

APPENDIX IV

‘SURPLUS LANDS’ IN THE NEW ZEALAND COMPANY’S DISTRICTS

To provide additional information on New Zealand Company purchases, Mr Duncan Moore has written the following summary. It has been drawn from a more detailed report of the same title, which forms part of a three-part report, ‘The Land Claims Commission Process’, for the Rangahaua Whanui Series.

The New Zealand Company completed six initial transactions with Maori between September 1839 and February 1840 that were adjudicable under the Land Claims Ordinance 1840 and its successor Acts.¹ Rather than submit claims based on these transactions per se, the company arranged with Lord Russell for a colonising charter (issued in February 1841), which on the one hand ‘guaranteed’ the company an acre of land for every five shillings it spent colonising (conditional on the company’s purchases being found valid by the Land Claims Commission) and, on the other, restricted it to selecting lands in blocks of certain shapes and sizes and to on-selling lands at certain prices. These shapes, sizes, and prices subsequently gave rise to extensive negotiations and re-negotiations between the company and the Colonial Office. The company believed that this charter gave it a legally binding claim against the Crown for the value of the four acres awarded to it for each pound spent colonising. For six years, the company claimed this value from the Crown in land, but the Crown could not pay in this form because it did not have the land to grant.²

The company’s agents in New Zealand regarded their 1839 transactions at Queen Charlotte Sound and Porirua as extinguishing the broad ‘overlord’ interests of the Maori tribes that dominated the Cook Strait region from Taranaki to Wairarapa to the top of the South Island. They regarded their four transactions – one at Port Nicholson, one at Wanganui, and two at Taranaki – as extinguishing lower, ‘resident’ Maori interests in smaller parts of this general region of operation, which was planned for colonisation by the New Zealand Company.³

The company first surveyed its town acres in Port Nicholson, Porirua, and Wanganui in 1840 and 1841. Each survey aroused substantial opposition and physical resistance from Maori. Consistent with the above ‘overlord–resident’ purchase approach, at each settlement the company’s agents pursued a policy of making on-going payments to ‘residents’ upon taking physical occupancy of the purchase areas.⁴

1. D Moore, ‘The Land Claims Commission Process’, Rangahaua Whanui Series unpublished draft, pp 4–14

2. *Ibid*, pp 19–20

3. *Ibid*, pp 4–14. See also page 18 regarding conflicting Maori testimony on whether this was in fact Maori custom.

4. *Ibid*, pp 15–16

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Governor Hobson first visited the company's settlements in late 1841, finding that Maori at each place except Porirua appeared generally anxious for Pakeha to settle but were equally anxious not to be displaced by that settlement. Hobson had just received his instruction to fulfil within six months the 1841 charters 'guarantee' of four acres per pound. He did this, while also broadly endorsing the company's purchase approach, by waiving pre-emption. Hobson's pre-emption waiver authorised the company's agents only to try to complete their existing purchase transactions with the 'residents' in Port Nicholson, Wanganui, and New Plymouth – the three settlement areas where Maori appeared generally favourable. Hobson did not authorise the company to undertake any new purchases. He also issued directions that Maori had to be allowed to identify any particular lands that they wanted to exclude from the transactions.⁵

Hobson could grant unconditionally only from lands to which the Crown's own title was clear. It was accepted public law that the Crown obtained title clear of other interests pursuant to a written record.⁶ Hobson could not, therefore, grant the company land unless a land claims commission report had declared it free of Maori interests. His pre-emption waiver specifically aimed to secure favourable land claims reports for sufficient land to fulfil his instruction to grant the company four acres to the pound.

In early 1842, the company's agents began presenting their initial transactions to the Land Claims Court on the one hand, and on the other, they stepped-up negotiations for 'resident' interests to complete their selection of land for survey and sale at each of their settlements. These negotiations took them beyond Port Nicholson, Wanganui, and New Plymouth to Nelson and Manawatu, where they transacted for 'resident' Maori interests, ostensibly under authority of Hobson's pre-emption waiver.⁷ Hobson, however, complained that the transaction at Manawatu breached the 'purchase-completing' limits of his pre-emption waiver.

By August 1842, it was clear that the open-ended negotiations for 'resident' interests were not going well. The company's agent and the land claims commissioner assigned to the company's cases devised a plan for a binding arbitration that would give finality to the pre-emption waiver negotiations for the completion of the company's purchases.⁸ The Land Claims Court was to run two processes concurrently, in effect identifying the outstanding interests that the arbitration was to extinguish and then sanctioning the arbitration under the Land Claims Ordinances. Like the pre-emption waiver enabling it, the arbitration was restricted to the areas that the company sought for selection and settlement under its 1841 charter.⁹ The accompanying land claims inquiry was likewise restricted.¹⁰

From 1840 to 1846, Commissioner Spain and the officials involved in the company's land claims and first arbitrations, consistently deemed Maori at Port Nicholson, Wanganui, and New Plymouth, and then at Manawatu and Nelson, to have generally 'admitted the sale' of some territory. Put otherwise, they deemed the company to have effected a 'partial purchase', which meant that, in fairness to the purchaser, the vendor was committed to the deal. They understood that the vendor had surrendered the right to 'back out' of the deal altogether.

5. Moore, pp 20–23

6. Wai 145 rod, doc e3, pp 23–25

7. Moore, p 24

8. Ibid, pp 27–28

9. Ibid, pp 28–29

10. Ibid, pp 30–33

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Hence, we find the judicial and arbitration officials from mid-1840 onwards consistently affirming that Maori at Port Nicholson, Wanganui, Nelson, and Taranaki had no general right to refuse to sell their land to the company. Maori had no choice as to whether to see their customary interests generally extinguished. They had a ‘right’ only to see their customary interests extinguished completely and fairly.¹¹

The official perception of a ‘partial purchase’ also had far-reaching implications in another direction. The basic features that indicated a partial purchase to the officials were:

- the company’s initial transactions, which had to involve at least some of the Maori with interests in some portion of the lands under arbitration or inquiry; and
- especially, undisputed physical possession.

The land claims commissioner took the latter – undisputed physical possession – as the essential feature distinguishing an incomplete (but valid) ‘partial purchase’ from a completely invalid claim. For example, Wakatu compared with Wairau and Taitapu compared with Porirua.¹²

From 1840 to early 1843 at Port Nicholson, Wanganui, and New Plymouth, Crown officials made specific pledges to convince Maori to stop obstructing both the company from carrying out surveys and its settlers from occupying their selected sections. That is, the Crown’s pledges stopped Maori from disputing the company’s physical possession.¹³ Or, put otherwise, the company’s peaceful possession was based upon the Crown’s pledges.

Hence:

- the company obtained title primarily by means of the Crown’s acknowledgement of its partial purchase; and
- the Crown acknowledged the company’s partial purchase mainly by virtue of its generally undisputed physical possession; and
- the company obtained generally undisputed physical possession mainly by means of the Crown’s pledges.

Therefore, the Crown granted the company title largely on the surety of its own pledges to Maori.

This leads us to the right question to ask of the Crown’s title to its ‘surpluses’ in the company’s districts: the Crown’s title to its ‘surpluses’ is, by nature, derived from the colonist purchasers’ extinguishment of the prior Maori interests. Therefore, we can see from the above that, wherever there was a ‘surplus’ in the company’s purchases, the Crown’s title to that surplus was largely grounded on its own ‘peaceful possession pledges’ to Maori.

The Crown’s 1840 to 1843 undertakings to Maori included some or all of the following:

- further ‘compensation’ payments;
- the fulfilment of the company’s promises of trust-style (‘tenth’) reserves;
- the exclusion of essential lands, including pa and ngakinga; and
- the reservation for Maori purposes of 15 to 20 percent of the proceeds of Crown land sales.¹⁴

It becomes crucial to weigh the Crown’s grants to the company, and its right to its ‘surpluses’ at Port Nicholson, Wanganui, and New Plymouth, against its fulfilment of those early pledges.

11. Ibid, pp 27–28, 42, 45

12. Ibid, pp 15–16, fn 34; see also BPP, vol 5, p 43

13. Moore, p 17, fn 37

14. Ibid, p 17, fn 38

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At Port Nicholson, Manawatu, Wanganui, Taranaki, and Nelson, the arbitrations were conducted, and the compensation was ultimately calculated, on the express understanding that the only lands under consideration were those to go to the company under its 1841 charter. Prior to Governor FitzRoy's arrival, there was no indication that the arbitrations would produce a surplus beyond that which was to go to the company.¹⁵

At Port Nicholson, the company selected and paid for just over 60,000 acres of land, and Maori signed deeds of release with an attached list identifying the 60,000 acres. Shortly afterward, though, the arbitration umpire (the land claims commissioner) instructed the surveyors to cut an exterior boundary following a natural route around these selected lands. This boundary was later found to enclose about 210,000 acres. No compensation was paid for the 'surplus' in this area (ie, the area over and above the company's 60,000 acres).¹⁶

Similarly, in Wanganui, the company only selected 40,000 acres, and the umpire and protector specifically assured Maori that their deeds of release affected only these 40,000 acres.¹⁷ Yet in 1846, when the boundaries of this theoretical 40,000-acre block were actually cut on the ground (and again when McLean renegotiated the location of the reserves in 1848 and paid over the £1000 additional compensation), they described an area later found to enclose 86,000 acres. In 1850, when the boundary was redrawn following natural features, the actual area conveyed increased again. Both times, neither the company's payment nor its award of 40,000 acres increased; the Crown's 'surplus' did.

Likewise, at Nelson, the arbitrated award (compensation payment plus reserves) expressly extinguished Maori interests only in the 150,000 acres claimed by the company as 1841 charter lands. Apparently on the 'strength' of his Wairau purchase of early 1847, however, Grey's 1848 Nelson grant engulfed this compensated and awarded land in an area of at least two million acres.

In 1844, at Port Nicholson and Wanganui, Governor FitzRoy began surveys of the pa and ngakinga (cultivations) to be excepted from the purchase). In 1846 and 1847, Governor Grey continued these surveys of the 1844 exceptions. In the 'surplus' areas, Grey bunched together discrete ngakinga to make large blocks, which he assigned to Maori by deeds (later dealt with in the land courts). In return for assigning these 'new' large blocks, Grey got Maori to agree to surrender other excepted ngakinga that stood in the path of Pakeha settlement and development.¹⁸ In short, Maori paid for their lands excepted from the Crown's surpluses by giving up some of their lands excepted from the company's awards.

Manawatu and Taranaki appear to have escaped the Crown's post-1844 expansions of the company's boundaries (although there was some exchanging of excepted lands at Taranaki). Surpluses probably were expected in 1844 – Spain sanctioned both the company's purchase of 'hundreds of thousands' of acres at Manawatu reaching to the hills and the entire 1840 Ngamotu deed up to the summit of Mount Taranaki. Probably, the Crown did not expand the boundaries to enclose these surpluses at Manawatu and Taranaki owing to the settlements' 1844 arrangements respectively lapsing and failing.¹⁹ It is, however, doubtful that McLean paid anything for the interests of resident Maori in his 1847 purchase of the Grey block, because he apparently believed that these had already been extinguished by the company's Ngamotu deed.²⁰

15. Moore, pp 23–26, 28–30

16. Ibid, pp 39–41

17. Spain, 'Wanganui Report', no 4, encl 8, BPP, vol 4, p 98

18. Ibid, pp 50–58, 78–79, 65–66, 96–99

19. Ibid, pp 52–53, 80, 46–48

20. Ibid, pp 66, 72–75

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In May 1843, in order to coax the company out of its suspension of operations, Lord Stanley instructed Governor FitzRoy to grant the company the lands it had selected for settlement under its 1841 charter, conditional upon there being no ‘prior titles’ to those lands. In February 1844, in lieu of issuing the conditional grants, Governor FitzRoy expanded the company’s waiver of pre-emption to enable entirely new purchases in Wairarapa and Otakou to be made.²¹

The waivers were initially for 150,000 acres each, with conditions that the negotiations would be overseen by Crown commissioners. At the insistence of one of these Crown commissioners, the Otakou purchase boundaries were expanded so as to create a 250,000-acre ‘unappropriated residue’ for the Crown. The Colonial Office approved this move in August 1845.²²

In this case, as in the previously mentioned expansions at Port Nicholson, Wanganui, and Nelson, the Crown apparently acted with Maori consent. Nevertheless, the Crown’s fiduciary role toward Maori raises the question of whether mere consent was an adequate limit to Crown self-restraint and an adequate measure of justice. Again, in this context, the various undertakings made in 1840 to 1843, including the promise of endowment reserves as well as the residential reserves, and the 15 to 20 percent allocation of Maori purposes from the profits of the Land Fund become relevant.

From May 1843 to June 1845, Lord Stanley repeatedly instructed Governors FitzRoy and Grey, first, to commence the registration that Lord Russell had instructed the Governor to carry out in 1841, thus distinguishing Maori lands from demesne lands, and, second, to issue the company a conditional grant of the lands guaranteed to them under Russell’s 1841 charter. In addition, in August 1845, Stanley loaned the company £100,000, instructed Grey to expand its pre-emption waiver to cover its entire field of operations (now everything south of a line from the Mokau River to the Ahuriri River), and arranged a Special Commissioner to supervise and aid their future purchases of Maori interests. The compulsory registration and the pre-emption waiver both aimed to generate enough unencumbered demesne to enable the company to fulfil the condition in the previously instructed conditional grants of the 1841 charter lands – that is, to extinguish all ‘prior titles’.²³

Governor Grey pursued these instructions up to mid-1847. He waived pre-emption and granted Otakou.²⁴ At Port Nicholson, Wanganui, and Nelson, he continued FitzRoy’s surveys of lands to be excepted for Maori from the ‘surplus’ areas – which he later reported as intended effectively to register the Maori interests in those districts’ demesne areas. Similarly, in March 1847, he attempted a ‘resumption’ of the Crown’s estate in New Plymouth with a registration or reservation of outstanding Maori interests in it.²⁵

Throughout these adjustments, resumptions, and registrations of interests, Grey presumed that those lands outside the company’s sections but within the ‘external boundaries’ sanctioned by Spain were ‘surplus’ for the Crown to keep, sell, or exchange with Maori as it pleased.

In contrast, Grey’s purchases of the Porirua and Wairau districts accepted that Spain had wholly disallowed the company’s purchases in those districts.²⁶ Apparently, Wakefield and Maori refused to buy these areas from, or sell them to, each other, but the purchases were

21. *Ibid*, p 37

22. *Ibid*, pp 48–49

23. *Ibid*, pp 55–63

24. *Ibid*, p 65

25. *Ibid*, pp 64–65, 72–75

26. *Ibid*, pp 49–50

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vital to Grey's wider military plans and the company's whole Nelson settlement. Grey went to the limit of his instructions and purchased the lands. He anticipated that, after the company had selected the lands for settlement under their 1841 charter, the Crown would be left with a huge remainder – for all intents and purposes a large 'surplus', able to be resold for many thousands of pounds.²⁷ Both transactions suffered in their integrity from being conducted while Grey held the vendors' chief, Te Rauparaha, captive.

The distinction between 'Crown' and 'company' purchases was obliterated in the 'combined operations' established by the Loan Act 1847. Knowledge of the Act reached New Zealand in about October 1847 and waived the Crown's demesne and pre-emption in favour of the company. The accompanying instructions stipulated that the company would choose which settlements to pursue and which lands to buy and that it would provide the funds to the local officials conducting the purchases. The Crown would lend the company the funds for the purchases and for further colonisation (secured by a mortgage against the lands purchased) and would do the face-to-face transacting with Maori. In the heyday of the Loan Act 1847 a few months later, Earl Grey said he saw Governor Grey as an agent of both the company and the Crown.²⁸

Hence, it was no mistake that in January 1848, Grey granted the company about 210,000 acres at Port Nicholson, when Spain had only awarded it 71,900. He was vesting the surplus demesne in the company under the Loan Act. Likewise, at Nelson, Grey granted the company almost two million acres, roughly 1.5 million acres of which was demesne land from the Crown's Wairau purchase. Similarly, rather than have the company select its portion of the Porirua purchase, Grey simply granted them the whole area, including the Crown's unappropriated residue.²⁹

Under the new Act's purchase procedures, in April 1848, Wakefield instructed the Crown to acquire land 'from Port Cooper to Otakou'. Native Secretary Kemp did so, his deed for 20 million acres in the South Island naming the company as the purchaser. Purchases attempted at Wairarapa under the Loan Act failed before the company folded in June 1850. They did not, therefore, pass any company surplus to the Crown.³⁰

Prior to the Loan Act 1847, the portion of the company's purchases that was not selected (or selectable) by the company under its 1841 charter was to have gone to the Crown. In the purchases that were completed as company purchases, this portion would have gone to the Crown as 'surplus'. In the purchases completed more as Crown purchases, though, we may not reasonably treat the residue as 'surplus'. Therefore, all the purchases in the company's districts, other than Porirua and Wairau, can fairly be said to have generated surpluses for the Crown.

Estimating the area of this surplus is perhaps less daunting than one would expect. Upon the dissolution of the company in July 1850, the Crown, under the Loan Act 1847, bought back the company's 1.3 million-acre right of selection – the company's portion of each of its purchases. The Crown merely resumed the remainder – the vast outlying areas that the company only held at the time as demesne waived to it under the 1847 Act.

At the time it surrendered its charter, the company had already exercised its right of selection over 828,000 acres out of its total right of selection of 1.3 million acres. These 828,000 acres were actual, locatable lands, and those lands that the Crown obtained were

27. Moore, pp 75–77

28. Earl Grey to Grey, 19 June 1847, BPP, vol 5, p 117

29. Ibid, pp 92–93

30. Ibid, pp 99–100

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acquired by paying the company five shillings per acre, as agreed under the Act. Of these 828,000 ‘realised’ acres, though, the company had already on-sold 199,000 acres to private purchasers. Because the company had already recovered its costs on these lands, the Crown did not need to ‘buy them back’. Or, alternatively, because these lands were owned by third parties, the Crown could not ‘buy them back’.

That left a company estate of 629,000 acres of selected lands (828,000 minus 199,000), plus 472,000 acres of unexercised ‘right of selection’ (1.3 million minus 828,000). All these lands and rights were valued under the 1847 Act at five shillings per acre or £275,000. This was the cash redemption of the company’s old 1841 charter claim against the Crown for four acres per pound spent on colonisation. Upon dissolution, the company handed over these lands and rights to the Crown, and the Crown started paying their value to the company.³¹

Excluding Porirua and the Wairau portion of the Nelson grant, a rough total of the company’s lands is given in the following table.³²

Land	Area (acres)
FitzRoy block	3500
Grey block	9770
Omata	12,000
Tataraimaka	4000
Nelson	1,500,000
Port Nicholson	210,000
Kemp purchase	20,000,000
Wanganui	110,000
Otago	400,000
Total	22,250,000

This total estate, minus the above 1.1 million acres of lands and rights that the Crown ‘bought’ from the company, leaves a ‘surplus’ in round figures of 21.2 million acres in the company’s purchase areas.

In 1856, the company commuted its £275,000 lien against the colony’s demesne lands for a single payment from the British Parliament of £200,000. This amount became simply a national debt to England, though it was still apportioned between the provincial governments (mainly according to the acreage they had ‘inherited’ from the company’s activities) and still paid primarily out of the proceeds of each province’s land sales. It would be difficult to guess the extent to which the need to repay this debt may have driven the Crown to continue to purchase far more Maori land than it needed for its actual use and occupation.³³

31. Earl Grey to Grey, 19 June 1847, BPP, vol 5, pp 100–101

32. Ibid, p 102

33. Ibid, pp 103–104

