deforestation and land intensification. For over a decade, Western scientists trained in the context of an anthropocentric world view have advised farmers to use nitrogen-based fertilizers on pasture to increase productivity for economic growth.<sup>5</sup> Climate change expert Dr Adrian Macey has recently warned of the risks of New Zealand continuing to deforest and farm in these ways.<sup>6</sup> Contaminants such as nitrogen and phosphorus have, over time, leached into freshwater streams and rivers which are no longer drinkable or swimmable. Accordingly, law and policy is being developed to set targets and

limits for contaminants. This has economic implications for farmers (many of whom are Māori) and other stakeholders who have become dangerously dependent upon the income from agricultural exports. So, apart from environmental impacts, these issues have significant consequences for future prosperity, not just for farmers, but for the country as a whole.

Other current challenges where a more robust check on decision-making could apply include a local council debating whether to add chemicals to a badly polluted freshwater lake in order to change its colour (rather than attempting to restore and rehabilitate the lake) to make it more aesthetically pleasing to tourists. This could well be damaging in the long term. There is an increase in the activity of extractive industries seeking to explore the economic potential of drilling the seabed in our deep waters. This poses a threat to the marine environment and in turn threatens the subsistence lifestyle and culture of the peoples who have lived in rural coastal areas for centuries should something go wrong.

## **Te Tiriti o Waitangi and the RMA**

And things do go wrong. New Zealand's worst maritime environmental disaster occurred when the container ship *MV Rena* ran aground on Astrolabe Reef near the city of Tauranga in October 2011. An estimated 350 tonnes of heavy fuel oil leaked from its ruptured hull into the bay. Three years on, the authorities are still struggling with the rehabilitation of the reef, both ecologically and spiritually. The struggle to respond to this relatively small oil spill raised serious concerns about our ability to respond to a larger oil spill either from bigger container ships or from rigs in deep waters. Ironically, at the time of the grounding, indigenous peoples of the Tauranga area were involved in court proceedings opposing the Tauranga Port Company's application for consent to dredge the harbour to allow for larger container ships to enter.<sup>7</sup> The dredging would result in deepening and widening the harbour and removing

part of the base of a mountain based in the harbour. Extensive evidence of environmental and cultural effects was put before the Environment Court, particularly in relation to the special status of the harbour and the mountain Mauao. For the tribes of the area the mountain has a deep cultural and spiritual significance and is the sacred mountain to which they are linked by genealogy. The Court faced the challenge of addressing the competing interests of the Port of Tauranga seeking to accommodate larger ships, while recognizing and providing for the legitimate cultural concerns and special relationship of local Māori groups with their ancestral mountain and the large seafood beds in and around the entrance. The Court recognized that the proposal would have adverse impacts upon these relationships: a matter of national importance required to be recognized and provided for under section 6(e) of the RMA; on kaitiakitanga, a matter for particular regard under section 7(a); and on the principles of the Treaty, a matter to be taken into account under section 8. The Court also noted its concern about the evidence of resource loss and environmental degradation, particularly in relation to the harbour and waterways. Nevertheless, the Court recommended that the consent be allowed, subject to conditions. The dredging could be justified on the basis that imports and exports were seen as vital for New Zealand's economy and standard of living, and this proposal related to New Zealand's largest export port.

This example and the two that follow illustrate why Māori seek stronger tools than those that exist in the current RMA regime to protect the environment, to protect Māori proprietary rights and interests, and to enable Māori to exercise kaitiakitanga.

In the case concerning a decision to grant a resource consent allowing a council to take water from springs for a term of 25 years, the Environment Court found that the desecration of the springs by the Council's abstraction were acts of 'considerable cultural insensitivity'. So strong was the connection between the Ngāti Rangiwewehi people and the springs that the Court warned,

in terms of cost, that there comes a time when those who are adversely affecting Māori by their activities need to 'bite the bullet' if there are viable alternatives.<sup>8</sup> With no jurisdiction to direct the Council to adopt an alternative supply, the Court reduced the term of the consent to 10 years to 'signal the cultural sensitivity of the environment, the statutory prerogatives relating to Māori, and the failure of the Council to investigate adequately the viable alternative.'<sup>9</sup>

A final example here concerns the use of a ministerial power of veto. Surfers, environmentalists and Māori all opposed a marina on a shallow estuary in Whangamatā due to the effects upon a major wetland area and the risk to a world-class surf break. An Environment Court hearing allowed the marina to go ahead subject to conditions. The exercise of a ministerial veto was overturned by the courts.<sup>10</sup> As a result of the development, several rare species were displaced or exterminated, and scientists have concluded that the surf break has been degraded.

### **Strengthening Māori voice in resource management**

Despite acknowledgements regarding the significance of cultural and environmental effects, and admonition for the lack of Māori participation in determining strategy for these projects, the consents were still granted, albeit subject to conditions or for a reduced term. In light of decisions like these (and there are many more), the Waitangi Tribunal has recommended a number of reforms for a Treaty-compliant environmental management regime.<sup>11</sup> Because these recommendations are not binding on the government, more traction has been gained by Māori looking to Treaty of Waitangi settlements to strengthen their voice in decision-making processes. The Crown's process for settling Treaty claims runs parallel to the Waitangi Tribunal process. I have written elsewhere about the Waikato River settlement which compels co-management and has led to changes in regulatory frameworks regarding land use and

freshwater, as well as changes in community expectations.<sup>12</sup> Such models are becoming increasingly common, and strengthen Māori advocacy in the governance and management of the landscapes and ecosystems they live in and near. A recent innovative model is found in the settlement between the Crown and the iwi, tribal groupings, of the Whanganui River on the west coast of the North Island. Earlier freshwater settlements have recognized to varying degrees Māori conceptions of the environment. For example, the Waikato River settlement recognizes that to Waikato-Tainui the river is a tupuna, an ancestor, which has mana and a life-force of its own.<sup>13</sup> The earlier settlements have also vested lakebeds, riverbeds (or parts of the beds) and surrounding lands in claimant groups. They have created co-management regimes that either compel or encourage relationship agreements between claimant groups and central and/or local government. These regimes provide more freedom for Māori to carry out customary activities, and will lead to more collaborative planning processes. The settlements provide funding for restoration projects and have highlighted the need for Māori models and indicators for assessing the mauri (health and wellbeing) of waterways. The Whanganui River settlement does all of these things. It also involves an interesting legal development – it accords the Whanganui River full legal personality. The river has legal standing in its own right. An official guardian will be appointed to protect the health and wellbeing of the river and to participate in relevant statutory processes. This legal status of the river, combined with the recognition that the post-settlement governance entity has an interest in the river that is ‘greater than the public generally’ when applying the RMA, provides the strongest opportunity for more effective participation by Māori in planning processes of all the freshwater settlements to date. The emphasis in this settlement on stronger legal voice for Māori in RMA processes is not surprising given the feedback from Whanganui iwi in the 1995 consultation process for the Sustainable Water Programme of Action, at which hui, a tribal member had this to say:

The Resource Management Act has always provided the opportunity for Māori to participate at the planning level, but it never happens because there is *no willingness*, we have no political weight. So we are shut out, and we become one voice amongst many other constituencies. [emphasis added]

By expressly including indigenous conceptions of nature in legislation, these settlements are said to reprioritize nature within Western law and culture and have stirred interest amongst non-indigenous commentators.<sup>14</sup> Despite these promising advances, indigenous aspirations in respect of both their rights and their resources continue to be compromised, highlighting the need for even stronger tools.<sup>15</sup>

### **Shades of veto and the requirement of free, prior and informed consent**

An earlier joint management arrangement between the people of Ngāti Whātua o Orākei (the hapū) and the Auckland Council effectively provides for an indigenous right of veto. Under this statutory arrangement the fee simple title to certain lands in Auckland is registered in favour of the hapū and set aside 'for the common use and benefit of the hapū and the citizens of Auckland'. The lands are jointly administered through a Reserves Board which comprises three representatives of the hapū and three representatives from the Council. The position of chairperson and the casting vote is reserved for a hapū representative in recognition of hapū title and mana whenua, territorial authority. Although born of conflict and collision, the arrangement has worked successfully and without untoward incident since its inception in 1992. It has been described as a benign but efficient regime which recognizes the mana of the hapū and which has developed a spirit of mutual respect.<sup>16</sup> Despite the hapū having a casting vote, it seems that it has never been used. Public access to the reserve (including a popular

beach area) has been unrestricted from the day title was returned to the hapū. Another form of veto exists in the 'permission right' designed to apply in those areas of the foreshore and seabed where customary title is shown to exist in the tribal territories of Ngāti Porou and Te Whānau a Apanui on the east coast of New Zealand's North Island. As an outcome of direct negotiations with the Crown, in these areas hapū will have the right to either approve or withhold approval for any resource consent application that will have a significant adverse effect. Ngāti Porou is advocating for a similar type of mechanism to apply either generally in relation to freshwater management or in those areas where it is agreed that Ngāti Porou have strong interests.

Interestingly, the Waitangi Tribunal proposed what might be considered an indigenous right of veto in its 1999 report on the Whanganui River claims. The Tribunal had found that the Whanganui River was a single and indivisible entity, inclusive of the water in flow. As at 1840, Whanganui iwi possessed and held rangatiratanga over the river and never sold those interests. Acts of removing possession and control from the Whanganui peoples were contrary to Treaty principles. Based on these findings, the Tribunal recommended that the Crown negotiate with Whanganui iwi having regard to two key proposals. Firstly, it recommended that the river *in its entirety* be vested in an ancestor or ancestors of the iwi. Secondly, any resource consent application in respect of the river would *require the approval* of the iwi governance entity (emphasis added). Neither of these recommendations has been followed. In terms of the first proposal, the Tribunal has recently reinforced the idea of the potential of owning entire rivers, including water. In its interim report on the National Freshwater and Geothermal Resources Claim (Wai 2358, 2012) the Tribunal addressed the question of what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi. The Tribunal found that Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership. Those

rights were then confirmed, guaranteed and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of hapū and iwi to control access to and use of the water while it was in their tribal domain.<sup>17</sup> Despite the Whanganui River settlement being the first to have been signed off after these significant Tribunal findings in relation to the nature of Māori rights and interests in water, the settlement explicitly avoids issues relating to ownership of water.<sup>18</sup>

The other key proposal in the 1999 Whanganui River report is that any resource consent application in respect of the Whanganui River would require the approval of the iwi governance entity, either solely or jointly with the current consenting authority. The example of the Ngāti Whātua joint management arrangements, and the fact that the Tribunal made this recommendation, illustrates that, in some minds, the idea of an indigenous power of veto is not new.

Nor is the idea confined to New Zealand's shores. The requirement of approval recommended in Whanganui resonates strongly with the requirement in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) for free, prior and informed consent.

Once prosperous and flourishing, indigenous communities around the world have suffered similar effects of colonialism. Their lands, territories and resources have been expropriated for national economic and development interests. Large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights and responsibilities. They have been excluded from participating in the control, implementation and benefits of development. Involvement in inquiries, litigation and negotiations with the Crown shows that Māori, like other indigenous peoples, continue to fight to protect the lands, waters and air that play a specific role in their identity, wellbeing and fundamental rights and responsibilities. As has been shown, this has resulted in increasing levels of Māori participation in decision-

making and a growing willingness by decision-makers to recognize indigenous conceptions of nature.

Māori have been active in asserting their rights on an international level too. For decades, Māori such as Moana Jackson, Aroha Mead and Dame Ngāneko Minhinnick have contributed to the drafting of the Declaration. In a sudden change to its former position, New Zealand endorsed the Declaration in 2010. While the heart of the Declaration is the self-determination framework, and in particular Article 3, there are other powerful articles such as Article 25, relevant here, which provides that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied or used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The Declaration also contains a number of articles that require free, prior and informed consent.<sup>19</sup> According to Article 32:

States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their *free and informed consent* prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. [emphasis added]

A right of veto is a unilateral right to prohibit a course of action chosen by another. The Declaration is deliberately silent on whether the right of consent includes a right of veto. Whilst FPIC only explicitly refers to the notion of an indigenous right to *consent* (which has been defined as the right of a competent person to voluntarily agree to another person's proposition), it has been argued that FPIC implicitly includes a right to say 'no' to activities that have potential to significantly impact upon them and their traditional lands and territories.<sup>20</sup>

## Concluding comments

When crafting the RMA, Tom Fookes and others had aimed to provide, among other things, a fair opportunity for Māori, as Treaty partner, to have a strong voice in decisions that affect them and the places they care about. In seeking to exercise those voices, Māori have turned to Treaty settlement processes to achieve what they could not achieve through the application (or non-application) of legislative provisions in the RMA. Gaps remain. Accordingly, this essay explores the idea of providing Māori with a general power of veto – the right to approve or reject development projects assessed against Māori laws and values designed to protect the integrity of natural resources with future generations in mind. It is suggested here that such a power exists in the Ngāti Whātua joint management arrangements where tangata whenua have the casting vote on the relevant governance board over certain lands, including foreshore. Through the development of mutual regard there has been no need to use that power. A requirement to seek consent of tangata whenua in resource consent processes was recommended by the Waitangi Tribunal in its 1999 report on the Whanganui River claims. A form of veto is arguably implicit in the requirement for states to obtain the free, prior and informed consent of indigenous peoples on decisions affecting their territory under the United Nations Declaration on the Rights of Indigenous Peoples.

Some will struggle with the idea of an indigenous right to veto. But if indigenous laws and values which are more earth-centred become a priority in decision-making, this could transform our approach to resource management. An indigenous veto has the potential to benefit all peoples in Aotearoa New Zealand in terms of better ecological outcomes, better governance, and long-term economic stability. Debating the idea of a veto provides a window of opportunity for New Zealanders to better understand the nature of Māori proprietary rights and the world view that individual property ownership operates within a collective context of user rights and responsibilities.

## Notes

- 1 Waitangi Tribunal (2010) *Tauranga Moana Report 1886–2006* (Wai 215), Chapter 7, p498.
- 2 Waitangi Tribunal (2008) *He Maunga Rongo: Report on the Central North Island Claims*, Stage One, Volume 1 (Wai 1200).
- 3 Resource Management Act 1991, sections 6(e), 7(a) and 8.
- 4 Irons Magallenes, C. (2014) 'Moving Towards Global Eco-integrity: Implementing Indigenous Conceptions of Nature in a Western Legal System', Chapter 15 in L. Westra and M. Vilela (eds) *The Earth Charter, Ecological Integrity and Social Movements*, Routledge, Oxon, p182.
- 5 Wedderburn, L. (2014) 'Farm and Catchment Solutions to nutrient loss entering New Zealand waterways', Keynote Presentation at 21st Century Watershed Technology Conference, University of Waikato, 2–6 November.
- 6 Law, Ethics & Responsibility Symposium, Hopuhopu, New Zealand, 23–25 November 2014.
- 7 *Te Runanga o Ngati Te Rangi Iwi Trust & Ors v Bay of Plenty Regional Council* [2011] NZEnvC 402.
- 8 *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] 14 ELRNZ 331 at para [140].
- 9 At para [140].
- 10 *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252.
- 11 Waitangi Tribunal (2011) *Ko Aotearoa Tenei* (Wai 262), Chapter 3, pp235–292.
- 12 Te Aho, L. (2009) 'Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – The Waikato River Settlement', *Journal of Water Law*, vol 20, nos 5/6, pp285–292.
- 13 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Preamble.
- 14 Irons Magallenes, C., 'Moving Towards Global Eco-integrity', above note 4.
- 15 Te Aho, L. (2012) 'Ngā Whakataunga Waimāori: Freshwater Settlements', Chapter 7 in N. R. Wheen and J. Hayward (eds) *Treaty of Waitangi Settlements*, Bridget Williams Books Ltd, Wellington, New Zealand, p102.
- 16 See Kawharu, I. H. (2004) 'Orakei', Chapter 9 in M. Belgrave, M. Kawharu

- and D. V. Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Oxford University Press, Melbourne, pp151, 158. This description is made by P. Sneddon in 'Rangatiratanga and Generosity: Making the Connections', Philanthropy New Zealand Conference, 2004.
- 17 Waitangi Tribunal (2012) *Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358), p110.
- 18 Te Aho, L. (May 2014) 'Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River', *Māori Law Review*, <http://maorilawreview.co.nz/2014/05/ruruku-whakatupua-te-mana-o-te-awa-tupua-upholding-the-mana-of-the-whanganui-river/>
- 19 Articles 10, 11, 19, 29, 30 and 32 of the UNDRIP all require FPIC.
- 20 MacKay, F. (2004) 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review', *Sustainable Development and Policy*, vol 4, no 2, pp43–65; Seier, F. (June 2011) "Free, Prior and Informed Consent" under UNDRIP: What Does it Really Mean?; <http://www.right2respect.com/2011/06/>, accessed 14 December 2014; and Erueti, A. and Pietras, J. (2013) 'Extractive Industry, Human Rights and Indigenous Rights in New Zealand's Exclusive Economic Zone', *New Zealand Yearbook of International Law*, vol 11, p1 at pp3–7.