INDIGENOUS ENVIRONMENTAL JUSTICE: ACCESS TO ENVIRONMENTAL JUSTICE FOR MĀORI

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Kaitiakitanga, aroha and customary rights were no match
for individuality, greed and private property rights.[1]

I. INTRODUCTION

Environmental issues are justice issues. This is so for everyone, not just Māori or other indigenous peoples. Who gets what access to clean air, water, food, and the natural environment, as well as to the decision-making processes for such distributions, are issues of broad, societal justice. This includes access to the benefits of a clean and healthy environment, as well as the burdens of a polluted or degraded environment. It includes access to ownership and use of our environment, whether for ecosystem services in general or for particular resources.

While these may be general justice issues, in Aotearoa New Zealand environmental justice is of particular concern to the indigenous Māori peoples. Part of this is because environmental justice can be considered the "environmentalism of the poor,"[2] of which Māori form a disproportionate share; this is partly because of aspects particular to Māori, notably their history and indigenous culture. A key concern for this paper is how well these are recognized as matters of access to environmental justice for Māori.

Access to justice is typically framed as being about access to decision-making. This encompasses matters such as natural justice and fairness in administrative decision-making, as reflected in administrative law origins.[3] It also encompasses assessments of how well the justice system enables individuals and groups to access it, particularly for remedies. In discussions of environmental justice, these aspects are extended to the realm of environmental law and to the distribution of environmental goods and services. This is the second type of justice that New Zealand jurist Sir Grant

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1. WAITANGI TRIBUNAL, THE HAURAKI REP. VOL. III 1151 (2006).

2. *See Environmentalism of the Poor*, ENV'T JUSTICE ORG., LIABILITIES & TRADE, http://www.ejolt.org/2012/12/environmentalism-of-the-poor/ (last visited Jan. 22, 2022) (providing a short summary about the concept environmentalism of the poor); *see also* Iain Davey, *Environmentalism of the Poor and Sustainable Development: An Appraisal*, 4 J. ADMIN. & GOVERNANCE 1 (2009) (discussing why environmentalism of the poor has the potential to become the main driving force to achieve an ecologically sustainable society); *see also* JOAN MARTINEZ-ALIER, THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICT AND VALUATION 10 (Edward Elgar 2002) (analyzing the environmental movement with an emphasis on the growing environmental justice movement, also known as popular environmentalism or environmentalism of the poor).

3. Rt. Hon. Dame Sian Elias, GNZM, C. J. of N. Z., Address to the Resource Management Law Association, Salmon Lecture: Righting Environmental Justice (July 25, 2013) (available at https://www.courtsofnz.govt.nz/assets/speechpapers/sl3jh.pdf).

Hammond identifies.[4] It requires examination of law and its practice to see if procedural and substantive justice is achieved, including "proper recognition and dues" for Māori.[5] This includes (procedural) access to the decisions by which natural resources are allocated, and justice in the substantive results of those decisions. While environmental justice goals are typically conceptualized as being either procedural or substantive, Māori claims to and aspirations for environmental justice introduce additional elements that make this binary categorization too simplistic.

The aspect of environmental justice unique to Māori is their cultural connections to New Zealand's natural environment, while also having a history of dispossession and forced alienation from it. One way of conceptualizing Māori aspirations for environmental justice is as three types of goals. One goal for Māori environmental justice is political, in that it concerns the distribution of power. This goal is for the respect of Māori *iwi* (tribes) and *hapū* (sub-tribes) as Treaty partners to substantive active protection of the environmental assets of Aotearoa as well as the recognition of their authority to control and/or share in making decisions over them. A second type of environmental justice goal is cultural. Māori values and culture need to be equally respected and protected in environmental law and decision-making, including metaphysical as well as physical features of the natural environment. A third type of goal is the respect of equality of treatment as individuals. This encompasses the more traditional procedural and substantive aspects identified above. This includes access to the legal system in respect of environmental and resource decision-making, and the distribution of environmental benefits and burdens; this distribution is most commonly discussed in relation to bearing of environmental burdens such as pollution and its impact on individual health.

There is no one single definition or conception of environmental justice, especially one that can capture all these types of Māori goals and the elements within them. Instead, environmental justice for Māori is an overarching concept that incorporates this range of concerns and concepts that vary, depending on the issue involved. This paper does not attempt to cover the various conceptions or elements comprehensively, nor address all the legislative regimes relevant to any one aspect; it merely introduces a few environmental justice issues for Māori in Aotearoa.

Part II introduces some of the different types of environmental justice: procedural, substantive, and indigenous. Part III then discusses aspects of justice under the Resource Management Act 1991 (RMA) and Environment Court. It summarizes environmental justice concerns with the RMA and

4. Sir Grant Hammond, *Access to Justice and Indigenous Peoples*, 15 N.Z. Y.B. OF JURIS., at vii, viii (2017).

5. *Id*. at vii.

addresses the 2017 RMA amendments to increase iwi participation, Mana Whakahono ā Rohe. The current issues of access to justice in the Environment Court discussed include funding, Maori cultural expertise on the Court, and the use of mediation to resolve Environment Court cases.

The second half of the paper illustrates some of the elements and issues identified in Parts II and III with two case studies. Part IV uses the example of Mount Te Aroha and the Tui mine pollution to illustrate the interplay of various procedural and substantive aspects of environmental justice for the *kaitiaki* (guardians) of that *maunga* (mountain). Part V examines the aftermath of the grounding of the MV Rena in the Bay of Plenty to illustrate a different combination of aspects of environmental justice.

The issues arising from the loss of land and resources after colonization adds an extra layer of complexity to the discussion of environmental justice in Aotearoa. Some issues of environmental justice for Māori will concern traditional procedural aspects, such as an individual's access to the courts for environmental claims, and some will concern traditional substantive elements, such as the distribution of pollution and other environmental burdens. Other environmental justice claims can only be understood in terms of these additional historical, political, and cultural elements of justice. This may seem trite for those who are well used to considering issues of Māori access to justice in areas other than environmental justice. Yet it is helpful nonetheless to be able to assess the utility of the traditional environmental justice frame and how it might be adapted to better serve environmental justice needs in Aotearoa. The reframing offered in this paper may in turn help to better serve indigenous justice needs elsewhere.

II. ENVIRONMENTAL JUSTICE

> Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.[6]

The term "environmental justice" initially arose in the USA in the early 1980s in relation to the racially discriminatory siting of toxic waste dumps;[7] it was used interchangeably with "environmental racism." Both terms refer to the concern with the (racially) unequal distribution of negative environmental burdens, rather than unequal access to positive environmental

6. Delegates to the First Nat'l People of Color Env't Leadership Summit, *Principles of Environmental Justice*, http://www.ejnet.org/ej/principles.html (last modified Apr. 06, 1996).

7. *See* Commission for Racial Justice, *Toxic Wastes and Race and the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (United Church of Christ, 1987), https://www.nrc.gov/docs/ML1310/ML13109A339.pdf (demonstrating the origins of the term environmental justice).

benefits. And while the focus was initially on racially equal substantive outcomes—such as not suffering the effects of toxic waste sites—procedural access to decision-making became an important component of environmental justice in order to ensure equality of substantive results.[8] Today, concern with the racial distribution of negative environmental burdens is still a significant aspect of environmental justice, both in the USA and worldwide.[9] Yet surprisingly, more official attention is now paid to achieving procedural access to environmental justice, through access to environmental decision-making procedures and systems, than is given to the substantive outcomes of those decisions. This is surprising because, despite such procedural attention, and even though it was the substantive outcomes which provoked the procedural attention in the first place, the actual distribution of negative environmental burdens is still racially unequal throughout at least the developed world.[10] Substantive environmental justice is still a key concern.

Since the 1980s, environmental justice concerns have become broader in coverage. Environmental justice has also come to refer to fairness for all socio-economic groups, not just racial groups; for example, low-income populations as well as those defined on racial and ethnic grounds.[11] It can also refer to the need for everyone to equally share in environmental benefits, such as access to parks and other beneficial features of the natural environment, without focusing only on those suffering pollutions and other such burdens.

Further, while also becoming broader in coverage, conceptions of environmental justice have also become broader in type: some concepts refer not just to a liberal equality of distribution, within a Western or liberal capitalist frame of property ownership and resource utilization, but they

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8. *See Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice (last visited Jan. 22, 2022) (providing an overview of the role of the EPA's Office of Environmental Justice which is located with its Office of Policy). The Office of Environmental Justice "works to protect human health and the environment in communities overburdened by environmental pollution by integrating environmental justice into all EPA programs, policies and activities" *id.*

9. *See* ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at 45 (discussing environmental injustice in toxic waste). A follow-up report on the original 1987 assessment of the distribution of hazardous waste sites by racial make-up of the communities they are sited within, found that there was not much change 20 years later *id.* at xi. Hazardous waste was still largely—90%—sited in the communities of people of colour *id.*

10. *Id*. at xii.

11. *See Bush EPA Dilutes Meaning of Environmental Justice*, GRIST (Mar. 5, 2004), https://grist.org/article/griscom-envjustice/ (contrasting the focus of environmental justice within the EPA under the Clinton administration and first term of the George W. Bush administration); *see also* Talia Buford, *Has the Moment For Environmental Justice Been Lost?*, SALON (Aug. 3, 2017), http://www.salon.com/2017/08/03/has-the-moment-for-environmental-justice-been-lost_partner/ (discussing the evolution of environmental justice and the Office of Environmental Justice within the EPA across presidential administrations).

recognize a wider set of relationships with our natural environment.[12] Thus, for example, some conceptions recognize that environmental justice for indigenous peoples is more than what is currently included in predominant conceptions of benefits and burdens, but encompasses recognition of metaphysical relationships and responsibilities for an ancestral natural world. Other conceptions focus on the need to adopt a true ecological sustainability in order to achieve justice in the availability of nature and its resources for future as well as present generations. Finally, yet others refer to justice for the natural world itself, such as upholding the inherent interest of nature to exist as a form of eco-justice.[13] This range of ideas about what is or can be encompassed by environmental justice is unsurprising, given that environmentalism itself means different things to different people. All of these can be relevant to the various goals of Māori access to environmental justice.

A. Procedural Environmental Justice

> Environmental justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.[14]

Procedural access to environmental justice concerns equitable access to the procedures and systems by which environmental decisions are made. It differs from the substantive equitable sharing of benefits and burdens, and relates to the need for Māori voices and concerns to be heard and addressed in all relevant decision-making processes. This necessarily includes procedural participation in the decisions themselves, such as at a local authority or government department level. It also includes the review of these decisions, and thus administrative access to justice matters such as access to the courts.

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12. *See Principles of Environmental Justice*, *supra* note 6 (proclaiming 17 principles of environmental justice that address a wide range of goals, including political, the decision-making power, self-determination, sovereignty for indigenous First Nations, universal protection from toxic waste, recognising the threat of toxics to natural resources, and also framing waste as a product of colonisation, oppression and injustice).

13. *See* DAVID SCHLOSBERG, DEFINING ENVIRONMENTAL JUSTICE THEORIES, MOVEMENTS, AND NATURE (Oxford Univ. Press 2009) (exploring the meaning of justice in definitions of environmental and ecological justice); *See also* GORDON WALKER, ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS 2–3 (2012) (analysing the evolution of environmental justice); *See also* PETER S. WENZ, ENVIRONMENTAL JUSTICE (Routledge 1988) (exploring the philosophical background of environmental justice and particularly focusing on theories of distributive justice).

14. *Principles of Environmental Justice, supra* note 6, at Principle 7.

The USA first developed the term "environmental justice"; justice in respect of access to initial decision-making on environmental matters is now well developed in US law and policy. Some aspects are broader than the New Zealand conceptions of consultation, in that participation applies to all public groups, not only to indigenous or racial groups.[15] However, the American conception is limited by the traditional liberal framework within which it sits. For example, the US EPA uses equality goals for both procedural and substantive justice, not affirmative action nor any other type of special preferences such as Treaty or other political rights for indigenous peoples.[16] In contrast, in Aotearoa there is a strong call for special participation rights for Maori, based on the Treaty relationship, and not just on racial disadvantage. Discussion of such issues in Aotearoa needs to be attentive to these differences.

Another generous aspect of the USA conception of procedural environmental justice is that procedural participation rights are often coupled with substantive environmental outcomes. This is addressed at the level of assessing individual benefits and burdens as well as systemic decision-making.[17] This has not been seen in Aotearoa in the same way.

In Aotearoa, access to environmental justice for Māori includes a concern with the more traditional sense of access to the justice system, such as to the Environment Court for review of some environmental decisions. In addition, access to environmental justice is discussed under the rubric of consultation by decision-makers, as well as increasingly discussed as a

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15. *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Sept. 22, 2021). The US Environmental Protection Agency (EPA) frames procedural environmental justice as "meaningful involvement." "Environmental justice is the fair treatment and meaningful involvement of all people, particularly minority, low-income and indigenous populations, in the environmental decision-making process. *Meaningful involvement* means that: potentially affected community residents have an appropriate *opportunity to participate* in decisions about a proposed activity that will affect their environment and/or health; the public's contribution can *influence* the regulatory agency's decision; the concerns of all participants involved will be *considered* in the decision-making process; and the decision makers seek out and facilitate the *involvement* of those potentially affected," *id.*

16. *Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 8. The environmental justice goals are defined as: "the *same degree* of protection from environmental and health hazards, and *equal access* to the decision-making process to have a healthy environment in which to live, learn, and work," *id.*

17. *See* Buford, *supra* note 11. Indeed, it was determined early on that playing such a coordinating role was the key means by which the EPA could progress environmental justice, *id.*; *see also Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15; *see also* NAT'L ENV'T JUST. ADVISORY COUNCIL, U.S. ENV'T PROT. AGENCY, INTEGRATION OF ENVIRONMENTAL JUSTICE IN FEDERAL AGENCY PROGRAMS (May 2002), https://www.epa.gov/sites/production/files/2015-02/documents/integration-ej-federal-programs-030102.pdf (providing examples, advice, and recommendations on federal government efforts toward integrating environmental justice into agency policies, programs, and activities). The US systematically uses inter-agency agreements whereby different government agencies explicitly agree on procedures and goals to work together to better achieve substantive environmental justice, *id*.

matter of exercising environmental governance. There is an expectation that Māori will participate in this governance, whether instead of or in combination with existing governance arrangements. This entails Māori becoming the decision-makers, not merely contributors to decision-making processes run by others. Notably, this focus on governance and the operation of decision-making procedures is much stronger and more pronounced in Aotearoa than in other countries' policies on environmental justice. Even in New Zealand this is still a procedural and systems focus rather than one focusing, for example, on who suffers which environmental detriments; but it is a political goal rather than an individual citizenship goal.

B. Substantive Environmental Justice: The Distribution of Burdens and Benefits

> Environmental justice calls for universal protection from…extraction, production and disposal of toxic/hazardous wastes and poisons…that threaten the fundamental right to clean air, land, water, and food.[18]

The other branch within environmental justice as traditionally framed is the disproportionate sharing of (substantive) environmental benefits and hazards, particularly according to race. As mentioned above, the term "environmental justice" initially arose in the USA in the early 1980s in relation to racially discriminatory siting of toxic waste dumps; it was often also referred to as environmental racism. In New Zealand, work on environmental burdens is much less developed than in the USA, thus it is instructive to turn to the US EPA program and consider how we might learn from the US experience in Aotearoa.

The work of the US EPA Environmental Justice Office has focused on the distribution of (negative) environmental burdens:[19]

> Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.[20]

It explicitly recognizes that lower socio-economic and some racial communities suffer the worst substantive environmental burdens, and that

18. *Principles of Environmental Justice*, *supra* note 6.
19. *Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 8.
20. *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15.

government needs to pay special attention to address such effects.[21] Significant work to identify and address these issues has been done pursuant to the US EPA's Environmental Justice program.[22]

The most significant practical work done pursuant to this program is the gathering of information about where negative environmental outcomes meet disadvantage and race.[23] A new environmental justice mapping and screening tool, EJSCREEN, was released in 2015.[24] It combines national data on environmental and demographic indicators in maps and reports, identifying "a community's potential susceptibility" to a number of environmental threats.[25] There are 11 environmental indicators, covering nationally collected data on matters such as air quality, lead paint indicators, proximity to waste storage or treatment sites, and proximity to major discharges into water.[26] The demographic indicators address income, race, education level, language spoken, and age.[27]

The most useful aspect of this screening tool is that, using these demographic indicators, measurements are generated for assessing the correlation of environmental burdens and different disadvantage risk factors. This data is then combined by overlaying the various maps to show whether the environmental burdens are correlated with these particular demographic groups. Overall, it is an extremely effective tool for gathering information on—and determining the correlation between—environmental burdens suffered by different communities.

There is much New Zealand can learn from this example. The suffering of environmental burdens is a major concern of the environmental justice

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21. *See Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15 (providing an overview of the EPA's environmental justice approach and work). The EPA quotes Dr Robert Bullard: "Whether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation," *id.*; *see also* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (focusing federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all communities). In 1994 President Clinton directed each federal agency to develop an agency-wide environmental justice strategy that "identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations," *id.*

22. *See Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, *supra* note 15 (highlighting the EPA's environmental justice approach and work).

23. *See* Justice Map: Visualize Race and Income for Your Community and Country, JUSTICEMAP.ORG, http://www.justicemap.org (identifying locations and concentration of racial communities) (last visited Jan. 22, 2022).

24. U.S. ENV'T PROT. AGENCY, *How was EJSCREEN Developed?* https://www.epa.gov/ejscreen/how-was-ejscreen-developed (last updated Aug. 23, 2021).

25. *Overview of Demographic Indicators in EJSCREEN*, U.S. ENV'T. PROT. AGENCY, https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen (last updated Mar. 5, 2021).

26. *Overview of Environmental Indicators in EJSCREEN*, U.S. ENV'T. PROT. AGENCY, https://www.epa.gov/ejscreen/overview-environmental-indicators-ejscreen (last updated Jan. 10, 2022).

27. *Id.*

movement in the USA, yet not talked about as much in Aotearoa. New Zealand does not appear to take such a systematic approach to identify communities burdened by environmental pollution. Whether or not Māori have the same scale of the burdens that indigenous and other minority communities in other countries suffer, if we are to ensure that environmental justice is achieved for Māori, we should know where these burdens lie.[28] For example, in relation to urban and industrial areas, some communities are likely to be more adversely affected than others, if only because of economic factors.[29] Much of New Zealand's farming, mining, and industrial waste has been drained into New Zealand's rivers and streams, often over the objection of local Maori.[30]

New Zealand could usefully pursue mapping mechanisms such as that of the US EPA, in order to better define and achieve this type of environmental justice. The primary focus could first be the negative burdens but it could also possibly include data on positive benefits, such as how close different communities are to accessible green spaces, parks, clean waterways, and wild nature.[31] As with the US model, it would best be achieved through the provision of maps of communities overlaid with the various burdens. It would be particularly helpful to identify the siting of Māori communities relevant to burdens such as waste dumps, airports, factories, industrial zones, polluting industries, and toxic wastes.

A New Zealand screening tool would presumably be based primarily on the scientific measurements of the type that the US EPA uses, but it need not be limited to that and would include local knowledge and *matauranga Māori* (traditional indigenous knowledge). For example, to know how any particular environment has degraded over time, there may not be relevant air or water quality measurements from 20, 30, or 50 years ago; but there will be local Māori elders (*kaumatua* and *kuia*) who know and can describe what it used to be like. In addition, a New Zealand screening tool may also include a record or measure of metaphysical aspects and thereby extend it

28. Jamie Pearce & Simon Kingham, *Environmental Inequalities in New Zealand: A National Study of Pollution and Environmental Justice*, 39 GEOFORUM 980 (2007).

29. Deborah Read & Craig Wright, *Cancer Incidence and Mortality in New Plymouth* 4 (Oct. 2005), https://www.health.govt.nz/system/files/documents/pages/cancerincidenceandmortalityinnewplymouth.pdf.

30. *See* Materoa Dodd, *Effects of Industry on Maori Cultural Values: The Case of the Tarawera River*, 1 INDIGENOUS VOICES, INDIGENOUS RSCH. 53 (2010) (discussing the Kawerau pulp and paper mill discharges into the Tarawera River which have been allowed to continue since the mid 20th century despite objection from local Maori).

31. *See* Rhys Jones et al., *Climate Change and the Rights to Health for Māori in Aoteara/New Zealand*, 16 HEALTH & HUM. RIGHTS. 54, 57 (2014) (Environmental benefits may be greater than average for rural Māori who live closer to the land. In contrast, urban Māori may face less access than other communities to land and nature, especially for recreational purposes, perhaps as a result of the combination of location or neighbourhood and income).

beyond the solely physical aspects of pollution. For example, a 'mauriometer' has been developed by Māori scholars in order to assess the effects of physical environmental damage on the metaphysical mauri of that environment.[32] Such a meter could appropriately assist an environmental burdens screening tool to identify a wider range of environmental burdens suffered by Maori and thereby better provide environmental justice.

Of the three most significant New Zealand environmental disasters,[33] two have significantly adversely affected Māori: pollution from the abandoned Tui mine at Te Aroha, and pollution from the Rena grounding on Otaiti (Astrolabe Reef). Both of these examples provide excellent illustrations of different aspects of environmental justice for Māori, particularly the way the physical and metaphysical, as well as different procedural and substantive aspects, interrelate. Each of these examples are addressed separately in Parts IV and V, respectively, below.

C. Indigenous Environmental Justice

> Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.[34]

Environmental justice for indigenous peoples brings in elements additional to the procedural and substantive branches described above. For example, colonization entailed the loss of most Māori lands and resources; these had been held collectively (by *whanau, hapū* and *iwi*) so issues of substantive environmental justice also relate to restoration of collective rights over such lands and resources. Because of the guarantees provided by the Treaty of Waitangi, the political environmental justice goals relate to regaining decision-making powers over such lands and resources, as well as protecting the resources themselves. The cultural goals are also key: upholding Māori cultural values in decision-making processes and results, in respect of lands and resources.

For example, internationally, the taking of land from indigenous peoples for the purpose of environmental protection such as creating parks and reserves is conceived of as an environmental justice issue. It is talked about as environmental justice, not just because land has been confiscated—i.e. not treating land as the monolithic "environment"—but because it exhibits

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32. *See generally* Tumanako Ngawhika Fa'aui & Te Kipa Kepa Brian Morgan, *Restoring the Mauri to the Pre-MV Rena State*, 3 MAI J. 3, (2014) (explaining how the Mauri Model decision-making system helps blend cultural and physical environmental concerns).

33. MINISTRY FOR THE ENV'T, *Environmental Reporting*, https://www.mfe.govt.nz/more/environmental-reporting (last updated Aug. 3, 2021).

34. *Principles of Environmental Justice, supra* note 6 at Principle 5.

the combination of environmental protection and broader justice. In Aotearoa the taking of Māori land for conservation or environmental protection is being addressed through the Treaty grievance resolution procedures. Māori value the conservation estate immensely, for both the land and the species that are protected within it, and "although it is owned by the Treaty partner [Crown], every inch of it is tribal territory."[35] Substantive justice is being addressed through the Treaty settlement process—such as through return of lands and resources, and/or Māori enjoyment of use—as are procedural aspects of justice—such as Māori being involved as decision-makers (co-governance arrangements for conservation land, being just one illustration).[36] However, there are still many unresolved or partially resolved justice issues of this type.[37]

An illustration of substantive and procedural justice in respect of conservation lands is that of Te Urewera. Te Urewera was confiscated from the Tuhoe people for the purposes of creating a national park. As a result of the negotiation process to settle the grievance from this confiscation, the lands have been transferred out of National Park status and into a co-governance arrangement where iwi are expected to make up the majority of the decision-making body.[38] Most significantly, Te Urewera has been made a legal person, with the territory being vested in Te Urewera, and the decision-making body effectively being appointed as guardians of its interests. A traditional fee-simple ownership might accord better with full control in the Western property sense; yet the guardianship and legal person model gives effect to Māori cosmology and is one way to give effect to cultural claims as well as to partially uphold the political claims.

These indigenous aspects of political and cultural justice in relation to our natural environment are relevant also to traditional environmental concerns such as pollution and species conservation. For example, in relation to pollution, this is combined with the loss of control of ancestral lands; Māori thus have to suffer the effects of the pollution without being able to remove it. Examples include the Te Aroha Tui mine pollution, Kawerau pulp and paper mill waste, and the Glenbrook steel mill water usage and waste. But further—and this is not a concern addressed in the overseas screening tools—Māori have cultural and spiritual concerns in relation to environmental activities, even where there is no recognized scientific effect.

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35. WAITANGI TRIBUNAL, *Ko Aotearoa Tēnei: A Report on the Wai 262 Claim Released, Concerning New Zealand law and Policy Affecting Maori Culture and Identity* 127, (July 2, 2011), https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/.

36. *See* Letter from the Hon. Kate Wilkinson, Minister for Conservation, to Brendon Mills, (Aug. 22, 2012) (showing that the Department of Conservation administers eight million hectares of land and the treaty settlement process transferred 17,235 hectares of public conservation land to iwi).

37. WAITANGI TRIBUNAL, *supra* note 35 at 126.

38. Te Urewera Act 2014, s 21 (N.Z.).

For example, the simple mixing of different bodies of water, such as one stream or river being diverted into another, affects their *wairua* (spirit) and *mauri* (life force); *tangata whenua* (Māori with traditional authority over a territory) perceive this as an environmental burden, affecting their health as well as that of their community. The Huakina Development Trust objected to the Glenbrook steel mill water uses and discharge on this basis, even when the water was not being polluted in Western scientific terms.[39] The same can be said for Whanganui River *iwi* objections to the diversion and mixing of water at the headwaters of the river.[40] The *Huakina* case in particular was a significant, ground-breaking case where an application to discharge treated effluent and improve upon the untreated discharge was objected to on the basis of the offence it caused to Māori cultural spiritual beliefs.[41]

III. ENVIRONMENTAL JUSTICE UNDER THE RESOURCE MANAGEMENT ACT AND THE ENVIRONMENT COURT

> To get the Resource Management Act enacted at all was something of a miracle. To make it work properly is an even greater challenge.[42]

Several statutes govern New Zealand's natural resources allocation and decision-making. The one with the largest scope of application is the Resource Management Act 1991 (RMA).

A. Resource Management Act 1991

The Resource Management Act governs most official environmental decision-making in New Zealand. Māori participation in the range of RMA processes—from broad plan-making to individual consents—is an area that has been well-studied and extensively commented on. While there are several mechanisms specifically designed to accord appropriate Māori access and participation under the Act, there have been many criticisms of such access and participation, and these criticisms continue today.

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39. See *Minhinnick v Auckland Regional Water Board*, Plan. Tribunal, Decision No. A116/81, 16 (Dec. 1981) (N.Z.); *Minhinnick v. Waikato Valley Authority*, Plan. Tribunal Decision No. A 66/84, 23 (July 1984) (N.Z.); *Minhinnick v Auckland Regional Water Board*, Plan. Tribunal, Decision No. A119/84, 6 (Nov. 1984) (N.Z.); *Minhinnick v. Manukau Harbour Mar.*, Plan. Tribunal A120/84 (1984) (N.Z.).

40. WAITANGI TRIBUNAL, *The Whanganui River Report: Wai 167*, N.Z. (1999).

41. *Huakina Development Trust v. Waikato Valley Authority*, 2 NZLR, 188 HC (1987) (N.Z.).

42. SIR GEOFFREY PALMER, ENVIRONMENT: THE INTERNATIONAL CHALLENGE: ESSAYS 147 (Victoria Univ. Press, 1995).

The RMA includes substantive provisions designed to enable decisions under the Act to protect environmental assets that Māori value. For example, section 6(e) requires councils to "recognise and provide for…the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], and other taonga [treasures]."[43] Such substantive goals are relevant to procedural access to environmental justice as they require the decision maker to adopt a particular process for consideration of what such a relationship is and how it can be recognized and provided for in the decision in question. If there are deficiencies in the process of such consideration, there are likely to be deficiencies in the substantive outcome as well.

In addition to these substantive provisions, there are a range of procedural provisions requiring consideration of *tikanga* Māori (Māori customs) at different stages and enabling and/or requiring consultation and/or other forms of participation with *iwi* and Māori in decision-making processes under the Act. For example, local authorities are required to consult with *tangata whenua*, typically through relevant *iwi* authorities, when preparing or changing policy statements or regional and district plans[44] and "must consult tangata whenua through relevant iwi authorities" in relation to the appointment of hearings commissioners with understanding of *tikanga* Māori.[45] There are several duties in the Act on local authorities to provide information to "tangata whenua through relevant iwi authorities."[46] There are also various situations where councils have a duty to include as members of the decision-making panel, at least one member who "has an understanding of tikanga Māori and the perspective of tangata whenua."[47]

An amendment in 2005 clarified that there is no duty on an applicant or a consent authority to consult in an individual resource consent application,[48] nor on designations or heritage orders.[49] Yet, consultation may still occur pursuant to other obligations;[50] such consultation may be necessary in order to satisfy the substantive obligations to consider Māori values, relationships, and perspectives.

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43. *See* DEREK NOLAN, ENV'T AND RES. MGMT. LAW 14 (LexisNexis NZ, 5th ed. 2014) (describing that s 6 and s 7(a) require decision-makers to "have particular regard to… Kaitiakitanga," and s 8 requires them to "take into account the principles of the Treaty of Waitangi."; *See* Resource Management Act 1991, s 74(2)(b)(iii) (N.Z.). In addition to these general requirements, the Act also contains specific requirements, such as to have regard to regulations relating to non-commercial Māori customary fishing, *id*.

44. *See id*., Resource Management Act 1991, ss 3, 66(2A), 74(2A), sch 1, cls 2–3, 3B.

45. *Id.* s 34A(1A)(a).

46. *Id*. ss 44, 5(4), 5A(8), 20, 47, 51.

47. *Id*. ss 34(A)(1A)(b), 39, 40(1). The same applies to establishing collaborative decision-making groups, *id.* ss 39, 40(1).

48. *Id.* s 36A(1).

49. *Id.* s 36A(2).

50. Local Government Act 2002, ss 76(5), 77(1), 81 (N.Z.).

Unfortunately, assessment of Māori input into RMA decision-making through such consultation has not been positive. While there has been judicial comment that consultation with *tangata whenua* is "good practice," [51] the Waitangi Tribunal noted the inconsistency of Māori influence on planning instruments or consents under the RMA. Piecemeal results were a reality: where "relations between iwi and the local authority are good and well resourced, Māori priorities stand a fair chance of being heard; if not, the Māori voice is effectively silenced." [52] The Tribunal criticizes New Zealand's reactionary system, where Māori "react to priorities being set by local councils and applicants." This system results in Māori "usually sidelined in the role of objectors" as opposed to being part of initial discussions for such priorities.[53] Unfortunately, where a Māori voice is not considered as part of the decision-making process, it has led to decisions contrary to their interests.[54] It has been commented that:

> The main barriers to Māori effectively participating in the resource management process relate to lack of resources and limited understanding of the resource management process. Indeed, lack of resources is a huge impediment to participating and there appears to be an expectation amongst both local authorities and consent applicants that you will consult about an application, yet limited recognition that this can incur significant costs.[55]

The lack of a budgetary commitment to Māori or *iwi* (tribal) participation on the part of councils demonstrates the limited recognition that significant costs can be incurred.[56] At the same time, *iwi* authorities in popular resource development areas can be expected to handle thousands of resource consents without compensation. [57] This was first officially identified in 1995 yet it still happens today.

A related procedure for considering the substantive environmental concerns of Maori is through the development by *iwi* (tribes) of Iwi

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51. *Carter Holt v Te Runanga o Tuwharetoa Ki Kawerau* [2003] NZHC at [55] per Heath J, 2 NZLR 350, at [55].

52. WAITANGI TRIBUNAL, *supra* note 35, at 115.

53. *Id.*

54. *See Helmbright v. Env't Ct. (No. 1) [*2005] NZHC 118 per Baragwanath J. (N.Z.) (showing that the High Court's refusal to recognize a battleground site as important to Māori lead to the destruction of the site); *See also Ngati Maru ki Hauraki Inc v. Kruithof* [2004] NZRMA 1 (HC) per Baragwanath J. (N.Z.) (reviewing an alleged historic pa site included in a proposed development on private land).

55. Jenny Vince, *Māori Consultation Under the Resource Management Act and the 2005 Amendments*, 10 N.Z. J. ENVTL. L. 295, 311 (2006).

56. *Id*.

57. S*ee generally Marlborough Seafoods Ltd v Marlborough District Council* [1998] NZRMA 241 (NZEnvC) per Kenderdine J. (N.Z.) (where the iwi in that case had 11 local bodies in their rohe and in 1995 alone received 1,330 resource consents for consultation on, without any remuneration.)

Management Plans. Regional and district authorities consider these when preparing or changing their policy statements and plans, and can even inform decision-making on resource consents.[58] However, as Kenderdine J has noted:

> A Local Government New Zealand survey of council engagement with Maori published in 2004 found that only half of the 86 councils surveyed held IMPs. Only eight councils had supplied funding or other support for IMP development. Subsequent investigation by the Ministry for the Environment disclosed that five of the 10 iwi organisations that the department spoke to felt that IMPs were not being utilised as they should by councils and consultants, and that it was all too easy for iwi concerns to be ignored.[59]

Besides these ways that Māori can participate in decision-making by others, the RMA contains methods for Māori organizations to become decision-makers under the Act. The first way this can occur is through a simple transfer of powers under section 33. This section allows local authorities to transfer any of their functions, powers, or duties to a range of public authorities, including to an *iwi* authority. Another type of decision-making process that can be delegated is the issuing of heritage orders to protect places of special significance on spiritual and cultural grounds.[60] Under these provisions, an *iwi* authority can apply to the Minister for the Environment to be made a heritage protection authority. The Waitangi Tribunal notes that these are "significant" powers and can accordingly provide a useful avenue for substantive justice.[61] However, they have not yet been "invoked in favor of iwi, despite attempts to do so."[62]

A third type of decision-making process is a shared one through the creation of joint management agreements, whereby the exercise of any function, power or duty under sections 30 and 31 in relation to particular natural and physical resources can be made jointly between the *iwi* and local or regional authority.[63] However, this provision has not lived up to its promise. Until 2015 there was only one formal such agreement, between

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58. Resource Management Act 1991, ss 66(2A)(a), 74(2A) (N.Z) (indicating that such plans must be recognized by the relevant iwi authority, lodged with the relevant Council, and relevant to the resource management issues of the area covered by the plan).

59. Shonagh J. Kenderdine, RESOURCE MANAGEMENT THEORY & PRACTICE 66 (2010) (footnote omitted).

60. Resource Management Act 1991, s 189 (N.Z.).

61. WAITANGI TRIBUNAL, *supra* note 35, at 113.

62. *Id.*

63. Resource Management Act 1991, ss 36B-E (N.Z.).

Ngāti Tūwharetoa and the Taupō District Council.[64] The Waitangi Tribunal comments that "while a unique and laudable initiative, it remains unproven and appears to be somewhat tentative" due to the numerous restrictions the agreement contains.[65]

A prominent criticism has been that government is not legally compelled to enter into such arrangements.[66] Local authorities are left with most of the power as they are the party relinquishing control to *iwi*. It has been criticised that there is little incentive for local authorities to enter into JMAs.[67] The Waitangi Tribunal is very critical of the lack of use of these decision-making delegation sections. The Tribunal argues that "the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business."[68] This creates an environment where political means, such as through Treaty settlements, are the primary ways in which tangata whenua can become environmental decision makers.

In 2013, Justice Joe Williams criticized the operation of the various provisions that were designed to benefit Māori and better achieve their access to environmental justice:[69]

> Despite the Act's mechanisms aimed at mediating these issues, it has not over the last two decades produced examples of any significant step change in the structural relationships between the necessary players under the Act. Neither s 33 nor the heritage protection provisions in pt 8 have been used by ministers to transfer decision-making powers to iwi or hapu. Partnership-based powers under s 36B have been used by local authorities, as far as I know, only once and then only in relation to Māori-owned land. Iwi generated planning instruments, although they are specifically provided for in the Act, have not enabled iwi and hapu to take the resource management initiative on matters of deep significance to them - that is to drive conversations with local authorities over iwi and hapu priorities. Iwi remain, for the most part, cast in the role of objectors to the initiatives of others. These structural provisions are, for Māori, a dead letter, despite Lord Cooke's obiter in the *McGuire*

64. *Joint Management Agreement*, The Waikato Raupatu River Tr. & Waikato Dist. Council (Mar. 23, 2010), https://wdcsitefinity.blob.core.windows.net/sitefinity-storage/docs/default-source/your-council/council-committees-and-boards/waikato-and-waipa-river-settlements/joint-management-agreement.pdf?sfvrsn=abbb9c9_2.

65. WAITANGI TRIBUNAL, *supra* note 35, at 114.

66. Natalie Coates, *Joint-Management Agreements in New Zealand: Simply Empty Promises?*, 13Journal of South Pac. L. 32, 36 (2009).

67. *Id*. at 36.

68. Waitangi Tribunal, *supra* note 35, at 115.

69. Justice Joseph Williams, *Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law*, 21 WAIKATO L. REV. 1, 22 (2013).

> *v Hastings District Council* case that the Māori provisions in pt 2 of the RMA are "strong directions, to be borne in mind at every stage of the planning process."

It is thus perhaps not surprising that various methods of according both procedural and substantive justice are being negotiated through the Treaty settlement process. Procedural mechanisms are being adopted in order to ensure ongoing collaboration between *iwi*, *hapū*, and councils, as opposed to the more episodic consultation on plans and consents as they arise. For example, one option is the establishment of advisory boards to give advice to local authorities.[70] Another is establishing joint committees to directly assist regional councils with the development of policy statements and plans, as well as to develop separate planning documents that must be recognized and provided for by local authorities in RMA planning instruments.[71] Joint Management Agreements are being negotiated with a similar goal of ongoing collaboration, but in relation to all processes: plan-making, decision-making on resource consents, and monitoring.[72] While Joint Management Agreements under the RMA envisage delegating resource management decision-making roles to an *iwi*, the only settlement agreement to include aspects of such a role is that over the Waikato River, which Waikato-Tainui has taken up. These settlement agreements fill important gaps, but the gaps remain for those without agreements for such arrangements.

1. 2017 RMA Amendments to Increase Iwi Participation: Mana Whakahono ā Rohe.

In April 2017, new *iwi* participation processes—Mana Whakahono ā Rohe—were added to the RMA, with the aim of enhancing Māori participation in resource management. Mana Whakahono ā Rohe are written agreements between *iwi* authorities and local government bodies that record how the two will work together when preparing, reviewing, or changing policy statements and plans.[73] Agreements can be initiated by an *iwi*, rather

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70. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, ss 158, 160, 161; The Ngati-Tama ki te Tau-Ihu settlement summary, N.Z. Gov't, https://www.govt.nz/treaty-settlement-documents/ngati-tama-ki-te-tau-ihu/ (last visited Jan. 31, 2021).

71. *See generally* TE RAUTAKI O TE ONEROA-A-TŌHE, https://b836a396-45d9-45cf-a2f1-bc6f8b170e04.filesusr.com/ugd/653f56_a0802ba81e434ae29d8ff2d3615b4c35.pdf (last visited Feb. 5, 2021) (illustrating a joint committee assisting a regional counsel with planning and policy).

72. Joint Management Agreement, *supra* note 64.

73. Resource Legislation Amendment Act 2017, s 58R (N.Z.).

than *iwi* waiting for local government to approach them to initiate the relationship.[74]

It is likely that the Mana Whakahono ā Rohe provisions will enable more certainty for iwi participation in local government decision making and will incentivize early involvement of *iwi* by the local governments. They do not shift policy making power to *iwi*, as this remains ultimately with the relevant council, but they do provide a better forum for collaboration by requiring the voices of *iwi* to be heard and understood.[75] While it is too early to evaluate the operation of these provisions, Deputy Chief Judge Fox of the Māori Land Court comments that they "are subject to local authority discretions, internal dispute resolution procedures and a default process back to the Minister, rather than the Court." [76] Further, she comments that, "[w]hile the Environment Court may be asked to have regard to these agreements at some time in the future, it is hard to see how the failure to transfer power will be progressed any time soon in the Environment Court."[77]

It is possible that the focus of these provisions on lower-level participation may be delaying—or at least avoiding—the transfer of decision-making powers to *iwi*. In one sense, this could be seen as procedural justice (participation) being awarded at the expense of substantive justice (political redress). This does not fit the traditional procedural/substantive categories of environmental justice, but illustrates the need for a more nuanced analysis, including considerations of the Maori political goals for indigenous environmental justice.

B. Access to Justice in the Environment Court

> The Court embraces change for positive effect and is constantly looking . . . to enhance access to justice.[78]

The issue of access for Māori to the Environment Court is not usually addressed in discussion of environmental justice in Aotearoa, even in

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74. *Id.* s 58O.

75. Marama Fox & Te Ururoa Flavell, *RMA Strengthens Kaitiakitanga*, SCOOP PARLIAMENT (NOV. 9, 2016), http://www.maoriparty.org/rma_strengthens_kaitiakitanga (suggesting that this arrangement "goes beyond anything that currently exists for Māori outside of a Treaty Settlement" and that addition of Mana Whakahono ā Rohe agreements "gives iwi a chance to engage like they haven't been able to do before.").

76. Caren Fox, Taking into Account Spiritual and Cultural Values and Te Tiriti o Waitangi in the Environment Court (June 26, 2017) (unpublished manuscript) (paper delivered at a symposium entitled: "*Huakina*: "The Fabric of New Zealand Society", on file with the author).

77. *Id.*

78. Laurie Newhook et al., *Issues with Access to Justice in the Environment Court of New Zealand*, INT'L SYMP. ON ENV'T ADJUDICATION IN THE 21ST CENTURY (2017), http://www.rmla.org.nz/wp-content/uploads/2017/05/FINAL-LJN-DAK-and-JJH-PAPER-FINAL-100417-3.pdf.

discussion of access to the Environment Court.[79] This section briefly introduces four such issues and suggests avenues for further research.

1. The Environmental Assistance Legal Fund

The most common issue of access to justice, in relation to access to the courts more generally, is the practical one of cost. In order to address the high cost of participating in RMA proceedings before the Environment Court and boards of inquiry, the Environmental Assistance Legal Fund provides funding for not-for-profit community groups, including *iwi* and *hapū* groups.[80] There have been increasing criticisms of this funding, including the low total amount plus the budget has sometimes been underspent even while applications have been denied.[81] Another criticism has been over who makes the decisions on grants from this fund. In early 2016, the government took this responsibility away from the Ministry for the Environment chief executive and gave it to the Environment Minister Nick Smith to exercise.[82] Even though the increased ministerial powers are to be exercised upon the advice of an independent panel, Sir Geoffrey Palmer labelled it "as a 'constitutional outrage,' saying 'due process is replaced by Executive fiat.'"[83] The Environmental Defense Society submitted that the, "[m]inisterial discretion provided for by the Bill is excessive and the reduction in public participation unjustified. The changes allow the politicization of RMA processes and comprise the democratic separation of powers. The focus on quick decision-making will compromise good-decision making and good environmental outcomes."[84]

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79. *See id*. (discussing the need for access to the courts); *See also* Sian Elias, *supra* note 3 (where the Chief Justice addressed only administrative conceptions of access to environmental justice).

80. MINISTRY FOR THE ENVIRONMENT, *About the Environmental Legal Assistance Fund*, http://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/about-fund (last reviewed July 23, 2020).

81. Stacey Kirk, *Government Blocking Public Access to Environmental Assistance Legal Fund, Say Greens*, DOMINION POST (Mar. 20, 2016, 6:54PM), http://www.stuff.co.nz/dominion-post/news/politics/78074905/Government-blocking-public-access-to-Environmental-Assistance-Legal-Fund-say-Greens. For example, the budget was $680,000 for the 2014-2015 year but only $281,000 was spent. Budgets have also been reduced, with the budget for that 2014-2015 year reduced by $445,000 from the 2013-2014 financial year before, *id.*

82. Sam Sachdeva, *Nick Smith Accused of Power Grab Over Change to NGOs' Environment Legal Fund*, STUFF (Oct. 19, 2016) http://www.stuff.co.nz/national/politics/85522500/nick-smith-accused-of-power-grab-over-change-to-ngos-environment-legal-fund.

83. Eugenie Sage, *Resource Legislation Amendment Bill a Shambles* (Nov. 3, 2016), https://www.greens.org.nz/news/press-release/resource-legislation-amendment-bill-shambles.

84. Environmental Defence Society, *Submission to the Local Government and Environment Select Committee on the Resource Legislation Amendment Bill* (2016), https://www.eds.org.nz/assets/Submissions/Submissions2019/191105%20EDS%20submission%20on%20RMA%20Reform.pdf?k=2bdeb2bd72.

However, despite these criticisms of the fund, a positive aspect for Māori is that Māori are receiving significant financial assistance through this fund. For example, in the 2016-2017 financial year alone, it appears that Māori organizations received approximately $374,000 whereas non-Māori organizations received approximately $186,000 from this fund.[85] Perhaps the biggest criticism from Māori is that the application criteria for this fund relate only to decisions under the Resource Management Act. For example, there have been calls to extend the criteria to cover activity consent applications under the Exclusive Economic Zone legislation, but this has not been done.[86]

2. Kaupapa Māori Expertise in the Environment Court

A key cultural issue of access to justice for Māori is how courts deal with the presentation of evidence of Māori *tikanga*, values, and interests.[87] This can be both a procedural and substantive issue. For example, if the court misunderstands *tikanga* or *matauranga* Māori, then it is likely to also misunderstand their appropriate application to resolve a particular case.

The Environment Court is required to "recognize tikanga Maori where appropriate."[88] However, there is no requirement to have any member of the Court with expertise in *tikanga* Māori on any particular hearing panel. The appointment of special advisors in order to assist the Court in a proceeding is possible.[89] Knowledge and experience of "matters relating to the Treaty of Waitangi and kaupapa Māori" are one of the six areas of knowledge that the court is expected to possess in order to ensure an appropriate "mix of knowledge and experience in matters coming before the court."[90] It is thus a matter of good management and best practice that judges and commissioners with expertise in *kaupapa* Māori be appointed. However, it needs to happen more often and, if it does not happen, there is no recourse.

Since 2009, Māori Land Court judges have presided over 13 Environment Court cases involving Māori issues.[91] This came about through the then Principal Environment Court Judge, Bollard J, requesting Māori land court judges who could also sit as Alternate Environment Court judges.[92] Deputy Chief Judge Fox and Judge Clark were appointed—and

85. *See* Ministry for the Environment, Environmental Legal Assistance Fund http://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/previous-applications.

86. Environmental Defence Society, *supra* note 84.

87. *See* Williams, *supra* note 69, at 21-22 (explaining how the court lacks understanding of Maori evidence).

88. Resource Management Act 1991, s 269(3) (N.Z.).

89. *Id*. s 259.

90. *Id.* s 253(e).

91. Fox, *supra* note 76.

92. *Id*. at 6.

while they have not been able to accept all invitations to join the Environment Court hearings—at the time of writing they had presided over seven and six cases respectively.[93] Deputy Chief Judge Fox comments that it helps because they can assess evidence related to *tikanga* Māori: "Although we are not experts in tikanga, we work with Māori communities, te reo Māori and tikanga Māori experts on a daily basis."[94]

Fox DCJ notes that, while good substantive results can be and have been achieved even without such expertise on the Court, where it does exist there is less room for avoiding such evidence and issues. She observes that, where a Māori Land Court judge "has presided with an Environment Court judge":[95]

> Exploration of the relationships of parties to their ancestral lands and waters have been comprehensively analyzed; Mana whenua issues have not been avoided where there are competing parties; Kaitiakitanga [stewardship] values have been tested to ascertain how kaitiaki principles have been applied; and the principles of the Treaty of Waitangi have also been taken into account.

Full and appropriate consideration of *tikanga* and *matauranga* Maori (where it is relevant) will ensure that important matters are not left unaddressed and that, when addressed properly, will better justify whatever substantive result is ultimately reached.

3. Access to Alternative Justice in the Environment Court

The Environment Court uses mediation to resolve "approximately 75 per cent of all cases filed in the Court."[96] Mediation provides a more cost-effective approach, lower costs than litigation and no risk of an award of

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93. *See id*. at 7 (citing cases involving Judge Fox,*Ngāi te Hapū Inc v Bay of Plenty Regional Council* [2017] NZENvc 73; *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195; *Te Puna Matauranga o Whanganui v Whanganui District Council* [2013] NZEnvC 110; *Te Rūnanga o Ngäi Te Rangi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* [2010] NZEnvC 26; *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* EnvC Auckland A092/2009, 6 October 2009. Those involving Clark J are: *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council* [2017] NZEnvC 72; *Purewa Ancestral Land Unincorporated Group v Whangarei District Council* [2016] NZEnvC 94; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 83; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 248; *Te Rakato Marae Trustees v Hawkes Bay Regional Council* [2011] NZEnvC 231; *Wairoa District Council v Hawkes Bay Regional Council* [2011] NZEnvC 97; and *Wairoa District Council v Hawkes Bay Regional Council* [2010] NZEnvC 420).

94. *Id.*

95. *Id.* at 8.

96. NEWHOOK ET AL., *supra* note 78, ¶ 16.

costs against a party, and thereby provides greater access to justice in a formal sense.[97]

It is also possible that the use of mediation to resolve issues before the Environment Court can provide greater access to environmental justice. In its favor is that the process of mediation is closer to Māori problem solving methods and emphasizes a partnership where "equitable power sharing and decision-making responsibilities"[98] are placed at the forefront, rather than the adversarial approach of litigation which does not encourage an enduring partnership between the two parties. Where two cultures are coming together to find a solution to an issue, "face-to-face contact . . . . throughout the decision-making process" is an important tool for "building trust and respect amongst the individuals involved."[99] *Iwi* and governmental bodies should work together as a partnership; the even-footing and non-adversarial nature of mediation make it a more appropriate method of access to justice for Māori.

On the other hand, Environment Court judges have noted that mediation is a private method of dispute resolution and does not leave the public record that litigation does. The use of mediation, therefore, removes from the public eye matters that should be resolved in the public sphere, thus diminishing public access to justice.[100] It is much harder to track Māori access to justice in the Environment Court if 75 percent of the cases that come before it cannot be easily evaluated. The Environment Court has safeguards in place to protect against concerns of inconsistent treatment: alternative dispute resolutions are facilitated by commissioners of the Environment Court, and any resolution of a case that has gone through an alternative dispute resolution process is subject to final approval by a judge.[101] However, it could be a concern that the understanding of Māori issues and evidence varies widely between commissioners. That is why, for example, there is a requirement for at least one commissioner on a consenting and planning panel to have an understanding of *tikanga* Māori. But if there is only one commissioner as mediator, and one judge's oversight, there is greater possibility for levels of access to justice for Māori to vary depending on the abilities and knowledge of the personnel involved.

Thus, the use of mediation needs to be examined for its ability to provide access to justice for Māori. Procedural and substantive issues should be addressed—from costs, timelines, and consideration of evidence, to the

97. *Id*. at ¶ 21.

98. Philip O. Lyver, *Co-Managing Environmental Research: Lessons from Two Cross-Research Partnerships in New Zealand*, 32 ENVIRONMENTAL CONSERVATION 365, 365 (2005).

99. *Id.* at 366.

100. NEWHOOK ET AL., *supra* note 78, ¶ 6.

101. *Id.*

consistency of results with the interests of the Māori parties and their tikanga. Even though it is a process where the results are a matter of private settlement and not public record, researchers should be given access for these purposes. Results can be reported with anonymized data as well as in aggregate studies. Only when justice is seen to be done can we be sure that it really is being done.

4. Resource Legislation Amendment Act 2017

Concerns have been raised about possible reduced access to justice as a result of changes to court processes and jurisdiction under the Resource Legislation Amendment Act 2017 (assented to on April 18, 2017). For example, there are effective restrictions on the Court's jurisdiction through changes to the notification framework and limitations on rights for merits appeals. [102] Consent authorities are no longer required to do "a comprehensive effects-based assessment to determine whether to notify a resource consent application." [103] This reduces public participation in exchange for a resource consent process that is cheaper for the applicant.

Experienced Environment Court judges have identified the following consequences of the reform where the emphasis on streamlining procedures has been "to the virtual exclusion" of enhancing access to justice.[104] They comment that:

> - Rights of participation in decision-making have been very significantly reduced;
> - Public participation having been substantially constrained in relation to consent decision-making, the reforms might be seen to erode the refuge in participation in policy and plan-making that arose in consequence; and
> - Commentators accordingly perceive a continuing and significant erosion of the opportunity for citizens to participate in decision-making processes and give effect access to judicial proceedings.[105]

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102. *Id.* ¶ 107.

103. MINISTRY FOR THE ENV'T, *Resource Legislation Amendments 2017: Fact Sheet 9* (April 2017), https://www.mfe.govt.nz/sites/default/files/media/factsheet-9-changes-to-resource-consent-notification.pdf.

104. NEWHOOK ET AL., *supra* note 78, ¶ 109.

105. *Id.* ¶ 108.

One concern with the new legislation is that streamlined processes could be particularly detrimental to Māori. For example, oral representations need time. Further, the streamlining processes that have been adopted under the RMA can both limit Māori participation as well as exclude Māori from participating in decisions. One safeguard for Māori representation in streamlined projects is the requirement that counsel identify any implications that the streamlined planning process may have on any relevant iwi participation legislation or on Mana Whakahono ā Rohe arrangements. Counsel is also required to include "a summary of the consultation planned or undertaken on the proposed policy statement, plan, change or variation, including with *iwi* authorities."[106] The Minister, in reaching a decision to grant consent or not, must also have regard to the Mana Whakahono ā Rohe arrangements that are relevant, as these arrangements must specify what iwi participation is to be under a streamlined application.[107]

It will take time before we can assess how these new arrangements will work for Māori; they will need to be assessed to determine how they affect access to justice for Māori in the Environment Court. As with the other suggestions for research, procedural and substantive issues should be addressed—from costs, timelines, and consideration of evidence, to the consistency of results with the interests of the Māori parties and their tikanga.

IV. TUI MINE, HAURAKI IWI AND ENVIRONMENTAL JUSTICE

> Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.[108]

This paper now considers a case study concerning the pollution from the abandoned Tui mine site. The history and ongoing situation of the Tui mine site illustrates the interplay between procedural and substantive environmental justice for Maori, as well as a clash of values and cultures between a minority and the majority. It illustrates a more typical environmental burden of historic pollution that is made more complicated by the history of colonization. It thus serves as an illustration of the interplay

106. MINISTRY FOR THE ENV'T, *Resource Legislation Amendments 2017 Fact Sheet 5: A New Optional Streamlined Planning Process* (Apr. 2017) http://www.mfe.govt.nz/sites/default/files/media/fact-sheet-5-a%20new-optional-streamline-planning-process.pdf.

107. *Id*.

108. *Principles of Environmental Justice, supra* note 6, at Principle 6.

between several different elements of Maori environmental justice; procedural, substantive, and indigenous.

Most discussions of the Tui mine begin with its opening by Norpac Mining Ltd. in 1967. It was mined for a range of metals—particularly copper, lead, and zinc—until 1975. It was then abandoned, leaving behind ore dumps and tailings which leached heavy metals into the Tui and Tunakokohoia Streams. Yet for Hauraki *iwi*, the story of environmental justice and Te Aroha *maunga* starts more than 100 years earlier, in the Native Land Court.

A. Mount Te Aroha's Importance to Hauraki iwi

Mount Te Aroha has always been a site of significant spiritual importance and *wahi tapu* for Hauraki iwi.[109] The cultural importance of Te Aroha *maunga* was significant enough for it to be recognized in the relevant district plan as being a "Māori Historic Sacred Mountain" and *waahi tapu* site;[110] construction of a cellular radio tower was accordingly denied by the Environment Court in 1997.[111] Unfortunately, a failure by the Crown to encourage and foster participation by—or recognize the traditions and values of—the *iwi*, has resulted in the "continuity of tikanga Māori [being] lost at Te Aroha."[112]

B. The Crown and the Aroha Block

The Aroha block has a long history of tribal tension between Hauraki *iwi*, who tried to use the courts as a method for attempting to secure title over the land. For example, from 1869 to 1878 the Native Land Court determined claims to the land from four tribes: Ngati Haua,[113] Ngati Rahiri, Marutuahu

109. WAITANGI TRIBUNAL, THE HAURAKI REPORT 3 at 902 (Wai 686, 2006). Its name, meaning "love, yearning or compassion," is a shortened version of Te Aroha-ki-tai, Te Aroha-a-uta which is an "expression of yearning for home," *id.* In the *Hauraki Report*, the Waitangi Tribunal expressed that, although the land was sold to the Crown in 1878, it is clear that Mount Te Aroha "has remained a maunga tapu, a sacred mountain, in the mind of Ngati Rahiri Tumutumu and Hauraki people generally," *id.*

110. *See Mason-Riseborough v. Matamata-Piako District Council* (1997) NZEnvC A147/93 per Whiting J (holding that Mäori had an interest greater than the general public interest in preventing construction on Mt. Te Aroha).

111. *Id.*; *see also* WAITANGI TRIBUNAL, *supra* note 109, at 902.

112. *Id.* at 928.

113. WAITANGI TRIBUNAL, *supra* note 109, at 465 (explaining the Ngati Haua were awarded it in 1869 on the basis that they had occupied it at the time of European settlement in New Zealand).

and Ngati Rahiri Tumutumu.[114] However, the Crown purchased the Aroha block in 1878.[115]

When it faced resistance to reaching an agreement to open a goldmine at Te Aroha, the Crown introduced "the system of raihana - lending money for food and other purchases to Māori landholders in anticipation of future mining revenue." It was through this practice that the Crown was able to secure large blocks of land by calling in debts, including Te Aroha.[116] The Crown conceded that they had exerted "undue pressure or manipulation" in securing this agreement to open the goldfield;[117] the Waitangi Tribunal found that the Crown had failed to "protect the traditional values and kaitiakitanga of [Ngati Rahiri Tumutumu] in [regards to] Te Aroha Mountain."[118] It was through this injustice that the Aroha block was purchased and the Te Aroha goldmine was able to be opened in 1880.

C. The Tui Mine

In addition to the goldmine, in 1967 the Tui mine opened on the western side of Mount Te Aroha. The site was leased by the Government to Norpac Mining Ltd. for extracting "a range of base metals, including copper, lead and zinc."[119] In 1973 the mining became economically unfeasible due to overseas buyers becoming reluctant to purchase metals from the mine due to high levels of mercury.[120] By 1975 Norpac had abandoned the site and gone into liquidation.[121] This left behind ore dumps, the ruins of the mine infrastructure and tailings which leached heavy metals into the Tui and Tunakohoia Streams.[122] While temporary work was done by the Hauraki Catchment Board in 1980 to prevent the tailings from bursting from the

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114. WAITANGI TRIBUNAL, THE TE AROHA MAUNGA SETTLEMENT PROCESS REPORT: WAI 663 at 7, N.Z., (2014).

115. *See* Philip Hart, *The Aroha Block to 1879* (Univ. of Waikato, Te Aroha Mining District Working Paper No. 13, 2016), https://researchcommons.waikato.ac.nz/handle/10289/10322 (showing in the late-1800s, the Government attempted to buy it "against the wishes of a section of the native claimants."); *Id.* at 78.

116. Geoff Cumming, *Hauraki Pains*, NEW ZEALAND HERALD (Feb. 3, 2021), https://www.nzherald.co.nz/nz/hauraki-pains/AQL22AQEBFR7OWCO4RYZOIS2NI/.

117. WAITANGI TRIBUNAL, THE HAURAKI REPORT I, at xxviii (2006).

118. *Id.* at xi.

119. *Tui Mine Remediation Works*, AECOM, https://aecom.com/us/projects/tui-mine-remediation-works/ (last visited Jan. 22, 2022).

120. *A Tale of Mining in New Zealand—and the Tragic Tailings of Tui Mine*, ENVIROHISTORY NZ (May 2, 2010), https://envirohistorynz.com/2010/05/02/a-tale-of-mining-in-new-zealand-and-the-tragic-tailings-of-tui-mine/.

121. *Id*.

122. *Tui Mine Remediation Project*, WAIKATO REG'L COUNCIL, https://www.waikatoregion.govt.nz/Services/Regional-services/Waste-hazardous-substances-and-contaminated-sites/Tui-mine/ (last visited Jan. 22, 2022).

dam,[123] it was another 30 years before remediation began. In 2010, when the remediation project began, "the Tunakohoia Stream was contaminated with heavy metals leaching from the mine and was unsuitable for swimming, fishing, drinking or irrigation. The Tui Stream was dead and unable to support any aquatic life."[124]

Iwi (local tribes) suffered greatly from this contamination from the mine. The contamination of the Tunakohoia and Tui streams destroyed "plant, birdlife and tuna (eel) that were once abundant on the mountain."[125] The oldest known name for Te Aroha was Puke Kakariki Kaitahi—"the place where the Kaka parrots flocked to feed"—and this was a symbolic name to represent "that the mountain supplies an abundance of food and resources."[126] What is not mentioned in most accounts of the environmental pollution is the effect on *kaitiaki* (tribal guardians) of the metaphysical damage to the *mauri* (life force) of Te Aroha, and thus to the *mana* (status) of the *kaitiaki* themselves and the consequent shame when their responsibilities as *kaitiaki* were unable to be fulfilled.

Another concern was the tailings dam which had deteriorated over time and become unstable. The dam was at risk of collapse from a "moderate seismic event," and such a collapse would result in the waste "liquefying and flowing down the Tui stream past the edge of Te Aroha" (i.e., the township).[127]

D. Remediation of the Site

The remediation effort was managed by the Waikato Regional Council and governed by the Waikato Regional Council, the Ministry for the Environment, the landowners (Matamata-Piako District Council and Department of Conservation), and local *iwi*.[128] It had multiple goals aside from stabilizing the tailings, it also aimed to:

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123. *November 2010 Newsletter: The Story so Far*, WAIKATO REGIONAL COUNCIL, https://www.waikatoregion.govt.nz/Services/Regional-services/Waste-hazardous-substances-and-contaminated-sites/Tui-mine/November-newsletter/The-story-so-far/.

124. WAIKATO REGIONAL COUNCIL, *Tui Mine Remediation delivers excellent stream improvements*, SCOOP (Apr. 7, 2014), https://www.scoop.co.nz/stories/AK1404/S00132/tui-mine-remediation-delivers-excellent-stream-improvements.htm.

125. IWI ADVISORY GROUP: TUI MINE REMEDIATION PROJECT, TUI MINE CULTURAL MONITORING PLAN 2012–2017, at 7 (Mar. 2013).

126. WAITANGI TRIBUNAL, *supra* note 107, at 903.

127. *Tui Mine Cleanup: Project Update*, WAIKATO REG'L COUNCIL (Dec. 2011), https://www.waikatoregion.govt.nz/assets/PageFiles/20673/TuimineDec2011.pdf.

128. Nick Smith, *$16.2 Million Tui Mine Clean-up Gets Underway*, NEW ZEALAND GOV'T (Oct. 19, 2011), https://www.beehive.govt.nz/release/162-million-tui-mine-clean-gets-underway (explaining $15.2 million was originally contributed by the government for what it stated was "the largest ever for a clean-up"); *see also* MINISTRY FOR THE ENV'T, *Tui Mine Remediation*,

- "reduce the release of contaminants into the Tui and Tunakohoia streams, thereby improving the water quality in those streams";
- "improve the geotechnical stability of the tailings impoundment";
- "improve the safety and security of the site";
- "improve the visual appearance and aesthetics of the site";
- "address as far as practicable, within the limitations of the project, the impacts of the Tui mine on the taonga (treasures) of the Te Aroha maunga (Mt Te Aroha) for iwi."[129]

Despite completion in 2013, there are still ongoing costs involved with the remediation project. A key environmental impact of the mine was discharge of contaminated water into the Tunakohoia and Tui streams. Although there is a return of life to the streams, both are "still affected by past and/or present activities at the Tui Mine."[130] Particularly affected is the Tunakohoia stream—to this day it has yet to return to healthy conditions.[131]

E. Māori participation in the remediation

The remediation project was overseen by a governance group comprising the senior management of Waikato Regional Council, Ministry for the Environment, the landowners, Matamata-Piako District Council, and the Department of Conservation. Local *iwi* (tribe) Ngāti Rāhiri Tumutumu are also a part of the project governance, as is a representative of the Iwi Advisory Group.

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http://www.mfe.govt.nz/more/environmental-remediation-projects/tui-mine-remediation (last visited Feb. 1, 2021) (explaining this amount eventually grew to $20.53 million (excluding GST). The final figure for the remediation project, which was completed in May 2013, was $21.7 million (Waikato Regional Council and Matamata-Piako District Council also provided funding).

129. Smith, *supra* note 128.

130. PATTLE DELAMORE PARTNERS LTD, TUI MINE: POST REMEDIATION ECOLOGICAL MONITORING 2015, WAIKATO REG'L COUNCIL, (Mar. 2016), https://www.waikatoregion.govt.nz/assets/PageFiles/13588/Tui_Mine_Remediation_-_Ecological_Monitoring_Report_2015_(3747598).pdf.

131. *Id.* at 2 (assessing the different sections of the Tunakohoia, the Waikato Regional Council found that although some sections showed "a significant reduction in the combined mass flux of cadmium, copper, lead and zinc," others had "no significant change in water quality" with the "concentration of a number of elements, particular cadmium, lead, nickel and zinc [remaining] elevated particularly when compared to the concentration of these elements measured in the south branch of the Tunakohoia Stream").

A steering group oversaw the project's implementation; it included senior staff from the main parties, and a representative of the Iwi Advisory Group. The Iwi Advisory Group consisted of members of interested iwi, including Ngati Rahiri Tumutumu, Te Kupenga O Ngati Hako, and Ngati Haua.[132]

The Iwi Advisory Group stated that "Kaitiaki obligations to the mountain" were "marginalised" by the negative impact the mine had on the environment.[133] The effort made to remediate the mountain was done with the knowledge that the mountain "cannot be returned to a pre-mined state," and that the regeneration of the site "is an intergenerational responsibility" of which "iwi have an ongoing responsibility in the monitoring of the maunga."[134] With Hauraki and Ngati Haua as kaitiaki for Te Aroha, they bear an "inter-generational responsibility to ensure the cultural, social and spiritual integrity of the maunga is upheld for present and future generations"[135] and must be active participants in the ongoing regeneration projects for the Tui mine site.

F. Te Aroha Maunga Settlement and the Tui Mine Site

Currently, Te Aroha *maunga* is Crown land and managed by the Department of Conservation as part of the Kaimai Mamaku Forest Park.[136] The Tui mine site sits on land owned by the Matamata-Piako District Council.[137]

The Tui mine site has had an interesting treatment for Treaty settlement in the area and there is, on its face, a conflict between the cultural importance of this site and the reality of offering it in a settlement package. The site now sits outside of any settlement claim, with Pare Hauraki having initialed a Collective Redress Deed with the Crown in December 2016 that includes Te Aroha Tupuna Maunga (an area of 1000 hectares) which is to be vested in the Collective as a Local Purpose (Pare Hauraki Whenua Kura) Reserve, without the contaminated site.[138]

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132. WAIKATO REG'L COUNCIL, *supra* note 127. The Iwi Advisory Group was involved in: "consent compliance planning activities"; "cultural induction of all contractors onsite"; "blessing of the site"; "leading the coordination of, and hosting, the ministerial visit for the official launch of phase 2 of the project"; "accommodating the public open day at Tui Pā"; "providing cultural advice to the project governance and management groups." *Id.*

133. IWI ADVISORY GROUP, *supra* note 125 at 6.

134. *Id.*

135. *Id.* at 11.

136. WAITANGI TRIBUNAL, *supra* note 109, at 901.

137. WAIKATO REG'L COUNCIL, *supra* note 122.

138. PARE HAURAKI COLLECTIVE REDRESS DEED, PARE HAURAKI-CROWN ¶¶ 1.6, 8.97.1 (Aug. 2, 2018), https://www.govt.nz/assets/Documents/OTS/Pare-Hauraki/Pare-Hauraki-Collective-Redress-Deed-v2.pdf.

G. Environmental Justice and the Tui Mine Site

Various issues are raised in terms of environmental justice for *kaitiaki* and the Tui mine site. The first is that the political claims of Maori for ownership and control of the site is not one that is typically faced by traditional environmental justice issues surrounding toxic sites and pollution. For example, it is especially unusual to see a battle to take control of the toxic site rather than attempts to avoid responsibility. As illustrated in the Māori Land Court proceedings in the 1800s, there is conflict over who is *kaitiaki* and how the mountain and site should be treated in any settlement package.[139] The Hauraki Collective put forth a proposal including it in 2011, yet the Crown has not agreed to this, even while Te Aroha Tupuna Maunga is included.[140] Notably, *iwi* carry the responsibility of being *kaitiaki* over the mountain, and are therefore key figures in its regeneration, which has been contaminated by a third party who is no longer around to participate in the remediation process.

In contrast, issues of financial liability and other responsibility for the site are not unique to New Zealand. The site still shows the signs of environmental damage from the mine in the contaminated status of the Tunakohoia Stream. Ongoing monitoring of the streams and ongoing work on the site is required, and more work needs to be done on how the Crown can uphold its responsibility to remediate the site, without placing all of the financial burden on *kaitiaki*.

The Hauraki Collective, as stated *kaitiaki* of mount Te Aroha, have proposed a land transfer that included the site, and are presumably willing to take on the responsibility of the continued remediation of the Tui mine site.[141] It seems that a settlement package that does not include the full western slopes of mount Te Aroha is detrimental to the Hauraki Collective in terms of achieving full redress (the return of mount Te Aroha in full) and the ability to properly fulfil their *kaitiaki* obligations. However, the role of Ngati Rahiri Tumutumu would also need to be resolved.

Overall, this example illustrates how procedural and substantive justice are intertwined with each other and with the uniquely Maori goals of environmental justice. It particularly illustrates how, even in a seemingly traditional case of substantive justice for pollution, historic and continuing substantive Māori environmental justice is much more complicated than simply who bears the burdens of pollution as traditionally framed. Instead, these are intertwined with aspects of justice that are peculiar to Maori,

139. MAORI LAND COURT, 150 YEARS OF THE MAORI LAND COURT 99 (2015).
140. WAITANGI TRIBUNAL, *supra* note 109 at 902.
141. *Id.*

relating to historical injustice and the remedies that are needed to address that.

V. THE AFTERMATH OF THE GROUNDING OF THE RENA

> There is really only one issue that is immediately relevant to the issues before us—and that is the state of the mauri of the reef.[142]

The grounding of the cargo ship, the MV Rena, provides a second case study illustrating the interplay of a range of issues of Maori environmental justice. The grounding of the Rena was a significant modern environmental disaster that illustrates different issues from that provided by the Tui mine case study. After the initial emergency clean-up, the Rena grounding involved the application of the Resource Management Act (RMA), a hearing and decision at the local authority level, and a hearing in and decision from the Environment Court.[143] It sheds light on Maori goals for environmental justice, including political justice and *iwi* participation in decisions, in substantive justice over the results, and particularly the importance of cultural aspects of substantive and procedural justice.

On the 5th of October 2011 the MV Rena was grounded on the Astrolabe reef (Otaiti) carrying over 1,733 tonnes of oil.[144] Salvage operations began immediately after the event but a tropical storm on the 7th of January 2012, which caused the ship to be split in two, caused cargo and debris, including 1,700 tonnes of oil, to be spilled onto the reef and nearby beaches.[145] It caused the deaths of many marine animals including thousands of seabirds.[146] The stern section remained submerged on the reef, leaking contaminants.[147] Volunteers removed more than 1,000 tonnes of oil and debris from the beaches.[148] A two nautical mile exclusion zone around the wreck was established and a clean-up plan put in place.[149] Even while the wreck remained on the reef, by 2013 the physical effects outside the reef

142. *Ngāi Te Hapū v. Bay of Plenty Reg'l Council* [2017] NZEnvC 073, at 29.

143. *Id.*

144. IAN G. MCLEAN, ANALYSIS OF THE GROUNDING OF THE MV RENA IN NEW ZEALAND, 5 OCTOBER, 2011, at 2 (Feb. 18, 2018).

145. MV Rena, MARITIME N.Z., https://www.maritimenz.govt.nz/public/environment/responding-to-spills/spill-response-case-studies/rena.asp (last visited Jan. 22, 2022).

146. Iryll Findlay, *Rena Spill Field Report*, N.Z. BIRD RESCUE CHARITABLE TR. (Nov. 21, 2011), https://birdrescue.org.nz/rena-spill-field-report/.

147. MCLEAN, *supra* note 144, at 2–3.

148. SIMON MURDOCH, INDEPENDENT REVIEW OF MARITIME NEW ZEALAND'S RESPONSE TO THE MV *RENA* INCIDENT ON 5 OCTOBER 2011, at 74 (2013), https://www.maritimenz.govt.nz/public/environment/responding-to-spills/documents/Independent-Review-MNZ-response-to-Rena.pdf.

149. N.Z. GOV'T, RENA LONG-TERM ENVIRONMENTAL RECOVERY PLAN 8 (2011).

were much improved;[150] by 2015 it was considered by many to be a matter solely for history.[151] However, the impact on Maori lasted longer and, for some, continues today.

For local Maori, both on the mainland and those based on Motiti Island near the reef, Otaiti is a *tipuna* (ancestor) and "an important tāonga and wāhi tapū; and…a significant *mahinga kai* (traditional food gathering place)."[152] For some, Otaiti is also a *toka tapū*, where the spirits of the deceased depart for Hawaiiki.[153] It is thus a site of spiritual significance and the physical damage to Otaiti thereby damages its *mauri* (life force). Because of this connection to Otaiti and the regard in which *iwi* held it, they were severely affected by the grounding of the Rena. The *mana* of *kaitiaki* suffers from an inability to protect the physical and spiritual health of the reef—their *tipuna* (ancestor)—and the physical and spiritual health of the Otaiti *kaitiaki* (guardians) suffered in turn.[154]

There have been several types of remedies, none of which have been enough to accord Maori environmental justice, individually or collectively. They have included criminal liability, compensation for financial losses, compensation for the cleanup, and inclusion in future governance of the area.[155]

In 2012, the owner of the Rena, Daina Shipping Company, was found to be criminally liable under the RMA for the discharge of harmful substances into the sea and was fined $300,000.[156] The shipping company was also liable under the Maritime Transport Act for the removal of the wreck[157] and for remedying the hazard to navigation.[158] Further, it was liable for damages from the pollution.[159]

As a result of liability under the Maritime Transport Act, the ship's owners placed a little over $11 million in a fund to compensate claimants.[160] This was to be for the purposes of restoration of the environment and for

150. *Decision of Panel on MV Rena Resource Consent Applications, in Astolabe Community Trust*, at 75 [hereinafter *MV Rena Decision*] (2016).

151. *See* Jamie Morton, *Rena: What to do With a Shipwreck*, N.Z. HERALD (Sept. 6, 2015), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11508801 (conveying local sentiments about the Rena incident).

152. *MV Rena Decision*, *supra* note 150, at 113, 114.

153. *MV Rena Decision*, *supra* note 150, at 129.

154. *Ngāi Te Hapū*, [2017] NZEnvC 073, at 29–30.

155. Newshub, *Rena Owners to Pay $27m Compensation* (Jan. 10, 2012), https://www.newshub.co.nz/nznews/rena-owners-to-pay-27m-compensation-2012100210.

156. *Maritime New Zealand v. Daina Shipping Company* DC at Tauranga CRI-2012-070-001872, 26 October 2012 at [17] (N.Z.).

157. Maritime Transport Act 1994, s248(2)(a) (N.Z.); *MV Rena Decision*, *supra* note 150, at 2.

158. Maritime Transport Act 1994, s248(4)(b)(iv) (N.Z.); *MV Rena Decision*, *supra* note 150, at 2.

159. *Daina Shipping Company* DC at Tauranga CRI-2012-070-001872 at [17].

160. Simon Judd, *Compensation for Pollution from the Rena*, 12 N.Z. J. PUB. & INT'L L. 261, 275 (2014).

financial compensation, such as, for losses of profits as a result of the physical damage.[161] This was of limited assistance to Maori, partly because the clean-up to date had already been funded by the Crown or the shipping company, and partly because none of this compensation could be paid for the environmental damage per se or for the cultural or spiritual damage to *kaitiaki*.[162] Further, the compensation fund had to be divided by a large number of claimants, such that even those with economic losses were not fully compensated; those whose losses could not be quantified monetarily could not recover.[163]

A later settlement between the ship's owners and the Crown was similarly unable to address environmental justice for *kaitiaki*. Despite shipowners providing $27.6 million in damages, they paid it to the Crown (e.g., for past and future clean-up).[164] A further $10.4 million compensation would be payable to the Crown if the wreck was allowed to stay on the reef.[165] It is the request for the wreck to remain on the reef which has most divided Maori over the situation.

In June 2014, the shipowner applied to the Bay of Plenty Regional Council for a resource consent under the RMA to authorize leaving the wreck on the reef.[166] The panel received 151 submissions on the application for the consent.[167] Forty-eight submissions were from Māori, of which forty-six then opposed the application.[168] The opposing applications were concerned that "the proposal did not adequately recognise Māori values;" such as *kaitiakitanga* (stewardship), *mauri* (life force), *tapū* (sacredness), and customary practices required to meet customary obligations of those Motiti *iwi* (tribes).[169] A key issue was that of *kaitiakitanga*. For those iwi opposed to the application, some felt that leaving the wreck on the reef would be a "constant reminder…that they had somehow failed in their

161. *See* Marine Transport Act 1994 No 104, ss 345, 346, 351 (N.Z.) (elaborating liability owed for maritime pollution spills).

162. *See* Bevan Marten, *Pollution, Liability, and the Rena: Lessons and Opportunities for New Zealand* 3 (VICTORIA UNIV. WELLINGTON L. RSCH. PAPER 10, 2013) (explaining that the narrow definition of pollution damage in the Maritime Transport Act of 1994 prevents recovery for non-monetary environmental damage).

163. *Id.*

164. Catherine J. Lorns Magallanes, *Treaty of Waitangi Duties Relevant to Adaptation to Coastal Hazards from Sea-Level Rise*, 63 DEEP S. NAT'L SCI. CHALLENGE 54 (2019).

165. *Id.*

166. *MV Rena Decision*, *supra* note 150, at 13.

167. Elton Rikihana Smallman, *Commissioner's Report: Rena Application Granted but Conditions Must be Met*, STUFF (Feb. 27, 2016), https://www.stuff.co.nz/national/77309101/commissioners-report-rena-application-granted-but-conditions-must-be-met.

168. *MV Rena Decision*, *supra* note 150, at 123. One Māori submission supported the application, and one was neutral. *Id.*

169. *Id.*

responsibilities as kaitiaki."[170] Similarly, Ngāi Te Hapū Inc. stated that the proposal "ran counter to, and was inconsistent with, Ngāi Te Hapū responsibilities as kaitiaki of Otaiti."[171] Ngāti Awa Rūnanga also rejected the proposal due to the marginalization of their "strong kaitiakitanga obligations."[172] The status of Otaiti as *tāonga* and, as such, it having a need to be "recognised and provided for as a matter of national importance" was another concern raised by multiple *iwi*.[173] Those opposing the application also considered that the reef's *tapū* (sacred) characteristics had been "totally disregarded" and its *mauri* adversely affected.[174]

As well as the cultural and spiritual concerns about the consent being granted, concerns were raised about the effects on the environment. Contaminants that would continue to be released from the wreck would have "direct detrimental consequences for kai moana and other ecological resources."[175] A concern raised was whether the application could result in "traditional food gathering practices . . . [being] adversely affected and the kai moana resource" being lost.[176] This is a serious consequence to those who rely on the reef as a source of food.

Other reasons for opposing submissions were the failure of the application to uphold the principles of the Treaty of Waitangi (in particular the principle of partnership), a failure to "undertake customary practices, and to meet their customary obligations . . . in a traditional and proper manner . . . would be compromised," that *rangatiratanga* over the reef would be adversely affected, and that "the proposed conditions of consent were inadequate."[177]

In February 2016 the decision-making panel found that "the hapū of Motiti have kaitiaki responsibilities for Otaiti that outweigh others"[178] due to their direct proximity to the reef and reliance on the surrounding sea being "carefully managed and cared for so that it can sustain the people of Motiti."[179] It noted that, if the proposed conditions of consent were accepted, there would be significant effects on Māori values.[180] The panel decided that this was a matter to "weigh in the balance" when evaluating the application and in coming to their decision.[181]

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170. *Id.* at 117.
171. *Id.*
172. *Id.* at 119, 120.
173. *Id.* at 121.
174. *Id.* at 123.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 127.
179. *Id.*
180. *Id.* at 131.
181. *Id.*

However, despite being weighed in the balance, the Motiti *hapū* concerns were outweighed and a resource consent was granted allowing the wreck to remain on the reef. The decision-makers had considerable concerns that they did not have any authority to order removal of the wreck—merely to consent it to remain or not.[182] They instead wanted to be able to impose conditions on that consent which would enable both procedural and substantive concerns of kaitiaki to be better upheld in the future.[183] The only way to impose and enforce such conditions would be with a grant of consent. Thus, the resource consent was granted with conditions for "the establishment and maintenance of a Kaitiakitanga Reference Group" involving *kaitiaki*, which would be involved with monitoring and with an Independent Technical Advisory Group.[184]

These conditions provided a foundation for environmental justice, both procedural and substantive, and gave Māori authority to participate in future action and monitoring. However, despite these conditions, this decision to grant consent was not acceptable to many *kaitiaki*, especially as they ultimately wanted to force removal of the wreck.[185] The decision was accordingly appealed to the Environment Court by Ngai Te Hapu Incorporated and Nga Potiki a Tamapahore Trust.[186] The Environment Court issued the judgement in May 2017.[187] Notably, Fox DCJ of the Māori Land Court presided in this decision.[188]

The Environment Court noted the "complex array of iwi and hapu groups all vying for recognition" regarding their relationships with Otaiti.[189] Starting with s6(e) of the RMA, the Court considered the following as "markers" to understand the relationship between *iwi* and *hapū* with Motiti Island and Otaiti as "Whakapapa (Genealogy), Ancestral traditions and cultural associations, Ahi ka (occupation) and title to land, Mana, Customary associations and activities, Contemporary Mechanisms such as Treaty of Waitangi settlements, [and] claims to customary marine title."[190] These factors demonstrated to the Court that "there are different layers of relationships, cultures and traditions with Otaiti that require different forms of recognition and provision."[191]

182. *Id.*
183. *See id.* at 153 (discussing the benefits of certainty through granting conditions).
184. *Id.* at 2.
185. Ngāi Te Hapū Inc. v. Bay of Plenty Reg'l Council [2017] NZEnvC 073, at [81, 167].
186. *Id*, at 5.
187. *Id.* at 2.
188. *Id.* at 1.
189. *Id.* at 12.
190. *Id.* at 12–13.
191. *Id.* at 13.

The Court began by determining which of the *iwi* or *hapū* had *mana whenua* ("customary authority exercised by an iwi or hapu in an identified area"), noting the "contestability between the tribes on the mainland over the issue" before moving on to determine who had *mana whenua* over the island.[192] The court emphasized that "normally, this Court is not required to undertake such an analysis."[193] It is notable that extensive evidence was considered, including both written and oral history, and that the genealogical stories are included in the summary of evidence contained in the written judgment.[194]

After assessing the relationships, both past and present, with the *iwi* and *hapū* applicants before the Court, it was determined that: "Ngāi Te Hapu - Te Patuwai and Te Whanau a Tauwhao are tangata whenua, and therefore they are the kaitiaki of Otāiti, with mana whenua over Motiti and its associated islands and reefs."[195] The Court subsequently declared that it was the *tikanga* (customs) of Ngati Hapu that should be applied to Otaiti as "a matter that becomes important in our consideration of how the mauri of the reef is recovering."[196] The court also determined that Te Arawa are *tangata whenua* who are affected on the mainland and that they have *kaitiakitanga* responsibilities for Otaiti.[197] This recognition of "different forms of kaitiakitanga" is reflected in the membership of the Kaitiaki Reference Group with Ngai Te Hapu to hold a majority in the Group.[198]

In assessing application of the provisions of the RMA to the case, the Court spent considerable time discussing the relevant Maori values, paying particular attention to the *mauri* of the reef.[199] Most important was the evidence of two Māori experts, one a diver and marine salvage expert and the other a marine scientist.[200] Extensive evidence was provided about the recovery of the reef, including photographs and "video footage taken just prior to the commencement of the hearing."[201] The evidence was that "the remains of the wreck have now been covered by marine organisms, which appear similar to those on the balance of the reef," "that the wreck area has

192. *Id.* at 26.

193. *Id.*

194. *See id.* at 14–26 (discussing the genealogical and historical connections connected to the island). This was based on "ancestral connections," "continuous occupation," "proximity to the reef," "cultural and customary associations with the reef," "traditional use of the area as a fishing ground," and the "manner in which they have exercised their kaitiakitanga including through the use of tikanga, their customary values and practices pre and post the Rena disaster." *Id.* at [82].

195. *Id.* at 27.

196. *Id.*

197. *Id.* at 27–28.

198. *Id.* at 29.

199. *See id.* at 29–32 (discussing what mauri is and its present state on the reef).

200. *See id.* at 31 (showing that Joe Te Kowhai and Dr. Paul-Burke testified to the mauri of the reef).

201. *Id.* at 8.

aquatic life of diversity and abundance similar to other areas of the reef," and that most of the "taonga species identified in the Regional Plan had been sighted." [202] Commissioner Prime, an expert in *tikanga* Maori commented "'Kua hokimai to mana ki a Tangaroa' (the mana has been returned to Tangaroa—the Maori deity of the sea)." [203] The Court concluded that "[g]iven the evidence we have heard and what we saw ourselves, we are persuaded that the reef is recovering its mauri."[204]

Evidence was provided by the Maori salvage expert that all of the possible salvage work had already been undertaken; any other work to remove debris from the wreck still lying on the reef was likely to cause significant damage to "the reef and its biology (at least in the short term)"[205] and create "real and significant risks to life for the salvage divers."[206] The Court concluded "that nothing further at this stage can be done to actively protect the taonga that is Otaiti, as it would not be reasonable to require it in the circumstances."[207]

The combination of evidence "convinced Te Arawa Ki Tai and Te Patuwai to desist from requiring further removal" of the wreck.[208] As a result, five of the seven appeals were withdrawn, [209] leaving only those by Ngai Te Hapu and Nga Potiki.[210] The Court noted that "at the time the original application for these consents was filed a majority of Māori groups within the Bay of Plenty were opposed to the wreck being granted consent and wanted it removed."[211] Yet the intervening evidence and extensive discussions about possible future conditions of consent meant that most parties "have now either withdrawn or reached a position with the Applicant where they consider their concerns are addressed."[212]

The Court was persuaded heavily by this, as well as by the evidence about recovery and the practical matters in relation to any further salvage work; it granted consent for the broken tanker to stay on the reef.[213] The Court also noted its lack of jurisdiction to order removal of the wreck, and that the conditions offered by the applicant meant that the consent met the requirements of the RMA.[214] Notably, the Court also considered that the

202. *Id.* at 8–9.
203. *Id.* at 32.
204. *Id.*
205. *Id.* at 42–43.
206. *Id.* at 33.
207. *Id.* at 34.
208. *Id*.
209. *Id.* at 5.
210. *Id.*
211. Iorns Magallanes, *supra* note 164, at 61.
212. *Ngāi Te Hapū Inc.v. Bay of Plenty Regional Council* [2017] NZEnvC 073, at 48.
213. Iorns Magallanes, *supra* note 164, at 61.
214. *Id.* at 107.

"granting of a consent recognises and provides for mauri better than the refusal of any consent":[215] a consent would give "an opportunity to explicitly give recognition to concerns of the various groups" and it allowed for the "provision of the Kaitiaki Reference Group."[216] Overall, the granting of consent was the best way to "positively recognise and provide for Māori" in relation to the ongoing substantive effects of the wreck.[217]

Despite the result being the best practical option in the situation, the Court recognized that this does not provide justice for all *hapū* affected and that the granting of consent "will not resolve their ongoing concerns. For some, it will break their relationship with Otaiti and their confidence in their local environment. For others, it may mean that they will not eat food from the reef."[218] While the *mauri* of Otaiti would recover as the health of the reef recovered, and even while the evidence about the inability to remove the wreck was recognized, those of Ngai Te Hapu in particular "felt that as a matter of principle the Court should not agree to it being abandoned on the reef."[219] As *kaitiaki*, the chair of Ngai Te Hapu reported her "feelings of riri (anger) and whakamā (shame)" at the continuing interference with the site.[220] It would take a very long time for the physical recovery of the reef and its life to enable spiritual recovery.

This example of the aftermath of the Rena illustrates several aspects raised in this paper in relation to both procedural and substantive justice. Most notably, it illustrates the interplay of—yet also differences between—procedural and substantive environmental justice for Maori, and all three goals for Māori environmental justice. It involves the political claim to authority and control, the cultural goals and the interplay between physical and spiritual effects, and the unequal distribution of individual environmental benefits and burdens, especially the burden of pollution.

The early financial compensation paid by the ship's owners did not assist Māori in addressing physical or spiritual effects over and above compensation as affected citizens.[221] Perhaps the most that can be said about the fines is that they served as *utu* (reciprocity), particularly in relation to the criminal liability and fine.

In terms of the procedural aspects of the proceedings, three Māori appellants were allocated $30,000 each from the Environmental Legal Assistance Fund for their appeals: Ngai Te Hapu, Ngati Makino Heritage

215. *Id.* at 54.
216. *Id.*
217. *Id.* at 97.
218. *Id.*
219. *Id.* at 54.
220. *Id.*
221. *Id.* at 76–78.

Trust, and Te Runanga o Ngati Whakaue ki Maketu Incorporated Society.[222] The consultation and engagement with Māori throughout the process was referred to frequently in the Court decision as more than is normally seen in such situations and that a genuine attempt seemed to be made to accommodate procedural and substantive interests.

The Rena example illustrates well how substantive environmental justice for Māori in cases of pollution differs from the traditional burdens of pollution typically focused on the additional layer of *wairua, mauri, tapu*, and *mana* that are not accounted for by standard physical measures of pollution. Typically this is not handled well in decision proceedings, particularly in relation to evidence in court and the difficulty of assessing this alongside evidence of physical pollution and practical consequences. In this case, these differences are well illustrated; however, they were appropriately addressed by the Environment Court.

There were two members of the Court with significant experience in handling *kaupapa* Māori evidence: Environment Commissioner Prime and Fox DCJ, appointed as Alternate Environment Judge (seconded from the Maori Land Court).[223] This expertise is not seen in most Environment Court hearings. This better enabled procedural environmental justice, through the sensitive hearing and acknowledgement of the Māori evidence, including storytelling, as was reflected in the written decision by Fox DCJ.[224]

It appears that this expertise has also better enabled an understanding of the cultural effects relevant to the application, which enables them to be considered in the application of the law and thereby facilitate substantive justice. For example, the Court took into account *hapū* management plans as a relevant matter under s104(1)(c) RMA, as well as cultural effects more generally.[225] There was no shortcutting of the evidence nor consideration of it in the judgment. All aspects of the effects on Māori were genuinely well considered, including the spiritual effects.

The result affords a considerable role for *kaitiaki* in the ongoing monitoring of the reef and future decision-making in respect of it. Ngai Te Hapu has a greater role in order to recognize its *mana whenua* status. While at the moment this is a procedural step, it is expected that it will lead to greater substantive justice. The ongoing relationship with the Council helpfully entails a greater recognition of *kaitiakitanga* obligations than existed before.

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222. *See* Ministry for the Environment, *supra* note 85 (showing types of applications).

223. MĀORI LAND COURT, *About the Māori Land Court*, https://maorilandcourt.govt.nz/about-mlc/judges/ (last updated Oct. 13, 2021).

224. Iorns Magallanes, *supra* note 164, at 176.

225. Resource Management Act 1991, s104(1)(c).

In terms of procedural justice, *iwi* played an active role in the Court process through receipt of funding from the Environmental Legal Assistance Fund. The consideration of evidence by the Court, along with understanding of *kaupapa* Māori, also satisfy procedural justice elements, as do the consent conditions attempt to ensure an active role of *kaitiaki* in the future. However, whether it provides for substantive justice depends on your point of view. For those who continued with the appeals—those closest *kaitiaki* with *mana whenua* (traditional authority over the land) and *mana moana* (traditional authority over the sea)—they felt that the spiritual effects had not been provided for adequately with the official approval of the wreck remaining in place. Others are swayed by the practical or logical fact that, without a consent, there would be no ongoing procedural provision for Māori participation or for the same requirements of monitoring; thus, better substantive outcomes were enabled through the awarding of a consent and its conditions.

Ultimately, this case is not one whereby the considerations in favor of the Māori applicants have simply been outweighed by those of the general public. The concerns of a minority have arguably been outweighed by the needs of a majority, but *kaitiaki* are on both sides of this equation. It is not possible to say that there has been no environmental justice for Māori; it appears that as much as possible has been obtained given the situation faced, and more than is usually the case.

VI. CONCLUSION

Injustice anywhere is a threat to justice everywhere.[226]

Achieving environmental justice for Māori or for any indigenous people is not simple. There is no simple definition of what environmental justice is, and there are multiple different aspects and overlapping elements. The achievement of environmental justice for Māori is affected by particularities of history and culture as well as of place and time; it is thus not possible to use overseas concepts without adapting them.

It is important that Māori environmental justice claims are recognized and respected. This entails that Māori environmental justice problems are identified, understood, and addressed. For Māori this respect is more complex than is admitted in mainstream concepts of environmental justice. I suggest that perhaps the primary goal for Māori environmental justice is for the respect of Māori *iwi* and *hapū* as Treaty partners to substantive active

226. Letter from Birmingham Jail from Martin Luther King Jr. to Alabama Clergymen (Apr. 16, 1963) (on file with Martin Luther King, Jr. Research and Education Institute).

protection of the environmental assets of Aotearoa, as well as achieving recognition of their authority to preferably control, but at least share in making decisions over those assets. This is a goal that is seen in other countries with indigenous peoples, and entails both procedural and substantive elements. However, this is not discussed in the standard environmental justice concepts. The term "environmental justice" arose in a very different context and has been comparatively limited in its application elsewhere since.

The second, cultural environmental justice goal is for the respect of Māori culture to be equally recognized in environmental law and decision-making, including metaphysical as well as physical features of the natural environment. This cultural goal is also not developed in mainstream or overseas concepts of environmental justice; it is much better developed in Aotearoa, due to its unique history. The example of the grounding of the Rena illustrated well the links between physical and cultural environmental damage.

The third type of goal is the respect of equality of treatment as individuals. This is most commonly discussed in relation to the bearing of environmental burdens such as pollution and its impact on individual health. Individuals are also a strong focus in the literature on procedural justice. Perhaps what is most interesting about the standard discussions of environmental justice overseas is that they reverse the order of these three goals, with the individual appearing first and the community and political structures following behind, if at all.

Māori environmental justice goals add a complexity that makes achieving environmental justice multifaceted. And while the mainstream approaches are not sufficient to achieve environmental justice for Māori, there are aspects which we could usefully borrow in order to better enrich our understanding and better achieve such justice.

There is considerable scope for future work in this area. Procedural participation by Māori in environmental decision-making and governance is widely discussed in Aotearoa, even if it is not yet widely and fairly—let alone generously—accorded. Yet other aspects are not so well researched. The substantive distribution of environmental burdens and benefits could be much more effectively addressed. This could be done along the lines of the U.S. EPA Environmental Justice program, while being adapted to better address the specific justice needs of Māori.

In relation to the range of environmental legislation in New Zealand, there are many aspects that need further research as well as substantive

provision. [227] While environmental justice within the RMA is typically very well studied and analyzed when considering the rules around resource access and management in New Zealand, the needs of Māori in Environment Court proceedings are under-addressed and need to be more thoroughly examined; particularly if more private mediation is to be used to resolve disputes in this area. In addition, it would be valuable for a researcher to examine the various cases where a Māori Land Court judge has presided with an Environment Court judge, as well as those where one was not, but similar Māori issues arose and evidence was heard. It would be helpful to know whether there are differences in the procedural consideration of the issues, as well as their substantive handling and the contribution to the final result. This could help illustrate precisely how the procedural issues intertwine with the substantive, as well as with the three Māori goals, and better enable environmental justice to be achieved for Māori in the Environment Court.

Looking to the future, environmental justice will look different from how it does today. Perhaps, as historical grievances are settled, focus will switch to the future and intergenerational aspects of justice. The needs of future generations, and the future needs of current youth, need more attention if they are to be met fairly in the future. Biodiversity loss, water depletion, and climate change need to be tackled quickly if Māori, in even 30 years' time, are to enjoy the natural environment and its services that we enjoy today.[228] As the final 1991 Principle of Environmental Justice states:

> Environmental Justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.[229]

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227. For example, procedural and substantive environmental justice in relation to other statutes, such as Hazardous Substances and New Organisms Act and the Exclusive Economic Zone and Continental Shelf Act, raise issues similar to those that the RMA raises.

228. *See, e.g.*, Darren N. King et al., *The Climate Change Matrix Facing Maori Society, in* CLIMATE CHANGE ADAPTATION IN NEW ZEALAND: FUTURE SCENARIOS AND SOME SECTORAL PERSPECTIVES 100 (Nottage et al. eds., 2010) (explaining Māori are likely to be particularly hard hit by climate change); *see* Lisa Kanawa, CLIMATE CHANGE IMPLICATIONS FOR MĀORI 212–14 (Rachel Selby et al. eds., 2010) (detailing how various regions of New Zealand will be impacted by climate change); *see* Jones et al., *supra* note 34 (explaining impacts of climate change on Maori health); D.N. KING ET AL., COASTAL ADAPTATION TO CLIMATE VARIABILITY AND CHANGE: EXAMINING COMMUNITY RISK, VULNERABILITY AND ENDURANCE AT MITIMITI, HOKIANGA, AOTEAROA-NEW ZEALAND NAT'L INST. WATER & ATMOSPHERIC RSCH. NO: AKL2013-22 (2013) (reporting on climate change risks in New Zealand).

229. Delegates, *supra* note 6.

There is a lot of research and action that could help provide the attention that will better address Māori environmental justice, now and in the future.

I hope that this article has provided some suggestions and encourages others to take them up. Most of all I hope it illustrates Sir Grant Hammond's comment that "justice is not just about the way we distribute things. It is about the way we value things; and the kind of society we regard as just."[230] An environmentally just society is one which realizes the political, cultural, and individual goals discussed in this paper, as well as the intergenerational and ecological goals. While it makes for a long agenda, it will be essential if we are to better achieve any indigenous environmental justice.

230. Hammond, *supra* note 4, at vi.