

Ngai Tahu Sea Fisheries Report

01 About the Claim

1.1 The Claim and the Proceedings

1.ABOUT THE CLAIM

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The structure of the claim

1.1.1 For the reasons explained in the preface to this report the tribunal found it necessary to sever the sea fisheries claim from the land based claim and deal with that question separately. In order to understand fully the nature and extent of the Ngai Tahu claim it is necessary to read both reports. As will be seen later in this report the omissions and failures of the Crown in respect of its dealings with Ngai Tahu over the eight regional land purchases from 1844 to 1864 left that tribe in no position either to protect or develop its sea fisheries. In the first report the tribunal dealt quite extensively with mahinga kai - the food resources of Ngai Tahu. Fish of course formed a very important part of those resources and as the tribe found its access to the food resources of the land and forests disappear with land settlement it relied more heavily on its fisheries. Although dealing only with fisheries in this report the tribunal has very much in mind the facts and findings of the Ngai Tahu Report 1991.

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1.2 What the Claim is About

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1.2.1 Unlike the land claim, the fisheries claim is not presented as a series of specific grievances against the Crown. Rather, in its final form, it is a strongly-worded declaration on the nature and scope of Ngai Tahu fishing rights under the Treaty of Waitangi. It is a claim which the claimants say is "prosecuted to the fullest". It identifies Treaty principles which provide and protect the rights so claimed and it sets out the terms on which Ngai Tahu would be willing to negotiate a settlement of their claim with the Crown.

Ownership

1.2.2 In essence Ngai Tahu say that article 2 of the Treaty guarantees protection of tribal tino rangatiratanga over their fishery and that there can be no restriction of any kind on the exercise of that rangatiratanga in the seas off the Ngai Tahu coast line. Accordingly, Ngai Tahu claim ownership of the entire marine fishery adjacent to their tribal lands, including all property and user rights, commercial and otherwise, inherent in the business and activity of fishing. They claim the absolute right to fish in those waters without any restriction whatsoever by whomsoever and claim further that they are entitled to have that right protected by the Crown.

Species

1.2.3 The fishery they own, the claimants say, includes all species of fish without exception. It includes all the species known to have been fished by Ngai Tahu before 1840 as well as all species that have been discovered since 1840 or may be discovered in the future.

Ngai Tahu say their fishery includes all equipment, methods and technology that were, are, or may be used, in fishing. The extent of the fishery claimed is not limited by past technology nor by restrictions on the use of modern knowledge.

Protection of taonga

1.2.4 The claimants say their fishery is a taonga and that there are cultural and spiritual values associated with it. Ngai Tahu claim they are entitled to recognition and protection of those values free from outside control or interference.

Boundaries

1.2.5 On the question of boundaries Ngai Tahu recognise a northern boundary which separates their claim area from the offshore waters of the tribes which traditionally inhabited the northern end of Te Waipounamu. This boundary is marked by Parinui-o-Whiti on the east coast and Kahurangi on the west. Ngai Tahu also acknowledge the mana moana of the Chatham Islands people and make no claim in respect of that fishery. With these exceptions no seaward boundaries are recognised nor any limit as to fishing grounds and fishing depths: "We have the right to go to sea as far as we must, or are able, in order to obtain the fish that we require" (appendix 1).

Control

1.2.6 Ngai Tahu claim the exclusive right to manage and control their fishery, which includes the authority to grant (or revoke) fishing rights to others. Historically, Ngai Tahu say, they have always been generous in meeting the reasonable needs of manuhiri who wish to fish within their tribal waters.

Conservation

1.2.7 The claimants address the issue of conservation. They say that Ngai Tahu fully recognise their responsibility to manage their fishery in such a way that continuing benefit to themselves and all New Zealanders is assured. They suggest that modern expertise, when coupled with traditional Maori principles, will prove far more effective than the conservation management hitherto undertaken by the Crown. In the Ngai Tahu view, attempts by the Crown to manage the fishery have been "disastrously ineffective".

One of the main assertions by the claimants is the statement in their claim that:

The management and control of their fishery is guaranteed exclusively to Ngai Tahu by the Treaty of Waitangi, and further by s.88(2) of the Fishing Act in our view of the law. Ngai Tahu were also entitled to the income and other benefits that may from time to time accrue from the activity and business of fishing in our tribal seas. Furthermore the entire property in the fishery was guaranteed to Ngai Tahu however that property title might be expressed in modern legal terms following legislation by the Crown whether it is now in real or such abstract forms as "quota" "licences" or any other form of title or right to fish. In our view the Crown has never had any right to interfere in the management or control of the fishery, nor to divert away from the rightful owners the income and benefits of fishing, nor to issue "quota" "licences" or other forms of purported title in property or user rights in the fisheries that in right belong to Ngai Tahu. The fishery property still belongs to Ngai Tahu. (appendix 1)

Settlement terms

1.2.8 Finally the claim restates the terms on which Ngai Tahu would be willing to negotiate with the Crown. The claimants state that the fundamental prerequisite to honest negotiation and practical results is acknowledgement by the Crown that Ngai Tahu hold "the full and exclusive property and user rights in their tribal fishery". Once this principle is accepted by the Crown Ngai Tahu would agree to:

- equal shares in the management and control of the southern fishery;

or

- an equal or at least a very substantial share in the income and benefits of fishing;

and

- a similar share in the equity or property involved.

In this proposal for a share in the property rights Ngai Tahu say:

As long as the process of allocation of ITQ permits Ngai Tahu to achieve a total of 50% of TACC in all species offshore from our manawhenua without regard to statutorily imposed seaward boundaries, Ngai Tahu would be prepared, without prejudice to its Treaty of Waitangi right for 100% of such TACC, to accept such quota in the form of ITQ and to hold them as tribal property. Ngai Tahu would not object to such an allocation being delivered via the mechanism of the Maori Fisheries Act providing that there was statutory amendment requiring the Maori Fisheries Commission to ensure its actual delivery to Ngai Tahu. (AB1:30)

These terms, the claimants say, represent a significant concession by Ngai Tahu, given that the Treaty so clearly promised them full and exclusive ownership and control of their fishery.

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1.3 Development of the Fisheries Claim

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First fishing claim

1.3.1 The statement of claim of 26 August 1986, which initiated the Ngai Tahu inquiry, contained no reference to fishing grievances. However during the course of the two year inquiry the claim was altered and amplified on several occasions and in the amending document of 2 June 1987 the Ngai Tahu fishing claim made its first appearance. In that claim, under the mahinga kai section, the claimants alleged that Ngai Tahu had been wrongfully deprived of their fishing resources as a result of the Crown's acts and omissions and in breach of the principles of the Treaty. Without specifying the exact nature and extent of the Treaty fishing rights to be claimed, the claimants gave notice that they would be seeking a share in the southern fishery and compensation for fishing resources of which they had been dispossessed.

Second fishing claim

1.3.2 Greater definition of fishing grievances was given in the amended claim dated 25 September 1987. In this statement Ngai Tahu asserted exclusive ownership of the fishery adjacent to their tribal coasts out to the 12 mile limit. They stated that in accordance with the partnership principle implicit in the Treaty they would grant the Crown a 50 percent share in that 12 mile fishery. They would accept, as compensation for lost fishing resources, a negotiated share in the fishery outside the 12 mile limit and in the event that Ngai Tahu received an appropriate share in that deep sea fishery they would abandon their claim before the Waitangi Tribunal. The claimants stated that they accepted the commercial and practical reality of the ITQ system, but did so without prejudice to their position on whether the Crown was in breach of the Treaty by imposing the quota system.

Third fishing claim

1.3.3 At its seventh hearing at Tuahiwi Marae on 11 April 1988 Tipene O'Regan made a comprehensive statement of Ngai Tahu position on fisheries (H17). In addressing the tribunal, Mr O'Regan contended that 70 percent of the total New Zealand catch "which has produced a landed value in 1986 and 1987 of a little under \$1 billion in each year" was the property of Ngai Tahu (H17:16).

This submission was followed two months later by the claimants filing their third amended claim dated 25 June 1988. This claim was a comprehensive reformulation of the Ngai Tahu sea fishery claim, detailing in 25 numbered paragraphs the full scope of the fishing rights asserted by Ngai Tahu under the Treaty.

Fourth fishing claim

1.3.4 In a final statement of grievance placed before the tribunal on 21 August 1989 the claimants alleged:

3. Commercial fishing and fishery administration policies of the Crown have denied Ngai Tahu access to traditional seafoods.
4. The lack of an adequate capital base has limited the tribal right to develop its commercial fishery.
5. Ngai Tahu never sold any of their fisheries to the Crown, but the Crown has administered fisheries without reference to the Tribe and without considering Tribal needs and Tribal rights. (W6:12)

The texts of the original and amended statements of claim are set out in full in appendix 1.

The tribunal notes that the several revisions of the fishery claim were in no way due to error or omission on the part of the claimants. This inquiry coincided with a number of important developments in the national debate on Maori fishing rights and these developments had a direct bearing on the Ngai Tahu claim. In 1986 the Fisheries Amendment Act was passed which introduced into the management of New Zealand fisheries a system called "Quota Management System". Later in this report we shall more fully detail the consequences that flowed from that legislation, the subsequent litigation and its effect on Maori fishing rights. We shall also consider the Maori Fisheries Act 1989 and the purpose and effect of that legislation. All this legislation and litigation was taking place as our tribunal was hearing the Ngai Tahu claim. The Muriwhenua tribunal also released its report in June 1988. These combined factors led to a need for a Ngai Tahu restatement and redefinition of their sea fisheries. The changing circumstances enabled the claimants to amend their claim with growing precision but widening ambit as the scene unfolded and the Ngai Tahu inquiry progressed.

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1.4 Representation

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For the claimants

1.4.1 Paul Temm QC of Auckland was senior counsel for the claimants for the greater part of this inquiry. He represented Ngai Tahu from August 1987 until December 1990 and appeared at all hearings except the final two sessions in 1991 which dealt with sea fisheries. Mr Temm's departure from this inquiry resulted from his appointment as a judge of the High Court. John Upton QC of Wellington was appointed as senior counsel for the claimants in 1991 in place of Mr Temm. David Palmer of Christchurch acted as solicitor for the claimants throughout the claim. Michael Knowles also acted as solicitor for the claimants during the final series of fisheries hearings.

For the Crown

1.4.2 Appointment to the judiciary also resulted in changes to Crown representation on the Ngai Tahu inquiry. Shonagh Kenderdine, senior counsel from Crown Law, represented the Crown from the beginning of the claim until the end of 1990 when she became a District Court judge sitting on the Planning Tribunal. Thereafter Jennifer Lake has acted as senior counsel for the Crown. Ansley Kerr has acted throughout as assisting Crown counsel. Final submissions for the Crown were presented by Colin Carruthers QC.

For the fishing industry

1.4.3 The national fishing industry was represented by two organisations, the New Zealand Fishing Industry Board (NZFIB) and the New Zealand Fishing Industry Association (NZFIA). The board is a body corporate established pursuant to s3 of the Fishing Industry Board Act 1963. The functions of the board are as set out in s10 of the Act and are primarily as follows:

- (a) to promote the fishing industry in New Zealand;
- (b) to promote means of expanding the fishing industry in the interests of New Zealand and to ensure that full use is made of the fishing resources of New Zealand;
and
- (h) to promote a greater degree of co-ordination within the fishing industry.

The NZFIB represents, as a statutory body, the industry in New Zealand. The New Zealand Federation of Commercial Fishermen, the New Zealand Share Fishermen's Association and the Retailers Association are represented by the board.

The NZFIA is an incorporated society registered at Wellington. The association's members have a significant investment and are major participants in the New Zealand fishing industry. Its membership accounts for over 85 percent of the catching and processing capacity of the industry in this country. The association's membership currently holds in excess of 90 percent of quota issued under the Quota Management System introduced under the Fisheries Act 1983 (as amended 1986).

Both organisations were keenly interested in the Ngai Tahu fishing claim and took an active part in proceedings. Counsel for NZFIA were Tim Castle and Bruce Scott. Counsel for NZFIB were John Marshall and Carrie Wainwright. At the seventh tribunal hearing on Tuahiwi marae, counsel for the fishing industry requested that the association and board be joined as parties to the claim. The tribunal ruled that neither body could be accorded status as parties to the claim but they would be granted leave to appear and be heard on matters relating to sea and eel fisheries. The record shows that thereafter counsel for the fishing industry appeared at 12 of the tribunal's 27 hearings beginning 11 April 1988, 27 June 1988, 7 February 1989, 10 April 1989, 29 May 1989, 3 July 1989, 2 August 1989, 11 September 1989, 28 June 1990, 20 December 1990, 17 June 1991, and 2 September 1991.

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1.5 How the Fishing Claim was Conducted

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The sequence of hearings and the procedures adopted by the tribunal during the course of this inquiry have already been described in chapter one of the Ngai Tahu 1991 report. They need not be repeated here. Fisheries evidence, being part of the mahinga kai claim, was presented on many different occasions throughout the inquiry. Major portions of the fisheries evidence were given by the claimants' witnesses at Tuahiwi marae and Te Rau Aroha marae in April and June 1988. Appended to this report as appendix 3 is a record of documents which includes not only those documents produced to the tribunal during the land claim hearing but those subsequently produced at hearings on 28 June 1990, 20 December 1990, 17 June 1991 and the final hearing on 2 September 1991. The Crown opened its case on sea fisheries on 10 April 1989 (R9).

Although some hearings dealt solely with fishing issues it was not envisaged that the fisheries claim would be separated from the rest of the mahinga kai claim. The claimants' view that their lands and seas are a "seamless whole which cannot properly be divided into parts" (appendix 1) is acknowledged by the tribunal and as earlier stated the tribunal regrets the need to now deal with the fishing claim in a separate report. However, during 1987 and 1989 the Waitangi Tribunal was only one of a number of forums in which Maori fishing rights were being considered and events outside the tribunal's jurisdiction ultimately made the issue of a separate report inevitable.

High Court and Court of Appeal proceedings

1.5.1 In 1987 and 1988 a number of High Court proceedings were brought against the Crown by Maori and fishing industry interests. These proceedings called for consideration of a wide range of matters, including Treaty principles and guarantees, and all had "a common rootstock in the question of the existence and scope of Maori fishing rights" (Q7:3).

The tribunal was mindful of the fact that these High Court proceedings involved the essential aspect of the tribunal's specialist jurisdiction, namely Treaty rights. By the latter half of 1988 the tribunal was concerned about the propriety, not to mention the cost and convenience, of continuing to hear evidence when the same, or many of the same issues, were to be addressed in the High Court.

On 10 November 1988 the tribunal issued a memorandum seeking submissions from the parties and the fishing industry on whether the tribunal should postpone its consideration of the sea fishing claim in light of the High Court proceedings.

On 16 March 1989 the tribunal directed it would continue to hear fisheries evidence, having received submissions from the claimants, Crown and fishing industry which all urged the tribunal not to defer the fishing claim. The tribunal noted that the Ngai Tahu High Court action in *Ngai Tahu Maori Trust Board v Attorney-General & Others* was adjourned by the Court of Appeal for three reasons, one of which was that the tribunal's report on Ngai Tahu could be of significance and could also shorten the hearing in the High Court.

Further evidence: sea fisheries inquiry reopened

1.5.2 Formal hearings before the tribunal on the Ngai Tahu claim, including fisheries, were completed on 10 October 1989. The tribunal still intended at that time to report on fisheries grievances as part of the whole claim. However an application dated 22 May 1990 was received from the NZFIA and NZFIB seeking leave to adduce further evidence. This evidence had been compiled by NZFIA and NZFIB as parties in one of the High Court proceedings in which the claimants were plaintiffs. {FNREF|0-86472-103-X|1.5.2|1} It consisted of 28 affidavits which had not been completed until after the conclusion of the tribunal's hearing in October 1989. The NZFIA and NZFIB wished to have this evidence included as part of the Waitangi Tribunal inquiry on the grounds that it was relevant to the Ngai Tahu claim and would assist the tribunal in its deliberation. Following a hearing on 28 June 1990, and with the consent of the parties and the fishing industry, the tribunal decided to reopen the inquiry into the sea fisheries claim. A large quantity of additional evidence, in the form of affidavits adduced for the High Court proceedings, was received from the claimants and Crown as well as from the fishing industry. Two further hearings were held from 17-22 June and 2-5 September 1991.

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1.6 Ward and Habib Reports

1.6. Ward and Habib Reports

1.6.1 In 1988 Dr George Habib was commissioned to provide an overview report of the fisheries evidence. This report was presented at the eighteenth hearing of the claim held at the Chateau Regency Hotel, Christchurch (12-16 June 1989), supplemented by three other reports. These reports provided a comprehensive overview of the fishing evidence presented by the claimants, the Crown and the fishing industry.

At the June 1991 hearing Professor Alan Ward and Dr George Habib presented overview reports on the additional fisheries evidence. These expert witnesses had been further commissioned by the tribunal in 1990, pursuant to clause 5A of the second schedule to the Treaty of Waitangi Act 1975, to prepare respective reviews on the historical and fisheries evidence presented to the tribunal. The contributions made by Professor Ward and Dr Habib in reviewing the very lengthy evidence tendered by all parties for the additional sea fisheries hearings were substantial and, as noted by the tribunal in the first Ngai Tahu report, their overviews were very helpful to all concerned. As on previous occasions, counsel took the opportunity to cross-examine both witnesses.

At the tribunal's invitation, Whaimutu Dewes, Maori Fisheries Commissioner, and his counsel Joe Williams, appeared at the June 1991 hearing to make submissions on the Maori Fisheries Act 1989. Counsel for the claimants, Crown and fishing industry also made submissions on this legislation.

At the concluding hearing in September 1991 counsel for the claimants, Crown and fishing industry made final submissions.

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1.7 Remedies and Recommendations

1.7. Remedies and Recommendations

The role of the tribunal has been to determine whether, and if so to what extent, the Crown has acted in breach of Treaty principles and the extent to which the claimants' sea fishery rights under the Treaty have been prejudicially affected by any such breaches. The question of remedies and recommendations will be covered more fully later in this report.

References

{FNTXT|0-86472-103-X|1.5.2|1} 1 In the High court of New Zealand, Wellington Registry CP559/87; see also AA12(a)-(r)

Waitangi Tribunal, Department of Justice, Wellington.