

Ngai Tahu Land Report

15 Rakiura

15.1 Introduction

Chapter 15

RAKIURA

15.1. Introduction

Rakiura (Stewart Island) was the last major land mass to be purchased from Ngai Tahu by the Crown. Although Rakiura had been settled by Maori/European families for a number of years, the increasing unsupervised European encroachment on the island and the accompanying confusion over land titles, finally motivated the government into arranging the transaction. In 1854 a single land purchasing commissioner, Henry Tacy Clarke, was sent to negotiate the purchase. The deed of purchase, signed after a week's negotiation with 120 representatives having interests in the island, conveyed to the Crown all of Rakiura and the outlying islands where the titi seasonally burrow. Nine reserves were provided for Ngai Tahu and 21 islands were reserved for their exclusive use. The œ6000 payment provided for immediate and long term benefit to the tribe.

Although Clarke carried out his duties diligently in comparison with his predecessors, the full implementation of the agreement was delayed for some years. The claimants have stated that the Crown failed to appoint a protector to advise Ngai Tahu of their Treaty and other rights. Under the Rakiura umbrella also were two grievances regarding the administration of the Titi Islands and the inclusion of Whenua Hou (Codfish Island) in the sale.

Waitangi Tribunal, Department of Justice, Wellington.

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15.2 Background to the Purchase

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15.2.1 Rakiura was the scene of a great deal of Maori-European contact. During the first decade of the nineteenth century vessels involved in the sealing industry operated in Foveaux Strait. Although there were occasional fracas between Ngai Tahu and these sealers, relations were generally good and many European men married Ngai Tahu women and began families. In the mid-1820s a semi-permanent settlement of these families was established with Ngai Tahu consent on Whenua Hou, the largest of Rakiura's off-shore islands.

Sealing was in decline in the 1820s but the rise of the shore-whaling industry meant that the Foveaux Strait area continued to see a significant amount of traffic during the 1830s. In addition to shore-whaling ventures, Rakiura became the summer home of many whalers and their families. By the mid 1830s a sizeable community had grown up around "The Neck" on the eastern peninsula of Paterson's Inlet.

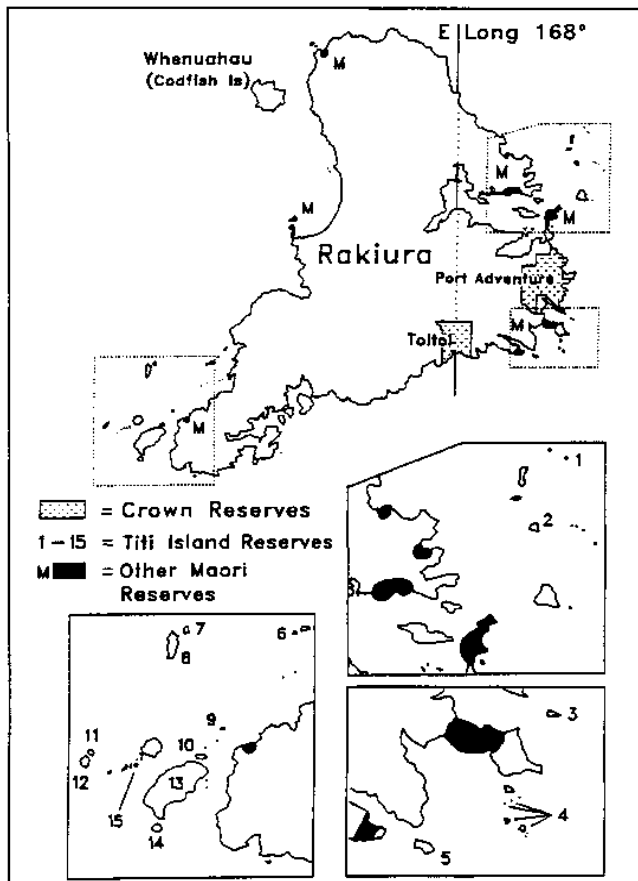


Figure 15.1: Rakiura and the Titi Islands, showing Maori reserves and Crown islands. The land west of the 168th parallel of longitude was offered in 1860 by Topi Patuki for sale to the Crown.

Titi Island Reserves		
Old name	No.	Modern equivalent
Pikomamaku Is	1	Womens Is
Herekopare Is	2	Herekopare Is
Tia Is	3	Tia Is
Potuafua Is	4	Breaksea Islands
Pomatakiarehua Is		
Kaihika Is		
Wharepaitaha Is		
Horomamae Is	5	Owen Is
Timore Is	6	Chimneys Is
Makiiti Is	7	Little Moggy Is
Makinui Is	8	Big Moggy Is
Kaimohu Is	9	Kaimohu Is
Rerewhakaupoko Is	10	Soloman Is
Tamaitemioka Is	11	Tamaitemioka Is
Pohowaitai Is	12	Pohowaitai Is
Taketu Is, Hereafua Is,	13	Big South Cape Is
Taukiepu Is,		
Te Pukeotahoke Is		
Pautama Is	14	Pautama Is
Huirapa Is	15	Huirapa Is

On 5 June 1840, Major Bunbury landed at the uninhabited harbour at Point Pegasus (Zephyr Bay) and proclaimed British sovereignty. Four days later his ship left for the island of Ruapuke where several Ngai Tahu chiefs, including Tuhawaiki, signed the Treaty of Waitangi.

15.2.2 In a letter dated 21 December 1854 an offer was made by Topi Patuki, the principal representative of Rakiura Ngai Tahu, to gift the Titi Islands to the Queen (U3:20). {FNREF|0-86472-060-2|15.2.2|1} The offer had one important condition attached to it. Patuki wished retain exclusive rights to the titi. He expressed concern about the plundering of titi by strangers. The tone of the letter suggests that this desire

to secure access to the titi and to stop European ravagement of the resource may have been the principal concern motivating the offer. In her report on Rakiura, Deborah Montgomerie stated that Patuki's letter is one of the clearest indications we have of a belief on the part of Ngai Tahu that the transfer of legal title to land to the Crown could be compatible with the retention of tribal rights to mahinga kai (U3:4). However, nothing appears to have come of the offer as Mantell, in his capacity as commissioner of Crown lands, seems to have made a decision not to relay the offer to the Queen.

15.2.3 While the Titi Islands and the titi may have been Ngai Tahu's major concern in the area, the large land mass and its timber made the question of ownership of Rakiura more significant to European administrators. The first official approach from Ngai Tahu to the government over the possible sale of the island to the Crown was made by Patuki in 1860. He offered to sell the Crown a portion of Rakiura westward of the 168th degree of longitude (A8:II:53){FNREF|0-86472-060-2|15.2.3|2}. According to Basil Howard, Patuki thought to retain the eastern portion of the island, as it contained all the populated area, the frequented harbours and the profitable timber zone. Howard suggested that increased European interest in Rakiura was related to Patuki's desire to sell the island. {FNREF|0-86472-060-2|15.2.3|3} There were already a number of established European settlers on the island and an increasing demand for secure land titles, particularly for sawmilling operations (A8:II:53){FNREF|0-86472-060-2|15.2.3|4}. On 10 May 1861, Patuki wrote to the government stating that he did not wish Europeans to locate themselves on the island. {FNREF|0-86472-060-2|15.2.3|5} Yet in another letter dated later that month he repeated his offer to sell the island to the Crown. {FNREF|0-86472-060-2|15.2.3|6}

15.2.4 The Crown faced a number of obstacles in expediting the Rakiura sale. Macandrew, the Otago superintendent who had been the prime mover behind the purchase within the Otago provincial government, had been removed from office. The cession of Southland from Otago complicated matters, as did the northern war and the instability of government ministries.

In this period, the problems with European encroachment on Rakiura seem to have continued to grow. In 1863 the native secretary, Francis Dillon Bell, urged the government to purchase Rakiura, as he considered the government might find itself in difficulty in consequence of unauthorised transactions from people "unlawfully occupying and dealing with portions of land in the island" (A8:II:53-54). {FNREF|0-86472-060-2|15.2.4|7} At least one of these transactions was recognised by Patuki as binding. In November 1863 he informed the government that he had entered into an arrangement with certain Europeans for the sale of a portion of Stewart Island (U3:5-6).

By this time the government had already decided to purchase Rakiura and Bell proposed that somebody should be appointed immediately to do so. He informed his ministers that Rakiura was not formally annexed to any province, but that it naturally belonged to Southland. He proposed to introduce legislation to annex the island to Southland, arguing that it was quite immaterial whether the island was ceded or not at the time, as the Queen's sovereignty existed over it under the Treaty of Waitangi (A8:II:53-54). {FNREF|0-86472-060-2|15.2.4|8} In December 1863 the Stewart Island's Annexation Act was passed. This move does not seem to have prejudiced the

interests of the Maori owners of the island, being merely an expression of the Queen's sovereignty. Maori title to the area was not affected.

15.2.5 In September 1863, Theophilus Heale, the chief surveyor of Southland, was asked to negotiate the purchase as soon as possible. His instructions were detailed. He was to:

ascertain and make a list of all the natives, such as Topi [Patuki], and others who are immediately interested as owners of the land in Stewart's Island, determining and defining what right they have, either generally or individually, to any and to what portions of the island and from what date their claims originate respectively. (A8:II:54){FNREF|0-86472-060-2|15.2.5|9}

It is not clear when the decision was made to attempt to purchase the entire island rather than the western portion offered by Patuki, or at what point it was decided to attempt to include the offshore islands. Heale's instructions show that the government had decided to attempt to purchase the whole of Rakiura. They do not explicitly mention the Titi Islands. The instructions also show there was a clear intention to provide an endowment for the vendors and not simply make a one-off payment. Regarding the payment, Heale was to:

offer as the purchase price of the land a certain sum to be paid at once, and a certain proportion-not exceeding one third-of the proceeds of future sales or leases of Crown lands in the island, on the understanding (to be explained to the sellers) that of the one-third so reserved, two-thirds will be spent for the benefit of the tribe by trustees to be appointed by the governor; and the remaining third to be distributed annually to Topi, Paitu, and the heirs of Tuhawaiki. (A8:II:54){FNREF|0-86472-060-2|15.2.5|10}

With the change of government in October 1863, it would seem that Heale was replaced in his commission to purchase Rakiura. This was placed in the hands of Henry Tacy Clarke in February 1864. In accepting his commission Clarke was to follow the instructions issued to Heale. Further, he was to adjudicate those land claims between Europeans and Ngai Tahu that were still outstanding. No specific instructions were given to Clarke regarding the making of reserves, nor were the Titi islands mentioned (A8:II:54-55). {FNREF|0-86472-060-2|15.2.5|11}

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15.3 The Purchase

15.3. The Purchase

15.3.1 Clarke arrived in Invercargill in March 1864, but could not make much progress as this coincided with the mutton birding season. He noted in his report of 30 March 1864 that he had personally communicated with the local Maori residents (A8:II:55){FNREF|0-86472-060-2|15.3.1|12}. A letter had also been sent to Otago informing Ngai Tahu there that the government intended to proceed with the purchase and asking them to be ready to meet with the Southland claimants when called upon. Disputes about rights on the island had arisen, some Maori claiming rights through Ngati Mamoe. Patuki, as a principal claimant through Ngai Tahu, rejected the Ngati Mamoe claim. Clarke also recommended the prosecution of the proposed purchaser who had agreed to give œ4000 for about two-thirds of the island. This was an agreement made directly with Patuki, who acknowledged that he had received œ10 on account.

In May 1864 Clarke was able to begin negotiations in earnest. He considered his position inherently unsatisfactory, being charged with both protecting Maori interests, and buying the island as cheaply as possible. He wrote to the superintendent of Southland in April 1864:

The position in which I stand is, I conceive rather an anomalous one. On the one hand I shall be expected to purchase for the Provincial Government on the most favourable terms. On the other, I am instructed to have due regard to the interests of the Natives. (A8:II:58){FNREF|0-86472-060-2|15.3.1|13}

15.3.2 Consequently, before entering into any purchase negotiations Clarke was careful to come to a clear understanding with the Southland Provincial Government over the purchase price. The payment schedule proposed by Clarke differed in several respects from that set out in the government's original instructions to Heale.

Clarke proposed a total price of œ6000. Two thousand pounds of this was to be paid over at the time that the deed was signed, and œ2000 was to be held by the government, with interest at 8 per cent per annum to be paid annually to certain named chiefs. The remaining œ2000 was to be used to buy land in Southland as a reserve for Maori education and other purposes. Clarke considered that the instructions given to Heale about making payments out of the proceeds of land sales were inconvenient and unworkable. He wrote on 6 May 1864:

This would be especially the case with regard to Stewart's Island. The Provincial Government may find themselves trammelled in their mode of dealing with those lands, and it may become the source of frequent disputes and complications. On the

other hand I know from my knowledge of the Natives, that eventually misunderstanding and dissatisfaction would inevitably arise. (A8:II:59){FNREF|0-86472-060-2|15.3.2|14}

The general government and the provincial government both agreed to his proposal, although the provincial government did try to reduce the rate of interest that was to be paid on the œ2000 invested with it to 6 per cent.

15.3.3 Clarke's letter to the superintendent of Southland on 26 April 1864 asking for approval of the revised payment schedule, contains the first official mention of an intention to make reserves on Rakiura for Ngai Tahu. Heale had previously noted that it would be necessary to make provision for the half-castes resident on the island. Clarke also recognised this, but suggested that other reserves would have to be made, including several reserves to provide Ngai Tahu with continuing access to titi. However the tenor of his comments on these reserves suggest that he did not see any conflict between making these provisions and the government's intentions.

In his letter he wrote:

The reserves necessary for the Natives will be two only;- one at Port Adventure, for William John Topi (Topi Patuki's half brother), and others residing in that locality; and one at Paterson's Inlet. It will also be necessary to reserve THREE OR FOUR OF THE SMALL Islands adjacent where the Natives procure the "titi," or mutton bird. (A8:II:58){FNREF|0-86472-060-2|15.3.3|15} (emphasis added)

It would appear that Clarke had been given authority to make reserves before leaving for the south as he saw no need to discuss the arrangements regarding reserves in his letter to the superintendent. He updated his proposed course in a letter to the colonial secretary in May 1864 (A8:II:59){FNREF|0-86472-060-2|15.3.3|16}. Clarke met with Mr Menzies, the Superintendent of Southland, in late June, and pressed upon him the necessity of settling the matter immediately. His view prevailed and Menzies arranged for the money to be made available.

15.3.4 On 24 October 1864 Clarke reported that the sale was complete (A8:II:60-61).{FNREF|0-86472-060-2|15.3.4|17} His report mentions that there was a dispute between Ngai Tahu and Ngati Mamoe over ownership of the island but does not record any division over the question of whether or not to sell, or any uneasiness about the fact that the government wished to purchase the whole of Rakiura. He had met with 120 representatives of Ngai Tahu and Ngati Mamoe on 23 June, and found that the issue of ownership had been settled. To make sure that no undue pressure had been applied Clarke went through the dispute again. He did not record the discussion, but concluded that Ngai Tahu "indisputably" established their right over Ngati Mamoe and that Ngati Mamoe kaumatua were content "to hold a secondary position, and claim through their Ngai Tahu ancestry"(A8:II:60).{FNREF|0-86472-060-2|15.3.4|18}

A second meeting was held the next day to discuss the price. Clarke claimed to have told Ngai Tahu at the beginning of the negotiations that the government was willing to pay œ6000. This was thought to be too low and Patuki asked for œ50,000, then revised it to œ22,000, and finally dropped his price to œ12,000. Clarke refused to

budge as he felt œ6000 "was a liberal and just payment for an Island which was of little or no value to themselves" (A8:II:60). {FNREF|0-86472-060-2|15.3.4|19}

On 29 June Clarke held another meeting with the owners, this time at Bluff, and a deed was executed. Thirty-four chiefs signed the deed which conveyed to the Crown all of Rakiura and the adjacent islands. Nine reserves were made, amounting to about 935 acres, plus an unspecified amount of land on the Neck (out of which half-castes' grants, with ten acres for men and eight acres for women, were to be made). Clarke appended to his report on the purchase a list of 28 half-castes residing at the Neck, but acknowledged that this was probably incomplete. Twenty-one of the Titi Islands were reserved for Ngai Tahu-Ngati Mamoe but there is no indication how this list was compiled. Most significant, however, was the exclusion of Whenua Hou (Codfish Island) and some of the smaller Titi Islands from the list of those reserved for the vendors.

The œ6000 was to be divided into three equal portions. The first was to be paid at the time of signing, the second invested with the government at 8 per cent and the income distributed annually, and the third used to buy land in Southland "for educational, and other Native purposes". This latter endowment, Clarke explicitly stipulated related "to Stewart's Island only" (A8:II:58). {FNREF|0-86472-060-2|15.3.4|20} In essence, he was conveying to the Southland provincial government that it should not use these funds and lands to set up schools in the Murihiku area for people other than Stewart Islanders.

Although Clarke's journal of proceedings, if it existed at all, has not been found, it is clear from the detailed list of islands in the deed that they were indeed negotiated for by the vendors. It is clear that some discussion on the Titi Islands must have taken place for them to be included in the list of reserves described in the deed. This is contrary to the witnesses' testimony, that specific islands were unintentionally included in the purchase.

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15.4 Developments After the Purchase

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The education endowment

15.4.1 In January 1868 Alexander Mackay visited southern Ngai Tahu settlements, including those on Stewart Island. In reporting on the education endowment he wrote:

... I would beg to point out the necessity that immediate action should be taken to make the third instalment of the Stewart's Island purchase money productive, either by way of investing it on mortgage, or by any other mode that would produce an immediate income. There appears to be very little doubt that if the terms of the Deed are strictly adhered to, and the amount invested in land, that there is every chance of its laying dormant for years, or at the best produce but a very limited amount.

The several Acts were explained for the benefit of the Natives, and they promised to hold meetings among themselves to concert measures to secure the return of a representative. A good deal of dissatisfaction was expressed by them, that the amount set apart out of the Stewart's Island purchase was lying idle, more especially as it had been withheld from them without their consent. They were given to understand that what was then done was for their ultimate benefit, but they failed to see any real advantage they had gained by the arrangement, whereas, if the money had been apportioned among them as they wished at the time, they would have the satisfaction to know, at any rate, what had become of it.

I explained to them that the Government were very anxious to find a safe investment for it, but many circumstances had occurred to prevent this intention being carried out. (A8:II:150){FNREF|0-86472-060-2|15.4.1|21}

On 4 April 1870 G S Cooper, under-secretary of the Native Department, reported on the delay in implementing the deed:

There is another question to be settled in reference to the Stewart's Island purchase. By the terms of purchase œ2,000 were to be invested in purchase of land in the Province of Southland, as an endowment for educational and other purposes for the benefit of the vendors. This land has recently been selected, and has to be granted to three trustees, who are to execute a Deed of Trust. These trustees (two of whom had better, if possible, be residents in Southland, and the third, Mr. A. Mackay) have to be appointed.

The Provincial Government also wish to know by whom the expense of surveying this land is to be borne. There can be no doubt, in this case, at least, of the liability of the

Province to execute the survey, as it is as much a purchase of their land as if it had been made with 2,000 sovereigns, instead of being, as it was, a remission of payment of œ2,000 of the Stewart's Island purchase money, which the Province was under engagement to provide. But the question still remains unsettled. (A8:II:66) {FNREF|0-86472-060-2|15.4.1|22}

In May 1870 Cooper reported that the provincial government was unable and unwilling to carry out the surveys (A8:II:67). {FNREF|0-86472-060-2|15.4.1|23} Cooper then obtained approval from the colonial government to pay for and engage Major Heaphy V C to arrange for the necessary surveys. At this time Heaphy had reported excellent land had been purchased as the education endowment, being Education Reserve Lot 225 Hokonui and Lot 13 Waimumu. This land was let for a period of 21 1/2 years at a rental of œ75 per annum for the first three years, and thereafter at œ100 per annum for the remainder of the term. As no survey had been carried out, no Crown grant or lease had been issued and therefore no rent paid. Heaphy wrote that œ75 would be due on 1 June 1870 and suggested a Crown grant be prepared. He also nominated two trustees to administer the trust: himself and I N Watts, the resident magistrate at Bluff (A8:II:72). {FNREF|0-86472-060-2|15.4.1|24}

15.4.2 There was some confusion about how the endowment was to be administered and what conditions were on the trust. For two years following the purchase nothing was done. In 1866 the government made available œ320, being two years' interest, to establish a school at Ruapuke. {FNREF|0-86472-060-2|15.4.2|25} The endowment was inadequate to provide for the education of all the children of the Southland kaika. Ngai Tahu were far from happy with the constant delays in providing for their educational needs.

The sum realised from the endowment was too small to pay all the running costs of the Ruapuke school and in 1868 the school committee decided that it would have to get contributions from the kaika so the teacher could be paid an adequate salary. The school had a difficult history and as the Maori population on Ruapuke declined it was only the dedication of Reverend Wohlers (who took over the teaching in 1869) that kept it operational.

In 1868 only one third of the children entitled to benefit from the fund lived on Ruapuke and no money was left over from the fund to set up other schools. The secretary of the Otago Education Board agreed to admit half-caste children to the school at Bluff and the central government agreed to pay the fees of those half-caste children whose parents could not afford to educate their children. A school had been built by the Riverton Maori five years earlier, but the community had not been able to find a teacher for their school. In 1868 I N Watt persuaded the teacher at the local provincial school to agree to teach Maori children before and after ordinary school hours. The parents of the Riverton children were obliged to pay five shillings per quarter per child.

It was not until 1875, eleven years after the purchase, that a school was finally established on Rakiura (M20:34). In 1877 the inspector reported:

I was disappointed to find the schoolhouse not yet built. This is very much to be regretted. I pointed out in my report last year that the small, smoky, overcrowded

room now occupied as a schoolroom is unfit in every way for the purpose for which it is used. (M20:34-35){FNREF|0-86472-060-2|15.4.2|26}

Despite having specific provision made in the deed for educational needs, Rakiura Ngai Tahu were called on to provide a further œ150 for the erection of the schoolhouse.

15.4.3 Today the endowment is still used for educational purposes. There is accumulated trust capital of \$3600 and income is derived from a lease over section 13 block I Waimumu and section 225 block LXIV Hokonui which is registered as Maori freehold land and vested in the Maori Trustee. The lease is a perpetually renewable 21 year lease which is subject to the provisions of the Maori Reserve Land Act 1955 and Maori Trustee Act 1953. The present term of the lease expires at the end of 1991. {FNREF|0-86472-060-2|15.4.2|27}

The purpose of the trust is to provide financial assistance in the post-primary education of all descendants of the original owners of Rakiura. Although the Maori Trustee holds the endowment, seven advisory trustees from the region, appointed by the Maori Land Court, decide how the funds are allocated. Applications for assistance are sent to the Hokonui Endowment Trust Board every year. The application must be approved by three or more trustees before being sent on to the Maori Trustee who then pays out the grant to the applicant.

No representations were made to the tribunal concerning either the question of ownership or the terms of lease of the endowment lands. As yet the beneficial owners have not been identified by the Maori Land Court. Various procedures are available in the Maori Reserved Land Act 1955 for those with an interest in the land to make changes to the present administration of the endowment. The tribunal therefore sees no need to intervene by way of recommendation. We do however highlight the following:

- under section 11 of the Maori Reserved Land Act 1955 the court may determine the beneficial owners of any reserved land;
- under section 14 of the Act the court may vest the land in the beneficial owners determined by the court, or, in section 14(5) make an order in terms of section 438 of the Maori Affairs Act 1953 vesting the land in a trustee or trustees; and
- under section 15a the land may also be vested in and administered by a Maori incorporation.

Regarding the lease and its perpetual right of renewal, we note that it is subject to the same restrictions as those imposed on the Mawhera leases referred to in the preceding chapter. The advisory trustees may wish to join this issue to that of the Mawhera Incorporation and have the endowment lands freed from the perpetual lease and its restrictive terms. The tribunal would support such a move.

The œ2000 investment

15.4.4 As related earlier, œ2000 of the purchase payment was to be invested with the government and interest of 8 per cent per annum distributed to the people specified in the deed, namely Paitu, Teoni Topi Patuki, Tioni Kihau, Frederick Kihau and Ellen Kihau and their descendants. This was subsequently carried out although the rate of interest was reduced to 6.4 per cent by the National Expenditure Adjustment Act 1932.

In 1954 there were fifteen beneficiaries of the investment, six of whom were receiving a mere ten shillings and eight pence per quarter. It was decided that a lump sum of œ3200 be distributed to the existing beneficiaries before any further fragmentation of interest occurred. {FNREF|0-86472-060-2|15.4.4|28} Section 7 of the Maori Purposes Act 1954 gave effect to this decision, and the money was distributed accordingly.

Reserves

15.4.5 In his report on the purchase Clarke did not give any acreage for the reserve at the Neck. A list of 28 half-castes residing there was prepared, but Clarke acknowledged that there were more. In 1868 Mackay, in his report on southern settlements, wrote that no reserves had been surveyed, nor had the old land claims referred to by Clarke been settled. He reported that the land at the Neck was insufficient for the reserves promised under the deed and other land should be obtained (A8:II:64). {FNREF|0-86472-060-2|15.4.5|29}

In 1869 Andrew Thompson presented a petition seeking redress for the lack of land allocated for half-castes. Mackay was appointed to examine the situation, arrange surveys of suitable land and report back to government. Mackay compiled a corrected list and this resulted in 94 claimants being recognised as landless half-castes. {FNREF|0-86472-060-2|15.4.5|30}

In April 1870 G S Cooper reported on the southern Ngai Tahu reserves:

But in the Stewart's Island purchase a great and substantial injustice has been inflicted on the Natives and on a large number of half-castes for whom land was specially contracted to be reserved, by the delay in defining the reserves, a delay which had now reached the length of very nearly six years.

The claim of the half-castes was brought under the notice of the Legislature by a petition from Andrew Thompson to the Legislative Council last session, and the Council passed a resolution praying His Excellency to give immediate effect to the recommendation of their Public Petitions Committee, who urged that steps should be taken without delay to put the half-castes in possession of the land which had been promised them. The obstacle to marking off this land is not only the ordinary difficulty of obtaining a survey and the question of who is to pay for it (there are 94 sections to be laid out), but there is also the fact that the half-castes' land, and some other reserves as well, are to be laid off after certain "old land claims" are disposed of. Many of the claimants to these "old claims" cannot now be found, and there is reason to believe that most, if not all, of them are unable to defray the expense of surveying their claims. It would, I think, be advisable if the parties interested (the half-castes and the Provincial Government) could be got to agree to it, to exchange the claim on

Stewart's Island for a block of land on the main, on which the half-caste families could be located. (A8:II:66){FNREF|0-86472-060-2|15.4.5|31}

The Stewart's Island Grants Act 1873 made provision for the issuing of Crown grants to half-castes born on the island and resolved a number of claims. As there were others equally entitled to land Mackay temporarily reserved 1676 acres from sale in the area of Foveaux Strait.

In 1874 the surveys were completed. The Stewart's Island Grants Amendment Act of 1876 vested two blocks at the Neck to Ihaia Whitiri and Hoani Timarere, the persons named in the deed.

This completed the laying out of the reserves mentioned in the deed. However there remained the need for reserves for the "half-castes" who had not been provided for at the Neck. It was some years before provision was made for them and the subsequent legislative history is referred to in chapter 20. Save in the case of the "half-castes" the delay caused no great hardship, for the Maori continued to occupy the land in the vicinity of the proposed reserves.

Waitangi Tribunal, Department of Justice, Wellington.

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15.5 Ngai Tahu's Grievance

15.5. Ngai Tahu's Grievance

15.5.1 The claimants stated:

The Crown failed to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights. (W6)

Mr McAloon in his evidence was critical of the unilateral determination of the Crown in fixing the purchase price below that sought by Ngai Tahu. He was also critical of Clarke's opposition to their request to administer the endowment fund. Mr Temm contended that Clarke failed to make the deed perfectly clear. He stated that Ngai Tahu wanted to preserve their birding rights on all of the islands and today they are not satisfied that these islands are Crown land.

Findings on grievance

15.5.2 There is no doubt that the Crown should have provided Ngai Tahu with a protector; an independent advisor to explain their Treaty and other rights to them. Clarke himself was aware of the ambiguity of his position: acting as a Crown agent on the one hand and keeping the interests of Ngai Tahu in mind on the other. The evidence however, suggests that Clarke did his utmost to ensure that there would be no subsequent complaints about the way the island was acquired. He met with a large contingent of Ngai Tahu with interests in the area and made sure internal disputes were resolved before any terms were negotiated. The deed with the annexed plan made it clear what was sold and what was reserved. Provision for ongoing benefit for Ngai Tahu from the purchase was made through the education endowment, and for a smaller group through the œ2000 investment. Regarding the latter, he ensured that a full 8 per cent interest be paid. In comparison with his predecessors then, Land Commissioner Clarke executed his duties diligently. There is no evidence that Ngai Tahu were substantially prejudiced by the lack of a protector during the negotiations, or that the negotiations were carried out in a manner inconsistent with the principles of the Treaty of Waitangi.

However, as we have detailed, the implementation of the deed was greatly delayed, to the detriment of Ngai Tahu. Had a protector been available to ensure that the terms of the deed were abided by, income from the education endowment may well have been made available promptly and to greater effect. In the same way, it was 10 years after the sale before the survey of the reserves was completed, and many more before those of mixed parentage were given land. Such delays are inconsistent with the Crown's duty actively to protect Maori interests. The tribunal was given no details as to any loss suffered by those living on the reserves and who eventually were given such land.

For those half-castes who had to wait many years for an allocation of land there must have been loss, and this has been addressed in chapter 20.

The tribunal finds that the claimants' grievance is sustained to the extent that it applies to the implementation of the agreement.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

15 Rakiura

15.6 Titi Islands

15.6. Titi Islands

Introduction

15.6.1 The Titi Islands are those lying adjacent to Rakiura where the titi burrow on their annual migration from the northern hemisphere. On 29 June 1864 the islands were conveyed to the Crown as part of the Rakiura deed of purchase. Twenty-one of the islands, those closest to Rakiura were:

Returned to us [Ngai Tahu] as reserved for us and our descendants ... under the Protection and management of the Government. (appendix 2.10)

These were purported to be the islands most frequented by the titi.

These islands at present have very great value, not only to Rakiura Maori as taonga and an important traditional mahinga kai, but also to New Zealand and indeed the world as a last refuge for many endangered species. Maintaining these sanctuaries requires very strict control of entry as risks arise not only from human activities but particularly from chance introduction of rodents. At present access and wildlife are managed by the Department of Conservation.

The claimants' grievance is that the tribe has been deprived of the full administration of the Titi Islands. The right to collect titi is known throughout Maori society to be the prerogative of Ngai Tahu. Any restrictions imposed on such rights creates an intensity of feeling illustrated to the tribunal by witnesses at this hearing.

The inclusion of the Titi Islands in the deed

15.6.2 The Rakiura deed of purchase refers explicitly to "all the large islands and all the small islands adjacent to Rakiura", and these islands are indicated on the plan annexed to the deed. However, there are no existing records of discussions regarding the inclusion of the Titi Islands. A number of submissions were put before the tribunal stating that Ngai Tahu had no wish to include the islands in the purchase.

Harold Ashwell of Ngai Tahu stated that the sale of Rakiura was not unanimously approved by all Ngai Tahu, and that the tangata whenua "unsuccessfully sought to exclude the Titi Islands from the sale". According to Ashwell, Clarke, the purchasing officer, was resolute in his stipulation that the islands must be included in the purchase, but reached an agreement with Ngai Tahu that access by Rakiura Maori to the titi would be guaranteed (E3:1). Mr Ashwell made a particular claim to the island of Poho-o-Tairea. He stated that Poho-o-Tairea is the Maori name for Big Island,

Stage Island or Women Island. The sealers' Ngai Tahu wives and children stayed on this island while the men went on sealing expeditions. Mr Ashwell claimed rights of ownership through his ancestress who lived there 160 years ago with her children, and through the concept of *ahi ka roa*, long-term association with the island. He stated that the lists of the original owners were published in 1864 and any island not spoken for at that time was designated as Crown land. As his ancestor had died before the sale no person came forward to claim for his family succession.

In the Titi (Mutton Bird) Regulations 1978 there is no mention of Poho-o-Tairea, but Big Island is named as a Crown island and Pikomamaku, or Women Island, as a beneficial island. In the list of islands supplied by Mr Ashwell in his claim on behalf of Rakiura Maori entitled to titi rights through descent, Pikomamakuiti is given the European name "North" and is a Crown island (E3:4).

Mr Ashwell held that ownership of Poho-o-Tairea should be vested in himself and equivalent measures extended to those people who have maintained a similar presence of the islands of Pukeweka, Putahinu and Kani.

Syd Cormack stated that he had read that Clarke had selected 32 men as trustees for all owners, and as a result they became the owners of the reserved islands. The remaining islands became Crown land, thus dispossessing Ngai Tahu of their rights to claim title to these islands (E1:9).

Jane Davis claimed that several families were not included in the list of Maori owners of the occupied Titi Islands. She stated that as a result, these families have established greater ties with unoccupied islands, used less frequently by their *tupuna*, which are now Crown islands. She claimed that her family and others have rights to Putau Hunua or Putahinu (a Crown island) through seasonal association since 1930.

Eva Wilson, of Ngati Mamoe descent, records the story of the Titi Islands as passed down by *kaumatua* in Titi Heritage. Her book attempts to prove by research the truth of their story. Wilson suggests that Ngai Tahu were adamant in wishing to exclude the islands from the Rakiura sale. Because Clarke's offer of purchase mentioned only "the island" and "an island", Ngai Tahu assumed that only Rakiura was being negotiated for and agreed to the sale on this understanding. Wilson claims that it was not until after the sale that Ngai Tahu realised that the Titi Islands were included. After some discussion amongst themselves, Ngai Tahu accepted this fact but asked that the resource be managed in the traditional manner and the islands protected from trespassers. Clarke then composed a list of reserved islands and their beneficial owners, and guaranteed government protection of the resource. {FNREF|0-86472-060-2|15.6.2|32}

15.6.3 The purchase negotiations have been outlined earlier. We have clear evidence that in April 1864, before the negotiations had begun, Clarke intended to reserve three or four islands for Ngai Tahu "to procure the 'titi' or mutton bird" (A8:II:58). {FNREF|0-86472-060-2|15.6.3|33} The negotiations extended over several days and involved a substantial number of people. Clarke's report on the purchase included an enclosure which listed the islands reserved for Ngai Tahu and named in the deed, together with a list of chiefs for whom such islands were reserved. It is this list which is cited by Wilson as being post-dated to the deed, made in response to

Ngai Tahu's belated realisation that the islands were part of the sale of Rakiura. We find it hard to substantiate Wilson's claim that the sale of the Titi Islands was inadvertent. Clarke made such lists for all reserves; not only the Titi Islands. Birding rights on these islands must have been discussed prior to the signing of the deed. Not only are the number of islands increased from the original three or four to twenty-one, but all are specifically named in the deed. It could well be that the list of beneficiaries, as distinct from the designated islands, was prepared after the signing of the deed. Ashwell's evidence refers to the preparation of such a list but he did not state that the islands were inadvertently sold, rather that they were included over the objections of the owners. The manner in which the list of reserved islands was made confirms our view that the islands were not unwittingly sold: it appears that the islands specifically reserved were the most popular resting places of the birds.

Legislation since the deed of purchase

15.6.4 The first piece of legislation to affect the administration of the Titi Islands was the Special Powers and Contracts Act 1886. By clause 48 of the first schedule the governor was authorised to make regulations for the protection and management of the Titi Islands and to protect the mutton birds in order to conserve them for the exclusive use of those Ngai Tahu who were beneficially entitled. These people were those listed in Clarke's appendage to the deed, and their descendants.

In the early part of this century disputes arose about Ngai Tahu rights to take titi and Pakeha trespassing on the islands. It was generally acknowledged that Clarke's list of beneficial owners was incomplete. In 1909 an Order-in-Council conferred jurisdiction on the Native Land Court to determine birding rights (P8b:38). {FNREF|0-86472-060-2|15.6.4|34} In 1910, Chief Judge of the Native Land Court, Mr Jackson Palmer, after a detailed investigation and consideration of submissions, made an order which established the rights of various members to beneficial islands, that is, to those islands specifically reserved to Ngai Tahu in the deed of purchase (P8b:43). With the owners of the birding rights established, the Crown was able to discuss with them the regulations to be applied to the Titi Islands. After consultation with the main kaika at Bluff, Riverton and Colac Bay, the regulations were gazetted on 30 May 1912, under the authority of the Land Act 1908. {FNREF|0-86472-060-2|15.6.4|35}

15.6.5 These regulations have been rewritten and amended slightly at different times since 1908. {FNREF|0-86472-060-2|15.6.5|36} They are enforced today as the Titi (Mutton Bird) Regulations 1978. The islands reserved to Ngai Tahu are defined as "beneficial islands". Although the beneficial ownership of these islands has always remained with Ngai Tahu, they are held in trust for such owners by the Crown. The other islands which were not specifically reserved in the deed of cession, but are named in the regulations, are defined as "Crown islands". Under the regulations a beneficiary is a Rakiura Maori who holds a succession order from the Maori Land Court entitling him or her to any beneficial interest in any beneficial island. Beneficiaries do not require a permit to enter such an island. However, no Rakiura Maori can enter any Crown island without first obtaining written permission.

The regulations make specific provision for the protection of the food source of the Rakiura Maori and their descendants and the protection of the islands from despoliation by people and animals.

In the administration of the regulations, Rakiura Maori and their spouses have supervisory powers and representation on a committee through which recommendations on matters concerning the islands can be made. The commissioner is statutorily bound to call an annual meeting of all interested Rakiura Maori.

Ngai Tahu's grievance

15.6.6 Counsel for the claimants contended that the problem of the Titi Islands is primarily a matter of establishing how the islands on which the titi burrow should be protected. The importance of the Titi Islands as a past and present food resource was evident in the submissions of Ngai Tahu witnesses. "Te Heke Hau Kai Titi", mutton birding, is an ancient tradition which takes place every autumn and has survived through to the present day. The claimants' grievance was that:

The tribe has been deprived of the full administration of the Titi Islands. (W6)

Robert Whitiri submitted that the time had come for the Ngai Tahu Trust Board to administer the 1978 regulations. Paddy Gilroy, in his submission, urged that more stringent measures be put in place to protect the mahinga kai for future generations (H:13).

The Crown's response

15.6.7 The Crown contended that the regulations provide a mechanism for mutual benefit, balancing the free access of beneficial owners against the policy of protection of endangered species. In his evidence to the tribunal Ronald Tindal, then conservator for the Rakiura district, referred to the islands as the "last ark of many endangered species" (P8b:2). He said that the continued existence of these species depends on an unaltered habitat and protection against accidental or deliberate introduction of competitors such as predators or grazing animals. He submitted evidence to show that already in some islands rat infestation had occurred. In 1964 a rat invasion on Big South Cape, the largest of the beneficial islands, caused irreparable damage to bird life. Four Crown islands and three beneficial islands alone support the entire breeding stock of South Island's saddleback, banded rail, gecko, skinks, and other insects. In order to maintain these populations at risk, an understanding of the species, a knowledge of management, a policy of control of access and a monitoring of invasion are necessary (P8b:2-5). The Crown maintained that it alone has the highly skilled workforce required to protect these treasures. The Conservation Act 1987 which established the Department of Conservation, provides under section 4 that the Act is to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. Ronald Tindal claimed that the history of Crown administration of the titi resource upheld at least three identified principles namely:

- the principle of protection of the tangata whenua food source;
- the principle of mutual benefit for both Rakiura Maori and the Crown by the protection of the island from despoliation; and

- the principle of options whereby regulations were established by consultation and have protected the economic opportunity for food or barter to titi as a solely Rakiura Maori right. (P8b:9-10)

He stated that it is probably one of the best protected Maori food sources in New Zealand.

Crown counsel claimed that it is established by case law that the Crown has the power to regulate for conservation purposes providing it gives priority to the indigenous people where their rights to take game conflict with the rights of the other people (see *Kruger v Queen* 1978 (Canadian Case) 1 SCR 104) (P8a:15-17). No evidence was given that Rakiura Maori have been refused permits to hunt for titi. They may be restricted in some way by the regulations, but these regulations are administered in consultation with a representative committee for the mutual benefit of all parties to hunt for the titi and to protect these islands from despoliation. Claimant Rakihiia Tau himself said:

Our relationship, management and administration as Ngai Tahu whanui of the mutton bird or Titi Islands is perhaps the nearest living example we have to the meaning of Rangatiratanga to our natural resources or mahinga kai. (J10:25)

The same view was taken by another witness Robert Whaitiri when he agreed:

the Titi Island Regulations...work and they were drawn up by Maori people. The fact that they were drawn up by Maori people makes them unique. (E1:7)

15.6.8 Rakiura Maori attach great importance to their exclusive right. It is essential that any legislative change which could impinge on such a right be discussed with the committee created under the regulations. In our view the regulations provide a good compromise of birding rights for Rakiura Maori and the conservation of endangered species. The Department of Conservation has the skilled workforce to implement policies arrived at by the representative committee. We are satisfied that under the present regime the islands on which titi are found are sufficiently protected.

The Crown islands

15.6.9 A further claim became apparent in submissions of claimants before the tribunal relating to the Crown islands. There was strong feeling among Ngai Tahu that the Crown islands should be returned to Ngai Tahu, that is, similarly vested for a beneficial interest in Ngai Tahu.

Both the Crown islands and the beneficial islands are governed by the regulations and Rakiura Maori have exclusive birding rights over these islands. Retention of full ownership of the Crown islands at this time is related to conservation management. While no grievance has been established in respect of the Titi Islands, there would be meritorious reasons relating to mana and rangatiratanga in recognising a Ngai Tahu status over the Crown islands.

We consider that vesting the beneficial ownership of the Crown islands in designated Ngai Tahu, or such other body as may be nominated by Ngai Tahu, would be

recognising to a large degree the actual situation which at present exists. This matter is discussed in greater detail in chapter 17.

If this course was followed it could satisfy the claim of Jane Davis, who claimed her family have rights to Putauhinu through long seasonal association since 1930. Mr Ashwell claimed ownership by long family association to Poho-o-Taiera. The tribunal cannot see how long association with an island can make it the subject of an ownership claim when such islands were included in the deed of sale. If Poho-o-Taiera is a Crown island then Mr Ashwell would be in the same position as Mrs Davis. The tribunal finds that there was no breach of Treaty principles in the action of the Crown in issuing regulations governing the administration of these islands.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

15 Rakiura

15.7 Whenua Hou (Codfish Island)

15.7. Whenua Hou (Codfish Island)

15.7.1 Whenua Hou is the largest of the Crown islands, being approximately 1400 hectares, and lies three kilometres off the western coast of Rakiura. In the deed of cession it was not mentioned as one of the islands to be reserved for the Maori people. The claimants stated that: According to oral tradition the island Whenua Hou (Codfish Island) was included in the purchase against the wishes of the people. (W6)

They further alleged that Rakiura Maori originated from this island and that it is their ancestral ground. They said that at the time of the purchase in 1864 it was settled by retired sealers and their Maori wives and children, but this last assertion is doubtful. In retrospect it is surprising, as it was a home to the ancestral Maori population, that it was excluded from the list of islands reserved from the sale. While some discussion was held prior to the deed being completed regarding which Titi Islands were to be reserved, it was either an oversight or a conscious decision that Whenua Hou was excluded from the rest of the beneficial islands.

It is clear that Whenua Hou was traditionally a stopping off place of Aparima Maori on their way to the Titi Islands. However, three boat landing reserves were provided on the eastern side of Stewart Island, including Mitini Island on the south coast of Masons Bay for Aparima Maori whilst on bird catching expeditions. There would appear to be no reason why Whenua Hou should be included in the sale if a request for its exclusion had been made, and no reason for Clarke to refuse such a request.

15.7.2 Further claims surfaced during the hearing which related to the designation of the island as a nature reserve, thereby restricting access to those with traditional associations with the island.

Whenua Hou was made a scenic reserve in 1915. {FNREF|0-86472-060-2|15.7.2|37} From 1968 access restrictions were applied requiring any intending visitor to first obtain a permit from the commissioner of Crown lands. In 1983 it was intended to classify the island as a nature reserve. This was thought to be more appropriate than a scenic reserve because access to a nature reserve is by permit only and preservationist in intent. A scenic reserve by comparison carries a presumption of public access except in special circumstances.

Ronald Tindal, then conservator for the Rakiura district, impressed upon the tribunal the extreme value of Whenua Hou both nationally and internationally as a last refuge for many endangered species of plant, bird, animal and insect life. Because of its size and distance from the mainland, the island provides an ideal sanctuary for the introduction of species at risk (P8b:10-15).

15.7.3 On 29 September 1983 the Rakiura Maori Land Incorporation submitted an objection about the classification of the island as a nature reserve.

The Rakiura Maori Incorporation concluded:

There must be provision to recognise the traditional worth of Codfish Island. It is not satisfactory to have the very basic of traditional sites, as this one undoubtedly is, held within the confines of a nature reserve and known only to a privileged few who have no connection with the island beyond their position of employment or academic qualifications. (O14B:160)

It was claimed by the incorporation's representatives that these restrictions, imposed for conservation, virtually preclude access to the island by the local people. They also wanted Ngai Tahu involvement in management decisions regarding the island.

A meeting was held on 30 May 1985 between the incorporation and the Assistant Commissioner of Crown Land, Invercargill. In reply to their objections the assistant commissioner claimed that he had not, as yet, ever seen an application from Ngai Tahu for a permit to visit the island, and that permits were given to anyone with a responsible and legitimate reason for entering the island. Restriction of access was necessary to preserve the island's special ecology. He stated that once the classification was in place, the descendants of the original residents may be accommodated in the island's management plan and he invited the Rakiura Maori Land Incorporation to submit suggestions on what this management plan should contain (O14B:161-163). {FNREF|0-86472-060-2|15.7.3|38}

Further representations were made to the Minister of Lands on 7 September 1985, but he supported the change of classification and the island was subsequently gazetted as a nature reserve in 1986.

Finding on grievances

15.7.4 The tribunal finds that no grievance exists in respect of Whenua Hou, but recognises that it is of great importance to Ngai Tahu as their ancestral ground and can only surmise that its inclusion in the sale was an oversight. Had a protector been engaged to oversee the transaction it could be that the islands would have been reserved to Ngai Tahu. As that is only speculation however, the claim cannot be substantiated.

The tribunal is now aware that tours of Codfish Island are available. These are conducted by Ronald Tindal and operated as a commercial venture. The tribunal considers that subject to prior notification, free access should be given to Rakiura Maori, consistent with the security of the wildlife. The tribunal also supports the involvement of Ngai Tahu in the management of the island.

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