

# Ngai Tahu Land Report

## 13 Arahura

### 13.1 Introduction

#### 13.1. Introduction

While Europeans, whether whalers, sealers, traders or itinerants, were to be found in various parts of Ngai Tahu territory east of the Southern Alps from early on in the nineteenth century, the west coast of Te Wai Pounamu remained largely undisturbed by such newcomers. Europeans knew little about the west coast. Occasional sealing gangs worked a certain way up from Foveaux Strait from the early nineteenth century, but for the most part they ventured no further north than Piopiotahi (Milford Haven). European exploration of any significance dates from the mid-1840s. Heaphy, Brunner and Fox were active at this time. Their reports did not excite further exploration or settlement. Between 1848 and 1857 there was little European contact with the Poutini (western) coast. In 1857 a young man, James Mackay Jr, ventured south from Nelson. He was more favourably impressed with west coast prospects. In 1858 and 1859 several sheep runs were selected there, but none were actually stocked at the time. Coal was known to be abundant and the presence of gold became known, but not its likely quantity.

The growing interest of Europeans in possibly settling in the area forced the Native Land Purchase Office to give serious thought to extinguishing all remaining Maori title in the area. Initially it was thought the Crown had acquired the land by Kemp and other purchases, but little of the purchase price had gone to Poutini Ngai Tahu and no reserves had been set aside for their benefit. Quite apart from these uncertainties several tribes from the Nelson area had invaded, and for a time occupied, the Poutini coast during the 1830s. By the end of this decade however, Ngai Tahu had regained control of much of their territory and progressed northwards to Kawatiri and beyond in the 1840s.

Between 1853 and 1856 Donald McLean, the chief native land purchase commissioner, entered into a series of agreements buying out the respective interests of Ngati Toa, Ngati Awa, Ngati Tama, Ngati Rarua and Rangitane. These tribes purported to sell their interests in the various parts of the northern South Island and extending down to the west coast. Poutini Ngai Tahu heard of these sales and were greatly incensed. In 1857 James Mackay Jr was given a letter from leading Poutini chiefs offering to sell the land from West Wanganui in the north, to Piopiotahi in the south, for £2500. They made it clear they would oppose any European settlement unless they first received payment.

McLean, in the belief that there was a mere remnant of 25 or so Poutini Ngai Tahu on the west coast, felt no need to act hastily. Finally, however, James Mackay was appointed by McLean to purchase both the Kaikoura and Arahura blocks. After purchasing the Kaikoura block Mackay traversed the alps, arriving on the Poutini coast in May 1859. He was authorised to pay no more than £200 for the 7.5 million

acres on the west coast, and to set aside no more than 500 acres as reserves for Ngai Tahu. Despite spending over four months on protracted negotiations Mackay failed to persuade Poutini Ngai Tahu to accept such parsimonious terms. Werita Tainui treated the offer with contempt, describing the sum offered as no more than the price of a horse.

On 25 October 1859, following a visit by Mackay to Auckland, where he saw McLean's deputy and Governor Browne, McLean issued fresh instructions. Mackay now had authority to offer up to £400 and set aside 10,000 acres in reserves, plus a further 2000 acres to meet surveying costs. By this time gold had been discovered in the Buller River. Poutini Ngai Tahu were well aware of the discovery as the survey party which found the gold included several Ngai Tahu from Mawhera. At this early stage it was not known how extensive the gold deposits might prove to be. But the possibility of a gold rush gave the renewed negotiations a certain impetus.

Just as they had done in 1859, Poutini Ngai Tahu in 1860 emphasised their concern to retain ownership of the Arahura River and access to its banks. This was an important source of their taonga, pounamu (greenstone). They sought not only to keep the river but a substantial reserve of some 8000 acres on either side of the river, so they could access the pounamu. In the event, Mackay agreed that the Arahura River should remain the property of Poutini Ngai Tahu, but he declined to set aside the 8000 acres requested and instead allocated only 2000 acres. This was insufficient to extend the whole way up either side of the Arahura. To meet this contingency Mackay agreed that Ngai Tahu would have the right to repurchase additional land from the Crown at 10 shillings an acre. This proved to be 12,000 times more than the Crown paid for an acre of land.

A deed of purchase was signed on 21 May 1860. The purchase price was £300. A total of 6724 acres in various parts were reserved for individual allotment, a further 3500 acres for religious, social and moral purposes (in effect, as an endowment), and 2000 acres in the Mawhera valley as Crown land to meet survey costs. Included in the 6724 acres was a reserve of 524 acres for Ngati Apa. On the south bank of the Mawhera or Grey River, in the vicinity of the Mawhera pa site, 500 acres were reserved for Poutini Ngai Tahu. This was to be the future site of Greymouth. In return Ngai Tahu surrendered their claim to land from Kahurangi Point in the north, to Piopiotahi (Milford Sound) in the south. Fourteen chiefs signed the deed, including Tarapuhi, Werita Tainui, and Makariri of Poutini Ngai Tahu, and Puaha te Rangi of Ngati Apa.

The claimants have 11 grievances arising out of the Arahura purchase. Of these, seven relate directly to the purchase and will be considered here. The principal issues arising from these grievances are:

- Should a protector have been appointed to assist Ngai Tahu?
- Did the Crown wrongfully use the Ngati Toa and other purchases to put pressure on Ngai Tahu to sell?

- Did the Crown fail to ensure that Ngai Tahu retained sufficient land for an economic base? Associated with this is a complaint that the Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude.

- Did the Crown fail to protect the right of Ngai Tahu to retain possession and control of all pounamu?

- Did the Crown pay an inadequate price and in particular fail to protect Ngai Tahu by not revealing the value of gold bearing land?

---

*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 13 Arahura

### 13.2 Statement of Grievances

#### 13.2. Statement of Grievances

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 used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale.
3. The Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude.
4. The Crown wrongfully imposed a price on land that Ngai Tahu had wanted to exclude from the sale.
5. The Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu.
6. The Crown failed to protect Ngai Tahu by ensuring that they had kept enough land to provide an economic base and so preserve their Tribal Estate.
7. The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.
8. The Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land which was a breach of the duty of good faith.
9. The Crown failed to protect Ngai Tahu by later causing or permitting lands that had been excluded from the sale to be reduced in area (for example, within the town of Greymouth; D3:65).
10. The South Island Landless Natives Act 1906 and other legislation was inadequate to remedy the landlessness caused by the sale to the Crown.
11. The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Enquiry into Maori Reserved Lands, [1975]. (W6)

# Ngai Tahu Land Report

## 13 Arahura

### 13.3 Background to the Purchase

#### 13.3. Background to the Purchase

##### Early history

13.3.1 The evidence before us, particularly that of the Crown historian Dr Donald Loveridge, traversed the early history of Poutini Ngai Tahu. It seems likely their ancestors were in occupation of the west coast of the South Island from as early as the seventeenth century, having subdued the original occupiers, Ngati Wairangi. During much of the first four decades of the nineteenth century Tuhuru appears to have been the leading Poutini Ngai Tahu chief (N2:4-5).

During the 1830s Poutini Ngai Tahu suffered some set-backs but appear to have retrieved their former position a year or two before 1840. The events of the 1830s and 1840s have been summarised by Dr Loveridge.

- Poutini Ngai Tahu in the Mawhera-Hokitika district had been defeated in battle in the early 1830s by Ngati Rarua and Ngati Tama;
- the district was occupied for about six years (1832-1837) during which time Niho, a Ngati Rarua chief, and his followers exacted tribute from the Poutini Ngai Tahu who remained in residence;
- in December 1836 or January 1837, at Tuturau in Murihiku, Tuhawaiki and Taiaroa led Ngai Tahu to a victory over a Ngati Tama fighting unit headed by Te Puoho. It was shortly after this that Niho left the west coast. Although he never returned, Niho continued to claim authority over the whole of the west coast. Poutini Ngai Tahu probably did not recognise his claims to the south of Kahurangi Point; and
- a decade after their "liberation", Poutini Ngai Tahu living in the Mawhera area were taking steps to occupy and cultivate land on the Kawatiri River (N2:6-11).

##### Crown purchases 1848-1856

13.3.2 As we indicated in our discussion of the Kemp purchase, it cannot be stated with any certainty whether or not any Poutini Ngai Tahu (apart from Werita Tainui who was resident at Kaikanui on the Waimakariri River) participated in that purchase. Werita Tainui received part of the initial payment of £500, a small part of which may have gone to his kinsmen on the west coast. While Mantell allotted portions of the second and third instalments for Poutini Ngai Tahu, it is unlikely they received any part of it. We agree with Dr Loveridge's conclusion, that since Poutini Ngai Tahu did not receive any significant sum of money from the Crown, and Mantell made no effort to lay out any reserves for them on the west coast, they had every right to

believe that any agreement to sell their interests in the land on the west coast was of no effect (N2:13). The Kemp deed was effective only as disposing to the Crown the interests of the east coast Ngai Tahu in the west coast.

13.3.3 In the 10 years following Kemp's purchase the Crown did, however, make a number of other purchases affecting the west coast. These purchases were all made from tribes other than Poutini Ngai Tahu. In the early 1850s, Donald Mclean, the government's chief land purchase commissioner, set out to extinguish all outstanding Maori claims to land in the northern part of the South Island.

- On 10 August 1853 Ngati Toa signed a deed of sale with the Crown transferring all their land in Te Wai Pounamu. The purchase price was œ5000, of which œ2000 was paid that day to Ngati Toa. Under the deed the balance of œ3000 was to be paid to Ngati Toa, "and to the Ngatiawa, the Ngatikoata, the Ngatirarua, Rangitane and Ngaitahu", who jointly with Ngati Toa "claim the land" (A8:I:307-308){FNREF|0-86472-060-2|13.3.3|1}. In a letter of 7 April 1856 to the colonial secretary, McLean explained why all these tribes were included in the deed:

their relative rights, through inter-marriage, the declining influence of the chiefs, and other causes, had [become] so entangled, that, without the concurrence both of these occupants and of the remnants of the conquered Rangitane and Ngaitahu Tribes, no valid title could have been secured. (A8:I:301){FNREF|0-86472-060-2|13.3.3|2}

In December 1854 it was agreed that, instead of the remaining œ3000 being paid by yearly instalments of œ500, one sum of œ2000 would be paid forthwith. The receipt specified the extent of the purchase as including all Ngati Toa claims "to Wairau and Hoiere, and Whakapuaka, and Taitapu, and Arahura and the Waipounamu, including all our lands which we have not sold in former times..." (A8:I:311-312).{FNREF|0-86472-060-2|13.3.3|3} While Taiaroa of Ngai Tahu appears to have been present, and possibly Werita Tainui and others (R4:6), there is no evidence that Ngai Tahu chiefs received any part of the œ2000.

- On 10 March 1854 Ngati Awa agreed, for œ500, to give up their claims to "the whole of the lands to which we lay claim in the Middle Island, or Wai Pounamu", including the area from "Whanganui, to Paturau, Te Awaruato, and from thence to Arahura" (A8:I:309-310).{FNREF|0-86472-060-2|13.3.3|4}

- On 10 and 13 November 1855 Ngati Tama and Ngati Rarua, for œ600, transferred all their lands from "Wairau, and thence to Arahura, continuing until it joins the land sold by the Ngaitahu" (A8:I:312-313).{FNREF|0-86472-060-2|13.3.3|5}

- On 1 February 1856 Rangitane accepted payment of œ100 "for all our claims on the Island, that is for all the lands of the Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of the Rangitane extend" (A8:I:313).{FNREF|0-86472-060-2|13.3.3|6}

Following these various transactions McLean submitted a comprehensive report, dated 7 April 1856, to the colonial secretary. In it he noted:

The only tribe having claims upon this purchase, whom it was impossible for me to visit, are a small remnant of the Ngaitaha [sic], about twenty-five in number, residing at Arahura, on the West Coast, a remote and as yet almost inaccessible part of the country. From a settlement of their claim I do not apprehend any difficulty; but, as a matter of justice, if the district is occupied by Europeans, a revenue [sic] of 300 or 400 acres should be secured to them, together with a small amount of compensation for their claims. (A8:I:303){FNREF|0-86472-060-2|13.3.3|7}

While McLean here recognised that Poutini Ngai Tahu had a claim to lands on the west coast which should be attended to, it is apparent that he regarded it as a minor matter, of no urgency.

#### Growing interest in the Arahura region

13.3.4 Early in 1857 McLean was being urged by W J W Hamilton of the desirability of settling the Poutini Ngai Tahu claim (A8:II:17). {FNREF|0-86472-060-2|13.3.4|8} On 5 February 1857, in a further report concerning his recently completed North Canterbury purchase, Hamilton told McLean that the Ngai Tahu vendors:

claimed no right over the land to the westward of the watershed of this portion of the Middle Island. They stated that the Arahura, or Putini [sic], Natives own it. (A8:II:20){FNREF|0-86472-060-2|13.3.4|9}

In February 1857 James Mackay Jr, then a settler from the Collingwood district, went on an exploratory journey down to the west coast. The first Ngai Tahu settlement he encountered was at the mouth of the Kawatiri. It consisted of only three inhabitants, "the sole survivors of the inhabitants-they had all died of the measles and influenza" (N2:25-26). {FNREF|0-86472-060-2|13.3.4|10} The first Poutini Ngai Tahu settlement of any substance reached by Mackay was near the mouth of the Mawhera, on its south bank. On 7 March 1857, as Mackay noted in his journal, he:

Had a long conversation with the natives today, when they stated that they would not allow white people to settle on the land till they were paid for it, and on my telling them that the land had been sold, they said that the Ngatitua tribe had no right to sell it; some of them proposed that I should not be allowed to go any further, but this was not agreed to. They asked me if I would take a letter to Mr. McLean for them. I said I would, but at the same time assured them that they might save themselves the trouble of writing, as they would get nothing from him for the land. (N2:26){FNREF|0-86472-060-2|13.3.4|11}

The letter from Poutini Ngai Tahu was dated 15 March 1857. Translated it read:

Friend McLean, salutations to you,

We have heard from the white man Mackay that the land we inhabit has been sold by the Ngatitua tribe, they are thieves, as their feet have never trodden on this ground, they are equal to rats which when men are sleeping climb up to the storehouses and steal the food.

Let the money which Rawiri Puaha has received be placed against Onepaka, and Martins (aupouri) go against Moetoa.

We do not wish white people to come here unless they pay for the land as it is our property. We are quite willing to sell to the Government the whole of the land along the Coast, from West Wanganui to Piopiotai, from the latter place the boundary proceeds inland to the Mountains, Tiori Patea, Teraotama, Kaimata, Taiwaniuta, Maruia, Maungawaripa, Otutaki, Porehia, Matakītaki, Te Ikahapuku, Te Rotoroa, Wangapeka, Aoraki (Mt Arthur), Onetoke, Rangiora (Snowy ranges between Takaka and Aorere[]) Wakamarama, (Range to the west of Aorere Valley) Te Hapu (about 6 Miles South of the entrance to West Wanganui).

We desire the sum of Two thousand five hundred pounds (£2500) for this block of land. We are living in poverty, as we have never received any money, it will also complete the purchase of all land in this island. We will make arrangements with you when you come to purchase the land about Reserves for ourselves, this is all we have to say. (N3:71){FNREF|0-86472-060-2|13.3.4|12}

Mackay forwarded this letter to McLean with a covering letter of 18 June 1857 (N3:72-73){FNREF|0-86472-060-2|13.3.4|13} He noted:

- that while at the Grey (Mawhera) River he made friends with Tarapuhi and was able to explore the Mawhera valley;
- he thought the country, as far as he had seen it, extending five or six miles south of the Grey, as being very suitable for European settlement; and
- there were very few Maori on the west coast. He understood there to be only 87 from West Wanganui to Foveaux Strait, but they expected an accession in numbers from Port Cooper.

McLean did not acknowledge this correspondence from Mackay, nor a letter from Mackay's father, until 22 December 1857, when he told James Mackay Sr that he was anxious to have James Mackay Jr settle a land question at Arahura. In February 1858 Mackay Jr was appointed assistant native secretary at the Collingwood gold-fields (N2:30).

13.3.5 McLean, by the end of 1857, had come to realise the desirability of resolving the Arahura land question. But delays in the appointment of Mackay Jr as an assistant native secretary, and lack of funds, led him to wait until the following summer. In the meantime, European interest in the west coast was growing. Leonard Harper, in November 1857, was the first European to cross the island to the far coast, with the assistance of Tarapuhi and Werita Tainui, among others. In 1857 the Nelson Provincial Government accepted applications for pastoral leases on the west coast, and the Canterbury Provincial Council followed suit in 1858. James Mackay Sr was involved with several such applications between December 1857 and February 1858, including one in December, filed in his son's name. This covered some 24,000 acres in the Mawhera district. Dr Loveridge's investigations suggest that James Mackay Jr later retracted or cancelled this application. In February 1858 he made a new application for a cattle-run, at West Wanganui to the north, and down the west coast

for some 25 miles to Kahurangi Stream (N2:34-35). {FNREF|0-86472-060-2|13.3.5|14}

Dr Loveridge gave us details of other applications made in December 1857 for land in the Mawhera valley. These were for substantial areas ranging from 10,000 to 60,000 acres. Other applications were made in 1858 (N2:36-37).

Whereas in 1857 Mackay Jr found no indication of gold on the west coast, specimens of gold in small amounts were found by a European, Lee, on a trip to the coast with Tarapuhi and Tainui early in 1858. The gold was in the vicinity of the Whakapoi or Heaphy River. As Loveridge notes, Poutini Ngai Tahu were aware of the presence of gold by this time (N2:37). {FNREF|0-86472-060-2|13.3.5|15}

James Mackay Jr is instructed to purchase the west coast

13.3.6 On 3 November 1858 McLean instructed Mackay Jr to effect two purchases. He was to go first to Kaikoura to settle outstanding claims of Ngai Tahu there, and once these duties were completed Mackay was told to:

have the goodness to proceed to Arahura on the west coast for the purpose of carrying out similar arrangements at that place by marking off a reserve, or reserves, not exceeding if possible, a total area of about 500 acres, which it appears, would be sufficient for the few Natives residing there.

You will have a conveyance of all their claims duly executed by Tuhuru and the other Chiefs and people residing on the west coast, to whom you will pay on surrendering their rights, a sum of œ150, or œ200.

...Great reliance is placed on your own judgment and discretion as to the carrying out of the details of this arrangement including the extent of the necessary reserves for the Natives. (A8:II:33-34) {FNREF|0-86472-060-2|13.3.6|16}

Mackay evidently contemplated some difficulty in settling with Poutini Ngai Tahu on the niggardly basis proposed by McLean.

On 19 November 1858 he wrote to McLean seeking directions as to whether he should purchase the whole of the west coast and advising:

From what I recollect of the conversation I had with Tarapuhi (son of the late Tuhuru) [in 1857], I believe he claimed the whole of land from West Wanganui (Province of Nelson) to Dusky Bay, Piopiotai (Province of Otago), for this he asked œ2500; he, however, admitted that the Port Cooper Natives and Taiaroa had received payment for the west coast, and to a certain extent allowed the conquest of part of the district by the Ngatitooa tribe. I do not anticipate any difficulty in persuading them to sell the land, as they were willing to do so when I was there two years ago, but I think it probable they may wish for a larger sum of money for it than the Government are willing to give. (A8:II:34) {FNREF|0-86472-060-2|13.3.6|17}

The 1859 negotiations

13.3.7 Mackay's negotiations with the Kaikoura Ngai Tahu took some time. He finally reached Mawhera, via an arduous journey over Harpers Pass, on 19 May 1859. Some time elapsed while a message was sent to the southern-based Poutini Ngai Tahu requesting them to come to Mawhera. It was 25 July before the southern Maori arrived and negotiations could start. After some initial differences between the Mawhera, Arahura and Taramakau Ngai Tahu on the one hand and the Waitangi, Mahitahi and Jackson Bay Ngai Tahu on the other were settled, the Poutini Ngai Tahu maintained a consistent stance. They were prepared to sell their land from Mawhera north to Te Hapu and from Okitika (Hokitika) south to Milford Haven (Piopiotahi), but they wished to retain the block between the Mawhera (Grey) and Kotukuwakaoka (Arnold) Rivers, and the Okitika. Mackay's record of the discussions on 30 July includes the following:

Werita Tainui, one of the principal Chiefs of Kaipoi, and brother of Tarapuhi offered the land in the Nelson Province (stipulating for Reserves at Karuroha, and Kawatiri (Buller River)) and the land situated in the province of Canterbury to the Southward of the river Okitika, and from there to Milford Haven, retaining the block between the river Okitika and the rivers Mawhera and Kotukuwakaho (this contains quite 200,000 acres of heavily timbered and tolerable level country).

I said I could not agree to this as they wished to retain the best of the land, and receive payment for bluffs like Otahu, Tauparekaka, Te Miko, and paripako-and I refused to pay for the land at all unless [they] chose to except reasonable reserves. It was then argued that they would lose the Arahaura River (Note. The Arahaura River is between the Okitika and Tarawakau) from which the much coveted Green stone is procured if they sold the land on each side of it.

I informed them that the Greenstone was of no use to the Government, and if it was all they wanted, they might have the whole of the Arahaura River bed, that it was of no use to any one and even if they sold it to the Government, no objection would be raised as to their procuring Greenstone from it.

Little more was done this day, the Natives contenting themselves with offering the land from Mawhera to Te Hapu, and from Okitika to Milford Haven, and demanding the price. I objected to this course and offered a Reserve of 500 acres of land at Arahaura, and the river bed, This was indignantly rejected. (N3:16){FNREF|0-86472-060-2|13.3.7|18}

Two days later Mackay offered to set aside 800 acres in reserves in a variety of places and to pay a purchase price of œ200. But this offer was also rejected. Poutini Ngai Tahu still insisted on retaining the block of land between the Rivers Mawhera, Kotukuwakaoka and Okitika, while accepting œ200 for the remainder. Werita Tainui was particularly contemptuous of the price offered, asking Mackay whether he had "come to pay for the land with the price of a horse" (N3:18).{FNREF|0-86472-060-2|13.3.7|19}

On 3 August 1859 there was more fruitless discussion, with Mackay recording that Poutini Ngai Tahu were unwilling to alter their terms at all:

and after some more arguments Taetae and his people made a start for Waitangi telling me to return to the Governor, and if I came back with four or five hundred pounds, they would sell the land. This ended the negotiations with the Natives. (N3:21){FNREF|0-86472-060-2|13.3.7|20}

#### The failure of the 1859 negotiations

13.3.8 Mackay reported the unsuccessful outcome of his negotiations in a letter of 27 September 1859 to the native secretary. He noted that the Poutini Ngai Tahu numbered 101 people and the block which he sought to purchase contained at least 7.5 million acres. He found the Ngai Tahu title to the west coast district to be good (N3:23-24). {FNREF|0-86472-060-2|13.3.8|21} He related the impasse in his negotiations in this way:

The Ngaitahu refused to surrender the whole of their claim for the sum of two hundred (200) pounds offered by me wishing to retain the block of land intervening the rivers Mawhera and Kotukuwakaha, and the river Okitika. They expressed their willingness to dispose of their lands in the province of Nelson, and those to the Southward of the Okitika in the province of Canterbury for the sum of two hundred pounds (æ200) (being æ100 for each block) but they could not be brought to give up the centre piece of land also for that amount (æ200)-As my instructions were to pay them on the surrender of the whole of their claims to land, I did not consider myself justified in paying them unless they did so, and the same urgent necessity did not exist as at Kaikoura, there being no European settlers as yet in the Arahaura district.

I used every exertion to induce the Natives to part with the country laying between the Mawhera and Kotukuwakoha, and the Okitika-but as the highly prized Greenstone is procured from the Arahaura River, which is situated within this block, and as it has been the scene of many bloody contests I found it impossible, from the value attached to its possession, to extinguish the Native title with the sum of money at my disposal for that purpose-It is my opinion that if I had been empowered to pay three hundred pounds (æ300) that I could have purchased, with the exception of 800 acres required for reserves, the whole of the land claimed by this division of the Ngaitahu. (N3:11){FNREF|0-86472-060-2|13.3.8|22}

Mackay returned to Nelson on 19 September and immediately embarked on the Airedale for Auckland, which he reached on 24 September. He submitted his report three days later. During the following week he had discussions with McLean's deputy, Thomas Smith, and with Governor Browne. Dr Loveridge suggested, we think correctly, that in addition to proposing the need for an increase in the purchase price, Mackay stressed the necessity for an increase in the reserves to be left with Ngai Tahu (N3:57-59). {FNREF|0-86472-060-2|13.3.8|23}

#### Mackay receives fresh instructions

13.3.9 On 25 October 1859 Thomas Smith, on behalf of McLean, sent fresh instructions to Mackay. Smith enclosed Mackay's 27 September report, with annotations by the governor, the minister for native affairs and the Native Department. These annotations cannot now be found, but Smith appears to have summarised them in his covering letter:

You will perceive that it is intended that 6000 acres should be reserved for individual allotment, as proposed in the minute of the Assistant Native Secretary, that 4000 acres should be reserved to be brought under the Native Reserves Act; and that an additional reserve should be made for the purpose of providing a fund for defraying the expense of surveying the individual allotments above referred to when required. 2000 acres will probably be sufficient for the last named purpose. All these reserves should be defined with as much precision as may be found practicable, without actual survey and cutting the lines on the ground, and in the case of those set apart for individual allotment, it will be well to indicate the names of the persons in a schedule to be attached to the Deed, to whom portions out of each block are assigned. As for instance in a block estimated to contain 1000 acres, the names of the proposed allottees should be specified as entitled to certain portions out of such particular reserve, according to the scale proposed in the minute above referred to.

His Excellency relies much on your own judgment in making such arrangements as may practically carry into effect the objects in view, as set forth in the minutes on your report.

Instructions have been issued to the Sub-Treasurer at Nelson to advance to you on requisition a further sum of £280, making with the £120 now in your hands a sum of £400 at your disposal for this purchase. You are authorised to pay to the Ngaitahu Natives a sum not exceeding the above in full satisfaction of all their claims.  
(A8:II:39){FNREF|0-86472-060-2|13.3.9|24}

Mackay was now in a more favourable position to negotiate a settlement. He could pay up to £400 and set aside reserves totalling 12,000 acres.

---

*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 13 Arahura

### 13.4 The Purchase

#### 13.4. The Purchase

13.4.1 In December 1859, only a month or so after receiving his new instructions, Mackay learned that significant quantities of gold had been found in the Buller River the previous month by his friend John Rochfort. This news was first published in the Nelson Examiner on 21 December 1859. Mackay had sent news of the discovery on to McLean four days earlier. He remarked that:

this forms an additional reason why the purchase of the lands should be terminated as speedily as possible. I have no doubt but if the above important fact becomes generally known that the Natives will endeavour to get more money for their claims to the land. (N3:38){FNREF|0-86472-060-2|13.4.1|25}

In commenting on this passage Dr Loveridge, the Crown historian, said:

This statement could be interpreted as a desire on Mackay's part to conceal from the Poutini Ngai Tahu the fact that gold had been discovered. Such was not the case. Rochfort's survey party included a large number of men from Mawhera pa. Indeed, he had not been able to start work until they arrived at the Buller River, after the crops at Mawhera had been sown. The local Maori already knew what had happened, and Mackay must have been aware of this. His comment to McLean undoubtedly refers to the possibility of a gold rush on the Coast, if and when "the above important fact" became "generally known" to Europeans. The presence of a large number of them in Poutini Ngai Tahu territory could have complicated his task enormously. (N2:63)

The claimants challenged this interpretation. They invoked a statement by Hamilton to McLean on 6 August 1857 that:

The recent gold discoveries at Nelson [on the Aorere River] are so likely to raise the value of the land in the eyes of the Maoris to the most extravagant pitch, that I fear any delay in accepting their proposals to treat may end in totally preventing the acquisition of the land sought for by us. (A8:II:27){FNREF|0-86472-060-2|13.4.1|26}

And, in more general terms, they cited from an article by Mackay in the Nelson Examiner of 26 August 1857, that prompt action should be taken to acquire the west coast from Poutini Ngai Tahu because:

I was informed that several of the Port Cooper natives intend settling at Mawera, and it would be easier to deal with the few at present residing there, than with a more numerous and wideawake population. (N2:28){FNREF|0-86472-060-2|13.4.1|27}

This evidence, the claimants said, indicates a consistent intention to acquire the Poutini coast for a great deal less than its value (O49:9).

We agree with Dr Loveridge's response to this comment, that it is unrealistic to think that Mackay was attempting to conceal from Poutini Ngai Tahu the fact the gold had been discovered by Rochfort in November 1859. Ngai Tahu already knew about the discovery and Mackay must have been aware of this. But Dr Loveridge rightly conceded that the Crown's hope to acquire the Poutini coast with a nominal payment is clear from all the available evidence. Moreover, he drew attention to his earlier evidence, that there was scant justification for the Crown applying this policy to either the Kaikoura or Arahura purchases (R4:12).

The negotiations begin

13.4.2 James Mackay Jr and others left Collingwood on 16 January 1860 for the west coast. The journey proved to be an arduous one. Mackay seriously injured his knee and finally limped into Mawhera on 2 March 1860 (A8:II:40). {FNREF|0-86472-060-2|13.4.2|28} While detained at Mawhera waiting for his injured knee to improve, James Mackay appears to have had some discussions with Poutini Ngai Tahu chiefs. In his belated report to McLean of 21 September 1861, Mackay said:

On the 28th March, I left the Pah at Mawhera, and, accompanied by Mr. S. Mackley, and the Chiefs Tarapuhi te Kaukihi, Taetae and Werita Tainui, and the Natives of that place, proceeded southwards with the intention of collecting as many of the Ngaitahu as possible at Poherua (Poera on charts), the residence of the Chief Taetae, for the purpose of discussing the question. It had, however, been previously arranged that the payment was to be made on our return to Mawhera, after all questions relative to the lands to be reserved for the use of the Natives had been finally arranged. We reached Poherua (distant 70 miles) on the 5th April. (A8:II:40){FNREF|0-86472-060-2|13.4.2|29}

There are hints here of a tentative agreement that the sale would proceed when all questions of reserves were settled.

From Poherua Mackay proceeded further and laid out reserves at Mahitahi, at Makawiho, at Manakaiaiu, and other small reserves "at various places' on the way back to Poherua. His party reached Poherua later on 20 April:

On the 21st the land question was recommenced, I found the Natives still desirous as on the former occasion to retain all the land intervening the rivers Mawhera and Kotukuwhakaho, and the river Hokitika, comprising some 200,000 acres of valuable country, unless they received œ300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven), and larger reserves than had on my first visit been offered to them (800 acres was offered at that time). After some days spent in discussing the question, and on my having informed them of the very liberal provision in that respect ordered by His Excellency the Governor, they agreed, on the 26th April, 1860, to accept the sum of œ300, as compensation for the whole of their claims to land in the Arahura or Poutini districts, excepting over such portions as were reserved for their own use or benefit.

It was specially stipulated that a very large reserve should be made at the river Arahura or Brunner, and that the reserves should be taken in a strip up each side of the river with a view of giving them a right to its bed, from which is obtained the highly prized greenstone, which gives the name Wahi Pounamu, -place of greenstone, -to the Middle Island, it was also arranged that there should be a reserve or reserves of 1000 acres at the Mawhera or Grey, which was assented to, the locality to be fixed on our arrival there, and [previous] to the payment being made. (A8:II:40){FNREF|0-86472-060-2|13.4.2|30}

The total area of reserves made for individual allotment was 6724 acres, 724 acres more than authorised by the governor. Mackay explained that two Poutini Ngai Tahu chiefs were jealous that in following his instructions, he had awarded 500 acres to three superior chiefs, namely, Tarapuhi, Taetae and Werita Tainui. He compromised by giving Hakiaha and Koeti 250 acres each instead of 100 acres. This accounted for an additional 300 acres. The remaining 424 acres were allocated to Puaha Te Rangi as compensation for certain claims of Ngati Apa to lands in the Buller and Kawatiri districts. Mackay reported that the majority of Poutini Ngai Tahu admitted the justice of Puaha Te Rangi's claim, and so he allotted reserves to Te Rangi and a few other Ngati Apa (A8:II:41). {FNREF|0-86472-060-2|13.4.2|31}

13.4.3 Having reached an agreement on 26 April 1860, Mackay set off for Mawhera accompanied by all the Poutini Ngai Tahu except Taetae (who was seriously ill and later died). On the way north Mackay laid out various reserves. At Mawhera further reserves were agreed on. Mackay relates that a dispute arose over the site for a reserve of 500 acres at Mawhera for individual allotment:

...I wishing the Natives to select it up the river, but they objected to do so preferring to have it near the landing place. As this spot had always been their home, and on the hill above it in a cave repose the remains of Tuhura and others of their ancestors; nothing could move them to give up this place, which I much regretted, as it enables them to retain the best landing place. I however found that further argument would have endangered the whole arrangement entered into at Poherua, on the 26th April, and therefore deemed it politic to acquiesce in their demand. It may be imagined from the position of this reserve that it would be a suitable site for a town, but the whole flat portion of it is liable to be flooded, of which we had practical demonstration by finding on our return from the south that several of the houses at the Pah had been carried away by a flood which took place in our absence. (A8:II:41){FNREF|0-86472-060-2|13.4.3|32}

The deed is signed



Figure 13.1: The map of the Arathura purchase was on the deed itself. The detail of the boundaries of the purchase contrasts dramatically with that of the Kemp deed map. Courtesy of DOSLI, Wellington.

13.4.4 On 21 May 1860, a deed of sale was signed by some 13 Poutini Ngai Tahu, including Tarapuhi and Werita Tainui, and also by Puaha te Rangi for Ngati Apa. Ngai Tahu transferred to the Crown for the sum of œ300 all their land except that reserved from sale and described in two schedules to the deed (see appendix 2.9).

The boundaries of the land sold were succinctly described by Mackay in his report as being:

all the portion of the West Coast district lying between Kaurangi Point in the Province of Nelson, and Piopiotai, or Milford Haven, in the Province of Otago, and bounded inland by the watershed range of the east and west coast of the Middle Island.  
(A8:II:41){FNREF|0-86472-060-2|13.4.4|33}

The English translation of the deed transferred the land described "with its trees minerals waters rivers lakes streams and all appertaining to the said Land or beneath the surface of the said Land" to the Crown.

By the time the deed was signed Mackay had settled the individual allotments for 6724 acres of reserved land. He had laid off the reserves between Mahitahi and Mawhera Valley (nos 4 to 35). Three reserves further south, at Jackson's Bay and Paringa (nos 1-3), had been "distinctly described" but not "defined on the ground".

Twelve to the north of the Mawhera Valley (nos 36-47) would be laid out after the deed was signed (N2:71). {FNREF|0-86472-060-2|13.4.4|34}

In addition, Mackay made provision for a further 3500 acres to be reserved "for the benefit of the aboriginal inhabitants of the West Coast, and for the promotion of social, moral, and religious objects among them". {FNREF|0-86472-060-2|13.4.4|35} In fact, the governor had ordered 4000 acres to be reserved for these purposes. But, as Mackay had exceeded the authorised allocation of 6000 acres for individual allocation by 724 acres, he make a compensatory reduction in the second category of reserves. Finally, as instructed, he set aside a block of 2000 acres at Totara Bush in the Mawhera Valley as a general government reserve. This was intended to be sold later, to defray the costs of surveying the 54 reserves scheduled in the deed. Copies of the plans of the reserves were supplied to Ngai Tahu with the names of persons allotted land noted on each (N2:76).

The deed was defective in that it did not mention an agreement between Mackay and Poutini Ngai Tahu concerning the Arahura riverbed and the adjacent land between the Arahura reserve and Mount Tuhua. We discuss this later in connection with the grievance concerning pounamu.

---

*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Land Report

## 13 Arahura

### 13.5 Ngai Tahu's Grievances

#### 13.5. Ngai Tahu's Grievances

Having related the principal events leading up to the sale we now consider various of the claimants' grievances. Some, which relate to after-sale events, we consider in other contexts.

Grievance no 2: Crown pressure on Ngai Tahu to sell

#### 13.5.1 The claimants stated that:

The Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale. (W6)

We have earlier discussed (13.3.3), the Crown purchases between 1848-1856, made at the instigation of the chief commissioner for land purchases, Donald McLean. The following points are clear from our discussion.

- Donald McLean attached a much higher priority to the desirability of purchasing the interests of the conquering tribes in the northern part of Te Wai Pounamu. As Professor Ward commented, the relative size and power of each tribe was taken into account when determining the purchase price.
- According to the terms of several deeds signed from 1853 on, the Crown acquired rights of a number of northern tribes in the whole of the South Island. In 1853 Ngati Toa sold all their remaining interests in Te Wai Pounamu for œ5000. The following year the land involved was more specifically described to include Arahura; the 1854 agreement with Ngati Awa for œ1000 disposed of their land in Te Wai Pounamu including their claims to Arahura; in November 1855 Ngati Tama and Ngati Rarua transferred all their lands including that at Arahura for œ600. Finally, in 1856, Rangitane were paid œ100 for their interest in land from Waiau to Arahura. At this point the only remaining interest not extinguished by the Crown was that of Poutini Ngai Tahu.
- McLean reported in April 1856 that if the inaccessible area where Ngai Tahu lived was ever required for European occupation, their claims could be settled for a small cash sum and a reserve of 300-400 acres.
- Political considerations (including security) appear to have had considerable influence in McLean's dealings with Ngati Toa and Ngati Awa.

- By 1857 McLean was being urged by Hamilton and others to settle the Poutini Ngai Tahu claim. The imminent prospect of more settlers, possible migration of some east coast Ngai Tahu, and rumours of the discovery of gold, were said to make a settlement desirable.

- In May 1857, after his exploratory journey to the west coast, James Mackay Jr brought back with him a letter from leading Poutini chiefs offering to sell the land from West Wanganui to Piopiotahi for œ2500. The letter expressed their anger that McLean had purchased from others the land on which Poutini Ngai Tahu were living. They expressed opposition to any European settlement of their land unless they received payment.

- McLean was slow to act on the Poutini offer. Some 18 months went by before James Mackay was instructed to settle the Arahura claim.

- During the abortive 1859 negotiations with Poutini Ngai Tahu Mackay had several discussions with them about the claims of Ngati Toa and other iwi to the west coast. On 30 July he reported:

We then got into a discussion about the Ngatitoo and Ngatirawa [sic], the Ngaitahu denying their claims, and I contending they were just, but at the same time telling them that the Government were willing to pay them as well as the Ngatitoo. If we acted according to Native law we could take the ground from them, as we had paid for it, but the Government wished to act fairly by them, and had deputed me to purchase the land, I recommended them to surrender there [sic] claims to the Crown, and take the Reserves offered by me, as it was possible that if they obstinately persisted in refusing to dispose of the land, that the Government would ask the Ngatitoo to put them in possession. (N3:16){FNREF|0-86472-060-2|13.5.1|36}

On 1 August Mackay records that he told Ngai Tahu that:

The Sun was then shining on them, it was fine weather to cut the ripe corn, if they did not do it at once, it might rain and they would lose it all, it would all be spoiled. (N3:33){FNREF|0-86472-060-2|13.5.1|37}

This, Mackay said:

they at once took as meaning that the Ngatitoo would put us [the Crown] in possession, and they said they were not the slaves of the Ngatitoo. They then rose in a body and said that they would write to the Governor for more money, they would not accept two hundred pounds. (N3:33){FNREF|0-86472-060-2|13.5.1|38}

Notwithstanding their 1857 offer to sell, Poutini Ngai Tahu refused in 1859 to accept what they no doubt regarded as a miserly offer of œ200 and 800 acres for reserves. After much wrangling, negotiations were broken off and Mackay returned to Nelson. His threats failed to intimidate Poutini Ngai Tahu.

In 1860 Mackay returned to the west coast and a much more generous offer by way of reserves, plus an increase in the purchase price of œ100 to œ300, resulted in an

agreement. By this time a gold rush was imminent and Mackay was anxious to complete the purchase.

13.5.2 It is not easy to judge the effect on Poutini Ngai Tahu of the earlier purchases from Ngati Toa, Ngati Awa and other tribes. Clearly they resented the Crown's apparent recognition of other tribes' interest in their land. Not surprisingly they expressed willingness to sell in 1857. But, that they were not prepared to accept what must have seemed to them a contemptuous offer in 1859, indicates that, while willing to sell, they were prepared to insist on terms which they found acceptable. Nor were they willing to bow down to Mackay's threats. The tribunal finds it difficult to accept that McLean adopted a purchase strategy which was deliberately designed to pressure Poutini Ngai Tahu into selling, and selling cheaply. Rather, McLean appears to have almost entirely disregarded Ngai Tahu in his dealings with the more northern tribes, on the basis that they (Ngai Tahu) were a mere "remnant"; remote, few in number and hence of very little consequence.

At the same time, we note that the Crown, in a series of agreements with the more northern tribes, had in some cases at least paid substantial sums to extinguish any claims the tribes might have in Arahura. This would have made Poutini Ngai Tahu very anxious to have their mana over their lands recognised, which an acceptable sale would do. It is to their credit, however, that, keen as they were to assert their mana, they were not prepared to accept what they clearly regarded as a derisory offer in 1859. As Dr Loveridge said at the conclusion of his evidence:

The fact that the final agreement was as good as it was, owed more to the bargaining skills of the Poutini Ngai Tahu leaders rather than the generosity of the Crown. (N2:88)

Finding on grievance no 2

13.5.3 Having carefully weighed all the factors we have enumerated, the tribunal is unable to find that the Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale. While in 1859 Mackay did use threats, these proved of no avail. We believe Poutini Ngai Tahu agreed to sell in 1860 because, while no doubt disappointed that the price was not higher, the Crown had increased both the price and the area of land to be retained as reserves. It follows that the claimants' grievance no 2 is not sustained.

Grievance no 8: Crown failure to reveal to Ngai Tahu the value of gold-bearing land

13.5.4 In their eighth grievance the claimants alleged that:

The Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land which was a breach of the duty of good faith. (W6)

We infer from this grievance that the claimants were saying that, had Poutini Ngai Tahu been aware of the value and importance of gold-bearing land, they would have insisted on a higher price than they received. We propose to consider this grievance under two heads. First, as to the state of Crown knowledge regarding the potential for gold mining on a commercial scale and Ngai Tahu's knowledge in 1860. Secondly,

the implications of the discovery of gold and wider considerations on the adequacy of the price paid.

13.5.5 The extent of the Crown knowledge is, we believe, fairly stated by Dr Loveridge as follows:

Rochfort, of course, had found gold at several points along the Buller River in 1859. The Poutini Ngai Tahu were well aware of this event, but it cannot have come as a surprise. Even assuming that they had never seen any trace of gold in their rivers themselves, (Rochfort's, incidentally, was found "lying upon the surface of the ground" in 1859), the Whakapoi finds of 1857 were a recent memory. Neither they, nor James Mackay Jr. nor anyone else, could tell if there was enough gold to support commercial mining, but it was fairly certain that many prospectors would descend upon the coast in the near future. Indeed, news that a party of fifteen men from Canterbury were digging on the Buller reached Mawhera shortly before the Deed was signed. (N2:84-85)

We have no evidence of the extent to which Poutini Ngai Tahu appreciated the potential significance of a major gold find. They were actively associated with the Whakapoi finds in 1857 and no doubt something of the excitement of the Europeans involved would have rubbed off on them. In the absence of such evidence it is not possible to say whether, at the time they agreed to sell in 1860, Poutini Ngai Tahu were aware that, should gold be discovered in commercial quantities, this would, in the short term at least, significantly enhance the value of some of their land. This we suggest demonstrates the value of an official protector. While Mackay was unlikely to go out of his way to emphasise the potential significance of the discovery of gold, an independent protector would certainly have done so. In the absence of a protector we believe Mackay was under a duty to ensure that Poutini Ngai Tahu were fully and fairly informed.

13.5.6 However, the adequacy or otherwise of the price can be judged by other factors besides the gold-yielding possibilities of the land. We recall that in 1853 the Crown agreed to pay Ngati Toa £5000 to extinguish their title. In 1854 £500 was paid to Ngati Awa and in 1855 £600 to Ngati Tama and Ngati Rarua, again for much smaller interests than the 7.5 million acres on the west coast. As we have seen, Murihiku Ngai Tahu were paid £2600 for a somewhat similar area of land in 1853.

The Crown's historian, Dr Loveridge, was critical of the price paid by the Crown:

The Crown's final offer, however, cannot be described as a generous one. The Governor himself called the cash payment an "almost nominal sum". He was referring, mistakenly, to £200, but £300 was hardly an improvement when more than seven million acres of land (by Mackay's reckoning) were being ceded to the Crown. This sum constituted 72,000 pence: the payment thus works out to about 100 acres per penny. I noted in respect to the Kaikoura Purchase (M10:52-53) that the Crown's policy of paying a nominal gratuity for Maori lands could not be justified when the lands in question had acquired a specific commercial value by virtue of European settlement and agricultural development. Although the Arahura District had not yet been physically occupied by such settlers at the time of the Purchase, applications for pastoral leases on the Grey River had apparently been accepted by both the

Canterbury and Nelson Provincial Government. Both Donald McLean and James Mackay Jr. were aware of the 1857-58 Nelson applications, at least. They were also aware, by the time negotiations were resumed in 1860, that gold was definitely present in the District - although the actual extent and value of these deposits remained to be determined. I would suggest that this information should have been given much greater weight in determining the monetary compensation due to the Poutini Ngai Tahu from the Crown. (N2:86-87)

It seems clear that, by the time the sale was completed, the Crown officials responsible were aware that the 7.5 million acres was potentially of considerable value not only for settlement, in part at least, but on account of the presence of gold. The price paid was miserly, the more so as Mackay had in his possession œ400, up to which sum he was authorised to settle. Perhaps the crowning insult was Mackay's verbal agreement that, having purchased in excess of 7 million acres of land for œ300 or one penny per 100 acres, he agreed they could repurchase certain of that land at the rate of 10 shillings an acre, or 12,000 pence per 100 acres; land moreover which they had strongly urged should be excepted from the sale in the first place (A8:II:50). Expressed in another way, the Crown, in 1860, purchased 7.5 million acres for œ300; in 1873, when Werita Tainui and other Poutini Ngai Tahu exercised their option to buy back a small portion of their land from the Crown at 10 shillings an acre, they bought 1050 acres for œ500 (N4:27).

Finding on grievance no 8

13.5.7 We find that the Crown was under a duty to advise Poutini Ngai Tahu that, if gold was discovered in commercial quantities, this would enhance the value of their land. Moreover, the Crown was aware that European settlement on the west coast was imminent. In offering to pay no more than a nominal price for land which had the potential for a very early substantial rise in value we believe the Crown failed to act with the degree of good faith required of one Treaty party to the other. We find the Crown acted in breach of its Treaty obligation in this respect. We sustain the claimants' grievance no 8.

Grievances nos 3 and 4: Crown failure to reserve lands requested by Ngai Tahu

13.5.8 The claimants stated both that:

The Crown failed to permit Ngai Tahu to exclude from the sale such lands as they wished to exclude;

and that:

The Crown wrongfully imposed a price on land that Ngai Tahu had wanted to exclude from the sale. (W6)

We propose to discuss grievances no 3 and 4 together as the difference, if any, between them is not readily apparent. The grievances appear to relate to two separate areas of land. First, an area of some 8000 acres which Ngai Tahu sought at the Arahura River. Secondly, the area of some 200,000 acres already discussed, between the Mawhera and Kotukuwakaoka Rivers and the Hokitika River.

## Request for 8000 acres at the Arahura River

13.5.9 In a memorandum of 6 June 1866 James Mackay Jr noted:

The question of the reserve at Arahura or Brunner River, was the great stumbling block in completing the purchase of the west coast district. Natives wished for a reserve which would have contained about 8000 acres. I objected to this, but agreed that they could have 2000 acres and the whole of the river bed, and entered into a verbal agreement that they should be allowed to purchase at 10s per acre, any land lying between the eastern extremity of the 2000 acres and Mount Tuhua.  
(A8:II:50){FNREF|0-86472-060-2|13.5.9|39}

Poutini Ngai Tahu had requested this reserve as they wished to have a strip of land adjoining either side of the Arahura River from its source at Mount Tuhua right down to its junction with the sea. The purpose, of course, was to protect their access to the cherished pounamu. As we have seen, Mackay noted in his report on the abortive 1859 negotiations that, after he declined Ngai Tahu's request for the 200,000 acres between the Mawhera and Hokitika Rivers, Ngai Tahu argued that they would lose the Arahura River from which the "much coveted greenstone" was procured if they sold the land on either side of it. Mackay's response at the time was to say that the greenstone was of no use to the government and, if it was all they wanted, they might as well have the whole of the Arahura riverbed. During the 1860 negotiations Mackay declined to grant the reserve of 8000 acres requested and instead allotted 2000 acres only, together with an option to purchase more at 10 shillings an acre.

Mackay's reason for granting no more than 2000 acres was that he was constrained by his instructions from Governor Browne from granting more than 6000 acres for individual allotment. The 8000 requested was not only considerably in excess of this maximum but, had it been acceded to, would have prevented Mackay from granting any of the other 46 reserves, amounting to some 4724 acres. While this explains Mackay's action, it does not justify it.

13.5.10 By imposing a limit on the maximum area of the three categories of reserves which Mackay might settle on for Poutini Ngai Tahu, Governor Browne and his officials were acting in clear breach of the Treaty. As we have seen, article 2 of the Maori version of the Treaty preserved to Poutini Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full, exclusive and undisturbed possession of their land so long as they wished to retain it. It is abundantly clear that Poutini Ngai Tahu wished to retain tino rangatiratanga over the area of land on either side of the Arahura River from its mouth at the sea to its source in the alps. Mackay estimated this to be of the order of 8000

acres. In fact he allocated only 2000 acres.

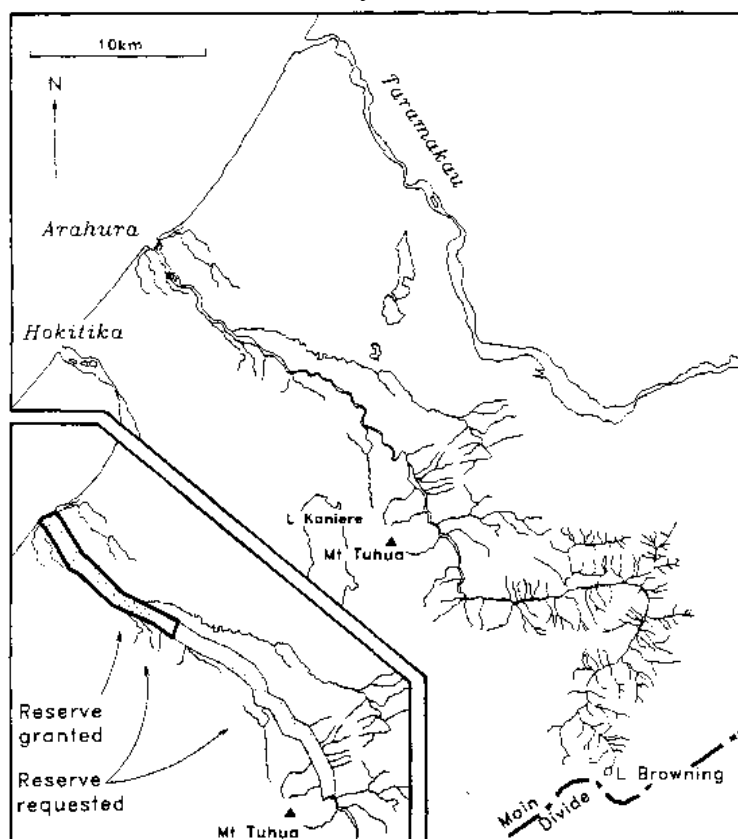


Figure 13.2: The Arahura River showing the reserve requested by Ngai Tahu and the lesser area granted by Mackay. The map also shows the river and its tributaries. In 1976 the Mawhera Incorporation was given title to the main course of the river from Lake Browning to the sea, but this did not include the river's tributaries.

Finding on grievance no 3 as it relates to Ngai Tahu's request for 8000 acres at the Arahura River

13.5.11 By imposing on the Crown's agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu, Governor Browne acted in clear breach of article 2 of the Treaty. Mackay was forced to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they very much wished, and were entitled, to retain. As we will see when we discuss grievance no 5 relating to pounamu, Ngai Tahu have suffered serious loss ever since.

It follows that Ngai Tahu's grievance no 3 is in this respect sustained.

Request by Ngai Tahu to retain 200,000 acres between the Mawhera and Kotukwakaoka Rivers and the Hokitika River

13.5.12 This is the second limb of grievances no 3 and 4. As we have seen, Poutini Ngai Tahu consistently maintained during the 1859 negotiations that they wished to retain this land. They feared that if they agreed to sell it they would lose access to the Arahura River and the associated pounamu, as the Arahura was north of the Hokitika and hence within the limits of the 200,000 acre block. Because he was instructed to provide, if possible, no more than "about 500 acres" by way of a reserve or reserves,

Mackay was unable to meet the understandable desire of Poutini Ngai Tahu to protect their treasured pounamu. This, and the nominal nature of the price of œ200 offered by Mackay appear to be the principal reasons for Ngai Tahu's refusal to sell. We have earlier cited Mackay's note, that on 3 August 1859 Poutini Ngai Tahu would not alter their terms at all and Taetae and his people departed, telling Mackay to return to the governor and come back with œ400 or œ500 and they would sell the land. Although Mackay does not here say so, it became apparent from his subsequent actions that he also realised he would have to obtain authority to agree to substantially larger reserves.

13.5.13 When Mackay returned in 1860 to re-open negotiations with Poutini Ngai Tahu he had less restrictive instructions. He could now pay up to œ400 and set aside three categories of reserves totalling 12,000 acres. Following preliminary discussions at the Mawhera pa, Mackay met with the assembled Poutini Ngai Tahu at Poherua on 20 April. As we have earlier recorded, Mackay noted:

On the 21st the land question was recommenced, I found the Natives still desirous as on the former occasion to retain all the land intervening the rivers Mawhera and Kotukuwhakaho, and the river Hokitika, comprising some 200,000 acres of valuable country, UNLESS they received œ300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven), and larger reserves than had on my first visit been offered to them (800 acres was offered at that time). After some days spent in discussing the question, and on my having informed them of the very liberal provision in that respect ordered by His Excellency the Governor, they agreed, on the 26th April, 1860, to accept the sum of œ300, as compensation for the whole of their claims to land in the Arahura or Poutini districts, excepting over such portions as were reserved for their own use or benefit. (A8:II:40){FNREF|0-86472-060-2|13.5.13|40} (emphasis added)

Immediately after citing this passage in his evidence Mr McAloon commented:

In terms of Article Two of the Treaty, the Crown did not have the right to pressure Ngai Tahu to give up the block between the Mawhera, Hokitika, and Kotukuwhakaoho Rivers. The statement by Ngai Tahu, on two separate occasions, that they wished to keep the block, should have been enough to guarantee it to them. The Crown was not in the position of trying to strike a deal with a sectional interest group; it was negotiating with the other party to the Treaty, and the independence and equality of that party was guaranteed. It was not for the Governor to make 'very liberal provision' of reserves, but to accept what was offered. (D3:6-7)

It is unnecessary for us to rule on the point of principle raised by Mr McAloon.

In the particular case in question Mr McAloon appears to be on somewhat shaky grounds. Poutini Ngai Tahu, in the passage cited by him, did not in fact decline to sell the land in question. Rather they made it a condition of their willingness to sell that they received œ300 and not the œ200 previously offered by Mackay in 1859, and also that they received larger reserves than previously offered. In the event, the Crown met both these conditions and a deed of sale was concluded.

Findings on grievances no 3 and 4

13.5.14 We have already found that the governor, in imposing an arbitrary limit on the size of the reserves which might be granted, was acting in breach of the Treaty. But in the case of the 200,000 acre block at present under discussion, we are satisfied that provided Poutini Ngai Tahu received  $\approx 300$  and larger reserves, they were willing to sell the block. And, in the circumstances, we are satisfied that the Crown did not impose a price on the 200,000 acre block which Ngai Tahu wanted to exclude from the sale. For the reasons given above (13.5.13) we find grievances nos 3 and 4 regarding Ngai Tahu's request to retain 200,000 acres between the Mawhera and Kotukuwakaoka Rivers and the Hokitika River are not sustained.

Grievance no 6: Crown failure to reserve Ngai Tahu sufficient land

13.5.15 In their sixth grievance the claimants stated that:

The Crown failed to protect Ngai Tahu by ensuring that they had kept enough land to provide an economic base and so preserve their Tribal Estate. (W6)

The question here is whether the Crown failed to ensure, as it was obliged by Treaty principles to do, that Poutini Ngai Tahu retained sufficient land for their present and reasonably foreseeable needs, or as the claimants put it, sufficient land for an economic base.

Poutini Ngai Tahu sold some 7.5 million acres of land for which they received  $\approx 300$ . Some 6724 acres were scheduled as reserves for individual allotment (D5:18, schedule A). Poutini Ngai Tahu accepted that Ngati Apa should be allocated 424 acres leaving a nett acreage of 6300. An additional 3500 acres was reserved to be conveyed to the Crown in trust for Poutini Ngai Tahu under the provisions of the Native Reserves Act 1856. Poutini Ngai Tahu were promised exclusive control over the bed of the Arahura River and were to be permitted to purchase any land lying between the 2000 acre reserve at Arahura and Mount Tuhua at 10 shillings per acre. A further 2000 acres were set aside as a general government reserve to meet the cost of surveying the other reserves.

Just as in the Murihiku purchase, which involved a roughly similar area of land purchased by the Crown, so here a quite infinitesimal area of land-6300 acres-was set aside for the direct use of the 100 or so Poutini Ngai Tahu.

Dr Loveridge, the Crown historian, presented to us a comprehensive and thoroughly researched account of the Arahura purchase. We cite his conclusion on the provision of reserves:

As for the 12,224 acres of reserved land and the promises respecting the Arahura River which made up the territorial component of the compensation, there are few signs of a spirit of generosity here either. The 6724 acres set aside for individuals-the only portion of the reserved acreage left under the direct control of the owners-represented about 66 acres apiece, on average, for the 101 people involved. This might have been adequate for the immediate requirements of the Poutini Ngai Tahu, but their future requirements apparently received scant consideration. The evidence indicates that James Mackay did his utmost to reduce the acreage reserved to the bare minimum which the owners could be induced to accept. Both Donald McLean and the

Governor approved of this approach. It is very difficult to understand why it was deemed to be appropriate-particularly with respect to the Arahura River. (N2:87)

In fairness to the Crown it should be recognised that the various reserves were well sited at Poutini Ngai Tahu kainga and included some 500 acres at the mouth of the Mawhera (the present town of Greymouth). But, as we discuss in the following chapter, the value of this land has been adversely affected by being perpetually leased. While on average an allocation of 66 acres per person might be thought relatively generous compared with those allowed on the east coast, we are satisfied, particularly having regard to the nature of the land and climatic conditions that the reserves were inadequate to provide a sustainable economic base for the future. We reserve for our discussion of the claimants' grievance no 5 the very unsatisfactory situation concerning pounamu.

13.5.16 Quite apart from the failure of the Crown to provide adequate land to enable Poutini Ngai Tahu to engage in agricultural, pastoral or (later) dairy farming on an equal basis with European settlers, little thought appears to have been given to the need to ensure continued access by Poutini Ngai Tahu to mahinga kai. As with earlier purchases we have discussed, the Crown failed, in considering the present and future needs of Poutini Ngai Tahu, to have any real regard to ensuring their continued access to important food resources. We agree with Dr Loveridge's considered conclusion about reserves that the future requirements of Poutini Ngai Tahu apparently received scant attention. Given the size of the area acquired -7.5 million acres-the land retained from Ngai Tahu was little more than nominal and, again to quote Dr Loveridge, "the bare minimum which the owners could be induced to accept".

Findings on grievance no 6

13.5.17 The tribunal finds that grievance no 6 is sustained for the reasons given above (13.5.16).

The tribunal further finds that the Crown's failure to ensure that Poutini 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. Ngai Tahu were detrimentally affected by such failure.

Grievance no 5: Crown failure to protect Ngai Tahu rights to pounamu

13.5.18 The claimants stated that:

The Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu. (W6)

In his final reply on behalf of the claimants Mr Temm, after criticising Mackay, the Crown purchase agent, for failing to protect Ngai Tahu's interests in pounamu, went on to say that:

the pounamu is and always was intended to be ours. It has been taken by other people and exploited for years. It has been taken for nothing, stealthily by helicopters from

inaccessible places and sold commercially in the market place. It is our taonga and belongs to us. It has always been for us a valuable asset not only for cultural purposes but as a means of trade. We have traded pounamu up and down New Zealand for centuries. We say that we are entitled to pounamu and that it should be a recommendation of this Tribunal that all pounamu in the South Island should be the property of the Ngai Tahu and that they should be allowed to use it for traditional purposes in any way Ngai Tahu see fit. (X1:121-122)

The tribunal notes that the grievance refers to the right of Ngai Tahu to retain all pounamu. Mr Temm in his submission referred to all pounamu in the South Island. We interpret this to mean all pounamu in Ngai Tahu's territory in the South Island. Whether this would include all pounamu in the South Island we have not been told. The tribunal is aware however that there is pounamu in South Westland, for example, outside the Arahura block and within the Kemp and Murihiku blocks.

It is convenient to consider first the pounamu in and adjacent to the Arahura River and its tributaries; secondly, elsewhere in the Arahura block; and thirdly, in Murihiku and any other Ngai Tahu sale areas in which pounamu is to be found.

Pounamu in and adjacent to the Arahura River and its tributaries

13.5.19 In his report of 21 September 1861 to the chief land commissioner, Mackay said:

It was specially stipulated that a very large reserve should be made at the river Arahura or Brunner, and that the reserves should be taken in a strip up each side of the river with a view of giving them a right to its bed, from which is obtained the highly prized greenstone, which gives the name Wahi Pounamu, -place of greenstone, -to the Middle Island. (A8:II:40){FNREF|0-86472-060-2|13.5.19|41}

As we have seen in our discussion on grievance no 3 (13.5.9), Mackay in 1866 characterised the question of the reserves at Arahura "the great stumbling block" in completing the west coast purchase. He declined the Ngai Tahu request for a reserve going the whole way up both sides of the Arahura River, which he said would have contained about 8000 acres, but agreed they could have 2000 acres and the whole of the river bed. He further verbally agreed they could purchase at 10 shillings an acre "any land lying between the eastern extremity of the 2000 acres and Mount Tuhua" (N3:93). {FNREF|0-86472-060-2|13.5.19|42} We have earlier found that the failure of the Crown to reserve the 8000 acres requested by Ngai Tahu to be a breach of article 2 of the Treaty (13.5.11).

Two maps were made of this reserve by Mackay, of which copies were produced in evidence. One (N19A) marks the strips of land reserved on each side of the river. It purports to show the respective strips of 1000 acres each stretching the whole way along each side of the Arahura River from the sea up to Mount Tuhua. A notation on the plan gives Ngai Tahu the right of purchase at 10 shillings an acre, as mentioned above. Given Mackay's 1866 statement that a reserve of 8000 acres would have been required to secure the land on each side of the Arahura up to Mount Tuhua, his map (N19A) seems to be misleading. It may well have induced Poutini Ngai Tahu to believe that reserves on either side had been secured up to Mount Tuhua.

The other map, (N19B), shows the river (as part of the same map (N19A)) extending up to Mount Tuhua and as being reserved to Ngai Tahu. Unfortunately the river bed was not made a formal "reserve" under the terms of the deed but there can be no doubt that both Mackay and Poutini Ngai Tahu considered it to be part of the agreement.

After referring to these two maps Mackay, in his 8 June 1866 report, concluded by saying:

I think, as a vast territory was acquired by the Government for a very small sum of money, and it has since become very valuable, and the reserves, though much enhanced in value, are very small in comparison with the whole block ceded, that the Provincial Government would be justified in giving to the Natives the land at Arahura which forms the subject of Mr. Bealey's letter. (N3:93){FNREF|0-86472-060-2|13.5.19|43}

It appears Mr Bealey's letter is not now available. But Mackay is here recommending that additional reserves in the Arahura area should be provided for Ngai Tahu.

13.5.20 In 1873 Werita Tainui and some others, in exercise of their right of pre-emption granted by Mackay, acquired 1050 acres near Mount Tuhua for œ500, that is to say, at a cost 12,000 times more than the Crown paid for it 13 years earlier. The land was subsequently sold (N4:27).

In 1876 some 14,150 acres commencing at the eastern boundary of the 2000 acre Arahura reserve (MR30) was vested in the Hokitika Harbour Board. This land was subsequently disposed of by the harbour board. Most is now owned by Tasman Forestry Limited (N5:28-32). Mr Blanchard, in his evidence for the Crown, argued that due to the operation of the rule against perpetuity, the option to purchase the land adjoining the Arahura up to Mount Tuhua is now inoperative. He stressed that he was merely attempting to assess the present legal position rather than making any submission as to what ought to be the outcome in terms of the Treaty (N5:33-34).

The bed of the Arahura River within the Arahura reserve (MR30) is now vested in the Mawhera Incorporation and the balance of the Arahura riverbed from the eastern boundary of MR30 to Lake Browning (the source of the Arahura) is now also vested in the Mawhera Incorporation by section 27, Maori Purposes Act 1976 (N4:5). As Crown counsel Mr Blanchard pointed out, the title purports to be to the bed of the river, but if the river shifts its course the title boundaries do not follow it (N4:35).

Crown counsel, in submissions on Poutini Ngai Tahu mining issues (N8:13), after referring to certain provisions of section 8, Mining Act 1971 and section 59, Land Act 1948, submitted that it could be argued that the pounamu did not vest in the Mawhera Incorporation when section 27 of the Maori Purpose Act 1976 was passed, since that section is silent concerning minerals on or under the land. Mr Blanchard thought the doctrine of aboriginal title would apply, but said that if the tribunal felt the point remained doubtful the Crown would be prepared formally to undertake to vest the pounamu in the incorporation.

We strongly urge that this should be done to avoid any future doubts. The tribunal's recommendation to this effect is in 13.5.31.

13.5.21 Mr Blanchard, in his closing address, discussed the Arahura River in some detail. We cite the following passage from his submissions:

The Crown accepts that the intention of Mackay was that the bed of the river and the tributaries, together with their banks, were to be vested in Poutini Ngai Tahu.

Certificates of Title have been issued to the Mawhera Incorporation in respect of the river bed itself from the Arahura reserve to Lake Browning pursuant to s. 27 of the Maori Purposes Act 1976 but those titles are inadequate to give effect to Mackay's promise because:

- (a) The tributaries are not included.
- (b) The banks of the river and the tributaries are not included.
- (c) Changes in the course of the river are unable to be accommodated by the fixed lines of the Certificate of Title boundaries.

They are not, however, merely centre line titles: their apparent lack of breadth is because of the scale of the title diagrams.

The Crown accepts that it would be proper for the Tribunal to recommend that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu but that, in accordance with the views expressed by the tribe, pounamu should not be commercially exploited by any person and thus the Poutini Ngai Tahu right to take it should be for non-commercial purposes. (X2:5:24-25)

Although not expressly stated, we understand the Crown's concession that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu to extend to all pounamu in the Arahura River and its tributaries, and the banks of the Arahura and its tributaries. In other submissions on Poutini Ngai Tahu mining issues (N8) Crown counsel, after noting that under the deed of sale minerals passed to the Crown, submitted that Ngai Tahu's rights to pounamu were extinguished in lands other than the bed of the Arahura River and the other reserves. We will consider this submission when we discuss the claimants' claim to all pounamu. In the meantime we note that the Crown's concession is to be understood as confined to the Arahura River, its tributaries and their banks.

13.5.22 Crown counsel did not, however, define what land was intended to be encompassed by the "banks" of the various rivers. If, as envisaged by the Crown, Ngai Tahu should have the exclusive right to control the taking of pounamu, should they not have vested in them a reasonable amount of land on either side of the Arahura River and its tributaries, to their respective sources, if such land can be acquired by negotiation by the Crown? At present, as the evidence made clear, there are formidable problems in policing the unlawful taking of pounamu from the Arahura. Further, the whole purpose of Ngai Tahu seeking the extensive reserves on either side of the Arahura was not only to ensure its continued ownership of the

Arahura River and its tributaries, but also the pounamu within such rivers and on land adjacent to them. Pounamu is often to be found on such adjacent land and is more readily taken than pounamu in the river itself. Pounamu was and remains a cherished taonga of Ngai Tahu. The Crown clearly acted in breach of its Treaty obligations in failing to meet the wishes of Ngai Tahu to retain ownership of the pounamu in and adjacent to the Arahura and its tributaries. Although we are conscious of the fact that some of the adjacent land is no longer in Crown hands we consider the Crown should accept responsibility and make every effort to redeem its long-standing Treaty breach by negotiating for the repurchase of appropriate blocks of land adjacent to the Arahura and its tributaries, and if successful, settling such land on Ngai Tahu in addition to Crown owned land.

13.5.23 In accepting that it would be proper for the tribunal to recommend that Poutini Ngai Tahu should have the exclusive right to control the taking of pounamu, the Crown suggested, "in accordance with the views expressed by the tribe", that such pounamu should not be commercially exploited by any person and therefore Poutini Ngai Tahu's right to take it should be for non-commercial purposes. The Crown may well have gained the impression that Ngai Tahu was opposed to the commercial exploitation of pounamu from the evidence of Mr Maika Mason, a leading spokesperson for Poutini Ngai Tahu and then deputy chairperson of the management committee of the Mawhera Incorporation. Mr Mason did, however, make it clear that the views he expressed were his, and not necessarily those of the committee of management.

Mr Mason told the tribunal that at Mawhera Incorporation meetings the commercial exploitation of pounamu by Pakeha is seen as being destructive of his people's mana. This, he said, is seen as the most crucial issue in Arahura, more important even than the question of the leases. "In the old days", Mr Mason said, "the pounamu and the carvings made from it enshrined everything that our people were and was a source of trade for them" (P4:4). For these reasons, we were told, Ngai Tahu have consistently tried to obtain control of this resource.

Mr Mason referred to a decision of the District Court in an application by Westland Greenstone Limited for a road licence under section 93 of the Mining Act 1971. The purpose of the application was to enable a road to be formed to give vehicular access to certain land over which the applicant held a mining licence to extract pounamu. The application was opposed by the Mawhera Incorporation in whom the river bed was vested. Judge Fraser stated the tenor of the Mawhera Incorporation's case to be as follows:

1. The Poutini Ngaitahu attach a special traditional and cultural status to greenstone.
2. The Arahura Valley is an important source of greenstone.
3. For those reasons when the Poutini Ngaitahu sold their land to the Crown in 1860 they sought to exclude the valley from the sale.
4. The vesting of the bed of the Arahura River in Mawhera (as representative of the Poutini Ngaitahu) is only partial recognition of that claim.

5. The Arahura Valley because of its significance as a major source of greenstone ought to be kept free of commercial operation.
6. The partial construction of the access track was a trespass onto Mawhera land and an un-authorised disturbance.
7. The valley ought to be kept as far as possible in its natural state. The proposed road is ecologically undesirable. (D5:658){FNREF|0-86472-060-2|13.5.23|44}

The judge commented that the views summarised in 1 to 5 above-at least in their entirety-did not seem to have been shared or regarded as binding by all Ngai Tahu at all times. He cited the late Mr Walter Tainui, a member of Ngai Tahu and a man of standing, as having been one of the original shareholders of Westland Greenstone and as being supportive of the applicants' commercial operation. The judge also noted that Mr Tipene O'Regan (a principal spokesperson for Ngai Tahu) had acknowledged that the spirit of the agreement with the Crown in 1976 (to vest the Arahura River in Ngai Tahu), included the understanding that Mawhera would respect all existing mining licences. Mr Mason cited to us the following conclusions by Judge Fraser:

The balancing of the historical and cultural beliefs and views of the people represented by Mawhera on the one hand and the commercial interests of Westland Greenstone and the economy generally on the other is a question of public interest of some importance. It is not readily susceptible of judicial evaluation.

...I consider that the continued existence of the mining and the business based thereon in today's economic circumstances outweighs the limited detriment to the beliefs and wishes of the proprietors of Mawhera. I recommend that the objection be declined. (D5:661-662){FNREF|0-86472-060-2|13.5.23|45}

Mr Mason expressed the view that this decision demonstrated the inadequacies and insensitivities of the Mining Act at least so far as it relates to pounamu and Maori values. He went on to express his belief that the value of pounamu to his people was so great that, as a minimum, there should be a special statutory control over its extraction and use (D4:5).

We note that, according to Mr Mason, and we accept his evidence, Ngai Tahu traditionally traded in pounamu and pounamu carvings. We will defer our final consideration of the various Crown proposals we have discussed and any recommendations we might make until we have considered the wider aspect of grievance no 5, that is, that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu. We turn next to consider all other pounamu within the boundaries of the Arahura deed of sale and not just that in and adjacent to the Arahura River and its tributaries.

Pounamu in the Arahura block other than that in and adjacent to the Arahura River and its tributaries

13.5.24 Mr Maika Mason, whose objection to the commercial exploitation of pounamu by Pakeha we have already noted, prefaced these comments by the

following observations. We quote them at length for the insight they give on the basis for the Ngai Tahu grievance we are considering:

The Tribunal will have already heard that when James Mackay was negotiating the purchase of Arahura, our people wanted to reserve from the sale all the land between the Rivers Mawhera, Hokitika and Kotukuwhakaoho. Their reason was that it is between those rivers that the pounamu was found. The pounamu was the most important resource for our people in Arahura and was a major source of their mana and of trade.

Even today many people consider the riverbeds, especially the Arahura, to be the source of the pounamu, and in the sense that the stone is brought down the riverbeds by water action that is true. Nevertheless, then and now, the most accessible source of pounamu is the land onto which the stone was washed over the centuries. In particular, the richest source is the land lying between the rivers I have named.

I believe that at the time of the sale our people were insisting on the reservation of the pounamu to them, by which Mackay and other Pakeha understood them to mean the need to reserve a river or rivers for that purpose. These Pakeha did not understand, as many do not understand now, that when the stone is in the river, it is covered by water and therefore difficult to find and extract. Our people knew that the best and most easily recovered pounamu was on the land.

I believe that our people on one side, and Mackay and his assistants on the other, never really understood what each was talking about when it came to pounamu. This misunderstanding was almost certainly coloured by the fact that neither side could [foresee] the day when the Arahura lands were fully settled and the pounamu found on the land might become the property of the landowner or lessee, and therefore inaccessible to the Maori people.

The result is that today our people have little lawful access to the pounamu. That is a tragedy for both our culture and our mana. Today we see cheap gimcrack pounamu ornaments being sold to tourists, much of the carving being done by Pakeha working in factories and with no knowledge at all of the spiritual values which our people enshrine in their carving. Our people are not entirely blamefree in this, some of them are also involved in that trade, but that is almost an inevitable result of the debasement of our heritage. They see Pakeha making money out of this business and almost inevitably some will try to do the same. (D4:2-3)

Mr Mason here claimed that the reason why Poutini Ngai Tahu wanted to reserve from the sale all the land between the Rivers Mawhera and Kotukuwakaoka and Hokitika was that it was between those rivers that the pounamu was found.

13.5.25 In our earlier discussions of the 1859 purchase negotiations (13.3.7) we cited a lengthy passage from Mackay's report. In this he referred to Ngai Tahu's wish to retain the area of some 200,000 acres between the three rivers. His response was that this was the best land, and he was being offered various bluffs, which he named. He then noted Ngai Tahu's response, which was that they would lose the Arahura River, from which the much coveted pounamu was procured, if they sold the land on either side of it. In the course of his lengthy report, which he described as "minutes of

proceedings" Mackay nowhere records that the reason Poutini Ngai Tahu were standing out for the whole of the 200,000 acre block between the named rivers was that they wished, thereby, to retain ownership of the pounamu. It was clearly his understanding, however, that they did wish to retain the Arahura River and access to it. When Taetae departed and the negotiations were terminated, as we have seen, he told Mackay to return to the governor, "and if I came back with four or five hundred pounds they would sell the land". This would appear to include the 200,000 acres apart from the Arahura River and its adjoining land.

We also recall Mackay's 1861 report in which he noted that, as part of the oral agreement reached on 26 April 1860, "it was specially stipulated that a very large reserve should be made at the River Arahura ... and that the reserves should be taken in a strip up each side of the river". This would give them a right to the river bed "from which is obtained the highly prized greenstone". That Ngai Tahu were insistent on retaining ownership of the Arahura River and adjacent land was confirmed by Mackay in his 1866 memorandum, to which we have earlier referred. There Mackay commented that the question of the reserve at Arahura River "was the great stumbling block in completing the purchase of the west coast district", as Ngai Tahu wanted to retain about 8000 acres and Mackay was able to agree to only 2000 acres.

It is difficult for the tribunal, in the absence of any contemporary or later evidence from any Poutini Ngai Tahu, to know whether Mr Maika Mason is correct in asserting that the reason Ngai Tahu stood out in 1859 for the retention of the 200,000 acre block was because only by this means would they retain ownership of all pounamu in the whole of the block. But the tribunal accepts that pounamu was treasured by Ngai Tahu and would have been of very great concern to them.

13.5.26 The Crown submitted that because all minerals (which term it says would include pounamu) passed to the Crown under the deed of sale, Ngai Tahu's rights to pounamu were extinguished in lands other than the bed of the Arahura River and the other reserves. The tribunal has carefully examined the Maori text of the Arahura deed of purchase as signed by Poutini Ngai Tahu rangatira (see appendix 2.9). We would say at the outset that neither the Maori or English version recognises the value attached by Poutini Ngai Tahu to pounamu. The Maori text refers to "kowhatu" (stones), translated in the English version as "minerals". But there is no mention of pounamu as such in the deed. The tribunal is satisfied that there would have been a clear demarcation in Ngai Tahu thinking between ordinary stones and greenstone, so great were the spiritual and cultural values attached to its possession. Was not the island inhabited by Ngai Tahu known as Te Wai Pounamu? We believe that since pounamu was not mentioned by name in the deed and since Ngai Tahu were so clearly concerned to retain it, there is every reason to believe that Ngai Tahu did not realise they might be thought to be assigning it to the Crown. The tribunal is satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey it to the Crown.

This is another instance where the presence of a protector to advise Ngai Tahu would have ensured that they were not put in the position where they might inadvertently part with their so greatly treasured possession. The tribunal finds that Ngai Tahu did not sell or assign to the Crown their interest in pounamu within the Arahura purchase block. Had the Crown appointed a protector as it should have done, the tribunal

believes this would have been discussed with the Crown's purchasing agent, Mackay, and specific provisions would have been made to make clear that Ngai Tahu retained ownership of all pounamu.

#### Pounamu in areas other than the Arahura block

13.5.27 As we have indicated, Mr Temm sought a recommendation that all pounamu in the South Island should be the property of Ngai Tahu. We have interpreted this as all those parts of the South Island formerly owned and occupied by Ngai Tahu. The tribunal was advised that pounamu is to be found in parts of South Westland, in the Murihiku purchase block and in parts of the Kemp block, in addition to the Arahura block. The tribunal has examined the Murihiku deed and all other deeds of sale between Ngai Tahu and the Crown. In none of these does pounamu appear in the Maori text signed by Ngai Tahu, nor in the respective English translations. Given the high intrinsic value of this taonga to all Ngai Tahu, the tribunal considers for the reasons already discussed in the case of Poutini Ngai Tahu, that specific mention of pounamu in each deed would have been required to signify Ngai Tahu's intention to part with their pounamu. The tribunal finds that in none of the deeds of sale did Ngai Tahu agree to part with any pounamu to be found in the respective purchase blocks.

13.5.28 Pounamu is an irreplaceable treasure. Once mined and commercially exploited much of it (at present sold to foreign tourists) is gone for ever. The tribunal believes that the unique nature of pounamu and its deep spiritual significance in Maori life and culture is such that every effort should now be made to secure as much as possible of the steadily declining supply to Ngai Tahu ownership and control.

Unfortunately the tribunal did not receive any significant evidence or submissions as to the proportion of pounamu which is owned by the Crown, on the one hand, and privately on the other. Our understanding is that the greater part is on Crown owned land. This should present no problem. We believe all such pounamu and any other owned by the Crown should be returned by the Crown to Ngai Tahu. Any such action would of course have to be on the basis that any current mining licences relating to pounamu should run their normal course, to ensure that those licence holders are not adversely affected. The same protection should be afforded any licensees of pounamu in the state forests which have been excepted from the provisions of the Mining Act 1971. The aim should be for the Crown as expeditiously as possible to return to Ngai Tahu ownership and control all such pounamu within its traditional boundaries.

Some pounamu we understand is the property of proprietors of privately owned land. The tribunal considers that it would be appropriate for an order in council to be made in respect of such pounamu pursuant to section 7 of the Mining Act 1971, and that an appropriate amendment be made to ensure that mining privileges should be granted only to Ngai Tahu under that section.

#### Finding on grievance no 5

13.5.29 The tribunal finds that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu:

(a) in and adjacent to the Arahura River and its tributaries;

(b) in the remainder of the Arahura purchase block; and

(c) in the Murihiku and any other Ngai Tahu blocks purchased by the Crown where pounamu was to be found.

#### Finding regarding breach of Treaty principles

13.5.30 The tribunal has already found, in relation to grievance no 3, that the Crown acted in breach of article 2 of the Treaty in failing to reserve to Ngai Tahu the 8000 acres requested at the Arahura River (13.5.11). The principal purpose of this request was to ensure continued Ngai Tahu ownership and control of the pounamu in the Arahura River and its tributaries. In refusing to meet the expressed wish of Ngai Tahu to retain such possession and control of all pounamu in the Arahura River and its tributaries and land adjacent thereto, and thereby failing to respect the tino rangatiratanga of Ngai Tahu over their taonga, the Crown acted in breach of article 2 of the Treaty.

The tribunal further finds that although Ngai Tahu wished and intended to retain possession and control of all pounamu both throughout the remainder of the Arahura block and in all other blocks sold to the Crown, the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.

#### Recommendations in respect of pounamu

13.5.31 1 That to remove doubts as to the ownership of the pounamu in or on the land described in section 27(6) of the Maori Purposes Act 1976 the Crown take appropriate legislative action to vest all such pounamu in such body or bodies as may be nominated by Ngai Tahu.

2 That section 27 of the Maori Purposes Act 1976 be amended so as to vest the beds of all tributaries of the Arahura River in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

3 (a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired and any such land already owned by the Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 That the Crown transfer ownership and control (including the right to mine) to Ngai Tahu or such other body as may be nominated by Ngai Tahu of:

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfers to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

5 (a) That the Crown pursuant to section 7 of the Mining Act 1971 by order in council declare in respect of all pounamu which is the property of proprietors of privately owned land, on or under the land in the districts described in the preceding paragraph 4 (a) and (b), that pounamu on or under such land shall be prospected for or mined only pursuant to the said section 7.

(b) An appropriate amendment should be made to the Mining Act that no prospecting, exploration, mining or other licence relating to pounamu shall be granted under that or any other Act to any person or body other than Ngai Tahu or such other body or person as may be nominated by Ngai Tahu.

Grievance no 1: Crown failure to provide a protector

13.5.32 The claimants stated that:

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

In our discussion of the Murihiku purchase we discussed an identical grievance. We there found that the failure of the Crown to appoint a protector was in breach of the Treaty principle which required the Crown actively to protect Maori Treaty rights. Just as in Murihiku so here, the tribunal believes that Ngai Tahu were seriously disadvantaged in their negotiations with the Crown's agent James Mackay Jr. As we have indicated, a protector would surely have impressed on Poutini Ngai Tahu the potential value of a major gold discovery and its effect on land values. A protector would have been able to ensure that they retained the right to ownership and control of all pounamu. A protector would surely have encouraged them to demand substantially greater reserves, and emphasised that they were entitled to retain whatever land they did not wish to sell. Mackay, anxious as he was to report a successful mission, and circumscribed as he was by the very restrictive terms he could offer, was in no position to perform the role of a protector.

Finding on grievance no 1

13.5.33 The grievance is sustained. 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 required the Crown to actively protect Maori Treaty rights. As a result Ngai Tahu were denied the right to retain

certain lands they wished to retain and were left with insufficient land for their present and future needs. As a further result Ngai Tahu lost their right to ownership and control of all their pounamu.

#### Remaining grievances

13.5.34 The claimants' remaining grievances were:

7. The Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu, and without provision to protect them from economic loss.

9. The Crown failed to protect Ngai Tahu by later causing or permitting lands that had been excluded from the sale to be reduced in area (for example, within the town of Greymouth).

10. The South Island Landless Natives Act 1906 and other legislation was inadequate to remedy the landlessness caused by the sale to the Crown.

11. The Crown has failed to protect Ngai Tahu by not implementing the recommendations of the Commission of Enquiry into Maori Reserved Lands, [1975]. (W6)

Grievance nos 7 and 11 will be considered in the next chapter dealing with the reserved lands.

Grievance no 9 will be considered in our further report on ancilliary claims.

Grievance no 10 will be considered in chapter 20.

#### References

{FNTXT|0-86472-060-2|13.3.3|1} 1 Translation of Ngatittoa deed of sale, Compendium, vol 1, p 308

{FNTXT|0-86472-060-2|13.3.3|2} 2 McLean to colonial secretary, 7 April 1856, Compendium, vol 1, p 301

{FNTXT|0-86472-060-2|13.3.3|3} 3 Translation of receipt for œ2000 paid to Ngatittoa tribe, Compendium, vol 1, p 311

{FNTXT|0-86472-060-2|13.3.3|4} 4 Translation of receipt for œ500 paid to Ngatiawa tribe, Compendium, vol 1, p 309

{FNTXT|0-86472-060-2|13.3.3|5} 5 Translation of deed of sale by the Ngatitama tribe, Compendium, vol 1, p 313

{FNTXT|0-86472-060-2|13.3.3|6} 6 Translation of receipt for œ100 paid to Rangitane, Compendium, vol 1, p 313

{FNTXT|0-86472-060-2|13.3.3|7}7 see n 2, p 303

{FNTXT|0-86472-060-2|13.3.4|8}8 Hamilton to McLean, 8 January 1857, Compendium, vol 2, p 17

{FNTXT|0-86472-060-2|13.3.4|9}9 Hamilton to McLean, 5 February 1857, Compendium, vol 2, p 20

{FNTXT|0-86472-060-2|13.3.4|10}10 "Notes of a Journey from Pakarau, Massacre Bay, to the Mawhera, or Grey River, on the West Coast, February and March, 1857", Nelson Examiner, 26 August 1857, pp 3-4

{FNTXT|0-86472-060-2|13.3.4|11}11 ibid

{FNTXT|0-86472-060-2|13.3.4|12}12 Tarapuhi (and others) to McLean (translation), 15 March 1857, ms papers 32 (McLean) folder 681A, ATL, Wellington

{FNTXT|0-86472-060-2|13.3.4|13}13 J Mackay Jr to McLean, 18 June 1857, ms papers 32 (McLean) folder 681A, ATL, Wellington

{FNTXT|0-86472-060-2|13.3.5|14}14 J Mackay Sr to McLean, 15 February 1858, ms papers 32 (McLean) folder 420, ATL, Wellington

{FNTXT|0-86472-060-2|13.3.5|15}15 For evidence of this see report in Lyttelton Times, 3 April 1858, p 4

{FNTXT|0-86472-060-2|13.3.6|16}16 McLean to J Mackay Jr, 3 November 1858, Compendium, vol 2, p 33

{FNTXT|0-86472-060-2|13.3.6|17}17 J Mackay Jr to McLean, 19 November 1858, Compendium, vol 2, p 34

{FNTXT|0-86472-060-2|13.3.7|18}18 Minutes of proceedings enclosed in J Mackay Jr to native secretary, 27 September 1859, MA Collingwood 2/1 Outwards Letterbook, 1858-1863, pp 57-58, NA, Wellington

{FNTXT|0-86472-060-2|13.3.7|19}19 ibid, pp 59-60

{FNTXT|0-86472-060-2|13.3.7|20}20 ibid, p 62

{FNTXT|0-86472-060-2|13.3.8|21}21 J Mackay Jr to native secretary, 27 September 1859, MA Collingwood 2/1, Outwards Letterbook, 1858-1863, NA, Wellington

{FNTXT|0-86472-060-2|13.3.8|22}22 ibid

{FNTXT|0-86472-060-2|13.3.8|23}23 For supporting evidence see J Mackay Sr to McLean, 16 August 1859, ms papers 32 (McLean) folder 420, letter 10

{FNTXT|0-86472-060-2|13.3.9|24}24 Smith (for McLean) to J Mackay Jr, 25 October 1859, Compendium, vol 2, p 39

{FNTXT|0-86472-060-2|13.4.1|25}25 J Mackay Jr to McLean, 17 December 1859, MA Collingwood 2/1 letters, NA, Wellington

{FNTXT|0-86472-060-2|13.4.1|26}26 Hamilton to McLean, 6 August 1857, Compendium, vol 2, p 27

{FNTXT|0-86472-060-2|13.4.1|27}27 see n 10

{FNTXT|0-86472-060-2|13.4.2|28}28 J Mackay Jr to McLean, 21 September 1861, Compendium, vol 2, p 40

{FNTXT|0-86472-060-2|13.4.2|29}29 ibid

{FNTXT|0-86472-060-2|13.4.2|30}30 ibid

{FNTXT|0-86472-060-2|13.4.2|31}31 ibid, p 41

{FNTXT|0-86472-060-2|13.4.3|32}32 ibid

{FNTXT|0-86472-060-2|13.4.4|33}33 ibid

{FNTXT|0-86472-060-2|13.4.4|34}34 Nelson Examiner, 30 June 1860, p 3, "The West Coast", for a copy of a letter of 20 June 1860 from J Mackay Jr to J Mackay Sr, which refers to his "seeing about native reserves" in the Buller area on way back to Collingwood.

{FNTXT|0-86472-060-2|13.4.4|35}35 see n 28, p 41

{FNTXT|0-86472-060-2|13.5.1|36}36 see n 18, p 58

{FNTXT|0-86472-060-2|13.5.1|37}37 see n 18, p 59

{FNTXT|0-86472-060-2|13.5.1|38}38 see n 18, p 59

{FNTXT|0-86472-060-2|13.5.9|39}39 J Mackay Jr, memorandum, 8 June 1866, Compendium, vol 2, p 50

{FNTXT|0-86472-060-2|13.5.13|40}40 see n 28

{FNTXT|0-86472-060-2|13.5.19|41}41 see n 28

{FNTXT|0-86472-060-2|13.5.19|42}42 see n 39

{FNTXT|0-86472-060-2|13.5.19|43}43 see n 39

{FNTXT|0-86472-060-2|13.5.23|44}44 Re Westland Greenstone Limited, (unreported, District Court, Greymouth, 9 July 1981) p 23

{FNTXT|0-86472-060-2|13.5.23|45}45 ibid, p 26-27