

Maori Owned Nothing in 1840.

Reuben P. Chapple

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Before the signing of the Treaty of Waitangi in 1840, there was no collective “Maori.” The functional social unit of pre-European Maori society was the hapu, or sub-tribe. Each hapu was in a Hobbesian state of nature (“War of every man against every man”) with every other hapu, rendering life “nasty, brutish and short.”

The absence of a settled form of civil government and a body of laws protecting property rights meant hapu used or occupied land only until another group took it off them. The “Customary Title” existing at that time was thus not ownership at all, but an ephemeral use or occupation for as long as you could keep it.

In *Maori Land Tenure: Studies of a Changing Institution* (1977), Sir Hugh Kawharu blatantly sets out to fabricate a ‘universally recognised’ body of Maori property rights pre-dating the Treaty of Waitangi. By implication, these were rudely subsumed by white-settler governments, who substituted their own Eurocentric notions of property ownership. This now widely accepted thesis is designed to fudge or remove the fact that “Customary Title” is in practical terms no title at all.

Kawharu correctly identifies that within the hapu-controlled estate, family groups sometimes enjoyed exclusive occupancy or use rights, but the only universally accepted “Customary Title” *between* hapu was “Te rau o te patu” or “The Law of the Club.”

Nor was the Treaty ever intended to convey to Maori ownership of the entire land area of New Zealand. Article II purported to secure the various hapu in their legal (as opposed to "Customary Title") ownership of land actually used or occupied as at February 1840.

In practice, this meant ownership of land identifiably occupied and cultivated. At a most generous assessment, this might have included a reasonable hunting and gathering range around a Maori settlement.

At the time the Treaty was signed, even in the more populous North Island, home to an estimated 100, 000 Maori, such settlements were typically few and far between.

Edward Dieffenbach, a German-born naturalist who travelled throughout the North Island in 1844, reported that "even in the areas of greatest Maori habitation, there are huge tracts of land, even up to hundreds of miles, between the various tribes [hapu]."

The South Island lay practically deserted. Edward Shortland's 1846 census found some 2, 500 Ngai Tahu, resident at several coastal locations. To suggest that 2, 500 people [a] lived on; [b] cultivated; or [c] hunted and gathered over more than 13 million hectares of land is arrant nonsense.

Even in the North Island, aside from the immediate areas around a Maori settlement, the "waste lands" were uninhabited, unimproved, uncultivated, and untrod by human feet, save those of an occasional war party or traveller. Since the forcible exclusion of one group by another was in practical terms impossible, the "waste lands" had no "Customary Title" owners.

The mischievous notion that Maori "owned" land and associated resources they neither used nor occupied was a fiction propounded in the 1840s by the missionaries. They were well aware the Crown had little money for land purchasing. Their agenda was to keep secular, worldly settlers confined to

already settled areas, ensuring missionaries remained the only European influence in the all-Maori hinterlands awaiting Christianisation.

The Crown was obliged to accept this misinformation because it lacked the troops to enforce its edicts against 100, 000 well-armed and potentially warlike Maori. Once Maori learned the Treaty supposedly gave them title to the entire land area of New Zealand and they could get money for it, each hapu became an instant "owner" of huge tracts of "waste land" adjoining its settlement(s). Naturally, this created multiple competing "ownership" claims.

To convey a clear title to subsequent purchasers and ensure incoming settlers went unmolested, the Crown found itself compelled to formally extinguish this Maori "ownership." In many early land purchases the Crown paid out anyone asserting a right to be paid.

The Native [now Maori] Land Courts were originally set up to deal with competing claims to the "waste lands." "Ownership" typically went to whoever could spin the most convincing yarn about his remote ancestor travelling over the land centuries before naming natural features after parts of his body.

Had the missionaries not bogged it for the Crown, the "waste lands" and appurtenant rights would have simply been assumed by all to be vested in the Crown, to be held, managed, onsold, or otherwise used for the benefit of all New Zealanders, irrespective of race.

"Appurtenant rights" in the "waste lands" of course include those associated with the foreshore and seabed, which in any event fall outside the scope of any property rights purportedly reserved to Maori under the Treaty.

The English Treaty version at Article II refers to "fisheries." This is simply the right for Maori to go fishing and gather shellfish. Since Article III conveys to individual

Maori “all the rights and privileges of British Subjects,” keeping the seabed and foreshore in public ownership clearly fulfils this requirement. This means Maori seabed and foreshore claims based on the proximity of former settlements to an area claimed must also fail.

Correctly interpreted, the Treaty establishes no justification for the privatisation to corporate iwi of what has been Crown (publicly) owned foreshore and seabed since 1840. The Marine and Coastal Areas Act 2011 doesn't restore Maori property rights, but hands over to Maori tribal groups a new kind of property right in the foreshore and seabed (“Customary Title”) that never existed before.

New Zealand's seabed and foreshore are resources that must remain vested in the Crown for the benefit of all New Zealanders, not passed to self-identified, self-interested, minority groups.

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