

Ngai Tahu Land Report

10 The Murihiku Purchase

10.1 Introduction

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Late in 1851 Walter Mantell was commissioned to purchase from Ngai Tahu the portion of the South Island which lay to the south of the Otakou block. Mantell understood from these instructions that he was to negotiate for all the land from coast to coast. He duly arrived in Dunedin on 16 November 1851.

Two days later he held a meeting at Port Chalmers with Topi Patuki, Te Au, Karetai, Taiaroa and many other rangatira. During or following this meeting Mantell prepared a map showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast and thence back around the coastline from Piopiotahi to the Nuggets. The names of various chiefs having an interest in various parts of the block are shown. On the west coast below Piopiotahi the names of Taiaroa, Potiki, Ariaaha Taheke, Whaikai and Karipa appear. The names of Maui, Tikini and Poka appear on the coastline west of the Waiiau River. The names of other well-known Ngai Tahu chiefs are shown at various places east of the Waiiau almost back to the Nuggets. This map appears to indicate the extent of the land which the Ngai Tahu chiefs were prepared to sell.

Mantell left Dunedin on foot early in December, accompanied by the paramount Murihiku chief Topi Patuki and some other Ngai Tahu. On the way the party was delayed by heavy rain. While so detained Mantell, presumably with Patuki's assistance, prepared a list of some 84 claimants, together with a further plan having the same boundaries. Various areas nominated SE, S, W, N, NW are indicated. Between them they cover the whole area from coast to coast. The names of chiefs having an interest in particular areas are shown. In particular the names of Taiaroa, Potiki, Ariaaha Taheke, Whaikai, Karipa, Pohau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. The names of other Ngai Tahu appear on the coastline west of the Waiiau River.

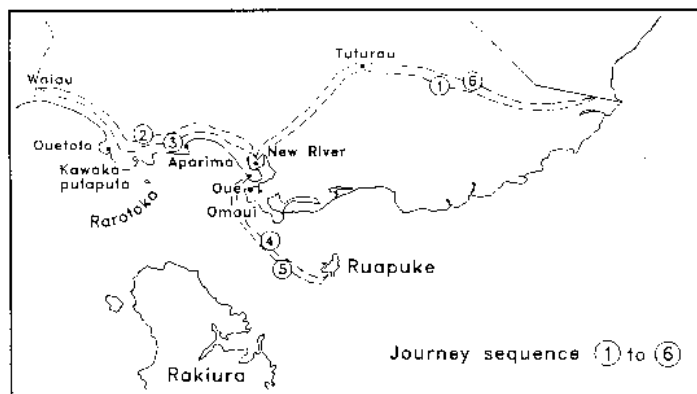


Figure 10.1: Mantell's journey to Murihiku from December 1851 to February 1852 showing his route and the main settlements he visited.

The party then proceeded to Tukurau, on the Mataura River, where Mantell agreed on a reserve. From there he went south to Oue, on the coast of Foveaux Strait a little to the west of the Bluff. There a large meeting was held on 22 December 1851 with Ngai Tahu from Rakiura (Stewart Island), Ruapuke Island, Aparima, Oraka, and Kawakaputaputa to the west. It seems the Ngai Tahu chiefs present agreed to sell their land, but made it clear they wanted a good price. Mantell was not willing at that time to say how much the Crown would be prepared to pay.

Following this meeting, Mantell arranged for reserves to be provided at Omaui on the New River, Oue, Aparima, Oraka, Kawakaputaputa and Ouetoto. These reserves were surveyed in March-April 1852 by Charles Kettle-unfortunately at a time when many Ngai Tahu were on the annual excursion to the Titi Islands. The claimants say that in some cases Mantell declined to make the reserves as large as Ngai Tahu requested, and in other cases he refused altogether to reserve areas which they wished to keep. Among these was Rarotoka Island in Foveaux Strait. In all, the seven reserves made by Mantell totalled some 4875 acres.

Mantell returned to Dunedin early in 1852 where he was employed as commissioner of Crown lands, having scheduled a meeting with Ngai Tahu for May to finalise the purchase. Although he planned to pay over the purchase price in June, these arrangements fell through as the government failed to make the necessary funds available to him. Meanwhile, Topi Patuki and Tairaroa visited Wellington and there confirmed their willingness to finalise the sale. As a result the officials in Wellington felt no need to complete the purchase quickly. Moreover, government was short of funds at the time. And so the matter dragged on until, in August 1853, Mantell decided to act on his own initiative. By this time he had begun to fear, given the apparent indifference on the part of government to completing the sale, that Ngai Tahu might be tempted to sell or lease direct to Europeans who were moving into the district. He took advantage of the presence of a substantial number of Otago and Murihiku Ngai Tahu in the vicinity of Dunedin at the time and convened a meeting to discuss the sale. After a "long and anxious debate" the deed of purchase was signed on 17 August 1853.

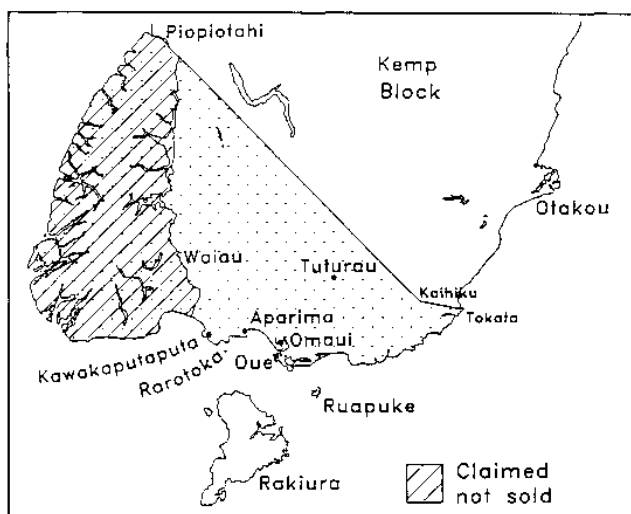


Figure 10.2: The Murihiku purchase, 1853, showing the land west of the Waiau River which the claimants alleged had not been included in the sale to Mantell.

The English translation of the deed makes it clear that the boundary extended from Piopiotahi (Milford Sound) east to Kaihiku and Tokata on the east coast, and right around the west coast from Piopiotahi to Tokata again on the east. That is, the whole of the land south of a line from Milford Sound to Tokata or Nugget Point (the southern point of the Otakou purchase). The claimants, relying on a very recent translation of the Maori version of the deed of purchase, contended that the deed is ambiguous. A map attached to the deed clearly shows the coast line etched in blue extending from Milford Sound all the way round to Tokata (the Nuggets).

The purchase price provided for in the deed was œ2000, but Mantell orally agreed to seek an increase to œ2600 and government agreed to pay the extra œ600.

The claimants have a variety of grievances about the Crown purchase. These fall under three main heads:

1 The failure of the Crown to ensure that Ngai Tahu retained sufficient land for an economic base. Associated with this are complaints that the Crown failed to set aside either additional land or specific areas of land requested as reserves by Ngai Tahu.

2 Failure of the Crown to provide schools and hospitals at each Ngai Tahu village as promised by Mantell.

3 The wrongful inclusion by the Crown of land west of the Waiiau in the sale. Associated with this is an alleged failure by the Crown to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

Waitangi Tribunal, Department of Justice, Wellington.

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10.2 Statement of Grievances

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The grievances as filed were:

1. The Crown failed to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.
2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.
3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale.
4. The Crown failed to set aside the following lands for the use of Ngai Tahu after the sale:
 - additional land at Aparima to that which Mantell allowed;
 - additional land at Kawakaputaputa to that which Mantell allowed;
 - additional land at Omaui to that which Mantell allowed;
 - a block at Oue;
 - a block of 200 acres at Waimatuku;
 - Rarotoka Island;
 - 300 acres on the Waiau River, which may be at Oetota as a reserve there;
 - a block at Opuaki;
 - the waterfall at Te Aunui on the Mataura River.
5. The Crown failed to provide schools and hospitals at each Ngai Tahu village which provision was part of the price agreed upon by the Crown.
6. The land west of the Waiau was wrongfully included in the sale.
7. The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.
9. The Half-Caste Grants Acts, the Landless Natives Act and other legislation were inadequate to remedy the landlessness caused by the sale to the Crown.
10. The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

We will consider these various grievances at the appropriate points in our narrative of events which follows.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.3 Background to the Purchase

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10.3.1 As we have seen, the Otakou purchase was effected in 1844. But it was not until the late 1840s that the Otago settlers began to arrive and settle over the 530,000 acres of land purchased some years earlier. In 1848 the Kemp purchase had been negotiated and in 1849 a substantial part of Banks Peninsula had been acquired by Mantell for the Crown. The land to the south and south-west of Otago remained unpurchased, but the Crown was in no hurry to complete its purchase down to Foveaux Strait and across Fiordland to the west coast. As Professor Ward pointed out, for some years after the Otakou purchase there was no settler pressure. There was also a persistent belief that Ngai Tahu were not only willing, but anxious, to sell to the Crown their lands to the south of the Otakou and Kemp purchases. For instance, Governor Grey in November 1853, after receiving a copy of the Murihiku purchase deed, commented to Domett that about six years previously some of the principal chiefs of the Murihiku district had agreed, while the governor was there, to dispose of the land on terms "nearly the same as those to which they have since adhered" (E2:37(c)). {FNREF|0-86472-060-2|10.3.1|1}

10.3.2 On 12 February 1849 the paramount Murihiku chief, Topi Patuki, wrote to Grey inviting him to come to Parewha on Ruapuke Island to discuss the purchase of land south of the Otakou and Kemp purchase boundaries, but making it clear that "the larger area however must remain with us, the Maori people" (Q3:4-5). {FNREF|0-86472-060-2|10.3.2|2}

A year later, however, attitudes appear to have changed. Captain Stokes of HMS Acheron reported to Lieutenant-Governor Eyre on the then disposition of Ngai Tahu, "to sell all that remains to them of the Middle Island" (A8:I:270). {FNREF|0-86472-060-2|10.3.2|3} Many Ngai Tahu visited the Acheron hoping that it was part of Captain Stokes' mission to effect a purchase. Stokes was persuaded by Ngai Tahu to make out on a chart the reserves they wished to retain. W J W Hamilton prepared a list now in the Canterbury Museum (O13:4-6). {FNREF|0-86472-060-2|10.3.2|4} It records 19 locations, all east of the Waiiau River. Stokes further reported that:

after making out on the charts the reserves they were desirous of retaining, the Maoris, both in Foveaux Strait and at Otago, expressed their desire to sell all the land from Otago to the Western Coast. (A8:I:270){FNREF|0-86472-060-2|10.3.2|5}

While we have no clear indication of the size of the various reserves charted by Stokes, or of the precise location of all of them, it is evident that Stokes met their wishes and that in consequence Ngai Tahu were willing to sell the remainder of their land from Otago right across to the western coast. Stokes also indicated in his report

that Ngai Tahu would probably accept œ2000 as purchase money, which he suggested should be distributed by paying œ1000 at Otago and the other œ1000 at Awarua (Bluff) (A8:I:270). {FNREF|0-86472-060-2|10.3.2|6}

Mantell receives his instructions

10.3.3 It is against this background that Mantell received instructions from Governor Grey in October 1851. Earlier in the year Grey had evidently discussed with Mantell the possibility of his going south to purchase the southern portion of the South Island. Mantell followed up his conversation with the governor by writing to Domett, the colonial secretary, on 13 March 1851. He made various proposals for submission to the governor. On the question of reserves he said that:

In carrying out the spirit of my instructions on the block purchased by Mr. Kemp, I allotted on an average ten acres to each individual, in the belief that the ownership of such an amount of land, though ample for their support, would not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain. (E2:2) {FNREF|0-86472-060-2|10.3.3|7}

This hardly augured well for Ngai Tahu.

As to the equipment necessary he commented:

it must be borne in mind that in parts, especially toward the West Coast, overland communication is reported to be impracticable; I would therefore recommend the chartering of a serviceable coaster, sufficiently large to carry a useful boat: the vessel, if such a course were sanctioned by Government, might be useful in payment for the territory to be acquired; in such a craft, too, the Natives resident on the western portion of the block purchased by Mr. Kemp might be visited, and some idea obtained of the nature and value of that country. (E2:2) {FNREF|0-86472-060-2|10.3.3|8}

It is clear from this proposal that Mantell had in mind a purchase which extended over to the west coast.

On 14 April 1851 Domett advised Mantell that, as he had executed the duties in purchasing a large portion of the South Island "in a very satisfactory manner", the governor wanted to engage him to purchase "the remaining portion of that Island". If arrangements could not be made for sending Mantell on the government brig, the governor would endeavour to charter a whaling schooner at present attached to the Acheron (E2:2). {FNREF|0-86472-060-2|10.3.3|9}

10.3.4 Subsequently, Mantell was appointed commissioner of Crown lands based at Dunedin. On 17 October 1851 he received firm instructions from Domett, at the behest of Governor Grey, to purchase for the Crown the portion of the South Island which lay to the south of the Otago block. As to the price, Mantell was told that, as the Ngai Tahu had never expressed any expectation of receiving more than œ2000 for this land, he should regard that sum as the "extreme limit". He was to carefully ascertain who were the leading chiefs and the proportionate amount to be paid to each of them (E2:7-10). {FNREF|0-86472-060-2|10.3.4|10}

On the question of reserves Mantell was told that:

His Excellency further directs me to authorise you retaining for the use of the natives out of the lands purchased, such reserves as you think proper; and to acquaint you with reference to such exceptions, that you will be responsible for taking care that ample reserves are kept both for their present and future wants, and that in selecting such reserves, you will, in as far as is consistent with the public interests, consult the wishes and feeling of the Natives both with respect to their position and shape.
(E2:10-11){FNREF|0-86472-060-2|10.3.4|11}

Mantell was therefore required to ensure that ample reserves were kept for both the present and future wants of Ngai Tahu, although this would be determined by Mantell himself. Moreover, Mantell was to consult with Ngai Tahu regarding the location and size of such reserves "in as far as it is consistent with the public interests". It appears that Mantell, not Ngai Tahu, was to be the ultimate arbiter.

In commenting on these instructions and Mantell's earlier intimation to Domett in March that he envisaged reserves of 10 acres per person to be appropriate, Professor Ward said:

It must be assumed that Domett saw no conflict between such instructions and Mantell's clearly stated intention of restricting reserves to ten acres per head. In commissioning Mantell, Domett assured him that his actions in completing the Kemp purchase had Grey's complete confidence. In this exchange there is clear evidence that Grey and Domett were quite content with a policy which combined a stated intention of providing for Ngai Tahu's present and future needs, with the practice of confining the tribe on tiny subsistence reserves without any further land being made available for their future endowment. Grey's statement to the Smith-Nairn Commission that he would not knowingly have allowed such a miserly provision to have occurred is shown to be no more than self-serving rhetoric. (T1:216)

The tribunal has no reason to disagree with these conclusions.

Mantell also received instructions to employ a surveyor to lay out the reserves, to provide Ngai Tahu with a copy of the plans, to keep a daily journal of his travels and to make a population census of Maori in the country being purchased.

Waitangi Tribunal, Department of Justice, Wellington.

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10.4 The Negotiations

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Mantell meets Ngai Tahu chiefs at Port Chalmers

10.4.1 Mantell arrived in Dunedin on 16 November 1851. He lost no time in arranging a meeting with leading Ngai Tahu chiefs having an interest in Murihiku. In a letter of 20 November 1851 to the colonial secretary, he reported on the meeting which took place on 18 November. We reproduce his letter in full:

I have the honor to report to you for the information of H.E the Governor in Chief my arrival at this port on the 16th inst.

On Tuesday the 18th inst. I held at Port Chalmers a preliminary conference with the natives relative to the purchase which I am instructed to effect. Patuki, te Hau, Karetai, Taiaroa and many other Chiefs interested were present and expressed their wish to cede the land to the Government. I have arranged to proceed to the Native Settlement at the Heads in a few days to discuss the matter more fully and to hear any other claimants in this neighbourhood to attend and take part in the proceedings after which I propose to depart at once for the South accompanied by John Topi.
(O13:20){FNREF|0-86472-060-2|10.4.1|12}

Although Mantell referred to the Ngai Tahu chiefs wishing to cede the land he did not define the area discussed. It appears, however, that during or following the discussions on 18 November Mantell prepared a map (figure 10.3) showing the northern boundary running from a point near the Nuggets on the east coast, past the Kaihiku range and across to Piopiotahi on the west coast, and from there back around the coast. On the west coast below Piopiotahi are the names Taiaroa, Potiki, Ariaaha Taheke, Whaikai, and Karipa. The names G Maui, Tikini and Poka appear on the coastline west of the Waiiau River. The names of other well-known Ngai Tahu chiefs appear at various places east of the Waiiau almost back to the Nuggets. Mantell, it seems, obtained this information during his discussions with Ngai Tahu chiefs on 16 November. The map bears the hand-written legend "Korero chart, Nov. 1851 No.1". The map appears to indicate the extent of the land which the Ngai Tahu chiefs were

attempt to determine just who had rights throughout the whole block. For instance, Rawiri te Awha, later identified as a 'native of Te Anau', was marked as having rights to the North. (E2:26) Being compiled before Mantell had visited the Foveaux Strait settlements, the schedule is likely to have been created with information provided by Topi Patuki. Although prepared early in the course of events there is clear evidence that Mantell continued to use this table throughout the purchase negotiations: the subsequent deaths of several individuals including Tuhawaiki's son, Kihau, are recorded. (T1:217-218)

A map bearing the legend "10 Dec. 1851, Korero chart No.2 (Mantell)" prepared by Mantell presumably the same day, shows how he subdivided the whole block below a line running from Tokata (the Nuggets) in the east to Milford Sound in the west and showing also the complete coastline. The areas nominated SE, S, W, N and NW are all indicated (figure 10.3) and the names of various chiefs having an interest in particular areas are shown. The names of Tairaroa, Potiki, Ariaaha Taheke, Whaikai, Karipa Pohau, Irai Tihau and Hohaia are given as having an interest in the west coast. Rau Te Awha and Ratamira Tihau are shown at Lake Te Anau. As the Ward report indicated, the information in Mantell's list of claimants and in his chart no 2 is likely to have come from Patuki, the chief of Murihiku, who was with him at the time. It is obvious that Mantell and Patuki were concerned to identify who held interests in the whole of the block running from coast to coast which Mantell was subsequently to purchase.

Tuturau reserve (no 1)

10.4.3 No doubt satisfied by his earlier discussions at Dunedin, Mantell began the task of negotiating the terms of the sale with Ngai Tahu and determining reserves in various locations. He intended that all reserves should be settled prior to any deed being signed or money being paid. On reaching Tuturau on the Matura River on 15 December Mantell laid out a reserve for the local people there. Mantell's journal entry for that day notes:

Reko demands a reserve of about fifty square miles. Fine day very warm. Gave reserve as at p.7. Reko quite satisfied. (E2:21) {FNREF|0-86472-060-2|10.4.3|15}

The reserve was surveyed by Kettle in Reko's presence three months later. The area amounted to 287 acres (O13:37-39). {FNREF|0-86472-060-2|10.4.3|16} No complaint was made of this reserve by the claimants.

On leaving Tuturau the party crossed the Matura and on 20 December reached Oue.

The sale discussed

10.4.4 Two days later, on 22 December 1851, a hui was held at Huruhuru's boathouse at Oue. At least 60 Ngai Tahu were present (E2:22). {FNREF|0-86472-060-2|10.4.4|17} Hoani Takurua described to the Smith-Nairn commission how Paitu was brought from Stewart Island. Patuki was present, along with the Ruapuke people; and others from Aparima, Oraka and Kawakaputaputa (E2:324-325). {FNREF|0-86472-060-2|10.4.4|18} Patuki, in his Smith-Nairn testimony, said that in addition to himself, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs were present. In the

morning some individual claims were discussed for a time. Mantell then produced his chart of claims. This too was discussed. It is not clear whether the "chart" was the "korero sheet" prepared on 10 December or the list of claimants, also prepared at that time, or both. Following the arrival of Paitu at noon, discussion of the purchase resumed. Mantell noted that Ngai Tahu wished to have the money distributed there and that the "Final korero" was to be at Otago (E2:22-23). {FNREF|0-86472-060-2|10.4.4|19}

Takurua said that at the meeting at Oue:

Mantell explained about the land. [He] asked them to cede the land to him and to the Queen. They asked him what was the price, and Mantell said he did not know then, that he would tell them at some future time. It was then and there that the land passed into Mantell's possession. The Maoris thought that there would be a large price given. Mantell concealed the price that would be given. By saying the land passed into Mantell's possession I mean that the people agreed to sell it. He obtained our consent to sell the land, and we went away with the impression that he was to pay us a large sum of money. When Mantell came back [in 1853] he told us it was a thousand pounds, and then we complained of the smallness of the money. Then came the promise of schools and hospitals. (E2:324-325) {FNREF|0-86472-060-2|10.4.4|20}

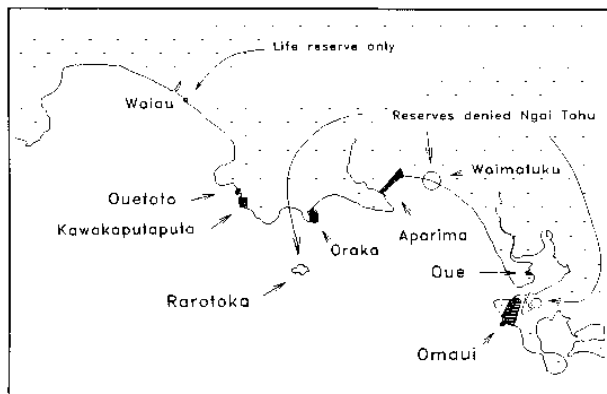


Figure 10.4: Mantell's Foveaux Strait reserves showing those he granted and those such as Rarotoka, Waimatuku and an additional reserve at Ormaui which he denied. There was an additional reserve at Tuturau.

Unfortunately Takurua did not say what land he understood was being bought by Mantell.

While arguing that Rarotoka (Centre Island) was excluded by Ngai Tahu from the sale, he made no such qualification about the land west of the Waiiau. Nor did he make any suggestion that such land was not included in the sale which he regarded as having taken place at Oue. On the other hand, as we will see, both Patuki and Horomona Patu were to tell the Smith-Nairn commission that Mantell was told at Oue that the western boundary of the land to be sold was to be the Waiiau River.

Additional reserves

10.4.5 In addition to the reserve at Tuturau, Mantell made provision for six more reserves, plus a life reserve, following his discussions at Oue. The claimants, in their grievance no 4, complained that Mantell failed to set aside certain lands in addition to those provided by him. We will now discuss each of the reserves in the light of the

claimants' grievance. The number following the name of each reserve is that appearing on the map which accompanied the deed of purchase.

Omaui reserve (no 2)

10.4.6 This reserve of 1686 acres was at the mouth of the New River. Horomona Patu was questioned about the reserves at Omaui and Oue:

The natives pointed out where the boundaries were to be.

They (including Patu) walked round where the boundary was to be? -Yes, and then they put down a peg. (E2:94){FNREF|0-86472-060-2|10.4.6|21}

Patu went on to say that the people were not "exactly satisfied" and were not clear as to what was meant by the marking off of reserves (E2:94-95). {FNREF|0-86472-060-2|10.4.6|22}

According to Mantell, on 22 December Patuki demanded a reserve at Omaui which included the whole headland:

from the head of the inlet across to the sea. Went along the sandhills but could not get a good view. I demanded from the houses outward for Europeans. Very dissatisfied. (E2:23){FNREF|0-86472-060-2|10.4.6|23}

The reserve was not settled by Mantell until 26 December when Mantell noted that, "After the reserve was fixed Patuki set out in his boat for Ruapuke". Mantell did not say whether or not this reserve met with Patuki's approval. On balance we think this unlikely and find that there was some shortfall in the provision made by Mantell. We are unable to quantify it. But, as Professor Ward pointed out, Mantell later arranged for Patuki to be compensated with two sections at Aparima totalling 221 acres which Patuki accepted (T1: 224-225). The grievance is therefore not sustained.

Oue reserve (no 3)

10.4.7 A reserve of 176 acres was made on the western side of the New River estuary. Mantell commented that he:

Sent for Huruhuru, Heneri Huruhuru, Poharama & Tutauira about their wish for a reserve here. Set out with them-3 miles N. over wooded sand hills to a point whence they point out the Kotika [detached portion] they desired at the neck of sand between the river and the beach...Defined [sic] consideration of demand till I can converse on it with nat[ive]s at Omaui. (E2:23){FNREF|0-86472-060-2|10.4.7|24}

There is no evidence to suggest that Mantell failed to meet the wishes of Ngai Tahu in making this reserve. The claimants' grievance cannot be sustained.

Aparima reserve (no 4)

10.4.8 This was a reserve of 527 acres at the mouth of Jacob's River at Riverton. The following account is taken substantially from the evidence of a Crown witness, Mr D A Armstrong.

In his evidence to the Smith-Nairn commission Hoani Paororo stated that the site of the present town of Riverton was included in the reserve which the people originally asked for:

Mantell said -"I must have a portion of that land for a town". The Maoris objected. Mantell said -"It will be better for you to give a portion of this land to have a town here which will be a benefit to you". Then the Maoris consented. My father was one who agreed to it. Mantell then said -"Where shall the boundary be fixed". We fixed upon the line of that back street which passes the Marine Hotel... If the Maoris had persisted in what they originally asked for, there would be no town where it now stands. (E2:346-347){FNREF|0-86472-060-2|10.4.8|25}

According to Horomona Patu, Ngai Tahu:

told Mantell where they wanted the boundaries, from Reretai to Otaetae, and from Otaetae to Aparima. (E2:100){FNREF|0-86472-060-2|10.4.8|26}

But Mantell did not lay it out as the people wanted it, because, according to Patu:

...Mantell was not willing to have it owing to the entrance of the river. The natives would claim it.

Then did the natives want to get on both sides of the river? -No, only on one side.

Then how was it settled? -Mantell told them they had better go across the river to one side of the river, & leave the pakehas the other side. The natives did not want both sides of the river, but Mantell advised them to go on one side of the river, and let him have the other.

What was finally done? -We said, " We shall not go across to the other side of the river (the South side); We will remain on this side where we are"...

Was it finally arranged that they should remain where they were? -Yes. Mantell replied, "Well, if you actually want this place, I will mark it off for you".

Mr Smith -and it was marked off? -Yes, he marked off a similar reserve to that which we wanted, or would have liked to have got. (E2:100-101){FNREF|0-86472-060-2|10.4.8|27}

On 1 January 1852 Mantell noted in his journal:

Shewed the natives the boundary of 500 acres which Hor. Pukeite and the rest will not agree to as it includes no part of Otaitai wood and the E. boundary does not extend to Aparima. (E2:24){FNREF|0-86472-060-2|10.4.8|28}

On 3 January he noted:

Went to see the hapuas [lagoons] in the wood. Evg. offered to exchange that part for an equal quantity at Otaitai. (E2:125){FNREF|0-86472-060-2|10.4.8|29}

On the same day Mantell wrote to the colonial secretary, remarking:

I reached this place on the 27th ultimo, and have not yet succeeded in reducing the demands of the Natives for a reserve of extravagant dimensions sufficiently to justify me in assenting to them. (E2:2){FNREF|0-86472-060-2|10.4.8|30}

Mantell and his party then proceeded to Oraka on 5 January 1852. The Aparima reserve was left to be settled on his return.

On 23 January Mantell recorded:

Arranged the reserve...after great annoyance from those stupid dolts Paroro and Solomon. (E2:30){FNREF|0-86472-060-2|10.4.8|31}

It appears that Ngai Tahu succeeded in obtaining their reserve in the preferred location, despite Mantell's fear that this could interfere with further European settlement. But Mantell did succeed, against the wishes of Ngai Tahu, in confining the reserve to just over 500 acres, providing a mere 10 acres per head by Mantell's own census figures. The tribunal finds the claimants' grievance that Mantell refused to reserve additional land at Aparima is made out. We are, however, unable to quantify the deficiency.

Oraka reserve (no 5)

10.4.9 This was a reserve of 1132 acres at Colac Bay. Although Mantell at first appeared surprised at the extent of the reserve requested, on 13 January 1852 he noted in his journal that Hau [Te Au] and Matewai agreed with him on the boundaries of the reserve (E2:25).{FNREF|0-86472-060-2|10.4.9|32} This was confirmed by Hoani Paororo, who told the Smith-Nairn commission that their reserve was agreed to as requested:

There was no difference between Mantell and Te Au about Oraka. The reserve there was marked off as Te Au wished it. It was Te Au who asked for a reserve and Mantell at once assented. (E2:347){FNREF|0-86472-060-2|10.4.9|33}

No complaint was made about this reserve by Ngai Tahu.

Kawakaputaputa reserve (no 6)

10.4.10 This was a coastal reserve of 977 acres bordering on Foveaux Strait between Colac Bay and Te Waewae Bay.

On 9 January 1852 Mantell noted a discussion with George Maui, who sought a reserve at Te Awaroa rather than Kawakaputaputa. On 12 January when Te Au arrived, Mantell had a further discussion about reserves with Te Au and George Maui (E2:26). On 13 January Mantell recorded that:

After dinner spoke with George about Wakaputaputa reserve. He wishes it to extend to te Awaroa, about 6 miles off, which I tell him it is useless to demand, begging him to consider the matter till my return from Waiau. (E2:26){FNREF|0-86472-060-2|10.4.10|34}

On the following day Mantell recorded in his journal:

George came in to say that as I objected to it he had given up Awaroa, which he had wanted as a run for his 36 goats now there. He pointed out where he wished the lines to begin. (E2:27){FNREF|0-86472-060-2|10.4.10|35}

The claimants in their grievance no 4 complained that Mantell failed to set aside additional land requested at Kawakaputaputa. It is clear that George Maui did seek a more extensive area than Mantell provided. But Maui appears to have accepted Mantell's objection to the large area sought. He pointed out a lesser area of nearly 1000 acres which was duly reserved. This resulted in 32 acres being available to each of the 31 Ngai Tahu named in Mantell's census. This was insufficient for the future needs of the people. We uphold the claimants' grievance and find that Mantell should have acceded to George Maui's original request. Again, we have no evidence on which to quantify the shortfall.

Ouetoto reserve (no 7)

10.4.11 This reserve of 90 acres lies a little to the west of the Kawakaputaputa reserve. We have little information about it. Mantell simply recorded that on 14 January 1852 he "Set out reserve no. 7" (E2:27).{FNREF|0-86472-060-2|10.4.11|36} The claimants made no grievance as to this reserve.

Reserves allegedly requested and not awarded

10.4.12 We now discuss the remaining claims in the claimants' grievance no 4 concerning land not set aside at Waimatuku, Rarotoka Island, 300 acres on the Waiau River and the waterfall at Te Aunui on the Maitara River.

Waimatuku

10.4.13 This grievance concerns an area of some 200 acres. According to Horomona Patu, in evidence to the Smith-Nairn commission, Ngai Tahu requested a reserve at Waimatuku on the coast near Aparima. Patu told the commission:

The natives pointed out the boundaries they wanted [from Okuera to Otemakirikiri]. Mr Mantell took a note of it in his book, but he did not mark it off.

Did he agree to make the reserve there? -Yes.

Did he go round the boundaries? -No. (E2:98){FNREF|0-86472-060-2|10.4.13|37}

Patu went on to note that Mantell had promised to mark off this reserve of approximately 200 acres on his return from Waiau, but he "did not keep his promise" (E2:99).{FNREF|0-86472-060-2|10.4.13|38}

In later evidence by Patu the topic was again raised:

Did you see Mr Mantell when he came back? -Yes, I saw him when he returned from Waiau. Mr Mantell asked -"Where is Matiaha?...I thought that Matiaha was here, so that we might all go and mark off the boundaries."...

You are quite sure he meant the reserve at Waimatuku? -Yes, I am quite sure it was Waimatuku he was referring to. We have been speaking about that land ever since. (E2:121-122){FNREF|0-86472-060-2|10.4.13|39}

Although Mantell waited several hours for Matiaha Tiramorehu he did not come and Mantell resumed his journey (E2:123).{FNREF|0-86472-060-2|10.4.13|40} It appears that Tiramorehu later returned from his eel fishing and he set off after Mantell. He failed to catch him as Mantell had crossed the river on a ferry boat (E2:124).{FNREF|0-86472-060-2|10.4.13|41} Waimatuku was a Ngai Tahu kaika at the time the reserve there was requested. Patu said that when Kettle came to survey the reserves they "were all away mutton-birding" (E2:124).{FNREF|0-86472-060-2|10.4.13|42}

Mantell made no reference in his journal to a request for a reserve at Waimatuku. However, Horomona Patu's evidence has a convincing ring about it and we accept that, for whatever reason, Mantell failed to provide for a 200 acre reserve at Waimatuku as requested by the people there. The claimants' grievance is accordingly upheld.

Rarotoka Island

10.4.14 This island is situated some seven kilometres off Oraka Point. It is specifically named in the deed of purchase as being ceded by the owners and is shown on the deed map.

The principal evidence before the Smith-Nairn commission suggesting that Mantell was told Ngai Tahu did not wish to sell this island is that of Horomona Patu. According to Patu, Mantell, while at Oraka, looked over to Rarotoka and said:

"I must have that island." We replied to Mantell -"we will not let you have that island, and we shall not let you have that island." ... Mantell said "Let me have that island to place a powder magazine there, & to have a place for a prison." The natives said -"We will not let you have that island, Mantell, leave that for ourselves." (E2:102){FNREF|0-86472-060-2|10.4.14|43}

Evidence was also given to the Smith-Nairn commission by Thomas Pratt Haereroa as to:

the reason why the natives did not care letting the Island of Rarotonga go during the time Mantell was here. Several Maoris lived there for years before Mantell's time, and several of my ancestors, male and female, are buried there. Their bodies have never been removed. This shews to the Court that this was one reason why the natives did not care to let the island go. (E2:292){FNREF|0-86472-060-2|10.4.14|44}

Asked whether he had heard what was said to Mantell about it, the witness admitted that he had not. His statement was in the nature of opinion or hearsay evidence. But he was immediately followed by Horomona Patu who was recalled by the commission. Patu said Mantell was told:

"You shall not have that island; that island shall be kept by us; we cannot sell our graves or burial places." That is the reason why we claim this island up to the present time. The Govt. say that they bought this island off Te Au. I say that the island was never bought. Neither Mantell nor Te Au ever made any proclamation that the island had been bought. (E2:296){FNREF|0-86472-060-2|10.4.14|45}

Curiously, although Te Au gave evidence before the Smith-Nairn commission he made no reference to any refusal on the part of Ngai Tahu to sell Rarotoka and was not questioned on the matter.

The only other Ngai Tahu witness to advert to Rarotoka before the Smith-Nairn commission was Hoani Takurua. He told the commission that:

While there [at Kawakaputaputa] Mantell looked at Rarotonga. Mantell pointed to the island and said "That island must be given to me". Te Au and others replied -"That land will not be given to you; we shall keep it". Mantell said -"You must give it to me for a magazine or a store for powder and guns, and a place for prisoners to be kept". The Chiefs refused again and said they wished to keep the land for themselves and their children. Neither ceded the point. Mantell held to his, & the Maoris held to theirs. For this reason we say that the island of Rarotonga is still ours and that it is not gone. This took place at Ngawahakaputaputa. (E2:326-327){FNREF|0-86472-060-2|10.4.14|46}

In the Mantell papers held at the Alexander Turnbull Library is a memorandum by Mantell dated 1860 concerning the island:

Te Au, Oraka, Aug 5 1860 offers Rarotoka for œ500 rec'd Oct 9. Rarotoka was included in the lands ceded by the Murihiku Deed but contrary to the repeated protest of Te Au-the understanding courteously arrived at being that during his lifetime it should be only subject to military occupation if required-he having for that period all civil use of it. (J2:34){FNREF|0-86472-060-2|10.4.14|47}

If Mantell recorded this arrangement it has not been found. Mantell here acknowledged that Rarotoka was included in the deed of purchase despite repeated protest by Te Au. He appears to have suggested that Te Au eventually accepted a right of occupancy for his life only, subject to any military requirements of the government.

10.4.15 Rarotoka was an island of considerable strategic importance to Ngai Tahu. Not too many years previously it had been a populous refuge. Moreover, as Horomona Patu made clear in his evidence, Ngai Tahu were anxious to reclaim it because it was wahi tapu: there were many graves of Ngai Tahu on the island. The fact that Te Au in 1860 offered Rarotoka for sale indicates that he considered it was still in Ngai Tahu ownership. On the other hand Rarotoka is expressly named in the deed of purchase as passing to the Crown. While the tribunal accepts that it did pass to the Crown in this way we consider this was against Ngai Tahu's wishes and that it

should have been set aside as a reserve for Ngai Tahu. It is clear they sought to retain ownership and Mantell's note makes it clear that Te Au made repeated requests for the retention of the island. Accordingly the grievance is sustained.

Three hundred acres on the Waiau River

10.4.16 After laying out the Ouetoto reserve (no 7) on 13 January 1852, Mantell proceeded westwards to the Waiau River. The following afternoon he embarked in a small moki accompanied by John Matewai, leaving behind Te Au and Irai. Mantell remarked that no one crossed the Waiau except on business. Because of the fragility of the moki and the presence of innumerable snags the crossing was a risky one. On reaching the western side they found a group of grass huts with no inhabitants. After an hour's search Matewai returned to the kaika with two elderly women, "Heko and Popokore and a fine little boy - the entire native population of Waiau" (E2:29). {FNREF|0-86472-060-2|10.4.16|48} Heko was the mother of Te Au and Matewai. Mantell recorded:

These poor old women will not be induced to leave the valley, but today they consented at the urgent request of their relations to move to the east side of the river. I have therefore promised them about five acres at Tumutu for their huts and garden during their lives for their occupation only. (E2:29){FNREF|0-86472-060-2|10.4.16|49}

Mantell noted in his journal for the following day, 16 January, making a four acre life reserve opposite Tumutu for Heko and Popokore. Perhaps because it was a reserve for life only he did not record it on the deed of purchase or the deed map.

In evidence to the Smith-Nairn commission Horomona Patu claimed that Ngai Tahu asked for 300 acres at Waiau, although he admitted he was not present and other people told him there was a reserve there (E2:111). {FNREF|0-86472-060-2|10.4.16|50} However, also in evidence before the commission, Hoani Paororo substantially confirmed Mantell's account:

When Mantell went to Tumutu he found two old women there. Mantell pointed out ten acres which these old women were to occupy during their lives, and after their death it was to return to the Government. The Maoris say that the land was permanently reserved, but what I heard Mantell say was what I have told you. (E2:348){FNREF|0-86472-060-2|10.4.16|51}

We find that there is no reliable evidence to substantiate the claimants' grievance that a reserve of 300 acres at Waiau was either requested or refused. The grievance is not sustained.

A block at Opuaki

10.4.17 Horomona Patu told the Smith-Nairn commission that after Mantell set aside the reserve at Aparima they told him:

"that this piece of ground is small, you have [not] taken where we wished the boundary to be, our cattle cannot live on that reserve that you have reserved for us".

Mr Mantell said "If your cattle increase, if I am away apply to Mr Strode for a piece of land to run your cattle on... The natives said this -"let the land that is to be given to us be at Opuaki in the event of our cattle increasing."... Mantell said, -"It is all right your desiring that, but Opuaki is in my hands; I shall hold it in my hands." We agreed. (E2:125-126){FNREF|0-86472-060-2|10.4.17|52}

Although the cattle numbers at Aparima did increase the people sold the extra animals rather than make application to Chetham-Strode. According to Patu, this was because Mantell's promises were not believed (E2:127). {FNREF|0-86472-060-2|10.4.17|53}

It is clear that Mantell declined to grant the land requested at Opuaki, which Patu said was about six miles inland from Aparima. The claimants' grievance is sustained.

A waterfall at Te Aunui on the Mataura River

10.4.18 This grievance appears to rest on the following evidence of Matiaha Tiramorehu before the Smith-Nairn commission:

I want to speak with reference to the waterfall at Mataura. I want the Govt to give it back.

Why? What is your reason for wanting the Govt to return it? Do you mean as a gift, or have you any special reason why the Govt should give it back? -Because I think the £10 was not sufficient for my claims. The fall is called Te Aunui; it is on the Mataura. The reason why I did not mention Te Aunui was because somebody else held it then. The Ngaitahu killed the people who first held it, and that was the reason I did not put in my claim. It had passed by right of conquest. (E2:192-193){FNREF|0-86472-060-2|10.4.18|54}

Tiramorehu appears to be making his claim for the return of Te Aunui waterfall for the first time 28 years after the purchase. It is apparent he made no claim at the time. The Crown cannot be held to have failed to set it aside at the time of the purchase as alleged by the claimants. This grievance is accordingly not substantiated.

Summary of findings on grievance no 4

10.4.19 The claims that the Crown failed to set aside the following lands for the use of Ngai Tahu after the sale are sustained:

- additional land at Aparima to that which Mantell allowed (10.4.8);
- additional land at Kawakaputaputa to that which Mantell allowed (10.4.10);
- a block of 200 acres at Waimatuku (10.4.13);
- Rarotoka Island (10.4.14); and
- a block at Opuaki (10.4.17).

The remaining claims in grievance no 4 are not sustained.

Our findings in relation to the Treaty of Waitangi on the grievances upheld are deferred until we have considered grievance no 8, to which they are closely related.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.5 The Purchase

10.5. The Purchase

The purchase is delayed

10.5.1 After laying out the reserves and making a trip to Ruapuke, Mantell returned to Dunedin. As Professor Ward put it, Mantell clearly regarded the various meetings in the summer of 1851 and 1852 as settling the issue-certainly as it applied to the major concerns of the sale-although he was yet to reveal the price (T1:224-225).

On 19 February 1852 Mantell formally reported to the colonial secretary, Domett, the completion of his overland journey and the setting aside of eight reserves (including the Tumutu life reserve). He asked for the surveyor Kettle to be made available urgently as he wished to have maps of the reserves available for delivery to the chiefs by 24 May 1852, "the day fixed for a final general meeting at Otago to settle all disputes prior to the distribution of the final instalment" (A8:I:273){FNREF|0-86472-060-2|10.5.1|55} He indicated that after the 24 May meeting he intended to go south to distribute the first instalment of œ1000. He wished to travel there by sea, taking with him those chiefs living at Dunedin who should be there. Domett authorised Kettle's engagement but made no arrangements about the purchase money. The May meeting, which was fixed to coincide with the closure of the titi season, took place, but with no response from the government, the Murihiku people returned south still hoping Mantell would bring the payment to them. Eventually they dispersed (T1:225). On 21 June Mantell wrote to Domett suggesting further arrangements for completing the purchase in August:

As indicated in my letter of the 19th February I have awarded the sum of œ2000 to be paid for the district: this I have deferred communicating to the natives in order that I might do so in full assembly. The land in the meantime is regarded by them as ceded, the price to be fixed by me. (O13:66){FNREF|0-86472-060-2|10.5.1|56}

10.5.2 For more than a year there was no action on the part of the government in providing the funds to enable Mantell to complete the purchase. Domett did not explain the reasons for the delay until after the sale was effected. In a letter of 7 November 1853 he advised Mantell that:

- about six years previously some of the principal chiefs of the district had agreed with the governor to sell the land now sold on certain terms when it might be required;

- those terms were nearly the same as they had since agreed on in the deed of purchase;

- within the last 12 months Patuki and Taiaroa, on a visit to Wellington, had confirmed the earlier agreement; and

- given the agreement, there appeared to Grey no need to hurry the completion of the purchase, especially as at the time the government found it very difficult to find funds for more urgent purchases of land elsewhere. (A8:I:283){FNREF|0-86472-060-2|10.5.2|57}

10.5.3 Mantell heard nothing further from the government for over a year. By August 1853 he had become seriously concerned that Ngai Tahu would withdraw from their agreement to cede the land. Tired of waiting for government initiatives, 30 or 40 European families were placing increasing pressure on Ngai Tahu to sell them land directly, despite the Native Land Purchase Ordinance which was intended to prevent such purchases. In particular, Mantell began to fear he would be unable to settle for œ2000 (E2:37a){FNREF|0-86472-060-2|10.5.3|58}

The deed of purchase is signed

10.5.4 In August 1853 Mantell decided to act on his own initiative. He was still without funds from the government. Although lacking authority from Wellington he drew œ500 from the land fund, (which held profits from the sale of Crown lands within the Kemp and Otakou blocks), for which he was responsible, and he borrowed œ500 on the security of his own property. Finding that many of the principal claimants to the block from both Otakou and Murihiku were in or near Otago, Mantell arranged for them to assemble on 17 August 1853 to settle the sale. After what he described as "a long and anxious debate" some 58 Ngai Tahu chiefs signed or had their names recorded on the deed of purchase that day. These included a substantial number from the Foveaux Strait area to the south and south-west. Of the five chiefs identified by Mantell as representing those with the major rights to the block, Taiaroa, Karetai, and Paitu signed the deed. The remaining two, Te Au and Topi Patuki, were present and had their names recorded on the deed. Of these, all but Taiaroa and Karetai were from the south and south-west, while according to Mantell's map prepared in consultation with Patuki, Taiaroa had interests in Fiordland on the west coast as well as in the east. Other chiefs having an interest in Fiordland, namely Potiki, Akaripa Pohau and Irai Tihau also signed or were named on the deed.

10.5.5 Although the purchase price nominated in the deed was œ2000, Mantell explained to Domett in a letter of 18 August 1853, that the Ngai Tahu chiefs only agreed to this on the basis that he would urge the governor, particularly having regard to the long delay, to pay an additional œ600, one half of this would be distributed at Otago and the other half at the Bluff (E2:37(b) & (c)).{FNREF|0-86472-060-2|10.5.5|59} The governor agreed to this. The deed itself provided for the œ2000 to be paid in two equal instalments at Otakou and Awarua (the Bluff). The first instalment was paid at Koputai (Port Chalmers) on 3 October 1853, but it was not until 15 February 1854 that the remaining œ1000 was available and distributed at Awarua. The additional payments of œ300 each were not made until 4 and 25 November of the same year (E2:37(f)-(h)).{FNREF|0-86472-060-2|10.5.5|60} Mantell went to considerable pains to ensure that each claimant received a share of the payment. In some cases this was no more than a few pounds, or even less, and there were later complaints that others were not paid at all.

The deed and map

10.5.6 The deed states that the chiefs and people of all the lands within the boundaries described in the deed, and more particularly in the accompanying map, entirely give up those lands to the Crown forever. In return, they were to be paid œ2000 by two instalments of œ1000, as we have earlier indicated. The boundaries of the deed were described as:

Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotahi,) haere atu i reira ki Kaihiku, a i, reira, haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe, me nga Turanga me nga Turanga. me nga awa me nga roto, me nga ngahere, me nga Pakihi, me nga aha noa katoa kiroto ki aua wahi me aua mea katoa e takoto ana; Otira kei te pukapuka ruri kua oti te whakapiri, ki tenei pukapuka te tino tikanga me te tino ahua...(see appendix 2.5)

Which was later translated by Alexander Mackay as:

The boundary commences at Milford Haven (the name given to that place in Mr. Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the land within these boundaries, with the anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. A more accurate description and representation of the land is given in the plan hereunto annexed. (E2:37(g)) {FNREF|0-86472-060-2|10.5.6|61 }

The claimants, in support of their claim that the deed lacked clarity in its description of the boundaries, tendered in evidence a new translation of the Murihiku deed, in which the boundaries of the land alienated are described as follows:

The boundary commences at Piopiotahi (the name given to that place in Kemp's deed of sale is Whakatipu Waitai however the Maori name is Piopiotahi) from there it goes on to Kaihiku then from there to Tokata closely following the old boundaries of Kemp and Symonds to the sea of Piopiotahi then on to Tokata yonder to Tauraka, Rarotoka and Motupiu and all the islands which lie close to shore (but not the Ruapuke group)... (R39:3-4)

We note that the Mackay translation has stood unchallenged for over one hundred years until 1989. The essential difference between the two translations of the description of the boundaries is that the earlier translation, after reference to "Kemp and Symonds", says "and by the coast from Milford Haven round to Tokata..." where as the new translation says "to the sea of Piopiotahi then on to Tokata yonder..."

10.5.7 Those members of the tribunal qualified to do so have considered the two translations and have no hesitation in finding that the older Mackay translation of the disputed passage is correct. The words "ma te moana" mean "by the sea", and while "coast" is, in the context, an acceptable substitute for "sea", the most accurate translation would read "and by the sea from Milford Haven round to Tokata". The tribunal considers that the deed provided a clear, if concise, description of the boundaries which would have made it plain to all Ngai Tahu who heard the deed read out that the land extended from Piopiotahi (Milford Haven) on the west coast, across to Kaihiku and on to Tokata (the Nuggets) on the east coast; and the whole way around the coastline from Piopiotahi to Tokata, including Tauraka, Rarotoka, Motupiu and all the islands lying adjacent to the shore, except the Ruapuke group.

10.5.8 The deed map was also criticised by the claimants on the ground that there is no Green Island in the place indicated on the map. This is a valid criticism. As we have seen, the deed itself refers to "...Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (except the Ruapuke group)". But it makes no reference to Green Island. The map correctly identifies Rarotoka and Motupiu islands, but does not show Tauraka. Presumably the Green Island shown on the map was intended to be Tauraka. In Mantell's 1852 sketch map Tauraka is shown at the mouth of the Waitutu River, which drains Lake Poteriteri about 60 kilometres west of the Waiau river mouth (J4:76). {FNREF|0-86472-060-2|10.5.8|62}

Further enquiries made from the literature reveal references to both Green Island (or Islets) and Tauraka:

- Herries Beattie, *The Maoris of Fiordland*, (Dunedin, 1949), has in chapter IV a list of place names between Waiau and Preservation Inlet. The Green Islets are described as being between Cavendish and Wilson Rivers (p 20).
- W H Sherwood Roberts, *Place Names and Early History of Otago and Southland*, (Invercargill 1913), says "Windsor Point was Tauraka" (p 99). No source for this statement is given.

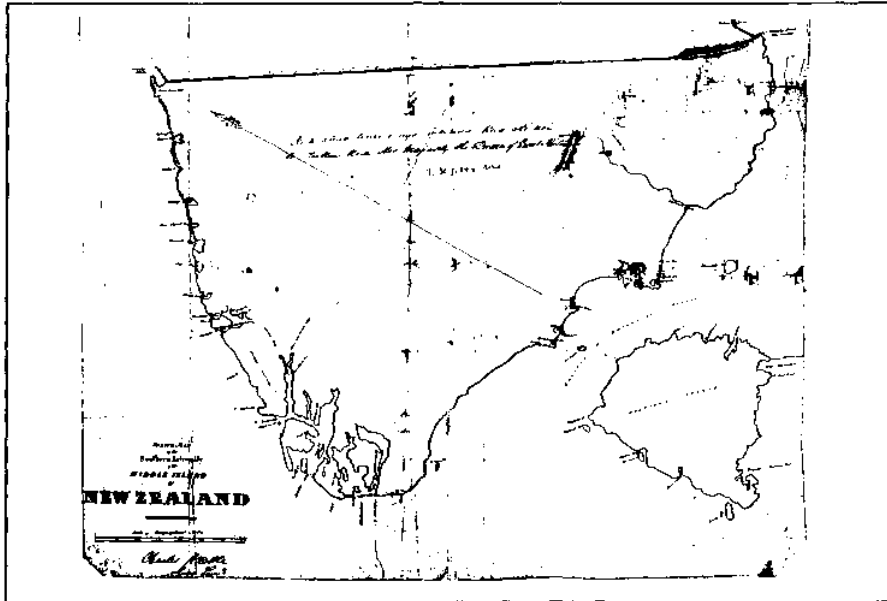


Figure 10.5: The Murihiku purchase deed map as drawn up by Charles Kettle. The coast line is heavily coloured blue in the original and the reserves are marked in yellow. The Waiata River is not marked and the place mentioned in the deed as Tauraka is on the map as Green Island. Courtesy of DOSLI, Wellington.

Windsor Point (previously Tauraka) was shown on a large map, in evidence before us (O40), as being near the south-west corner of the South Island, not far removed from the Green Island shown on the deed map. It seems highly likely, therefore, that the island described as Green Island was intended by Kettle, the map draughtsman, to be Tauraka. If so, he appears to have erred in describing it as an island, if in fact it was a point or headland. While to modern readers and viewers the reference to Tauraka may serve only to confuse, it is very likely from Mantell's identification of Tauraka on his 1852 sketch map that to Ngai Tahu, in 1853, the reference would have been perfectly familiar. It comes in the correct sequential order, preceding, as it should, the reference to Rarotoka, which is to its east, and Motupiu, which is further east. Even more convincing is the information recorded on a map made by Edward Halswell and dated 1842. The map was prepared from information provided by Ngai Tahu informants, and has already been reproduced as part of this report (figure 3.2

While Milford Haven, not Piopiotahi, is marked on the deed map, the deed itself expressly refers to Piopiotahi. This should have clearly indicated to Ngai Tahu signatories that the purchase extended right across to the west coast. Topi Patuki, while unclear about a number of matters, stated that he signed the deed at Port Chalmers (E2:73){FNREF|0-86472-060-2|10.5.9|63} and, asked whether it was read over before he signed it, replied -"Yes, it was read over before I signed it" (E2:75).{FNREF|0-86472-060-2|10.5.9|64} We will return to Patuki's evidence shortly.

It should also be noted that the deed map shows the seven reserves marked off by Mantell, except for number 3 at Oue, which either flaked off the original at an early or was not recorded and hence is not now shown on photocopies. (See P18:appendix A).

Who signed the deed?

10.5.10 Mr Temm, echoing in part at least observations by Mr McAloon, said in paragraphs 4-8 of his reply (Y1:92-94):

4. The Deed was signed once only-at Port Chalmers. It was sent off to Domett on the same day (E.2; p.1). Money was paid over at Port Chalmers in October 1853, at Awarua in February 1854 and in Dunedin on 2 occasions-on 4 November 1854 and 3 weeks later on 25 November. At none of these places was the Deed read out. It had been sent off to Domett on the very day it was signed at Port Chalmers.

5. The main point made by the claimants has not been adequately dealt with by the Crown. That is that the people living near Waiau, in the western part of Southland did not participate in the signing of the Deed and therefore did not hear it read out. The Crown's response to this point is as follows:

"..It has been suggested that the Deed was read out near Port Chalmers and no where else and that Mantell spoke one way at that time and a different way at Awarua. But it is for the claimants to prove this allegation; they have produced only unsupported speculations."

Again this is not correct.

6 Horomona Patu was the paramount chief in the western part of Murihiku and he certainly did not sign the Deed, nor did any of his people. The Smith-Nairn Commission received a letter from 17 of the chiefs of Ngai Tahu at Aparima written on 8 March 1880 urging the Commission to come down to Riverton so that their evidence could be taken (J.4; p.115). The writers of the letter point out that there were 80 or more in their community and that they were not at all clear about the sale "of this side of Murihiku".

7. On 25 March 1880 Horomona Patu gave evidence and said:

"...The people here south knew nothing of the sale of Wakefield, and as regards the selling of Murihiku Block it was not the people of Murihiku who sold it but the people of Otago..." (J.4:p.145)

It is clear from reading his evidence that when Mantell went down to Aparima the year before the sale as part of his negotiations he was obviously concerned only with identifying what reserves should be laid off. At that stage he did [not] disclose what he was prepared to pay and no price was discussed with Horomona Patu or his people near the Waiau River.

8. The fact that the Deed was signed at [Port] Chalmers and thereafter sent off to Domett is clear evidence that it was not taken about and read out to any of the others when the money was paid out in October 1853 and during 1854. It seems an inevitable conclusion to draw from the evidence that Mantell went to Aparima to lay off reserves but never returned there. It is clear that he did not disclose what price he would pay until the final discussions at Port Chalmers in October 1853 and the point made by the claimants is that he failed to get the agreement of all the principal chiefs of Murihiku. In particular he failed to get the agreement of those who were most affected by the sale of Fiordland, viz. those who were living near the Waiau River, at Colac Bay and at Aparima-those who had "the biggest interest" of whom Tiramorehu had spoken when he was asked about the boundaries of Murihiku during Mantell's first round of negotiations.

10.5.11 After these submissions had been made, Mr Evison, one of the claimants' historians, had the opportunity of closely examining the original deed. From this he concluded that the vast majority, 41 out of 58, of those named on the deed, did not actually sign the deed itself, but had their names recorded (Z41). The receipt for the first payment made at Koputai, on 3 October 1853, was written on the back of the deed and was signed by 39 Maori. The Awarua receipt of 15 February 1854 was also signed by all those named. However, Mr Evison suggested that Paitu was the only chief from Murihiku who signed the deed. Since Mantell had this receipt signed on a separate sheet, rather than continue using the back of the deed, Mr Evison argued it was likely that the deed was not taken to Awarua. From all this, Mr Evison concluded that, apart from Paitu, none of the signatories from Murihiku actually signed a document specifying what land, if any, was being conveyed to the Crown. As a result it is possible, he suggested, to argue that the Murihiku people were confused about the sale, and any doubt they may have had about the area of the block would not have been resolved.

Mr Temm erred in claiming that the deed was sent off to Domett on the day it was signed, as Mr Evison's later comments demonstrated. In fact Mantell sent a copy only to Domett that day (E2:37(b)). {FNREF|0-86472-060-2|10.5.11|65} The following year, by letter dated 12 May 1854, he enclosed "the ORIGINAL DEED OF PURCHASE of the Murihiku Block, with the receipts for the first two instalments of œ1,000"(E2:37(d)) {FNREF|0-86472-060-2|10.5.11|66} (emphasis added). The second instalment was paid at Awarua on 15 February 1854 (E2:37(g)). {FNREF|0-86472-060-2|10.5.11|67} Thus Mr Temm's claim that on no occasion after its signing on 17 August 1853 was the deed read out, cannot be sustained. Since the deed was used for the first receipt, it is likely that it was read out when the first payment was made. While Mr Evison suggested that it was not taken to Awarua in February 1854, because a separate receipt was on that occasion drawn up, this is not conclusive.

Mr Temm's main point was that the people living near Waiau in the western part of Southland did not participate in the signing of the deed and therefore did not hear it

read out. He said that Horomona Patu, whom he claimed to have been a paramount chief in the western part of Murihiku, did not sign the deed nor did any of his people. It is true that Patu did not sign the deed, but whether he was the "paramount chief in the western part of Murihiku" has not been established. The claimants' historian, Mr McAloon, claimed that Patuki had the paramount mana in Murihiku. It is certainly not correct that none from this part of Murihiku (referred to in his paragraph 8 as those living near the Waiau River at Colac Bay (Oraka) and at Aparima) signed the deed. The only chief named by the claimants as not having signed is Horomona Patu. No reference was made to the list of claimants in evidence prepared by Mantell in association with, and no doubt at the direction of, Patuki (O13:84-85). {FNREF|0-86472-060-2|10.5.11|68} Out of 59 names on the deed, 41 have been identified. Of the 41, 15 were from Otakou and the remainder-26 in number-were from Murihiku. In his list Mantell names the claimants from various localities. The numbers shown are as follows, with the number from each locality whose names appear on the deed shown in brackets.

Oue 3 (1-Huruhuru)

Aparima 13 (5-Paororo, Matiaha Kukeke, Haimona Pakipaki, Makaia, Akaripa Pohau.

Note: Horomona Pukuheti [Patu] is included in Mantell's list of claimants, but he was not a signatory and is therefore not one of the 5)

Oraka 8 (4-Tiare Te Au, Takurua, Pirihiira and Ratamira Te Hau)

Ruapuke 19 (10-John Patuki, John Karako, Ihaia Whaitiri, Tiare Hape, Horomona Mauhe, Wiremu Rehua, Matene Manaia, Teoti Rauparaha, Wi Rehu and Maraitaia)

Rakiura 8 (1-Paitu)

Kawakaputaputa 7 (none)

Including one from Rakiura, there are 21 chiefs from west and south of Otakou. To this number must be added a further five whose names appear on the census compiled by Mantell (O13:22-24), as follows:

Oue 1 (Te Marama)

Aparima 1 (Paororo)

Ruapuke 3 (Manihera Tutaki, Tipene Pepe and Riwai Piharo)

This brings the total of identified participants to the deed from Murihiku to twenty-six. Horomona Patu was not listed as a principal chief by Mantell. The principal men

according to Mantell's list were Huruhuru, Te Au, Topi Patuki and Paitu, all of whom are named on the deed.

10.5.12 Although, as Mr Evison pointed out, the deed was only signed by a minority of those involved, it has never been suggested that the chiefs named did not give their consent. The question remains, since they did not sign the deed, did they understand the boundaries mentioned in the deed and on the deed map? Given the circumstances, it can only be concluded that they did understand these. Topi Patuki commented to the Smith-Nairn commission that, "The document was read out and then my name was written"(J4:2). {FNREF|0-86472-060-2|10.5.12|69} If the deed was read out then the boundaries would have been clear to all those present. Although, as Mr Evison also pointed out, the receipts did not specify the nature of the land sold, the payments were the subject of much debate and the amounts made over determined on the basis of rights openly discussed and recorded by Mantell in his charts and rights table.

In the light of what actually happened, it appears difficult to sustain the claimants' allegation for which they cite Horomona Patu that:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it, but the people of Otago... (J4:145){FNREF|0-86472-060-2|10.5.12|70}

In fact, the evidence clearly shows, that all the leading Murihiku chiefs consented, as did an appreciable number of lesser rank from Murihiku. It is not correct to say that it was only the people of Otago who sold the land. They appear to have been a minority of those involved.

According to Mantell's charts and rights table, the area of the west coast owned by those from Foveaux Strait only extended to Dusky Sound. The area from Dusky Sound to Milford was owned by chiefs from Otakou. To this extent it would seem the Otakou chiefs did sell a large portion of Fiordland and since no significant evidence was given to the tribunal to suggest otherwise we can only conclude that it was theirs to sell.

Grievances nos 7 and 10

10.5.13 It is appropriate at this point to consider two further grievances of the claimants, grievance no 7, that:

The Crown failed to conduct the negotiations so that all the terms and conditions were known and accepted by each of the communities in Murihiku.

and grievance no 10, that:

The Crown acted in breach of its duty of good faith by not disclosing to the Ngai Tahu at Awarua and elsewhere what the price would be until after the deed had been signed at Port Chalmers. (W6)

In considering these grievances the following circumstances are relevant:

- Soon after arriving in Otakou Mantell, on 18 November 1851, had a preliminary conference with Patuki, Te Au, Karetai, Taiaroa and "many other chiefs". Those present expressed their wish to cede the land to the government. The map prepared by Mantell during or following the discussions demonstrates that the names of chiefs having an interest in various parts of the block, including Fiordland and the west coast, were identified. This map appears to indicate the extent of the land the Ngai Tahu chiefs were prepared to cede.

- On 22 December 1851 at least 60 Ngai Tahu were present at a hui held at Huruhuru's boathouse at Oue to discuss the purchase with Mantell. Among those present were Patuki, Te Au, Paitu, Huruhuru and Horomona Patu. According to Takurua in 1880, the chiefs agreed to sell, but he did not say what land he understood was being bought by Mantell. Others, as we will soon relate, told the Smith-Nairn commission that Mantell was informed at Oue that the western boundary would be the Waiiau River. It is clear that Mantell declined at that time to name the price the Crown was prepared to pay. This was not disclosed until much later. Following this hui Mantell spent the next six weeks visiting various kaika and laying off the reserves. Again we have no contemporary evidence of what he discussed. It is, however, difficult to believe that the purchase was not the subject of discussion and debate.

- Mantell arranged for a final meeting at Otago on 24 May 1852 to, as he put it, "settle all disputes prior to distribution of the first instalment". Although the meeting took place, nothing was concluded as Mantell had received no advice that the purchase money would be made available. We have no information as to what discussions took place during this meeting. It appears that Mantell again refrained from naming a price. On 21 June he wrote to Domett, advising that he had awarded œ2000 for the district, but had deferred informing Ngai Tahu of this so that he might do so "in full assembly". But, he added, "the land in the meantime is regarded by them as ceded, the price to be fixed by me".

- On 17 August 1853 Mantell met with many of the principal owners from both Otakou and Murihiku at Port Chalmers. After "a long and anxious debate" some 58 Ngai Tahu chiefs accepted Mantell's terms. We know from Patuki that the deed was read out before his name was written out. Among those also named, as we have seen, were a substantial number, including all the principal chiefs, from the Foveaux Strait area to the south and south-west. It is apparent there was a debate over the purchase price which led to an understanding that, while œ2000 would be named in the deed, Mantell would strongly urge the governor to agree to pay an additional œ600. This the governor agreed to, and œ2600 was duly paid.

- We have no contemporary record of what was said when the first instalment of œ1000 was paid out at Port Chalmers on 3 October 1853, or when the second œ1000 instalment was paid over at Awarua on 15 February 1854. While Mantell still had the original deed of purchase in his possession, we do not know whether it was read out or again referred to at either of these meetings. No doubt news had travelled fast from the August 1853 meeting when the deed was signed, as to what had been done.

Finding as to grievance nos 7 and 10

10.5.14 While it is apparent that not every chief was present at the signing of the deed, it is evident that all the leading chiefs were, along with many others, including a substantial number from or having interest in the south and south-west, including areas west of the Waiau. Many were at Port Chalmers when the terms of the purchase, including the price, were debated at length before the deed was signed. As a result of these discussions, Mantell was obliged to endeavour to obtain the agreement of the governor to pay œ2600. In this he was successful. In all the circumstances we are not able to sustain the claimants' grievances no 7 and no 10.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.6 Land West of the Waiau River

10.6. Land West of the Waiau River

10.6.1 The claimants, in their grievance no 6, said that the land west of the Waiau was wrongfully included in the sale. This area covers the largely mountainous region familiarly known as southern Fiordland, and includes Lakes Manapouri and Te Anau. As this grievance was a central issue in the claim we propose to deal with the evidence in some detail. Before doing so, however, we record a submission by the Crown on the relative infrequency with which this grievance has been raised with the Crown over the past 136 years.

Silence as to the western boundaries

10.6.2 The Crown, in closing, claimed that prior to the Smith-Nairn commission, the Fiordland question was not raised with the Crown and from that time until now-over 100 years-it again seems not to have been raised in any approach to the Crown. That fact, the Crown claimed, speaks for itself (X2:64). The Ward report put the matter more fully and perhaps in better perspective, as follows:

Whereas in the Kemp purchase a continuous line of protest, and the survival of more contemporary material has allowed us to establish firm links between the Maori view of the transaction in 1879-80 and the events of 1848, for Murihiku we are forced to rely almost entirely on the records of the Smith-Nairn Commission. Many of the concerns about reserves and the provision of schools and hospitals had been raised prior to 1879, however the suggestion that the Maori understanding of the boundaries of the Murihiku block differed greatly from that in the deed is recorded almost exclusively in the evidence of that Commission. An 1863 letter from the Superintendent of Southland, J.A.R. Menzies, shows that Ngai Tahu were concerned about the boundaries of the purchase, but is unspecific about the nature of their complaint (Q3:6). There are also the much later statements of two Ngai Tahu kaumatua, Poko Cameron and Thomas Spencer, that Fiordland was to be reserved, or that it had not been included in the sale (J2:54-8; J4:22, 23a). Only Spencer provided a specific boundary, 'Te Wae Wae to Milford Sound'. (T1:231)

It is apparent from the claimants' evidence that the Smith-Nairn testimony was the principal basis for their claim that Ngai Tahu did not intend to sell the land beyond the Waiau.

Smith-Nairn evidence 1879-1880

10.6.3 Mr McAloon presented evidence which he believed showed that the Murihiku purchase was understood by Ngai Tahu to extend only so far west as the Waiau River.

He based this belief particularly on the evidence of Topi Patuki, Horomona Patu, Horomona Pohio, Matiaha Tiramorehu and Wiremu Potiki. Mr McAloon claimed that these five Ngai Tahu stated that the Waiau was the boundary (E1 and E22). In later evidence Mr McAloon indicated that whereas Patuki, Patu and Pohio all explicitly gave the boundaries of the land that was offered to the Crown as "Kaihiku to Hokanui and then to Waiau", Tiramorehu and Potiki did not. He stressed however, that the importance of Tiramorehu's evidence is that the traditional boundary of Murihiku was the Waiau River (J2:48). Mr McAloon had certain parts of their evidence retranslated and submitted these in evidence (J4:1-6).

In fact, neither Potiki nor Tiramorehu were definite about the boundaries-see Potiki:

I was not clear about the boundary of the land which was bought by Mantell. (J4:5)

And see Tiramorehu:

I do not know about the boundaries. It is for other men to speak of the boundaries, the people with a big interest. I did not think about the boundaries. (J4:4)

Initially Mr McAloon claimed that five Ngai Tahu said the boundary was at the Waiau. Of nine others, six who were eye-witnesses made no comment, and three who were not also made no comment. These three are said to have included Karetai, who was a signatory to the deed. Following Mr McAloon's later evidence we are left with three only out of eleven claiming the boundary went only to the Waiau. The others were either vague or silent on the western boundary. We think it surprising that so few appeared to be aware of such an important matter if it was indeed the fact that the boundary did not, as the deed and deed map show, extend right across to the west coast.

We would observe that a careful reading of the Ngai Tahu evidence to the Smith-Nairn commission reveals a considerable number of contradictions or inconsistencies. These are no doubt the result of the witnesses attempting to recall events which occurred up to 29 years earlier. We find it difficult to know what evidence can be regarded as reliable when significant parts appear not to be.

It must also be remembered that whereas the Smith-Nairn commission heard from some Ngai Tahu witnesses, they did not hear from Mantell on the Murihiku purchase. The evidence accordingly lacks any statement from one of the principal protagonists. It must, we suggest, for this reason also be viewed with some caution.

Topi Patuki

10.6.4 The following points are from Patuki's evidence to the commission (E2:60-67). {FNREF|0-86472-060-2|10.6.4|71}

- He recollected Mantell coming down to the south in 1852 and accompanying Mantell on his journey west. In fact this occurred in 1851.

- He could not recollect whether Mantell met with any people at Dunedin and talked about the sale of the land before travelling across towards Murihiku with Patuki. We

note that this was the preliminary conference at which Mantell recorded Patuki and many other chiefs being present and agreeing to cede the land.

- Patuki described a meeting at Oue at which he, Te Au, Paitu, Huruhuru, Horomona Patu and other chiefs, and the majority of the people living there, were present. Mantell told them he came to buy their land and the Ngai Tahu asked about the price. Mantell spoke about schools and hospitals.

- Patuki said that "He [Mantell] described the boundaries as extending from Kaihiku, Hokanui & Waiau". This was retranslated (J4:1) to read that "the land which was mentioned by Mantell began from Kaihiku to Hokanui and extended from there to Waiau". The difference between these two versions does not appear to us to be material. In both versions Patuki, shortly after, said it was Ngai Tahu who mentioned the boundaries. In both versions Mantell was described as saying the land was too little and he would be satisfied if all the land were given to him. That was all that was said by Patuki to have passed on the question.

- Patuki recollected Mantell coming to Awarua in 1853.

We now set out an extensive quotation from Patuki's evidence concerning this visit by Mantell to Awarua:

Was there any conversation then about the land? -The natives asked Mantell questions.

What questions did they ask him? -They asked Mantell "How much money have you brought to pay for the land; what money have you brought wherewith to pay for the land?" Mantell said "I have brought one thousand pounds." The natives assented to Mr. Mantell's terms, because he mentioned hospitals & schools. They yielded to Mr. Mantell because he spoke of hospitals and schools.

Do you mean to say that one thousand pounds was all the money Mantell paid for the land? -We thought that this thousand pounds was for the boundary from Kaihiku to the river Waiau.

Did you know nothing about Mantell paying more than one thousand pounds? -No; I did not. I did not know of anything more than one thousand pounds. I have no knowledge of any other payment.

Do you know of any other payment than that œ1000 at the Bluff? -No; I do not.

[Murihiku deed produced.]

Did you sign the Deed? -I signed the Deed, but not at Awarua. It was at Port Chalmers I signed the Deed.

Did you get any payment at Awarua? -Yes. (E2:71-73){FNREF|0-86472-060-2|10.6.4|72}

Patuki was confused here.

- He had been a party to the deed at Port Chalmers on 17 August 1853.
- The deed, which he heard read out, clearly stated that the purchase price was œ2000.
- Mantell did not go south to Awarua to pay out the œ1000 to the Murihiku people until 15 February 1854.
- Mantell had some months previously (3 October 1853) paid out the first œ1000 to the Otakou people at Koputai (Port Chalmers).

Here follows further evidence:

Then you [Patuki] went to Port Chalmers, and signed the Deed? Did any other natives go up there from your part to sign it? -I don't know of anyone else. I know of myself. (E2:74){FNREF|0-86472-060-2|10.6.4|73}

In fact the deed was signed in August 1853, some six months before the money was paid out at Awarua. As we have seen, 25 other people from the south and west were present at Port Chalmers in August 1853, when Patuki agreed with them to the purchase. It seems surprising that he could not remember the presence of any of them there.

Later he acknowledged that his name had been placed on the deed which was shown to him. His evidence continued:

Was it [the deed] read over before you signed it, or not? -Yes; it was read over before I signed it.

You have told us that you had spoken to Mantell about the land from Kaihiku to the River Waiau. Did you notice that in that Deed much more land is included? -We thought it was on our boundary, but we did not know there was anything else taking place about the boundaries at Otakou. I supposed that the boundaries of the land we were selling were the boundaries that we mentioned to Mantell.

Did you understand what was read to you at the time? -I was not quite clear that the boundary was going beyond the boundary mentioned.

You heard it read, and did not understand that it included land beyond Waiau? -Yes. It was written clear enough, but the thing had been done at Otakou, and they could not help themselves.

Was the Deed signed by all the people together at the same time? -Yes, they were all there. Still they did not understand that the other portion of the land was sold. (E2:75-76){FNREF|0-86472-060-2|10.6.4|74}

It is interesting to compare the retranslation of this passage, which reads as follows:

The document was read out and then my name was written.

To our knowledge that sale was on our boundary. We did not know that a large land sale had been spoken of at Otakou. To my knowledge the land which was sold was the area described by us to Mantell.

When the deed was read out I was not very clear whether the boundaries were being extended.

I certainly heard it read out, however I do not know whether the lands beyond Waiau were being acquired.

The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed.

All the people were there. There was just one recording of their names. However they did not know that other land had been taken. (J4:2)

We note that Patuki was "not very clear" whether the boundaries were being extended. He certainly heard the deed read out but did not know whether the lands beyond Waiau were being acquired. But he then said, "The writing of the deed of sale was quite clear, however it had already been settled at Otakou. That was when it was discussed" (J4:2). Patuki seemed to be implying that the Murihiku people were not at Otakou. But 26 or so, including himself, were in fact there, and no doubt were party to the discussions in the "long and anxious debate" before the deed was read out and signed on 17 August 1853. He admitted the deed was "clear enough" (E2:76), or "quite clear" (J4:2). We recall that Topi Patuki was a major Murihiku chief. It is difficult to believe that he did not play a leading role in the lengthy discussions with Mantell. That he was interested in the sale taking place was evidenced by the special trip which he and Taiaroa had made to Wellington the previous year in the hope of expediting the sale (E2:37(c)). {FNREF|0-86472-060-2|10.6.4|75} It appears, however, that the passage of nearly 30 years before giving this evidence has substantially impaired his recollection of events.

Horomona Patu

10.6.5 According to Patu, Mantell, when asked by the people at Oue in 1852 on his first visit, what land he had come to buy replied, "The Murihiku Block; the southern end". Ngai Tahu gave the boundaries as, "From Kaihiku to Hokanui and to the Waiau River". Mantell replied, "It is too little". The Ngai Tahu then asked how much he would give for it (E2:92-93). {FNREF|0-86472-060-2|10.6.5|76} The new translation (J4:2-3) is not materially different.

Much of Patu's evidence was directed to the marking off of reserves by Mantell. Patu said he did not know the words of the deed nor did he sign the deed, although he later received part of the payment at Awarua (E2:106-107). {FNREF|0-86472-060-2|10.6.5|77} He was asked:

Was anything said on the second visit about the land that Mr Mantell was to acquire? -The natives, on the second visit of Mantell to Awarua asked "What sum of money have you got?" (E2:107) {FNREF|0-86472-060-2|10.6.5|78}

As we know, Mantell had œ1000, being the instalment due under the deed signed some six months earlier.

It appears from Patu's evidence that the only mention he heard of the land to be bought by Mantell was at Oue in December 1851, that he was not present at the lengthy discussions on 17 August 1853 when the deed was signed, and that when Mantell arrived in February 1854 to pay over the instalment of œ1000, the area of the land being purchased was not discussed. Many of those present had of course been in Port Chalmers when the deed was signed. Given Patu's very limited involvement in the purchase negotiations we consider his evidence cannot be regarded as definitive or conclusive.

Later on 25 March 1880, Patu made a statement to the Smith-Nairn commission at Riverton which included the following:

The people here south knew nothing of the sale to Wakefield, and as regards the selling of the Murihiku Block, it was not the people of Murihiku who sold it BUT THE PEOPLE OF OTAGO. The inquiry was held at Otago, and Mantell came here only to mark off the reserves here. He went back to Otago, and there a thousand pounds was paid, and Mantell then came South and brought a thousand pounds, which may be said to be money which passed through the hands of the Otago people, and handed to us. This money was brought and paid down as the price of Murihiku; but in my thought, what is this money? (J4:145){FNREF|0-86472-060-2|10.6.5|79} (emphasis added)

He continued by saying he looked on the money as merely clinching a bargain and did not challenge the boundaries in the deed. Nor did any other Ngai Tahu witness at that hearing.

The statement of Patu that it was not the people of Murihiku who sold it but the people of Otago does not square with the evidence of the deed. He appears to have overlooked or forgotten, or indeed not known, that many of the southern and western Murihiku people including the principal chiefs were named in the deed in August 1853. We believe his evidence suffers from a hazy memory or lack of knowledge or both.

Horomona Pohio

10.6.6 Pohio said he was at Port Chalmers when Mantell went there in 1852. The people from Waikouaiti, Moeraki, and Port Chalmers assembled there. Mantell stood in the midst of the people and said:

that he came to buy the land.

Did he say what land he wanted to buy? -No, people asked him what land, and he replied Murihiku Hokanui and on to Waiau River. And then the Maoris said -"You will have to give us a good price -"Mr. Mantell said "I shall give you a good price." I did not go to Murihiku with Mr. Mantell.

Was that all that Mr. Mantell said at that time about the land? -The words of Mantell were -"Do not consider what I am giving you now as the large payment, but hereafter I shall establish you schools and hospitals." (E2:134-135){FNREF|0-86472-060-2|10.6.6|80}

In later evidence Pohio said:

Was anything said about reserves at this first time in 1852? -Yes, there was.

What was it? -Mantell said -"I shall set apart reserves for the natives."

Did he tell them anything about the quantity-the size of the land? -No, I could not say.

Did he say where he would set it apart? -At Murihiku, out of the land that he was buying from Kaihiku to Waiau River.

Do you recollect seeing Mr. Mantell again in the following year, or about the land? - Yes, I did see him.

Did Mr. Mantell speak to pretty nearly the same people the following year as he spoke to in 1852? -Yes, pretty nearly the same people. He repeated the same words that he first told them in 1852. I and Matiaha Tiramorehu were present listening. Mantell talked to the same people on this second occasion, and I was present, and also Matiaha Tiramorehu.

What did he say to the people about the land on the second occasion? -He spoke of Kaihiku and down to Waiau, taking in the sea coast.

....You told us that he spoke to them about the land. Was anything further said about the benefits to the natives? -Yes. He spoke again of hospitals and schools.

Do you mean to say that he spoke to you on the second occasion to the same effect as on the first occasion? -Yes.

As to schools & hospitals? -Yes. This was the time that they were going to get the money. He spoke of hospitals and schools, and gave them the money.

How many times did Mr. Mantell ask the natives to meet him about Murihiku? - Twice.

Then it was at the second time that you got the money? -Yes. (E2:136-139){FNREF|0-86472-060-2|10.6.6|81}

Again, given the passage of 28 or so years, Pohio's recollection was shaky. He described a first meeting, between Mantell and the Otakou people only. This meeting took place before Mantell set aside the reserves. It was evidently a reference to the preliminary conference between Mantell and many chiefs at Port Chalmers not in 1852 but on 18 November 1851. Pohio's memory was faulty in suggesting only Otakou chiefs were present. We know that at least Topi Patuki and Te Au, two leading Murihiku chiefs, were present and possibly others. It is also difficult to

reconcile Pohio's recollection that at that preliminary meeting Mantell suggested he wanted to buy only to the Waiau River when, as we have seen, he obtained quite detailed information of who held rights in the whole of the area across to the west coast and prepared a plan based on this information.

Pohio also referred to a second meeting at which, as he recalled, Mantell again spoke of the land he wished to buy as being from Kaihiku and down to Waiau, taking in the sea coast. It was on this occasion, Pohio said, that he got the money. Horomona Pohio's name is on the deed and he also signed the first receipt at Awarua in October. The second meeting to which he referred must have been that held not in 1852 but when he received payment at Port Chalmers on 3 October 1853. Pohio appears to have confused the signing of the deed with the signing of the first receipt and the distribution of the first £1000. He was present on both occasions. While it is true that only Otakou people were present when the payment was made, many from Murihiku were present three weeks earlier when the deed was signed.

10.6.7 As Mr McAloon conceded, these three witnesses were the only ones to claim the land sold extended no further than the Waiau. Only Pohio suggested that Mantell mentioned the Waiau as the boundary on the day the deed was signed in August 1853. Patuki and Patu both suggested this was said by Mantell in December 1851 at Oue. Their recollections, as we have seen, were clearly faulty on a variety of points. It is surprising, if the Murihiku people really believed they were not selling beyond the Waiau, that more witnesses were not available to give persuasive evidence to that effect. Perhaps that is why, as the Ward report noted, Izard, the claimants' counsel did not push the boundary issue. Counsel made brief reference to the Ngai Tahu understanding at the time that Mantell wanted to buy the land from Waikanui (sic) on to the Waiau River, but when summarising the complaints over the purchase at the end of his address no mention was made of boundaries at all (T1:231-232).

The claimants placed some reliance on the evidence of two other Ngai Tahu witnesses before the Smith-Nairn commission. These were Matiaha Tiramorehu and Wiremu Potiki. Tiramorehu's evidence was invoked principally because of his reputation of being steeped in the history and traditions of his people.

Matiaha Tiramorehu

10.6.8 At the outset of his evidence Tiramorehu was asked:

Where does Murihiku begin? -At Waitaki, and goes on to Waiau.

What is the other side of Waiau? -Te-Whakatakanga-o-te-Karehu-a-Tamatea.

Then how far did this go north? -Up to between Piopiotahi and Whakatipu.

Where is Whakatipu Waitai as compared with Piopiotahi? -Piopiotahi is south of Whakatipu-Waitai.

Mr Izard -Is it far south of it? -I cannot tell you; I was not there. (E2:178-179){FNREF|0-86472-060-2|10.6.8|82}

It is of interest to note that Tiramorehu had apparently not been to Piopiotahi. Shortly after Tiramorehu was asked:

Were you present when Mr. Mantell met the people at Port Chalmers? -Yes, I was.

Did you hear what Mr. Mantell said to the people? -Yes, I heard Mantell ask Taiaroa and Karetai, on behalf of the natives of Murihiku, to let him have the land on the other side of the boundary of Captain Symonds' purchase.

Did Mr Mantell ask for the land by any name? -The other side of Kaihiku, round by Tokata.

Did he ask for it by any name? -No, he did not mention, but he said "The whole of Murihiku".(E2:179){FNREF|0-86472-060-2|10.6.8|83}

Later Tiramorehu was asked about the deed:

Mr Izard -Was the Deed read over to you before you signed anything? -I forget.

Mr Nairn -Did they speak of the boundaries? -I do not know. I could not tell you. It lays with the people who had a greater interest in it. I did not look to the boundaries. (E2:186){FNREF|0-86472-060-2|10.6.8|84}

Mr Nairn questioned Tiramorehu further about the deed later in his evidence:

When the natives assembled at Port Chalmers was the Deed brought before them and read out before them? -I was not there.

Did you never hear the Deed read? -No, I never heard it read.

Then you do not know the boundaries of the land that was sold? -I understood, but yet I did not understand. I heard it, but did not understand it.

Mr Smith -You had part of the money? -Yes.

But you did not sign the deed? -I signed the receipt, but not the deed, when I received a portion of the money. (E2:191-192){FNREF|0-86472-060-2|10.6.8|85}

It is not clear from Tiramorehu's evidence whether he was present at the meeting when the deed was signed on 17 August 1853 or only at the later meeting in October 1853 at Port Chalmers when œ1000 was dispersed. He signed the receipt in October but neither his name nor his signature are on the deed. As Mr McAloon conceded, Tiramorehu did not know what was agreed about the boundaries. It was not apparently of any great concern to him.

Wiremu Potiki

10.6.9 The following quotation comes from Wiremu Potiki's evidence. He is here giving his recollection of a meeting at Port Chalmers when Mantell first came there. That was in November 1851.

Do you live now at Port Chalmers? -I live at the Otago Heads, upon the large reserve there.

Were you at Port Chalmers when Mr. Mantell came there first? -Yes, I was.

Were you present when Mr. Mantell met the chiefs and the people? -Yes, I was.

Were Tairaroa, Karetai, Te Au and others present? -When Mr. Mantell met the natives first Tairaroa and Karetai were there, but Te Au and the Murihiku natives were not present.

These were Otago natives who were present? -Natives of Otago and the neighbourhood of Otago and Waikouaiti.

It would include the Moeraki natives? -Very likely Moeraki.

But it would not include the Murihiku natives? -No. (E2:220-221){FNREF|0-86472-060-2|10.6.9|86}

We pause here to observe that Potiki's recollection was clearly faulty. Both Topi Patuki and Te Au from Murihiku were present at this first meeting with Mantell. Potiki's evidence continues:

Did you hear the conversation between Mr Mantell and the people? -I did.

What did Mr. Mantell say to the people? -Mr. Mantell said to the people -"I come to buy land".

Where? -The land adjoining Wakefield's purchase, up to Kaihiku.

Did he mention the boundaries of the land he wanted to buy? -No, I don't know; I cannot say that Mantell mentioned any boundaries.

Do I understand that Mr. Mantell told them he wanted to buy the land south of Kaihiku? -Adjoining Kaihiku, and towards Murihiku.

Mr Smith -Do you mean by this "rohe" of Wakefield's, the boundary of Mr Symonds' Block? What "rohe" do you mean? Do you mean the "rohe" of the land bought by Mr. Symonds? -Yes, I mean the boundary of the Block bought by Mr. Symonds.

Then when you said he wanted to buy Murihiku, what land did the natives then understand by Murihiku? -The lands from Mataura down to Oue and adjoining the boundary of Wakefield's Block.

Did it not extend as far as the Waiiau? -Patuki and Te Au extended it to Waiiau.

Do I understand you to say that the northern natives claimed no interest in the land beyond Oue, and that Patuki and the others claimed it beyond? -Yes, the Otago people claimed as far as Oue, at the mouth of the Mataura, but myself and Tairaroa went on

further south. We went across the River Mataura, and claimed with the Murihiku people.

How far south did you claim? -Right to the far end.

How far did the claim of Taiaroa and yourself and the Murihiku people go beyond Oue? -I am unable to tell you.

Can you tell me what the natives called the land between the Waiau and up to Piopiotahi? -I do not know. (E2:221-223){FNREF|0-86472-060-2|10.6.9|87}

Mr Nairn, later in Potiki's evidence, made a further inquiry about the boundaries:

Did Mr. Mantell explain to the maoris the boundaries of the land he had purchased? -I am not clear. (E2:233){FNREF|0-86472-060-2|10.6.9|88}

Perhaps Potiki's evidence is best summed up by the last answer cited-he was not clear about the boundaries. We recall that during or immediately after the preliminary conference held by Mantell at Port Chalmers on 18 November he drew what he called a "Korero chart" (10.4.1). This extended right across to Milford Haven on the west coast. Among the names of those listed by Mantell as having an interest in Fiordland below Milford Haven are Potiki and Taiaroa. This may explain why Wiremu Potiki, when asked how far south he claimed, answered "Right to the far end". But when further questioned he said he was unable to say how far the claim of Taiaroa and himself and the Murihiku people went beyond Oue. If, as the claimants now contend, it stopped at the Waiau we would have expected him to say so.

10.6.10 Essentially then, the evidence that Murihiku Ngai Tahu did not intend to sell the land west of the Waiau rests on the faulty recollection of three only of their number, the rest of those who gave evidence either not knowing or not recalling.

Evidence to the contrary

10.6.11 Unfortunately Mantell himself did not give evidence on the question, presumably because of the premature winding up of the commission's proceedings. We therefore lack any response by the Crown agent to a claim first made public nearly 30 years after the purchase. In weighing the claimants' evidence on this question we must also consider the evidence to the contrary. This we now proceed to do.

Mantell's "korero charts" of November and 10 December 1851

10.6.12 In the korero chart no 1, prepared by Mantell during or soon after his discussions on 18 November 1851 with Otakou and Murihiku chiefs, the interests of various Ngai Tahu rangatira are shown in all parts of the block south of a line from Tokata (the Nuggets), on the east coast, to Milford Haven on the west. The Waiau River is depicted and the names of various chiefs having an interest on or near the coast to the west of the Waiau are noted. Also noted are those interests of other chiefs, including Taiaroa and Potiki, on the west coast south of the boundary line terminating at Milford Haven. The second chart, dated 10 December 1851, is more elaborate and

contains more detailed information as to the location of the various interests of a substantial number of Otakou and Murihiku chiefs around the coastline from Tokata to Milford Haven and at various locations inland. In preparing this, Mantell would appear to have built upon the information he obtained at Port Chalmers when he prepared his November chart, with additional information presumably from Patuki who was with him on 10 December 1851. In considering the significance of these charts we here had regard to comments by the Crown historian, Mr Armstrong

10.6.13 (Z11(a)), and Mr McAloon for the claimants (Z13(C)).

We believe the preparation of these charts is a clear indication that Mantell, from his very first contact with Otakou and Murihiku rangatira, was discussing with them the purchase of their interests in the land across to the west coast, including Fiordland. The fact that he was able to obtain from them advice as to their interests in the whole of the block suggests they were cooperating with him. When, on 20 November 1851, he reported to Domett on the outcome of his discussions with Topi Patuki, Te Au, Karetai, Taiaroa and the other chiefs present regarding their willingness to cede the land to the government, we believe he was referring to the land illustrated in his "korero chart" no 1.

The deed and deed map

10.6.14 These have already been discussed. In our view they clearly demonstrate that the land being sold by Ngai Tahu and purchased by the Crown included all the land west of the Waiau (known as Fiordland) up to Piopiotahi on the west coast. The deed in Maori, after being read out by Mantell, was assented to by all the principal Murihiku chiefs, and many others from Murihiku, as well as Otakou.

The request for reserves at Piopiotahi

10.6.15 Several Ngai Tahu gave evidence to the Smith-Nairn commission on requests for reserves on the west coast. This raises the question of why, if the land west of the Waiau was not being sold, reserves should have been requested on the west coast. We now consider the evidence of three witnesses, Hoani Paororo, Horomona Patu and H K Taiaroa.

Hoani Paororo

10.6.16 After discussing the marking off of certain reserves by Mantell during his 1851-52 visit, Paororo proceeds:

Mantell, Te Au and Poko then went to Waiau. It was then that the reserve at Oetota was made, and at Tumutu. I heard this from Mantell and Poko on their return. That completed the reserves that Mantell made. It was, as it were, the sort of thing that was spoken of in the clouds. Mantell spoke also of a reserve to be made at Piopiotahi, but he did not go there. It was Te Au who asked Mantell for a reserve there. Mantell did not promise to give this reserve at Piopiotahi, nor did he refuse, but Te Au asked for it, and it was left. It was asked for. Mantell neither refused nor consented.

(E2:348){FNREF|0-86472-060-2|10.6.16|89}

Mr McAloon, in attempting to explain this incident, claimed Mantell himself raised the possibility of a reserve with Te Au. Paororo's evidence is, however, quite clear. It was Te Au who raised the matter with Mantell. In later evidence Mr McAloon said he did not believe that Te Au, in asking to have his rights at Piopiotahi recognised, necessarily implied that he was consenting to the sale of the rest of Fiordland. Mr McAloon argued that it is entirely possible that he was merely asking to have the Crown confirm his rights at Piopiotahi as distinct from the more general rights of the southern people to Fiordland. While this is an interesting speculation, it does not really answer the question why Te Au should specifically seek a reservation at Piopiotahi if the sale did not extend beyond the Waiau.

Horomona Patu

10.6.17 Horomona Patu gave hearsay evidence about Te Au's request for a reserve at Piopiotahi. He was questioned by H K Taiaroa as to whether anything was said to Mantell concerning ground at Waiau, to which he replied that they asked for 300 acres.

Did Mr. Mantell agree to it? -I was not present, but other people told me that there was a reserve there, and that there was another at Milford Haven (Piopiotahi). Te Au asked Mr. Mantell to make the reserve there. (E2:111){FNREF|0-86472-060-2|10.6.17|90}

H K Taiaroa

10.6.18 The Member of Parliament for Southern Maori gave evidence, a significant part of which related to a reserve at Piopiotahi which he claimed Mantell promised his father, Matenga Taiaroa, would be set aside between Piopiotahi and Te Horo. Pounamu was said to be available there. Matenga Taiaroa was present at the Port Chalmers meeting with Mantell and was a signatory to the deed.

We record the following passage from the record of H K Taiaroa's evidence:

Taiaroa questioned Horomona Patu whether there were any reserves made at Piopiotahi. Horomona said there were. Mr Mantell wrote in 1874 or 1875 to Mr. McLean to say that a reserve had been made at Piopiotahi, but he did not mention it in the face of the deed of sale. The reason why this came out about this reserve was, that when I spoke to Mackay about the reserve at Aparima Mantell said, "That reserve is not for you, but for the natives at Aparima." Mantell said "Your reserve is at Piopiotahi". A memorandum was made at once by Mantell, and forwarded to the Govt, and the Govt wanted me to go with Mackay to see this reserve. There was no steamer available at the time. I asked Mantell why it did not appear on the face of the deed, and Mantell merely shuffled out of it, and said "Oh, I did not bother about it". He said -"I may, perhaps, have a copy of that memorandum, but the original is in the office." (E2:267-269){FNREF|0-86472-060-2|10.6.18|91}

It appears the memorandum was to Donald McLean, native minister, and asked that the reserve at Piopiotahi be confirmed. According to Taiaroa, "This land is land adjoining Murphy's, an old whaler" (E1:44).{FNREF|0-86472-060-2|10.6.18|92}

Shortly after Taiaroa said:

That reserve was made at Piopiotahi at the time the land was purchased, though there is no mention made of it in the deed. I have got more to say yet. (E2:271){FNREF|0-86472-060-2|10.6.18|93}

Taiaroa's evidence continued the next day:

I must explain about Piopiotahi. The reserve which the natives understand to have been made for them extends from Piopiotahi to a place called Te Horo. The reason why they wanted to have Piopiotahi reserved was on account of the greenstone. Why they called it Te Horo is, that is a land slip, where the greenstone is found. That is all I understand about Piopiotahi.

Mr Smith -Who gave you this information about the reserve extending from Piopiotahi to Te Horo? -Taiaroa, my father. Piopiotahi is the name of the inlet. I am not clear where Te Horo is; it is where they get greenstone from. It is adjoining the land of the person called Murphy. (E2:279-280){FNREF|0-86472-060-2|10.6.18|94}

In his later evidence Mr McAloon cited what he described as the strongest evidence of the Taiaroa claim as being a letter written by Mantell to H K Taiaroa on 14 July 1874:

But I can at once reply to your other enquiry as to the provision in fulfilment of the terms of the Deed made in favour of your father, Taiaroa, as one of the signatories.

Taiaroa excluded, or at least not included as one having an interest in the other reserves in the Block, stipulated for a reserve of 100 (one hundred) acres at Milford Haven, and to this I, on the part of the Government, acceded. But, as there was known to exist a Grant (in satisfaction of an old Land Claim) of 612 acres at Milford Haven to one Murphy & another, this reserve could not be selected before the claimant's land; and it was understood that the survey of the reserve could be made at the same time as that of the claim. (J2:59-60){FNREF|0-86472-060-2|10.6.18|95}

Mr McAloon later referred to the evidence of a Royal commission in 1907 which inquired into the Taiaroa claim that H K Taiaroa's father had been promised a reserve at Piopiotahi by Mantell during the Murihiku purchase arrangements. This commission found that:

the late Hon. H.K. Taiaroa had no legal or valid claim and that any rights that his Father might at any time have had were barred by the deed and the lapse of time between the date of the conveyance and the date the claim was first made on the Government. No doubt some such arrangement was made between Mr Taiaroa and Mr Mantell; but we think it probable that it was abandoned either before or after the completion of the deed of purchase and that Mr Mantell has, after twenty years, forgotten that such was the case. (J2:63){FNREF|0-86472-060-2|10.6.18|96}

Mr McAloon correctly commented that the Royal commission did not address the issues raised before the Smith-Nairn commission of whether Fiordland was included in the deed with the agreement of the vendors or not. He argued that even if an agreement was made between Taiaroa and Mantell as suggested by the

commissioners, there is no possible way in which that could have bound other vendors to dispose of Fiordland if they did not wish to do so (J2:63). But this comment of Mr McAloon seems to have missed the point. Why would Taiaroa Sr have requested a reserve at Piopiotahi if Mantell was not in fact purchasing the land over to the west coast and up to Piopiotahi?

Finding on grievance no 6

10.6.19 We find that the grievance that the land west of the Waiau was wrongfully included in the sale cannot be sustained. In coming to this conclusion we have carefully weighed the evidence of the three Ngai Tahu chiefs who nearly 30 years after the event testified to this effect. Not surprisingly after so great a lapse in time their recollection of events is defective, seriously so, in a number of material respects. Nor are they supported by any other Ngai Tahu witness before the commission. The claims that the southern Murihiku people were not consulted or parties to the deed has not been established. It was not, as was suggested, something done only by Otakou people but included principal Murihiku rangatira as well as many others. The deed in Maori was read out before it was agreed to and after protracted debate. It clearly included all the land west of the Waiau up to the northern border referred to in the deed, and clearly shown on the deed map. It seems apparent that from the outset of discussions between Mantell and the leading Ngai Tahu chiefs, a sale across to the west coast was contemplated. Although not definitive, the fact that Te Au and Taiaroa each made requests for reserves on the west coast is consistent with, and serves to reinforce the view, that Ngai Tahu were intending to sell across to the west coast. We recall the Crown's criticism that this claim was not publicly raised until the Smith-Nairn commission hearings some 27 years after the event, and since then has not again been raised until this tribunal began sitting. For the reasons indicated, we find that the land west of the Waiau was not wrongfully included in the sale.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.7 The Adequacy of Reserves

10.7. The Adequacy of Reserves

10.7.1 In our consideration of grievance no 4 we have found that the Crown failed to set aside additional land at Aparima and Kawakaputaputa requested by Ngai Tahu. Mantell also failed to reserve a block of 200 acres at Waimatuku and a block at Opuaki and Rarotoka (10.4.19). This grievance was only one of several relating to the setting aside of lands for Ngai Tahu in Murihiku. The principal grievance was:

8. The Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base and so to protect the Tribal Estate.

Other related grievances are:

1. The failure of the Crown to appoint a Protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights.
2. The Crown wrongfully instructed or permitted Mantell to limit the land set aside for the use of Ngai Tahu after the sale.
3. The Crown wrongfully instructed or permitted Mantell to decide what land should be set aside for Ngai Tahu use after the sale. (W6)

Grievance no 1: The failure to appoint a protector

10.7.2 As we have indicated in chapter 4 on the Treaty and Treaty principles, the Crown representatives at the time of the signing of the Treaty emphasised that Maori would be protected against land sales and that the Crown would ensure they kept such land as they needed or wished to retain. The third of the Treaty principles articulated by this tribunal concerns the Crown obligation actively to protect Maori Treaty rights. As we have said, the duty of protection imposed on the Crown extends not merely to the use of their lands and waters but to the exercise by the Crown of its Treaty right of pre-emption. Lord Normanby, in his instructions to Captain Hobson, contemplated the appointment of an official protector.

As we have shown in our earlier discussion of protectors of aborigines (5.5), the first protector was appointed by Hobson in April 1840. George Clarke's role as the first protector was, however, somewhat compromised by his dual position as land purchaser for the Crown. At his own request Clarke was relieved of this latter duty in 1842. From that time the protectors were not directly responsible for buying land and therefore provided a measure of protection of Maori interests. Grey, however, soon after his arrival in 1845 chose to abolish the Protectorate Department. At the same

time he embarked on a massive land purchase programme. The role of land purchase officer was recombined with that of protection of Maori interests. In all the Ngai Tahu purchases after that of Otakou, Ngai Tahu had no official to advise them other than the purchasing officer. The Murihiku purchase was no exception.

In his reply to the Crown's closing address Mr Temm referred to the failure of the Crown to protect the tribal estate of Ngai Tahu (Y1:1-2). The cause of this breach, he claimed, was not hard to identify: "In each transaction there was no Protector of Aborigines".

10.7.3 The Crown, through Mr Blanchard, appeared to minimise the need for a protector. In his closing address on the Murihiku claim, he said:

It is alleged against the Crown that it should have appointed a Protector to supervise the transaction and to ensure that Ngai Tahu were made aware of their rights. But that would not have been necessary if the instructions had been carried out. (X2:49)

The problem with Crown counsel's submission is that it assumes that the various commissioners appointed to purchase land for the Crown were capable of serving two masters. Events surely disproved this.

As will be seen, Mantell saw his primary duty as being to effect a purchase on behalf of the Crown while conceding to Ngai Tahu no more than seemed necessary by way of reserves. He did obtain a modest œ600 increase in the purchase price he had been authorised by the Crown to pay for some seven million acres of Ngai Tahu land. We do not consider that Ngai Tahu was in a position to bargain on equal terms with Mantell as the Crown's representative, or that he had sufficient regard for their legitimate interests, particularly in relation to the reservation of adequate lands for their own use. Moreover, the Crown was well aware of Mantell's approach to the provision of reserves in both the Kemp and Banks Peninsula transactions.

Finding on grievance no 1 as to breach of Treaty principles

10.7.4 The tribunal finds that the failure of the Crown to appoint a protector to ensure that Ngai Tahu were independently advised of their Treaty and other rights was a breach of the principle of the Treaty which requires the Crown actively to protect Maori Treaty rights. As a result of such failure Ngai Tahu were denied the right to retain certain land they wished to retain, and were left with insufficient land for their present and future needs.

Grievance nos 2 and 3: Mantell's instructions regarding reserves

10.7.5 Grievances nos 2 and 3 are closely inter-related.

Mantell, as we have seen (10.3.3), gave an early indication to the colonial secretary that he thought an allocation of 10 acres to each individual to be ample for their support. Despite this, Mantell, on the authority of Governor Grey, was given power to set aside such reserves as he might think proper, while taking care that ample provision was made for both Ngai Tahu's present and future wants. Clearly Mantell, not Ngai Tahu, was to be the judge of what constituted "ample provision". As we

earlier indicated Mantell was also to be the ultimate arbiter of Ngai Tahu's needs. We accordingly find these grievances are sustained.

Finding on grievances nos 2, 3 and 4 as to breach of Treaty principles

10.7.6 Mantell was instructed to limit the land set aside for Ngai Tahu by reserving such land as he (not Ngai Tahu) thought proper. It follows that he, not Ngai Tahu, would ultimately decide what land would be so set aside. As we have found in considering grievance no 4, he refused to reserve to Ngai Tahu certain land they wished to retain (10.4.19). Article 2 of the Maori version of the Treaty preserved to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to Ngai Tahu the full, exclusive and undisturbed possession of their land so long as they wished to retain it. We have earlier found that Ngai Tahu wished to retain rangatiratanga over certain land: they wished to retain it. But Mantell, no doubt conscious of his instructions, failed to respect Ngai Tahu's wishes. In so doing, we find that he failed to act in accordance with the Crown's obligations under article 2 of the Treaty. Clearly Ngai Tahu were detrimentally affected by the loss of the land they wished to retain.

The foregoing group of grievances are, however, in a sense ancillary to the more general grievance no 8, that the Crown failed to ensure Ngai Tahu were left with an adequate endowment of land. We now proceed to consider this claim.

Grievance no 8: The Crown failure to provide Ngai Tahu with an economic base

10.7.7 Apart perhaps from the western boundary question this is the claimants' principal grievance. The land which was purchased by the Crown encompassed some seven million acres. It included a mix of potentially rich farming land and heavily forested mountainous and lake country of great beauty. According to the census conducted by Mantell on his travels through the region there were 146 Ngai Tahu living in the Murihiku block and a further 127 on Ruapuke (O13:21-23). {FNREF|0-86472-060-2|10.7.7|97} We agree with observations made by Mr McAloon that southern Ngai Tahu led a mobile lifestyle and that people living on Ruapuke would have required land in the Murihiku block for their subsistence and trading surplus. Therefore it would be quite unrealistic to exclude the substantial number of Ngai Tahu living on Ruapuke from consideration for reserves on the mainland in which they had an interest. We are concerned then with at least 273 Ngai Tahu at the time, without allowing for absentees.

10.7.8 Mantell made provision for seven reserves other than the life reserve of 10 acres as follows:

Tuturau 287 acres

Omaui, New River 1686 acres

Oue, New River 176 acres

Aparima, Jacobs River 527 acres

Oraka 1132 acres

Kawakaputaputa 977 acres

Ouetoto 90 acres

Total 4875 acres

{FNREF|0-86472-060-2|10.7.8|98}

This area, divided among 273 people, averages 17.8 acres each. Given Mantell's earlier record in the provision of reserves in Kemp's purchase and the Ports Cooper and Levy purchases it is not surprising to find yet again that he marked off, out of seven million acres, a mere 4875 acres for Ngai Tahu. By any standard this was a totally inadequate provision for the present, let alone future needs of the Murihiku people. Crown counsel in his closing address told us that in Murihiku, Ngai Tahu gained most of the reserves in the locations they sought, but "these did not prove to be adequate in area or quality" (X2:70). The Crown thus conceded that it failed to ensure that proper provision was made for Ngai Tahu at the time of the purchase. It could scarcely do otherwise given the evidence of its witness Professor Pool. We recorded Professor Pool's views in our discussion of the Otakou (6.9.10) purchase and need not repeat them here. In the comparative table 3, taken from Judge Alexander Mackay's assessment of the sufficiency of land available to Maori in 1891, the figures given as percentages for Southland are:

Sufficient 7.7 %

Insufficient 50.6 %

None 41.7 %

Total 100.0 %

(O15:29)

These figures speak for themselves.

10.7.9 The immediate reaction to Mantell's allocation of such small reserves is to ask how he expected Ngai Tahu to survive. The Ward report suggested an answer:

It needs to be said that Mantell had a paternalistic motive in leaving Maori with little more than subsistence plots. He did not intend forcing Maori to remain only on these reservations, since he believed that full amalgamation with European ways would lead Maori to acquire land beyond the reserves as they required it. (T1:242)

But as Professor Ward later commented:

Mantell's social economy, his vision for the tribe's future, took little account of the realities of the nineteenth-century, capitalist economy in New Zealand. Economic and

social success in New Zealand depended not just on individual effort or capability but on access to capital. In stripping Ngai Tahu of all but a tiny fraction of their lands, Mantell was depriving them of the collateral required to participate effectively in the new world, while at the same time preventing them securing access to their traditional resources. (T1:243-244)

In referring to traditional resources Professor Ward clearly had mahinga kai in mind. We note that Mantell, after describing the boundaries of the land being sold, added that it included, in addition to all the lands within those boundaries:

the anchorages and landing places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. (see appendix 2.5)

On the face of it therefore, Ngai Tahu had at one stroke alienated all their mahinga kai on which they had previously depended on for their livelihood, save for a small quantity on the land reserved to them. The tribunal cannot accept that Ngai Tahu could have contemplated that in signing the deed they were thereby surrendering all future access to their traditional food resources or indeed to their taonga pounamu. Nor, despite the strict language of the deed, do we believe that Mantell envisaged that, as from the date of signing, Murihiku Ngai Tahu would be solely dependent on the extremely limited mahinga kai available on a few thousand scattered acres. As Professor Ward perceptively noted:

Only a cursory reading of Mantell's journal is required to see just how essential such foodstuffs were to existence in Murihiku in the early 1850s. Mantell lived on eels, ducks, fish: all caught as required. (T1:244)

It is, as Professor Ward suggested, conceivable that Mantell promised Ngai Tahu they would still have access to such resources, but in common with Europeans. Whatever may have been said, and on this we can only speculate, we are in no doubt that Ngai Tahu would not have agreed to part with virtually all their vast estate had they known that in so doing they were surrendering all rights of access to the food resources on which they so critically depended.

Had a protector been appointed to ensure that Ngai Tahu were independently advised of their rights, there would have been little likelihood of their agreeing to surrender almost all their mahinga kai.

10.7.10 In our discussion of the Treaty principle that the Crown right of pre-emption imposed reciprocal duties on the Crown, we pointed out that Crown officials in New Zealand were aware that hapu maintained a system of shifting cultivations and engaged in seasonal foraging and hunting pursuits in various parts of the interior. We found it to be incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over tribal territory as well as their more permanent kainga, so as to ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs (4.7.10). Mantell clearly failed to take such steps. On the contrary, he provided in the deed for the surrender of virtually all such rights without first ensuring that adequate land had been excepted from the

sale or reserved to Ngai Tahu which would preserve reasonable access to traditional food resources.

10.7.11 This failure to ensure Ngai Tahu were left with land giving them reasonable access to traditional food resources was not the Crown's only failure. Murihiku Ngai Tahu appear to have welcomed the prospect of more Europeans settling among them and sharing the land. For many years they had experienced European sealers and whalers living and inter-marrying with them. They were aware that the Crown was purchasing land to facilitate settlement but as we have earlier suggested, they probably had only a shadowy notion of the likely magnitude and rate of settlement.

In our discussion of Treaty principles we found the right of pre-emption granted to the Crown by Maori under article 2 to be a limited right. It was not to extend to land needed by Maori. In the light of the various considerations there discussed, the tribunal found that article 2, read as a whole, imposed on the Crown a duty, first to ensure that Maori people in fact wished to sell and secondly that each tribe maintained a sufficient endowment for its reasonably foreseeable needs.

If, as they clearly desired, Murihiku Ngai Tahu were to fully and effectively engage in the new economy which would result from European settlement and the steady development of agricultural and pastoral farming, or, as later occurred, dairy farming, they needed to retain extensive areas of suitable land. It was the duty of the Crown's purchasing agent, Mantell, to ensure that this happened. But Mantell had no sympathy for such notions. Although instructed by the governor that he was to be responsible "for taking care that ample reserves are kept both for their present and future wants", Mantell paid no regard to this injunction. As a result, they were left with a mere 18 or so acres per person, and without any significant access to traditional mahinga kai resources. Mantell duly reported the outcome of his negotiations and success in having the deed completed. On 7 November 1853 Domett transmitted to Mantell Governor Grey's special commendation on completing the purchase. Grey clearly endorsed all that Mantell had done (E2:37c-d). {FNREF|0-86472-060-2|10.7.11|99} Had the Crown, through Mantell, fulfilled its Treaty obligations, it would have ensured that, in addition to their kainga and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might as development occurred be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for. Instead, the Crown's approach virtually denied the rangatiratanga of Ngai Tahu over their land, treated them as supplicants and left them virtually landless.

Finding on grievance no 8

10.7.12 The tribunal has no hesitation in finding that the Crown failed to ensure that sufficient land was excluded from the sale to provide Ngai Tahu with an economic base, and so to protect the tribal estate.

We further find that the Crown failed to ensure that Ngai Tahu were left with sufficient land to preserve reasonable access to mahinga kai.

Finding on breach of Treaty principles

10.7.13 We find that the Crown's failure to ensure that Murihiku Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. As subsequent events were to show, by 1891 only 7.7 per cent of Murihiku Ngai Tahu had sufficient land, 50.6 per cent had insufficient land, and 41.7 per cent had none. Moreover this denial of Ngai Tahu's rangatiratanga in breach of article 2 of the Treaty was a serious blow to the tribe's social system and resulted in the disintegration of Murihiku Ngai Tahu's traditional life and society, a process later to be hastened by Native Lands Acts of the 1860s. That Ngai Tahu were detrimentally affected by the Crown's Treaty breaches is readily apparent.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

10 The Murihiku Purchase

10.8 Events After the Purchase

10.8. Events After the Purchase

10.8.1 In the 1870s the government made some attempt to relieve the parlous condition of many landless "half-caste" Ngai Tahu in Murihiku. In 1906 the Landless Natives Act made further provision for those Ngai Tahu with little or no land. The claimants, in grievance no 9, claimed that both the Half-Caste Grants Acts and the Landless Natives Act 1906 and other (unspecified) legislation were inadequate to remedy the landlessness caused by the sale to the Crown. We will defer to chapter 20 our consideration of the Landless Natives Act. At this point it is appropriate, however, to consider the claimants' grievance concerning the half-caste grants legislation.

Grievance no 9: half-caste land grants 1869-1888

10.8.2 For some time prior to 1840, European sealers and whalers had intermixed with Ngai Tahu in the Foveaux Strait area. There was a considerable amount of intermarriage between Ngai Tahu women and European men. People of this mixed ancestry were regarded as Ngai Tahu, but they were not provided for in the reserves made at the time of the Murihiku purchase.

When Rakiura (Stewart Island) was acquired by the Crown in 1864 the deed of purchase provided that a portion of land at the Neck was to be reserved for the half-castes residing there, and any surplus was to go to two named chiefs (see appendix 2). In 1873 the Stewart Island Grants Act recited that the area of land at the Neck was insufficient to make adequate provision for all the half-castes living there. Accordingly, the governor was given power to grant other land on Rakiura or the neighbouring mainland to those of mixed parentage without land. Such grants were not to exceed ten acres for each male and eight acres for each female.

10.8.3 In 1869 the Public Petitions Committee of the Legislative Council considered a petition of one Andrew Thompson. In its report the committee said:

Your Committee have the honour to report, that, in connection with this petition, they have necessarily taken into consideration the general question of the obligation on the part of the Crown to make provision out of the lands ceded by the Natives in the Ngaitahu and other Blocks in the southern portion of the Middle Island for the half-caste families resident thereon at the time of cession; and are of opinion that, inasmuch as it has been proved to the Committee that, for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown by the Commissioner for the purchase of these lands, such obligation does exist, and that the honor of the Crown is concerned in its faithful and immediate discharge.

(E2:373) {FNREF|0-86472-060-2|10.8.3|100}

The committee's report was referred to Alexander Mackay, as native commissioner familiar with the circumstances of Ngai Tahu. On 6 October 1869 he advised the under-secretary of the Native Department that in addition to landless half-caste Ngai Tahu at Rakiura, there were half-caste families living near the Bluff in Southland. He suggested a block of about, 1000 acres should be selected near Oraka for the Rakiura and mainland half-caste Ngai Tahu(E2:374). {FNREF|0-86472-060-2|10.8.3|101}

On 5 September 1871 Alexander Mackay reported again to the under-secretary of the Native Department. He enclosed a return which showed that of 187 half-caste Ngai Tahu, 91 had been born on Rakiura, and 93 at various places on the mainland. On the basis of ten acres for each male and eight acres for each female, 1676 acres would be required (E2:398). {FNREF|0-86472-060-2|10.8.3|102} A further report by Mackay of 19 November 1874 referred to Mantell's promise that special provision would be made for half-castes (E2:401). {FNREF|0-86472-060-2|10.8.3|103}

10.8.4 On 8 December 1877 the Middle Island Half-Caste Crown Grants Act was passed. It referred to certain promises having been made in favour of certain half-caste families then living in the South Island. Their names were listed in two schedules to the Act. The first schedule named 53 people living in Canterbury and 118 in Otago (which included Southland). The Act authorised a grant of ten acres to be made to each male and eight acres to each female. Such grants were to be deemed to be a final extinguishment of all claims of such people in respect of the promised provision of land. By later amendments various errors and omissions were corrected, the last being in 1888 (E2:383-396). {FNREF|0-86472-060-2|10.8.4|104}

10.8.5 Not surprisingly, the claimants said that a grant of 18 acres to a husband and wife in the 1870s did not provide a viable unit. As we have earlier indicated, Professor Pool pointed out that, by the 1850s, the relative sufficiency of 50 or even 100 acres was being challenged by European settlers (O15:12). Moreover, much would depend on the quality of the land, its location and accessibility (O16:191-231). Professor Pool quoted from a further report of Alexander Mackay of 6 May 1881:

The small quantity of land also held per individual-viz., fourteen acres, and in some cases the maximum quantity is less-altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a hundred acres too small to be payable... (O15:13) {FNREF|0-86472-060-2|10.8.5|105}

Although in 1868 Chief Judge Fenton increased the size of Ngai Tahu reserves from Mantell's average of 10 acres per person to 14 acres, (still a totally inadequate allocation), the New Zealand legislature as late as 1877 restricted the allocation of land to Ngai Tahu of mixed descent to a mere ten acres for males and eight acres for females. This in purported fulfilment of a promise by Mantell. It must have been well known to the Crown that such an allocation would provide, at best, no more than bare subsistence and at worst prove totally inadequate even for that. It is difficult to reconcile its actions with good faith on the part of the Crown.

Finding on grievance no 9

10.8.6 The tribunal finds the allocation of ten acres for male half-castes and eight acres for female half-castes in 1877 to have been insufficient to meet their need for

land and in breach of the Crown's Treaty obligation to ensure that adequate provision was made for these people. In so doing, it failed to honour the promise which it accepted had been made by the Crown representative Mantell to the Ngai Tahu people. We recall that the Public Petition Committee of the Legislative Council in its 1869 report, to which we have referred, acknowledged that "for reasons of policy as well as of justice and humanity, such promises were made on the part of the Crown...and that the honor of the Crown is concerned in its faithful and immediate discharge". Once more it is our melancholy duty to report that the Crown failed adequately to honour its obligation to many Ngai Tahu half-caste people, to their detriment and the detriment of successive generations.

Schools and hospitals

10.8.7 In their fifth grievance the claimants said that the Crown failed to provide schools and hospitals at each Ngai Tahu village, which provision was part of the price agreed upon by the Crown.

As we consider this claim in some detail in chapter 19 we say nothing of it here, except to indicate that we find the grievance to be very largely established.

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