

Ngai Tahu Land Report

Appendix 04 Maori Appellate Court Decision

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Appendix 4

MAORI APPELLATE COURT DECISION

4 South Island Appellate Court Minute Book 672

CASE STATED NO 1/89
IN THE MAORI APPELLATE COURT
OF NEW ZEALAND

IN THE MATTER of the Treaty of Waitangi Act 1975
AND
IN THE MATTER of a claim to the Waitangi Tribunal by
HENARE RAKIIHIA TAU and the NGAI TAHU TRUST BOARD
as Claimants and HER MAJESTY THE QUEEN as
Respondent.

TO: The Waitangi Tribunal

FROM: The Maori Appellate Court

On the 17th day of March 1989 the Waitangi Tribunal did state a question to this Court requesting determination in respect of two areas of land purchased by the Crown and contained in the Arahura Deed of Purchase dated 21 May 1860 and the Kaikoura Deed of Purchase dated 29 March 1859:

(1) Which Maori tribe or tribes according to customary law principles of "take" and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective Deeds at the dates of those Deeds.

(2) If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries.

The decision of this Court is:

The Ngai Tahu tribe according to customary law principles of "take" and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those Deeds.

Having decided that Ngai Tahu only is entitled question two above does not require an answer.

We annex hereto the reasons for our decision as recorded in 4 South Island Appellate Court Minute Book commencing at folio 673.

DATED at Rotorua this 12 day of November 1990

H K Hingston-President
H B Marumaru-Judge
Andrew Spencer-Judge

Coram

H K Hingston (Presiding Judge)
H B Marumaru (Judge)
A D Spencer (Judge)

DECISION

There were four claimants:

(i) Rangitane Ki Wairau (Mr M N Sadd)

(ii) Te Runanganui O Te Ihu o te Waka a Maui Incorporated.
(Mr J Stevens, Counsel) representing the tribes of Nelson and Marlborough:

Ngati Apa Ki Te Ra To
Ngati Kuia
Ngai Koata
Ngati Rarua
Ngati Tama
Ngati Tearangatira Ki Waipounamu
Ngati Waikauri
Rangitane Ki Wairau
Te Atiawa

These tribes were formerly represented by Kurahaupo Waka Society in the proceedings, before the Waitangi Tribunal.

(iii) Ngati Toa (Mr Williams, Counsel-Mr M Rei)

(iv) Ngai Tahu Maori Trust Board (Mr P Temm Q.C. & Mr Knowles) representing Ngai Tahu.

The Waitangi Tribunal has referred this matter to the Maori Appellate Court pursuant to Section 6A of the Treaty of Waitangi Act 1975 as amended by Section 4 of the Treaty of Waitangi Act 1988 ("The Act").

The question in terms of the Act referred to this Court concerns tribal boundaries in the northern part of the South Island of New Zealand and is set out hereunder:

By agreement the parties namely the claimants and the respondents, have formulated the following question for determination by this Honourable Court having regard to the two areas of land purchased by the Crown and contained in the Arahura Deed of Purchase dated 21 May 1860 and the Kaikoura Deed of Purchase dated 29 March 1859.

1 Which Maori tribe or tribes according to customary law principles of "take" and occupation or use, had right of ownership in respect of all or any portion of the land contained in those Deeds;

2 If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?

From the wording on the question referred to us, a decision finding one iwi had right of ownership at the relevant date, in respect of all the land in one or both of the Deeds would mean no answer to the second question would be needed in respect of that Deed.

Throughout this decision, because the case stated requests a determination as at the dates of the Deeds, we have ignored any European occupation of any of the lands up to those dates.

We are of the view that before embarking on an evaluation of the evidence presented to the Court it would be proper to record our understanding of the relevant law.

We begin initially with the relevant portion of Section 6A Treaty of Waitangi Act 1975 which provides:

3 Power of Tribunal to state case for Maori Appellate Court or Maori Land Court-The principal Act is hereby amended by inserting, after section 6, the following section:

6A(1) Where a question of fact-

(a) Concerning Maori custom or usage; and

(b) Relating to the rights of ownership of Maori of any particular land or fisheries according to customary law principles of "take" and occupation or use; and

(c) Calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries,-arises in proceedings before the Tribunal, the Tribunal may refer that question to the Maori Appellate Court for decision.

This provision directs the Court to make its decision on the question referred, taking into account Maori custom and usage relating to Maori rights of ownership in lands and fisheries according to customary law principles of "take" and occupation or use. To do this we must first decide what these principles are.

The pre-European inhabitants of New Zealand had, over many centuries, developed certain customary take or rights concerning land the principal being as follows:

- 1 Discovery such as when the first canoes arrived
- 2 Ancestry (take tupuna)
- 3 Conquest (take raupatu)
- 4 Gift (take tuku)

These take when supported by actual occupation of the land, generally signified rights (mostly in common) somewhat allied to ownership; these ownership rights could be lost in various ways; if a people left the area and none of their issue returned within three generations; if an iwi or hapu were defeated in battle and the victors remained and occupied the land to the exclusion of the losers; if iwi gifted the land to others, are examples.

Norman Smith in his book *Maori Land Law* (at pp 88, 91 & 92) described the general principles to be considered when weighing up occupation rights as follows:

(a) Those who show complete and continuous occupation ie occupation commenced before 1840, and extending up to the time of investigation of title. Where the occupation is by virtue of ancestry it is usual to require that constructive possession was held for at least three generations. Where the occupation arises out of conquest it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest. Where the occupation is claimed to be under a gift, unbroken occupation by the various generations from the time of the gift should be shown.

(b) Those who have never personally occupied but whose near antecedents had undisputed occupation or whose rights have been kept in existence by relatives.

(c) Those who have occupied at some former period but are not in present occupation.

(d) Those who are in occupation by right of ancestry but whose permanent occupation is recent in its origin.

It must not be necessarily assumed, however, that the application of one rule will exclude persons to whom the others might apply. On the contrary all four rules should, where applicable, be utilised.

Throughout the evidence of the various claimants there has been reference to the holding of mana-whenua in various lands comprised in the Deeds as additional right to the land; "mana-whenua" became the vogue in Maoridom circa the Kingitanga Movement in the 1860s. We believe the more appropriate word in relation to land is rangatiratanga, particularly as the Treaty of Waitangi uses that word.

The Court recognizes that the matters to be decided in its case are of great moment to each iwi making a claim and to Maoridom as a whole, this being the first case to be dealt with by this Court pursuant to this legislation.

We have throughout been conscious that the Court is sitting as a Court of first instance, that an appeal from our decision would necessitate the expense of a Privy Council appearance and that our decision is binding on the Waitangi Tribunal, and, because of these factors, have allowed more leeway to the claimants in the presentation of their respective cases as well the testing of the other claimants' evidence than would normally be in the Maori Appellate Court. We believe that section 54(1) of the Maori Affairs Act 1953 should be liberally interpreted by the Court when dealing with cases stated of this nature.

We note that the case stated requires determination as at 1859 and 1860 and refer to our finding at - S.I. APP CT MB - where we said:

We understand the rule to be that put to us by the claimants, simply, LAND COULD NOT BE ACQUIRED POST TREATY BY CONQUEST OR TAKE RAUPATU BUT THE OTHER INCIDENCES OF CUSTOMARY TITLE CHANGE REMAINED INTACT.

Having found accordingly we are mindful that where an iwi have proven one of the customary take supported by occupation but were absent in 1840 they could revive their ahi kaa as long as the re-occupation was peaceful and within three generations of their leaving the area.

One factor that influenced the title situation in respect of those deeds was the invasion of Te Waipounamu by Te Rauparaha and his allies.

In 1828 the Ngati Toa, led by their Chief Te Rauparaha, invaded the South Island. They were joined in alliance by Ngati Koata, Ngati Tama, Te Atiawa and Ngati Rarua. The invasion took the Ngati Toa and their allies to Akaroa on Banks Peninsula in the east and to Arahura on the west coast of the South Island. Patricia Burns, in Te Rauparaha: a new Perspective says at the beginning of a chapter headed "Power and the Final Peace" that Te Rauparaha "commanded Cook Strait, the north of Te Waipounamu in the thinly populated coasts east to Kaiapohia and west to the river Hokitika". The Ngati Toa had not had any presence in the South Island prior to their invasion in 1828. Acts of warfare had effectively ended by 1836.

It is therefore necessary for us to clarify the title situation as it was prior to the invasion then consider the effect of the invasion, the title situation going into the 1840s and any legitimate revival of iwi occupational rights post 1840 and before the time of execution of the Deeds evidencing the Kaikoura purchase of 29 March 1859 and the Arahura purchase of 21 May 1860.

THE KAIKOURA DEED "Exhibit A" annexed to the case stated shows the land in question is the north eastern block on that map. The parties to the Deed were the Crown and Ngai Tahu.

In respect of much of the land comprising the Kaikoura purchase, Deeds of Sale were entered into by the Crown with other iwi which specifically included areas sold by Ngai Tahu in the in the 1859 deed.

1 1847 Wairau Deed (Ngati Toa).

2 1853 General Deed covering the Northern Te Waipounamu. In this Deed Ngati Toa, claiming to be acting "co-jointly" with Ngatiawa Ngati Koata, Ngatirarua, Rangitane and Ngai Tahu ceded all their rights to the "Northern part of the South Island".

3 Rangitane in a receipt dated 1 February 1865 acknowledged payment by the Crown of one hundred pounds in consideration "for all their claims to land in the North and South Islands" as recorded in the note describing this transaction recorded in Mackay's compendium however the body of the document (receipt) referred to lands "from Wairau to Arahura ...".

4 1856 Deed whereby Ngatiawa is described as ceding all claims to land in the middle Islands to the Crown - again the translation of the body of the document refers to specific areas.

Insofar as the various deeds are concerned we adopt Dr Mitchell's (a witness for the Rangitane claimants) observation when he said viz a viz the various deeds-

There are other indications too of the Government's desire to extinguish all native claim regardless of their validity.

At 3.S.I. Appellate CT MB 240 this Court had this to say:

All Counsel ... are reminded that s6A of the Treaty of Waitangi Act is a comprehensive code and the Court's investigation will be conducted with the matters therein raised to the forefront-the fact that the Crown paid certain tribes for areas of New Zealand means nothing in terms of that section of the Act, however any properly recorded and documented evidence leading to the translation would on the other hand be extremely helpful.

During the course of the hearings, there was a substantial amount of evidence led concerning these deeds. In our view, however, the deeds themselves do little to assist us in determining the respective tribal rohe. The very fact that within the space of 13 years the Crown entered into a number of agreements which overlapped, thereby purchasing in some cases the same lands from different tribes, is evidence that the status of the respective deeds in determining "ownership" was questionable. Clearly, Ngati Toa received favoured treatment at the hands of the Crown, but we do not consider that this was necessarily an acknowledgement of their holding the "rangatiratanga" over the territories concerned. That situation probably came about through a policy actively adopted by Te Rauparaha of establishing a close working relationship with the settlers. Hence he established a strong trading relationship in flax and food etc., provided protection for whaling settlements and encouraged Pakeha settlement in areas under his control, such as Cloudy Bay. From the settlers' perspective one could imagine their ready acceptance of his having the authority to enter into the Deeds of Sale without making close enquiry, being happy to conduct their negotiations in Wellington and leave the tribal relationships among the Maori people for them to sort out amongst themselves.

Having stated what we believe to be the law that is to be followed in cases of this nature we now turn to the respective Deeds.

KAIKOURA DEED 1859

The Deed describes the boundaries of the land as follows:

These are the boundaries of the land commencing at the Karaka (Cape Campbell), and proceeding by the sea coast in a Westerly direction to Pari nui o whiti (Wairau Bluffs); from thence turning inland, it runs in a direct line to Rangitahi (Tarndale), at the sources of the River Waiautoa (Clarence); whence, turning in a South-westerly direction, it continues by the mountains to Hokakura (Lake Summer); turning thence in an Easterly direction, the boundary is the River Hurunui to its confluence with the sea; thence turning at the mouth of the Hurunui, in a North-easterly direction, it goes along the sea beach to Karaka (Cape Campbell), where the boundaries join.

Rangitane conceded that Ngai Tahu occupied the East Coast as far north as Kaikoura during the period prior to the northern invasions in the 1820s led by Te Rauparaha. To that extent, and during that period Ngai Tahu's title was not disputed.

Rangitane claimed it had clear customary title to the Wairau and as far south as the Waiau-toa in pre-Te Rauparaha times. It based its title on take tupuna (ancestral rights).

In support of its claim, Rangitane contended that the Waiau-toa has long been recognised as the tribal boundary between Rangitane to the north and Ngai Tahu to the south; that Tapuae-o-Uenuku, is the sacred mountain of the Rangitane; and that Rangitane's claim is recognised by the fact that the Blenheim Maori Committee administers Kaimoana as far as the Waiau-toa. It was further asserted that the Ngai Tahu currently residing in Kaikoura do not believe they have a claim to land north of the Waiau-toa as evidenced by the acceptance of the Waiau-toa as their northern boundary when the Kaikoura Tribal Committee lodged objection with the Minister of Lands to possible sales of Crown pastoral leases in 1983.

Extensive evidence was given by Rangitane and by Ngai Tahu as to their occupation of various parts of the disputed lands and surrounding territory, and to the battles fought between them prior to the advent of Te Rauparaha. As can be expected there were conflicting accounts of many of the historical events that occurred over 200 to 300 years ago.

According to Mr Frank Dodson Wairau MacDonald, a kaumatua who gave evidence for Rangitane, the first migration of Ngai Tahu from the North Island arrived at Moioio Island in the Tory Channel in the late 1600s. Over a period of a generation thereafter, Ngai Tahu were harried from place to place by the iwi of Rangitane, Ngati Mamoe and Ngai Tara until Ngai Tahu eventually migrated from Karaka (Mussel Point) to Kaikoura.

Mr MacDonald described a series of battles or incidents in which Ngai Tahu were forced to move firstly from Moioio Island where their Chief Puraho was killed; then from Pukatea Pa; from Patiaawa; from Ruatekanikani; from Hikurangi Pa; from Otekainga at the mouth of the Awatere River; from Otuwheru; and finally from Karaka (Mussel Point) when Ngai Tahu departed south to Kaikoura.

Mr MacDonald and other witnesses, spoke of the Waiau-toa as the sacred boundary of Rangitane. He said the boundary was established in the time of Te Hau (grandfather of Kupe) around 750 to the year 800. The sacred boundary was established in mythical times long before Rangitane was known as a tribe. It was firmly established when Ngai Tahu came to the South Island and Rangitane never trespassed south of the boundary. Ngai Tahu trespassed at Miromiro (northwest of Hamner Springs) and there were several battles to keep them back on the southern side of the boundary.

In the late 1700s a battle was fought at Matariki, on the north bank of the Waiau-toa, and Ngai Tahu were defeated by the combined forces of Rangitane and Ngati Mamoe. Tapuae-o-Uenuku, the sacred mountain of Rangitane, is on the northern side of the Waiau-toa.

Rangitane claimed that before the advent of Te Rauparaha, Ngai Tahu had been expelled from the northern parts of the South Island after suffering a series of defeats, and that the land north of the Waiau-toa was the domain of Rangitane.

Mr Tipene O'Regan, chairman of the Ngai Tahu Maori Trust Board, gave a different account. He described how Kai Kuri, a hapu of Ngai Tahu, migrated to the South Island under the leadership of Puraho and his son Muru Kaitatea. They settled in Tory Channel and established a great Pa Kaihinu (Mr MacDonald claimed this was a Ngai Tara/Mamoe Pa). Mr O'Regan related subsequent events that occurred and we set out an extract from his evidence:

Ngai Tara were living on Totaranui and Arapaoa Island on the other side of the water and before long they were in conflict with Puraho and his people in the wars over the bone fish hooks made from graves which had been interfered with. The conflict escalated and ended in the death of Puraho. With their ariki's death Kati Kuri set out to destroy Ngai Tara and this was accomplished and that tribe has never been known as a people of mana in this island since.

The Rangitane living at Wairau had assisted Ngai Tara in the fighting with Kati Kuri and it was necessary to seek utu from them. It was also convenient because Kati Kuri could not continue living at Kaihinu after the death there of Purahonui. War was made against Rangitane at Wairau and they were defeated. In the course of that fighting one of Maru's warriors, Tuteurutira, captured a wahine raketira thinking she was Rangitane. He later found she was a recently captured prisoner of Rangitane. Her name was Hinerongo and she was ariki of the Kati Mamoe people of Waipapa (or Waiau-toa) Clarence River. It was her tangi for her tupuna places, Te Rae o Te Kohaka, Te Rae o Te Karaka and the hill of tikumu named Kairuru, that made him realise she was not Rangitane. Tuteurutira returned her to her Mamoe people and married her and lived amongst Mamoe at Waipapa. Meantime, Maru and the rest of Kati Kuri lived at Wairau and Rangitane stayed there as a subject people.

After a time Rangitane became restless and it became necessary to subdue them. The take was to avenge their attacks on Kati Mamoe and the capture of Hinerongo (who was partly related to Rangitane herself as well as being ariki to Kati Mamoe). Kati Kuri combined in alliance with Kati Mamoe and the battle was fought on the beach beneath the Pa, Pukatea (Whites Bay). This time Rangitane were completely

conquered and ever since have been confined to Wairau where they were later to be overrun again by Ngati Toa in the 19th century.

Mr O'Regan stated that historically the real issue to them has always been the Awatere Valley and the control of the route right into the heartland of the Ngai Tahu. He said Ngai Tahu have never argued the Rangitane right to look upon Tapuae-o-Uenuku. He thought two peoples can look at different sides of the same mountain. What they differed with is where it stands. He referred to Aoraki which still remains the mauka atua of Ngai Tahu although it sits in a National Park.

Ngai Tahu, in their evidence, disputed the Waiau-toa as their northern boundary. Official documents produced to us indicated that in 1848, Ngai Tahu were claiming Parinui-O-Whiti to be their true boundary. We accept the assertion by Rangitane of the special significance of the Waiau-toa in their traditional history but we find insufficient evidence to establish that at the time of Te Rauparaha's incursions, the Waiau-toa was the tribal boundary between Rangitane and Ngai Tahu.

In 1828, Ngati Toa and their allies crossed to Te Waipounamu and at Pelorus Sound, Ngati Kuia were attacked and defeated. Rangitane who occupied the Wairau, were then overwhelmed and the invaders turned their attention to Ngai Tahu at Kaikoura and southwards.

Rangitane were not further involved in major warfare with the northern allies or any other iwi. Their defeat appears to have been comprehensive. J W Hamilton, Native land purchase agent, writing to Donald McLean, Commissioner of Native Land Purchase Department on 8 January 1857 says:

The Rangitane, now almost extinct appears to have been the original occupants of the northern portion of the middle island and might possibly maintain some kind of claim as far south as Waipapa or Waiau-toa (Clarence River). They seem, however to have been hemmed in on both sides by Ngai Toa and Ngai Tahu, and I am not able in this part of the Country to learn much about them. South of Waipapa however, I am of opinion, as I have stated before that the Ngai Tahu title is incontrovertible.

Ngai Tahu's defeats, and their resurgence against Ngati Toa in the 1830s onwards are discussed later and it is contended by the Ngai Tahu claimants that Ngai Tahu had never lost title to the lands up to Parinui-O-Whiti by 1840. We agree that that contention holds good as against the adverse claim by Rangitane who were in no position to assert customary title to the disputed land following their decisive defeat by the northern allies. There can be no doubt that Ngati Toa as at 1840 were in occupation of the area known as Cloudy Bay, North of Parinui-O-Whiti (White Bluff). They are claiming however, that their "sphere of influence" extended south of Kaikoura.

We must say at the outset that we found very little evidence of this. It is certainly true that the exploits of Te Rauparaha and his allies were well remembered. But we are unable to find evidence that Ngati Toa exercised ahi kaa south of "the Wairau". The only evidence which could seriously challenge that finding may be the observation by W.J.W Hamilton in 1849 that there were a number of Maori in the area of the Waiau-toa river who, it has been suggested, were descended from Tuhere Nikau. These

people would apparently have been of Ngati Toa descent and were tupuna of Makari Miller ("Granny Mag") who died in about 1942.

Apart from this isolated reference to people of Ngati Toa descent living south of Parinui-O-Whiti, there is no evidence to support the claim that Ngati Toa people exercised ahi kaa in that area. It is noteworthy that Hamilton did not himself identify the tribal affiliation of the people he described and nor was any evidence led which could recall the names of places in that area which were specifically of significance to Ngati Toa. For example, the mountain known as Tapuae-O-Uenuku was the subject of special reference by both Ngai Tahu and Rangitane. In the case of Ngati Toa, however, no traditions by which the people identified themselves with the area were referred to. In our view, the existence of an isolated handful of people of its own is insufficient to establish ahi kaa - there is nothing to suggest in the evidence that these people kept in touch with their tribe and were in turn held out as being their representatives.

We are satisfied, however, that Ngati Toa had established their ahi kaa in the 12 years following their invasion in the area of the "the Wairau" and as far south as Parinui-O-Whiti. In 1845, Commissioner Spain reported that the Ngati Toa were settled in that area and had parts of the land under cultivation. In 1847 the Surveyor General, C W Ligar, reported that members of the Rangitane tribe who wished to cultivate land for growing potatoes in the Wairau first sought the permission of Te Rauparaha before doing so.

During the hearings the expression, "the Wairau", was the subject of extensive argument. For the purposes of the claim by Ngati Toa, especially having regard to a the short period of time in which they had to establish themselves in the South Island prior to 1840, we find that "the Wairau" is the area they had settled in the vicinity of the Wairau Valley extending as far south as Parinui-O-Whiti only.

Accordingly, although it is clear that the Ngati Toa and their allies had effectively conquered the East Coast as far as Kaiapoi, (or possibly to Akaroa) they nevertheless did not follow up their military success by exercising ahi kaa over the territory south of Parinui-O-Whiti to such an extent as to establish a cultural tradition in the area. North of Parinui-O-Whiti, however, it is clear they established themselves in cultivating land there and established a mixed settlement with the European settlers. Kaumatua Pateriki Rei described Te Rauparaha as a cultivator who encouraged his people to sell produce to the Pakeha. This is consistent with Te Rauparaha's policy of trading with the new-comers rather than maintaining the more nomadic lifestyle of other tribes whose territory may better be described as takiwa rather than rohe. Accordingly, apart from possibly Granny Mag's forebears, there was very little evidence of the Ngati Toa exercising any presence south of Parinui-O-Whiti on either a seasonal or permanent basis. The incidence at Kaparatehau (Lake Grassmere) in 1836 when it is alleged Te Rauparaha had to make an undignified withdrawal from a duck shooting expedition, can only be assumed to have been an isolated expedition as no evidence was led which would suggest that a tradition of seasonal hunting in that area had been established by Ngati Toa after that event.

In his opening submissions, Counsel for Ngati Toa, Mr J V Williams, first amended the synopsis of submissions, he had filed, dated 21 June 1990, by the addition at

paragraph 1.3 to extend the area claimed on the east coast of the South Island to a "sphere of influence" south of Kaikoura.

Counsel subsequently went on to discuss the "1840 Rule" and the concept of ahi kaa. He said:

It may be that a tribe which has maintained the traditions of the exploits of its tupuna that recalls the battles that were fought, the defeats, the victories, that recites the whakapapa, that recalls the names of the places, the burials of the dead and wahi tapu which relate to its history, have maintained an ahi kaa, have not lost their connection with the land in respect of which they claim an interest ... My submission if the Court is to take a view of whether an iwi has maintained its ahi kaa up to the present day, then this court is invited to take a view that the maintenance of traditional stories, the maintenance of whakapapa, that the remembrance of wahi tapu, battles won and lost, is evidence of the maintenance of that ahi kaa.

We accept the thrust of those submissions but we have been unable to find evidence for Ngati Toa which satisfies the criteria described by their Counsel for finding that they had established ahi kaa south of Parinui-O-Whiti.

The historical evidence presented to the Court covering the settlement of Te Waipounamu by the Maori insofar as the lands, the subject of our enquiry clearly demonstrates the coming into being of the iwi now known as Ngai Tahu. This iwi evolved, we are told, over many generations by a process (in modern terminology) combining assimilation, amalgamation, conquest and intermarriage. The manuscript of Hariata Whakatau Pitini-Morera (Aaro Book 'B' as well as the evidence of Tipene O'Regan adequately demonstrates this evolution). This evidence of evolution was uncontradicted and we accept it.

The evidence regarding the customary title to the disputed lands prior to the invasion by Ngati Toa and other northern iwi produced by Ngai Tahu demonstrated that they had occupation and one or more of the various take; because of the evolutionary process adverted to above, discovery followed by intermarriage with conquerors and actual occupation for many generations made it difficult to clearly show a single take; this of course was not uncommon in Maori tradition and we accept it as it has been accepted by the Maori Land Court from the beginning.

There is adequate evidence that Ngai Tahu had the Rangitiratanga over the lands comprising both the Kaikoura and Arahura Deeds circa 1820; examples from the Ngai Tahu presentation were for the most part uncontradicted.

In his account of his Adventures in New Zealand published in 1845 Edward Jeringham Wakefield had this to say:

The Ngati Apa, Rangitane and Maupoko occupied the succeeding coast as far as Kapiti, and "ALSO SHARED THE SOUTHERN SHORES OF COOK STRAIT WITH THE NGAI TAHU WHO INHABITED CLOUDY BAY AND QUEEN CHARLOTTE SOUND.

Another commentator was Ernst Dieffenbach, naturalist to the New Zealand Company, who had this to say in his pamphlet *New Zealand and its Native Population* when describing Te Rauparaha's campaigns against the Te Waipounamu iwi:

He brought the war over to the Southern Island, to Queen Charlotte Sound, D'Urville's Island, to Cloudy Bay, Tory Channel and further along the eastern coast. These places were inhabited by a numerous tribe, the Naheitou[sic]-I often found the deserted dwelling places of the Naheitou.

The Ngai Tahu claim to the lands comprising the Kaikoura Deed was put simply as follows:

- (i) They had customary Title before the Northern Tribes invaded.
- (ii) Te Rauparaha and his allies defeated them at Kaikoura, Omihi and in the second campaign at Kaiapo then retired from the Ngai Tahu domain.
- (iii) That within two years of these defeats Ngai Tahu were seeking battle with Ngati Toa north of Parinui-O-Whiti and Te Rauparaha did not respond in kind to these excursions.
- (iv) Ngai Tahu continued to fish and hunt over the northern portion of their claimed lands as well living in the areas around Kaikoura and south, all this to the exclusion of other iwi.

Much has been written about Te Rauparaha and his invasion of Te Waipounamu-the reason why he invaded (if he needed a reason) the campaigns and what happened after the campaigns. The evidence presented by the claimants setting out the course of the campaign beginning in the Southern Cook Strait area against Ngati Kuia and Rangitane and then moving south is consistent with the evidence of other claimants.

On the east coast it is clear that Te Rauparaha devastated Takahanga Pa (Kaikoura) and Omihi Pa (both Ngai Tahu strongholds) in his first campaign, but was rebuffed at Kaiapoi and further in the following campaign he captured and sacked Kaiapoi. We also believe that on the east coast the invaders did not proceed further south than Akaroa.

It is also clear that Ngai Tahu were decisively defeated and the northern invaders if they had remained in occupation of the lands from the Wairau Valley to Kaiapoi would have, by reason of take raupatu, the "ownership" of the lands.

In our perusal of the material placed before us by all the parties there is a dearth of clear evidence of physical occupation either by the Northern Iwi, Rangitane or Ngai Tahu of the lands between Kaikoura and Parinui-O-Whiti post the northern invasion. There is uncontradicted evidence from the claimants that Tuhawaiki, a Ngai Tahu chief from Otago, led an expedition against Te Rauparaha and almost captured him at Lake Grassmere-there is independent evidence that the Europeans in the Cloudy Bay area were in the 1830s apprehensive fearing a Ngai Tahu invasion because they (the settlers) were there by licence of Ngati Toa. It is also not disputed that Tuhawaiki did

in the 1830s mount an expedition in the Cloudy Bay area, and occupy the land for a short period before retiring southward.

Walter Mantell a Crown Official with a real knowledge of the Maori of the Southern Cook Strait suggested that land immediately south of the Wairau Valley was possibly wasteland because it was not occupied by Maori and was probably forfeited to the Crown because of this. We are of the view that he may have been correct in his opinion that the land was in a technical sense uninhabited ie, there was no Pa or permanent evidence of iwi residing there but categorically disagree with his assumption that this circumstance meant no Maori had title; we much prefer the view expressed by Sir William Martin, the first Chief Justice of New Zealand, as he put it, before the Treaty of Waitangi the whole of New Zealand "or as much of it as is of value to man" was divided amongst the Maori tribes and sub-tribes.

We are aware that Ngati Toa claimed certain rights south of the Wairau Valley to Kaiapoi basing this on evidence that some of their principal chiefs had been murdered there and also their having almost exterminated the Ngai Tahu resident in these lands, the survivors of that iwi having fled southwards. This account does not demonstrate actual occupation by Ngati Toa after the wars, ignores the excursions of Tuhawaiki in retaliation mentioned earlier and more importantly attempts to import a take not recognised by this Court-that the murder (killing) of invading chiefs creates title rights to the land where they were killed.

Ngai Tahu are adamant that the expedition by Tuhawaiki clearly demonstrate that they held the Rangatiratanga over the lands north of Kaiapoi to at least Parinui-o-Whiti, they argue that no competent Maori general would have left his flank so exposed, there was no threat therefore there would not have been occupation by Ngati Toa south of Wairau.

This Court though sympathetic to this view accepts that Te Rauparaha must have considered he could safely hunt at Lake Grassmere until rudely interrupted by Ngai Tahu; significantly we believe is the absence of evidence of use of this lake by Ngati Toa post Te Rauparaha's well documented escape.

We are not satisfied that there was occupation to the exclusion of all other iwis by any of the claimants of the lands south of the Wairau Valley to Kaikoura circa 1840 and therefore accepting that there could not be waste lands considered whether this land could be classed as kainga taotohe, that is land over which rights were enjoyed by more than one iwi. The evidence does not substantiate this because as mentioned above Ngati Toa had retired north and any "shared" use would then have to have been agreed between Ngai Tahu and other iwi. There is no evidence before us from which we can conclude there was agreed use of these land by Ngai Tahu and other iwi.

To satisfy the question of re-occupation by Ngai Tahu however we are not tied to occupation as at 1840; having found that Ngai Tahu held customary title before the north invasion they could, as long as it was not forcibly, occupy post 1840 and within three generations thus reviving their ahi kaa.

It is clear from what is before us that due to missionary influence Ngai Tahu slaves that had been taken by Ngati Toa were released in the late 1830s and early 1840s-

many of these Ngai Tahu returned to their previous homes. These people were able to rekindle the fires as their release was within one generation of their capture as well they could not be classified as still subject to their former masters because of the Christian ethos as well the assumption of British sovereignty over New Zealand and the fact that all Maori post treaty held British Citizenship.

We have mentioned the Deeds entered into by the Crown with various iwi concerning the lands included in the Kaikoura Deed. Ngai Tahu suggest in their claim that the Crown's actions were based on a philosophy of divide and rule. We neither disagree or agree with this proposition but let the evidence speak for itself. We as a Court, though making clear our views as to the evidentiary value of the actual deeds, because all claimants appear to place great value on them, feel constrained to comment on both the Deed whereby Ngati Toa purported to dispose of the Wairau Valley and lands south to Kaiapoi as well the Kaikoura deed.

Though much has been made of the Wairau deed we believe the whole transaction was used by Governor Grey more as a device to appease the clamouring of the New Zealand Company's lobbyists than a genuine bargain with the iwi entitled to sell the land. We note that the Wairau incident whereat company officials had been killed had been the subject of a recent official enquiry which exonerated the Maori participants and blamed the company. When giving evidence in 1879 to the Smith-Nairn Commission which body was investigating the Crown Purchase of and in the South Island, Governor Grey said regarding the Wairau purchase, that the sellers (who were christians) wished to make atonement for the Wairau killings.

It is our view significant that before the Deed was entered into there was no enquiry of any persons living on any of the lands north of Kaiapoi, an enquiry would have produced competing claimants particularly Ngai Tahu. Also of some import is the dealings with three younger chiefs of Ngati Toa, an unusual circumstance; the negotiations proceeded initially to encompass the Wairau Valley, the lands of the Wairau incident, then it expanded to include the lands south to Kaiapoi.

We believe the Wairau deed effectively reduced the pressure being exerted by the New Zealand Company on the Governor and had the added benefit to the Crown of eventually forcing Ngai Tahu to deal with the Crown later very much on the Crown's terms.

Governor Grey in his 1879 evidence had this to say about the transaction:

I regarded it more as a giving up of the land for the good of both races than as a purchasing of it.

Lieutenant W F G Servantes, the negotiator interpreter and a witness to the Wairau Deed, said in 1850 when explaining the reasons why Ngati Toa were able to sell land as far south as Kaiapoi:

Although the right of the-above named tribe "(Ngati Toa)" was considered doubtful, I beg to add that I believe it questionable whether according to Native customs Ngai Tahu had a better title.

We observe that Servantes had access to Ngati Toa representatives but he had not dealt with Ngai Tahu on this question. Ngai Tahu have placed evidence before us detailing their objection to the Wairau Deed from the outset culminating in the negotiations that resulted in the Kaikoura purchase. During this period there were various Crown Officials involved in one capacity or another. Messrs Mantell, Hamilton, James Mackay (Jun), McLean and the Governor of the time. Throughout Ngai Tahu petitioned the Governors and attempted to impress other officials with the validity of their claim. The documentation presented to us shows that they convinced many of the officials that the Crown had erred when dealing with Ngati Toa for land south of the Wairau Valley.

We have found it useful to refer to the evidence of Wiremu Te Uki a Ngai Tahu chief given to the Smith-Nairn Commission on 3rd April 1880 when referring to discussions Ngai Tahu had with Governor Grey at Akaroa in March of 1848 when he said:

At the request of Governor Grey, I and about 20 others went to Wellington with reference to a word Governor Grey had spoken to me at Akaroa. When at Akaroa Governor Grey had spoken to me about Kaiapoi being sold. I said, 'That land does not belong to Ngati Toa' Sir George Grey said 'Oh, yes; according to the Ngati Toa, it belongs to them; it belonged to their ancestors.' There was another word of the governor's. He invited us to go and stand on one side and meet the Ngati Toa, who would stand on the other side, and he would be the judge between us; and if we were able to show that the land belonged to us, he would recognise it as so; and if the other party showed that the land belonged to them, he would recognise them. When we arrived in Wellington we saw the Governor. We met him, and he immediately sent a message to Ngati Toa. They did not come upon the first message, and a second was sent. The Ngati Toa were afraid of the whakawaa, which they heard it was to be. Then a third messenger was sent, and then they made an excuse and went over to Queen Charlotte's Sound, professedly to a tangi. When the Governor saw that they would not come-(Governor Grey, Governor Eyre and Mr Kemp were there, the latter as interpreter), I proposed that for the money which had been received by Ngati Toa land should be given at Kawhia, where their original possessions were. Taiaroa spoke to the same effect. All the other chiefs spoke to the Governor about putting back the boundary of Kemp's Purchase further north to Parinuiowhiti, near Wairau. On our return from Wellington Mantell was at Murihiku. Taiaroa followed him up, and overtook him at Arowhenua.

Though Ngai Tahu were there complaining about "Kemps" purchase Deed which had put the Ngati Toa boundary as far south as Kaiapoi, the southern boundary complaint is relevant in our enquiry into the Wairau Deed.

In a letter reporting to D McLean the then Chief Commissioner of the Native Land Purchase Department dated 8th January 1857, J W Hamilton a Crown Official relates how he had received Whakatau, a Ngai Tahu Chief, from Kaikoura, and heard him assert that Ngai Tahu owned the country southwards from Parinui-O-Whiti.. Hamilton had this to say with reference to the general question of Ngaitahu title:

The Rangitane, now almost extinct, appear to have been the original occupants of the North portion of the Middle Island, and might possibly maintain some kind of claim

as far south as Waipapa or Waiu Toa (Clarence River). They seem however, to have been hemmed in on both sides by Ngati Toa and Ngai Tahu and I am not able in this part of the country to learn much about them south of Waipapa, however I am of the opinion, as I have before stated, that the Ngai Tahu title is incontrovertible.

Hamilton went on to quote from and referred to Commissioner Mantell's report of 5th September 1848 wherein the submissions in favour of Ngai Tahu's ownership were recorded concluding:

This evidence seems to me to be conclusive in favour of Ngai Tahu for Mr Mantell's knowledge of the Cook Strait Maoris was so complete, that he could hardly be misled on noted facts in their history or drawn to express an opinion where he had not sifted the evidence.

The Kaikoura purchase from Ngai Tahu was negotiated by James Mackay, then Assistant Native Secretary for the Government and in a letter he wrote on 25th February 1859 to the Chief Land Purchase Commissioner he spells out clearly the claim of the Ngai Tahu of Kaikoura viz:

The district claimed by them commences at the Hurunui and is bounded on the south by that river to it's source; on the east by the sea from the Hurunui to Cape Campbell (Te Karaka) on the north by the sea from the last named place to the Wairau Bluffs (dividing the Wairau Plan from Kaparatehou); on the west by a line drawn from the Bluffs (Pari-nui-o-Whiti) to the Wairau Gorge from there to Rangitahi (Lake Tennyson, Tarnale) from there it is bounded by the range of mountains lying to the eastward of the Buller and Grey Districts, West Coast to the Pass of the Hurunui and Taramakou.

We believe it is significant that Messrs Mantell, Hamilton and Mackay were all aware of the Ngati Toa claim as well the Wairau Deed of Cession of 18th March 1847, they all at various times were offered evidence by Ngai Tahu and all three concluded that Ngai Tahu's claim were valid. We believe also that these persons were all experienced in Maori land dealings and yet, being Crown Officials knowing of prior purchases by the Crown of the lands, they all accepted the validity of the Ngai Tahu claim. We believe they were in a better position to reach a fair result than we are today; we are heavily influenced by their conclusions.

As we stated earlier the weight of evidence presented to us was in favour of Ngai Tahu holding rangatiratanga over the east coast of Te Waipounamu from Parinui-O-Whiti south to Hurunui including all the land comprised in the Kaikoura Deed immediately prior to the northern invasion.

We conclude our investigation in respect of the lands comprised in the Kaikoura Deed of Purchase by a finding that notwithstanding the conquest of Ngai Tahu by Ngati Toa and their allies, the failure of the northern tribes to remain in occupation post the conquest and the return of Ngai Tahu thus reviving their ahi kaa meant that at the time of the signing of the Deed (1859) the right of ownership of the lands comprised in that Deed was according to customary law principles of take and occupation or use vested in Ngai Tahu.

THE ARAHURA DEED 1859

Turning now to the Tai Poutini (West Coast).

The Arahura Deed describes the boundaries of the land as follows:

Commencing at the seaside, at Piopiotai (Milford Haven); thence proceeding inland to the Snowy Mountains of Taumaro; thence to the mountains,, Tiori Patea, Aorangi (Mount Cook) Te Rae, o Tama; thence to the saddle at the source of the River Taramakau; then to Mount Wakarewa; thence following the range of mountains to the Lake Rotoroa; thence to sources of the rivers Karamea and Wakapoai; thence by a straight line drawn to Kahurangi Point at the seaside; thence turning in a southerly direction, the sea coast is the boundary to Piopiotai (Milford Haven), where the boundaries meet.

The claimants are Ngai Tahu, Ngati Toa, Ngati Rarua, Ngati Tama, Te Atiawa and to a certain extent Ngati Apa. Once again, the historical accounts given by the respective claimants and their interpretation of certain events, differ markedly in several material respects.

A principal argument for Ngati Apa was that their ownership rights to lands, particularly in the Buller area, were recognised by the inclusion of members of their iwi (and also other non-Ngai Tahu) as owners in several of the West Coast Reserves. They pointed also to Puaha Te Rangi, of Ngati Apa, who asserted rights to land and compensation, during the negotiations leading to the signing of the Deed of the Arahura Purchase, and Mackay reports (Vol II, p.4.1):

... it was deemed expedient to permit Puaha Te Rangi on behalf of himself and a few other Ngati Apa Natives to participate in the payment, and it was arranged that some reserves should be allotted to them in the neighbourhood of the Buller River ...

Puaha Te Rangi was a signatory to the Deed of Purchase.

For Ngai Tahu, it was argued that Ngati Apa occupied the northern area of Te Waipounamu after their conquest of the early occupiers, Ngati Tumatakokiri. Ngati Apa were then replaced by Ngati Toa and Ngati Rarua and remnants of the Ngati Apa sought refuge from Ngati Rarua by moving to the lands of the Tai Poutini around Westport where Tuhuru allowed them to occupy land. Ngai Tahu contended that the Ngati Apa who settled there were a few individuals rather than a tribal entity.

In respect of the case presented by Ngati Toa in the area of the Arahura Deed, we find that they did not establish their claim. There was no evidence led which showed a cultural tradition with the area beyond leading at the early stages the invasion with their allies. There is nothing which suggests settlement or the exercise of any authority. They appear to have left any interest they would have established to their allies whom we have already considered, and limited their interests to the Cloudy Bay area. The sale in 1854 of the land which included pounamu is indicative of a lack of tradition in that resource. We were impressed by the significance attached to that tradition by Ngai Tahu, in particular Mr Maika Mason, and indeed it was Tuhuru, a Ngai Tahu Chief, who was allowed by the newcomers to continue that tradition. We

accordingly cannot identify any interest sufficient to satisfy the criteria to establish ahi kaa-or to satisfy the criteria described by their Counsel to which we referred earlier.

Ngai Tahu offered evidence showing how they were the iwi that had title to the lands comprised in the Arahura Deed prior to the arrival of Ngati Tama and Ngati Rarua and of their Chiefs Niho and Takerei at the Tai Poutini (West Coast). Their evidence is that the Ngai Tahu had long envied the Tai Poutini Iwi their pounamu (greenstone) and when a captured women was prevailed upon to show them the pass whereby Ngai Tahu could travel from the Canterbury plains over the Alps to Tai Poutini it was inevitable that Ngai Tahu would invade. Ngai Tahu consolidated their position on that coast and traded the pounamu through Kaiapoi and not northward through Taitapu as had been the norm up to their invasion. In the years preceding the arrival of the North Island iwi (1800-1827) Tuhuru was the chief and he enjoyed great mana; he had conquered the Ngati Wairangi of Tai Poutini and remained in occupation. Tuhuru's people developed the working of pounamu to the highest standard known to Maori. Ngai Tahu also maintain that Tuhuru as well as occupying the Tai Poutini fought against a large Ngati Toa taua (war party) circa 1820 the battle being at Otakoro-iti a place below Kahurangi Point; Ngati Toa after the battle withdrew to the sea. We were also told of other battles where Tuhuru defeated Tumatakokiri.

Ngai Tahu acknowledge that after the Ngati Rarua invasion of Taitapu about 1828-1829 a few Ngati Apa fled southward into Te Tai Poutini and Tuhuru allowed them to settle around Kawatiri (Westport).

Andrew Maika Mason of the Kati Waewae hapu of Ngai Tahu described their tribal boundary as follows:

Ko nga rohe enei o taua whenua ki tamata i te taha o te moana i Piopiotahi a ka haere ki uta ki nga maunga huka ki Taumaro-haere tonu ki nga maunga Tioripatea, Aoraki me te Ra o tama, ka haere i kona ki te tarahaka o Taramakau - haere tonu ki te maunga o Wakarewa haere tonu i reira ki runga ki nga maunga tae ki te hapua o te Rotoroa, a ka haere i kona ki nga tauru o nga awa Karamea me Whakapoai a ka haere maro tonu ki te kurae o Kahuraki i te taha o te moana.

Mr Mason stated that this boundary remained unchallenged for some 190 years until this present dispute.

We are of the opinion that Ngai Tahu held the "customary" title to Tai Poutini and had held it for a considerable time before 1827 the year Niho, Takerei and their Taua moved into the area.

There are conflicting stories regarding Niho's advent into the Tai Poutini; Ngai Tahu argue that Tuhuru and Niho made peace forthwith and Niho, Takerei and their people settled without there being battles; on the other hand we have before us evidence that Tuhuru was beaten in battle captured and ransomed by his people and the Northern iwi occupied Arahura and the surrounding lands.

Ngai Tahu presented evidence that Te Puoho a Ngati Tama chief, decided to move down the West Coast and attack the Southern Ngai Tahu: Niho did not become involved; Ngai Tahu suggest this was because he was aware of the strength of the

Ngai Tahu of Murihiku-be that as it may all the commentators agree that Te Puoho was killed and those few of his taua who were not also killed were enslaved by the Southern Ngai Tahu. This battle on the Molyneux Plains is remembered by Ngai Tahu and Ngati Toa as the battle of Tukurau.

There is an interesting side issue to this defeat of Te Puoho; in 1850 his nephew/stepson Paremata wrote to Governor Grey claiming the lands where Te Puoho had been killed for Ngati Tama, basing his claim on the fact that his uncle had been killed there. This was another attempt to invoke this new "take". We repeat that this Court does not acknowledge such a customary incidence of title.

Ngai Tahu's evidence is that upon Te Puoho's defeat, Niho, Takerei and their supporters withdrew from Tai Poutini northward to Taitapu. This withdrawal is not contradicted by other claimants and later European travellers in the 1840s (Heaphy & Brunner) confirm that Niho was not living on the Tai Poutini.

Ngai Tahu argue that with Niho's going north, any rights he might have had went with him.

For the purpose of this Court, once Niho and his people left it becomes irrelevant whether he was a conqueror in occupation or a friendly iwi living with Ngai Tahu with their consent; we agree with Ngai Tahu that any rights he or his supporters may have had were extinguished according to Maori custom. We say this because there is no evidence before us that he left any of his iwi behind to maintain the ahi kaa; as well Ngai Tahu's evidence that Niho never returned south of Kahurangi Point is uncontradicted.

We believe that consistent with this view if Ngati Toa, Rangitane and Te Ati Awa rely upon conquest and occupation by Niho or Takerei to substantiate their claims to Tau Poutini any such right would necessarily have been lost with those chiefs' withdrawals.

There has been, as mentioned earlier, much reference to the various Deeds of purchase and receipts signed by representatives of various iwi. We note that the Crown in its purchases of land on the West Coast of Te Waipounamu adopted a similar method to its approach on the east coast. It appears to have been willing to deal with any Maori other than those living in the area and finally after repeated approaches dismissing those on the lands with paltry sums.

The 1853 Deed with Ngati Toa and others purported to deal with all rights of various iwi, including Ngai Tahu, to the land in the Northern part of Te Waipounamu. There is no evidence that Ngai Tahu were:

(a) Parties to the Deed

(b) Received any payments thereunder.

The Ngati Toa receipt dated 13 December 1854 refers to the 1853 Deed and includes Arahura as part of the lands being paid for.

On 2 March 1854 the Te Ati Awa Deed was signed, this included lands down to Arahura.

The Ngati Tama Deed of 10 November 1855 again includes lands down to Arahura.

This Deed was followed by the Rangitane Deed of 1 February 1856 and again includes lands down to Arahura.

As this Court has stated earlier in this judgement the various Deeds indicate:

- (a) The Crown was attempting to extinguish all Maori claims regardless of their validity.
- (b) The fact of payment of lands by the Crown is only evidence of such payment and without the evidence leading up to the payment is unhelpful in deciding these boundary issues.

The evidence before us in respect of the Arahura Deed of Purchase signed by Ngai Tahu is that James Mackay visited Arahura and the surrounding areas, held long meetings with the persons then occupying the lands and convinced them that it was in their interest to contract with the Crown.

We believe it significant that Mackay was convinced that it was proper for the Crown to deal with Ngai Tahu in respect of lands as far north as Kahurangi Point because:

- (a) He was the first Crown official to deal directly with the persons occupying the land.
- (b) He would have been well aware of all the prior dealings wherein the Arahura and surrounding lands were included in previous sales to the Crown.
- (c) He was known as a knowledgeable but 'hard' man who boasted that no Maori had ever got the better of him.

We believe that any doubt Mackay may have entertained would have been resolved in favour of his employers and not the Maori. In a letter to the Native Land Court dated 27 September 1859 Mackay stated inter-alia:

I find the Ngai Tahu title to be good.

We believe it significant that when he made this statement Mackay was well aware that the claims of Takerei and Ngati Ratua were extinguished by McLean (Land Purchase Office for the Crown) in 1854, (he mentions it in the same letter); it is also extremely valuable that notwithstanding this knowledge he having investigated the Ngai Tahu claim was prepared to categorically confirm the title. McLean had not investigated the Ngai Tahu claim to these lands.

In the evidence presented by or on behalf of Rangitane much has been made of the fact that Puaha Te Rangi is included in the West Coast Reserves, this was met by Ngai Tahu claiming Puaha as being also of Ngai Tahu. Mr Sadd in his evidence

acknowledged that Matanihoniho a (sister/cousin) of Puaha is also of Ngai Tahu as well she is entered in Ngai Tahu records as theirs. Mr Tipene O'Regan of Ngai Tahu had no problem in accepting Puaha as Ngai Tahu.

Ngai Tahu also explained why persons of Ngati Apa descent were living in Tai Poutini post 1840-they put it simply, these people were allowed to settle by Ngai Tahu.

Having decided earlier that Ngati Toa had no rights of ownership in the Arahura Deed land we also confirm our understanding that any rights of Ngati Tama and Ngati Rarua were extinguished with the defeat of Te Puoho at Tukurau and the retirement of Niho and Takerei north of Kahurangi Point.

We accept that Ngati Apa and possibly other northern tribe remnants were in occupation of land along the Kawatiri and such occupation must have, as Mason suggests, been allowed by Tuhuru. However in the evidence before us nowhere have we found a customary take to support something more than a mere right of residence.

In our discussion earlier in this decision on the relevant law applicable in cases of this nature we accepted that to attain ownership there must have been one of the original take supported by actual occupation. We refer to our finding that Ngati Toa on the East Coast had conquered Ngai Tahu at least as far South as Kaiapoi yet because they did not remain in occupation, though they had Take Raupatu they did not attain ownership; In this West Coast question we have the opposite situation ie, occupation or residency but not supported by a customary take therefore we find that the rights of ownership of those people in terms of s6A(b) of the Treaty of Waitangi Act 1975 have not been established.

Having determined earlier that Ngai Tahu held the rangatiratanga over the lands comprised in the Arahura Deed before the invasion by Niho and Takerei in the late 1820's we now make a finding that for the reasons given above, in particular the defeat of Te Puoho of Ngati Tama and the consequential retirement of Niho and Takerei north of Kahurangi, the right of ownership accordingly to customary law principles of take and occupation or use was in 1860 vested in Ngai Tahu.

H K Hingston (Presiding Judge)

H B Marumaru (Judge)

Andrew Spencer (Judge)

This decision was formally promulgated in the Maori Appellate Court Te Waipounamu, Christchurch by Judge Heta Kenneth Hingston on the 15th day of November 1990.