

Mohaka River Report 1992

04 Sales of Land on the North Bank of the River

4.1 Introduction

SALES OF LAND ON THE NORTH BANK OF THE RIVER

4.1. Introduction

Further sales of Ngati Pahauwera land on the north bank of the Mohaka river proceeded in two main phases: first, the 1865 purchase of the Waihua block by Samuel Locke for the Crown; and secondly, the slow, piecemeal sales of subdivisions of land that were investigated and determined by the Native Land Court. The Waihua block was on the north side of the Waihua river outside the claim area and need not concern us here. In effect, its sale confined Ngati Pahauwera to a strip of land on the north side of the Mohaka river only nine kilometres wide at the coast (A29:10-14; C5:27).

The subdivisions and sales through the Native Land Court system included both blocks with river frontages and inland blocks. For the purposes of this claim, we are not concerned with whether these subdivisions and sales were fair and equitable, but with whether they demonstrated an intention on Ngati Pahauwera's part to dispose of their customary rights in the river and to relinquish their rangatiratanga over the river as well. We need also to consider whether there were individuals and hapu with interests in the river who were excluded from the titles awarded by the court and did not consent to the sales; and whether the Crown was in breach of the article 2 protection of Ngati Pahauwera rangatiratanga over the river in allowing these subdivisions and sales to proceed and in presuming that the ad medium filum aquae rule applied.

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4.2 The Native Land Court System

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Before considering the sales, we shall briefly explain the Native Land Court system through which they were conducted. The court was established after the governor handed over full responsibility for native affairs to his ministers and parliament enacted the 1862 and 1865 Native Land Acts. The object of the Native Land Acts, as Henry Sewell explained, was two-fold: to bring the great bulk of Maori land in the North Island "within the reach of colonization" and to detribalize the Maori and amalgamate them into the European social and political system. The chief instrument for achieving this object was the Native Land Court which was set up to investigate and determine titles to native land. Ultimately, it was hoped, the court would individualise titles and Maori would own land in the same way as Europeans.

In practice the court adopted the ten-owner rule by which not more than ten names could be entered on certificates of title. To protect the interests of other rightholders, an amendment Act was passed in 1867. Under section 17 of this Act the court was bound to determine interest according to native custom and to ascertain the interest of the applicant and every other person or tribe who might be interested in the land. Should more than ten be interested, their consent had to be gained to put a selected ten on to the certificate of title. The court had to satisfy itself that these requirements had been met as it thought fit. The names of all persons interested in the land had to be registered in court. A certificate of title, however, could be made out to a tribe and names and relative shares determined later.

No portion of land could be alienated except by lease for a term not exceeding 21 years unless it had been subdivided. A majority of owners had to consent before any such subdivision took place. The ten grantees were expected to be trustees for all the others registered. If persons were not registered, they were not entitled to claim any interest. Titles to land on the north side of the Mohaka river were initially investigated and determined under s17 of the Native Land Act 1867 (C5:36-37).

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4.3 Native Land Court Investigation of Titles

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In 1866, Paora Rerepu asked George Worgan to survey lands on the north bank of the Mohaka for the purpose of passing them through the court and leasing a sheep run to the local storekeeper, John Sim. With an order from McLean, Paora Rerepu had obtained food and other goods from Sim to supply Hauhau prisoners and people, and he needed money to pay his debts, but his right to lease the land was disputed by other claimants. Sim claimed to have leased 40,000 acres and offered McLean a share or mortgage. But in 1868 he filed for bankruptcy leaving Ngati Pahauwera owing Worgan £230 for the survey (C5:27-33).

The need to lease land probably prompted an application to the court to divide off the Mohaka block (A29:30). Other reasons were the need to resolve disputes over title and a wish to participate in the cash economy (C5:10,36). Judge Munro presided over the hearing at Wairoa in 1868. Paora Rerepu was the main witness, it apparently having been agreed that he should conduct the case (C5:34). Ngati Pahauwera, he said, derived their title from Kahungunu; claimants had arranged among themselves the ten names to be listed on the title.

Certificates of title were ordered under s17 of the 1867 Act as follows:

Mohaka block 22,355 acres 10 grantees 131 names

Waipapa block 1,290 acres 10 grantees 11 hapu

Whareraurakau
block 3,310 acres 10 grantees 2 hapu

(A29:appendix C: 1-4, 6)

Apparently the intention was to lease Mohaka, sell Whareraurakau and retain Waipapa.

Each of these three blocks bordered the Mohaka river on its north bank but there was nothing in the certificates of title or on the annexed survey plans (A25(a):39,42,47) to show that any part of the river was included or excluded in the subdivisions. Nor is there any reference in the court record to the English common law presumption that riparian lands carried with them riparian rights. The questions of who had interests in the river and whether they intended them to be partitioned by the court did not arise.

Under the ad medium filum aquae rule however the Crown could presume that from the time certificates of title were awarded for these subdivisions, each subdivision extended into the middle of the river. This would have meant that those named on the certificate of title and registered by the court would have been the trustees and beneficial owners of their respective part of the river. None of the evidence we heard suggests to us that this was the intention of those who applied for the subdivision; nor was it the understanding of those named on titles and registered by the court. Ngati Pahauwera at this time still lived in a Maori district where there were few settlers or officials and where their customary use rights and rangatiratanga over the river still prevailed. We therefore think that it was most unlikely that they had any knowledge or understanding of the ad medium filum aquae rule or any intention to subdivide their river rights.

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4.4 Subdivision and Sale of Rotokakarangu

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In 1873 a lease was negotiated for 60,000 acres of valuable timber and good grazing land fronting the river in the vicinity of Rotokakarangu. The lessee then requested the government to take over the lease and negotiate a purchase and McLean approved (C5:45-46). In 1875 the Native Land Court ordered a memorial of ownership under the Native Land Act 1873 for Rotokakarangu, 19,792 acres, for 41 named owners (A25(a):36; A29:54 & appendix H). This met the new statutory requirement that all those with interests be named on the memorial. The following year 151 acres were cut off at the eastern end for six minors (Rotokakarangu 1); the remaining 19,641 acres were awarded to 35 adults (A25(a):36-37; A29:54).

There was little permanent settlement in this area and in 1877 the Crown acquired the majority of shares from 30 of the owners in four sessions (A29:54,57,59). According to Mr Sinclair, there were sound strategic and economic reasons for the sale. European activity in the area would help create a buffer between the Urewera and Ngati Pahauwera tribes and facilitate the participation of Ngati Pahauwera in the cash economy (C5:52).

In 1880, the Crown applied to the court to have its interests determined. The court ordered that 2,805 acres be cut off for five non-sellers (Rotokakarangu 2). The remaining 16,684 acres were vested in the Crown (A25(a):37; A29:59). The Crown thus acquired 20.4 kilometres of river frontage below the Te Hoe confluence. Rotokakarangu 2 was further subdivided and sold in portions to the Mossmans between 1914 and 1977. By 1920 all the Rotokakarangu river bank had passed out of Maori hands (C7:6-10).

Once again there is no evidence that any part of the river was mentioned in court or included in the deeds of sales or annexed survey plans. Nor is there any evidence that the sellers intended to dispose of their river rights or understood that the sales of land adjoining the river carried with them riparian rights. Despite these sales Ngati Pahauwera continued to exercise their customary rights to mahinga kai and tino rangatiratanga over adjacent sections of the river.

When clearfelling commenced in the late 1880s, the logs for milling were floated down the river to where a sawmill had been built at the mouth (A25(b):46). At the turn of the century, fencing posts were also being sent down the river and exported. River transport of posts continued to the late 1920s. According to Mr Thomson the experts who actually guided the posts down the river to Mohaka were Ngati Pahauwera (A29:appendix A, p 5). They do not seem to have opposed the practice of timber floating on the Mohaka. As many of their pa tuna ceased to be maintained after

the 1860s (C7:53), they had little cause to object to timber floating and continued to share the use of the river with Pakeha.

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4.5 Other Subdivisions and Sales of Land on the North Bank

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Rotokakarangu was the last extensive block purchase by the Crown from Ngati Pahauwera. Other blocks of land on the north bank of the Mohaka acquired by the Crown through the slow, piecemeal Native Land Court process of subdivision and partition of interests were as follows:

Mohaka block

4.5.1 In naming the ten grantees for the Mohaka block and registering the names of 131 others in 1868, the court had relied on the single testimony of Paora Rerepu. It had not seen fit to investigate whether their interests were determined in accordance with native custom nor to ascertain whether any person or tribe had interests as s17 of the Native Land Act 1867 required. Subsequently there were many complaints about non inclusion in the title and many unsuccessful attempts to be included (A25(a):44-45; A29:32; C5:54). Although the ten grantees were expected to be trustees for all the registered shareholders, complaints suggest that after the block was leased and the survey paid for, rents were not always cooperatively shared.

Applications were made for further subdivisions to obtain some control over the land and a share of the rent (A29:30-37; C5:55-57). Partition orders were made in 1884, 1889 and 1896 but were annulled by the Native Land Claims Adjustment Act 1901 (C5:59). In 1903 the block was partitioned into 55 subdivisions with a total of 190 shareholders. Nine groups of claimants claimed descent from different ancestors. Because of the intractable nature of their differences, the court did not investigate and determine title in accordance with native custom but relied mainly on recent occupation and the relative position of owners (C14:17).

Only 22 of the subdivisions had river frontages. Under the English legal presumption of riparian rights, each of these subdivisions carried with it all riparian rights. Consequently those awarded shares in subdivisions located inland would be divorced from the river and, by riparian law, denied customary rights of use and Treaty rights of rangatiratanga over taonga. Yet there is no evidence that Ngati Pahauwera intended to dispose of their river rights through partition or that the court explained riparian rights to them. Clearly they did not understand that they had relinquished these rights; indeed, as we shall see in the next chapter, they continued to exercise them.

Of the 22 subdivisions with river frontages, 16 were partitioned between 1914 and 1925 and six were sold between 1920 and 1928. Some shares were acquired in six subdivisions by 1925 and in seven during 1927-1929. As an upshot of the 1925-1941 consolidation scheme five river frontages were returned, all of which were later to

become Crown forest land or scenic reserve. Out of a total river frontage of 20.6 kilometres, the Crown purchased or took for public works or acquired a part interest in 10.5 kilometres before the consolidation scheme was completed. As a result of consolidation, 4.8 kilometres was awarded to or retained by Ngati Pahauwera. Since 1941, 2.6 kilometres has been purchased by the Crown and 0.4 kilometres by a private purchaser (C7:16-39). By our calculations Ngati Pahauwera retained only 11.9 kilometres of river frontage on the north bank.

Subdivision and sale of the Whareraurakau block

4.5.2 Although it was proposed to sell this block, the sale did not eventuate and instead the block was leased in 1879 for 21 years. As a preliminary to subdivision for five groups of owners in 1903, a list of owners was compiled. Although four of the named grantees did not belong to the two named hapu, it was recognised that they or their successors had a valid claim to be included.

Three of the five subdivisions had river frontages. One was sold to Ann Mossman in 1914. The Crown purchased all the shares in another by the end of 1915, and 76.3 percent of the shares in the northern part of a third before June 1915. By further acquisitions of shares and partitions, the Crown acquired the southern part of the third and two more inland subdivisions between 1915 and 1919. A 100 link-wide river frontage was declared river reserve; the rest was used for grazing and, in 1974, state forest. The two remaining Maori subdivisions with river frontages were sold to the Crown for state forest in 1973. Thus 2.4 kilometres of the river bank was sold privately in 1914; 1.1 kilometres to the Crown in 1918 and the remaining 0.8 kilometres in 1973 (C7:11-15).

Subdivisions and sales in Waipapa

4.5.3 From 1868 to 1899, Waipapa was a hapu trust and papakainga land. A seven acre site at Te Kahika was leased by Paora Rerepu, probably for a store, in 1874, and a line run by Paramena of Ngati Kura cut off 700 acres leaving only 500 acres for Ngati Pahauwera. An application for subdivision was made in 1876. The block was put through the court again in 1896 to apportion the shares of the 11 hapu listed in 1868, the enquiry being limited to these 11 only. An appeal against this was heard in 1899 on the grounds that Ngati Pahauwera had not been able to arrange what hapu were entitled and what were not. Four hapu admitted by aroha had no right. The court cancelled the trust listed by hapu and replaced it with a list of names, leaving their relative interests undefined (A25(a):33-34; A29:47-49; C5:84-89). A partition order was made in 1906, the block was resurveyed in 1913 and 171 titles were shown on the survey plan (A29:50). As a result of partition there was a total of 28 subdivisions, plus two acres identified as Maori roadway and three acres identified as "balance" areas with river frontages (C7:40).

A local police constable purchased two acres one rood with river frontage and on sold it to the Crown in 1912. The Crown later sold this land reserving a one chain strip along the river bank.

Part of one subdivision at the river mouth was sold to a Pakeha sometime before 1919. As a result of the consolidation scheme the Crown was awarded the subdivision

furthest up the river adjoining the Mohaka block, and apparently used it for Maori land development. Since consolidation, the Crown has taken river bank land for the northern abutment of a new bridge, a loss of 20 metres (C7:40-43).

In the course of his research for the Crown, David Alexander found:

[no] weighting given to the river by Ngati Pahauwera in partition or sale dealings between 1912 and 1929. (C7:53)

He further found that:

The Maori Land Court has felt itself called upon to express an opinion on the river in only one instance. In that case (Mohaka A38) it followed the case law of the time and recognised *ad medium filum aquae* rights. (C7:55)

Mr Alexander's evidence confirms our conclusion that Ngati Pahauwera had no idea when they subdivided and sold land on the north bank that the *ad medium filum aquae* rule applied. As in the case of the 1851 sale there is no evidence that they intended to dispose of any customary or Treaty interests in the river or that they understood that they had done so. Survey plans of subdivisions did not include any part of the river. Land titles referred to land and appurtenances. Obviously Ngati Pahauwera did not regard their river as an appurtenance. In applying the *ad medium filum aquae* rule to lands on the north bank of the Mohaka river after the Native Land Court had determined title, the Crown was once again using the rule as a legal instrument to dispossess Ngati Pahauwera of their customary and treaty river rights.

Because titles to land on the north bank of the Mohaka river were issued by the Native Land Court, the Court of Appeal decision in *Re the Bed of the Wanganui River* is directly relevant here. As discussed previously, the court, in that case, emphasised that it accepted the Maori Appellate Court's opinion on the nature of customary ownership of the Whanganui river bed and also made clear that its reasoning and final conclusions were dependent on that opinion.

It is our view however, based on the evidence of Ngati Pahauwera's relationship with the Mohaka river and the nature of the river rights exercised by them, that there was, and still is, a distinct tribal relationship with the river, imbued with important spiritual and cultural values. We do not accept that as a matter of customary law the bed of the Mohaka river was owned by the hapu, whanau or other sub-tribal groups occupying the adjacent land as distinct from the iwi as a whole. We accept the claimants' submission that:

the river was a taonga and object of veneration, incapable of occupation in the sense of habitation. Use rights may well have been possessed by individual hapu or whanau but the river itself is clearly identified as a Tribal taonga with a life force of its own which makes individualisation of 'ownership' unthinkable. (C14:36)

Accordingly we find that Ngati Pahauwera, by later invoking the Native Land Court procedure on a sub-tribal basis, could not have intended to dispossess themselves of their tribal ownership and control of the river.

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4.6 The Social and Economic Consequences of Subdivision and Sale

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The Crown emphasized the extent to which subdivisions and sales through the Native Land Court system were intended to facilitate Ngati Pahauwera's participation in pastoral farming and the procurement of secure Crown titles in place of customary land rights.

Mr Sinclair contended that the purpose of subdivisions under s17 of the Native Land Act 1867 was to make explicit the existence of any trust relationship and identify the beneficiaries. No sale could take place without at least a majority of owners assenting (C5:38).

In respect of Waipapa, Mohaka and Whareraurakau he stated:

the boundary was verified and the owners according to native custom were ascertained. A measure of security was thus conferred upon those who were deemed to have a proprietary right. The owners were also better placed to obtain an income from leasing of portions they did not use to any great extent ... The land also became inalienable except by lease. A majority of owners could apply to have the land subdivided and sell their share but they could not sell the interests of any minority dissentients ... such an award preserved the 'tribal' character of the land. Far from subverting the exercise of 'rangatiratanga' this type of grant gave it a real opportunity to continue. But while the law court protect[ed] the boundaries and provide[d] some safeguards against improvident dealings, it could not preserve the quality of relationship between owners. The history of these lands in the later nineteenth century is marked by disputes among the proprietors. Against this background, the people came to court, this time with the intention of separating or privatising their respective interests. What they desired was the consolidation of their scattered ancestral rights on the land into a clear title to discrete blocks suitable for sheep farming.

If the role of the court were to be described in a phrase, it would not be unreasonable to say it had performed an essentially protective service in relation to these three blocks. (C5:97)

Mr Brown, in his final submissions, submitted that:

To this day extensive acres ... remain in Maori ownership with associated rights to the river. (C17:52)

The relevance of the land on the north bank to the claim, he submitted, arose from the sales of four blocks-Rotokakarangu, Waipapa, Mohaka and Whareraurakau. A very thorough report on these transactions had been presented by Mr Sinclair, and Mr

Brown referred us to the conclusions we have just cited. He emphasised that the transactions had to be considered on their merits and that it was not legitimate to assume that because there were difficulties with some other transactions there must have been with these. The opposite was the case. He had asked Mr Butterworth whether any of the four sales in issue was a breach of the Treaty and Mr Butterworth was unable to point to any such breach (C17:53).

The evidence on post 1903 land transactions presented by Mr Alexander seems to us to throw doubt on Mr Sinclair's conclusions. The native land legislation and the Native Land Court process largely accomplished what settler governments intended, namely the subdivision and partition of interests which facilitated either Crown and private purchases, or the fragmentation and individualisation of Ngati Pahauwera interests (C7:6-45). Subsequently these scattered interests had to be consolidated to provide individuals with farm holdings. Claimant evidence indicated that in the long run these holdings were generally too small to be economic. As Ms Elias submitted:

The Native Land Acts did not provide a proper vehicle for Tribal ownership. (C14:36)

In addition, once the tribal title to land had been individualised, the application of the *ad medium filum aquae* rule made it possible to alienate tribal rights to the river piece by piece, individual share by individual share, without any further reference to the tribe. All of this was in contravention of the tribe's treaty right to control the resource. The combined effects of the native land legislation and the *ad medium filum aquae* rule were to deprive Ngati Pahauwera of much of their tribal base. Many were forced to move away from Mohaka in search of jobs. Tribal society and leadership, the very things embodied in the guarantee of *rangatiratanga* in article 2 of the Treaty, were severely undermined.

Several claimant witnesses spoke of the social problems they were encountering such as high levels of unemployment and an increased dependence on a subsistence lifestyle which were partly the outcome of partition and sale of land on the north bank. Tureti Moxon said:

Unemployment means subsistence lifestyle. Many therefore depend on the river for their food, bathing and washing. Without our rightful relationship to the river, the community could not be sustained at all. (B13:5)

She emphasised the long term social impact of the Native Land Acts and "pressured land sales" on Ngati Pahauwera:

without the mana and potential of resource development from river and land Ngati Pahauwera were left to struggle with the remnants of river and land. (B13:3)

This struggle "meant poverty, low morale, unemployment, a high crime rate. A sense of hopelessness developed beneath the normal good will and pride of many Ngati Pahauwera" (B13:4). Economic conditions forced many away from Mohaka.

A case study of the adult population of Mohaka and Raupunga carried out by Tureti Moxon in April 1992, revealed that a total of 70 percent were unemployed. That

figure rose to 85 percent if seasonal, part-time and ACCESS scheme figures were added:

A direct consequence of these deprivations has been an ever widening sense of despair and negative behaviour. The fruits of this are often drunkenness, domestic violence, and child neglect. Coupled with low self-esteem this can often result in forms of psychological violence. Humiliating, apathy-producing dependence on the state is the chief characteristics of many life styles. (B13:5)

She believed that:

If our rangatiratanga over the river is recognised ... we will be able to sustain our life and begin to rebuild a corporate resource base and offer real hope for the development of Ngati Pahauwera people today and for future generations. (B13:6)

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4.7 Summary

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We conclude that, as on the south bank, the *ad medium filum* presumption is rebutted. The decision of the Court of Appeal in *Re the Bed of the Wanganui River* is distinguishable on the facts because the evidence before this tribunal leads us to a different conclusion on the question of tribal ownership of the river.

Indeed we note that Mr Justice Turner in the Whanganui river case said that:

If it could be or had been shown to be probable that those who owned the bed of the river according to such [tribal] customs were different from those who had claimed investigation of title of the riparian lands; if it could be shown that in the investigation of title to riparian lands the owners of the bed had taken no part, and that they had not participated in the resultant grants of riparian freeholds; then I for myself might have been disposed ... to agree that those entitled to the enjoyment of the bed had had it taken from them, without being heard, by the tacit application of a presumption of English law of which they knew nothing.

Were we to be wrong in our conclusion on the relevance of the Whanganui river case, the question would arise of whether the Crown's reliance on that decision amounts to a breach of the principles of the Treaty. Is the Crown in breach of its Treaty guarantees under article 2 when it continues to rely on the application of a legal presumption to deprive Ngati Pahauwera of their ownership and control of the Mohaka river without their full knowledge and consent?

Foreshadowing Ngati Pahauwera's claim before the Waitangi Tribunal by nearly thirty years, but unable at that time to invoke Treaty principles, counsel for the Maori applicants in *Re the Bed of the Wanganui River* submitted:

it would be unjust to allow the title to the bed of the river, not even the subject of a claim before the Maori Land Court by those who owned it, to pass to riparian owners by the application of a legal presumption unknown to Maori, and a mere creature of English law.

We agree. It is inconsistent with the principles of the Treaty that ownership of the bed of the Mohaka river was taken away from those entitled to it, without being heard and by the tacit application of a presumption of English law of which they knew nothing.

References

2 In Re the Bed of the Wanganui River [1962] NZLR 600, 625

3 *ibid* at 624-625

Waitangi Tribunal, Department of Justice, Wellington.