

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.1 Introduction

13.1. Introduction

In this chapter we record in summary form our principal findings and conclusions on the main events and issues arising in this claim. We would stress that this summary is just that. A full account of our findings and of how we reached them is to be found in preceding chapters. This summary should therefore be read in the light of and subject to those earlier chapters. In chapter 14, our final chapter, we briefly re-state our findings on treaty breaches by the Crown and we record our recommendations.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.2 Ngai Tahu Sea Fisheries at 1840

13.2. Ngai Tahu Sea Fisheries at 1840

- The tribe's coastal territory was and is all the land below the northernmost eastern boundary Pari-nui-o-Whiti (White Cliffs, just south of Blenheim) around the South Island coast to the northernmost western boundary at Kahurangi. Ngai Tahu territory also includes Rakiura (Stewart Island) and all other islands off these shores. Ngai Tahu do however recognise the separate mana of Ngati Kahungunu from the north and Maori from the Chatham Islands and they reserve the right to determine sea boundaries with these tribes;
- fishing in lagoons, in harbours, in river mouths, in estuaries and at sea formed an essential part of the Ngai Tahu economy prior to the Treaty, as did the taking of seals, shellfish, whales and marine flora. The use of marine resources was a fundamental feature of Ngai Tahu mahinga kai, and played a key role not only in the tribe's economy, but in its social and spiritual life. Marine resources formed a significant part of the diet of Ngai Tahu communities, and some hapu, such as Ngati Kuri at Kaikoura, were heavily dependent on the resources of Tangaroa;
- the major constraint on the Ngai Tahu ability and need to fully exploit the abundant marine resources of their territory was a limited population. Ngai Tahu developed their fishing operations according to their needs. Any more extensive or labour intensive exploitation of their sea fisheries was simply not necessary;
- Ngai Tahu had developed a sophisticated fishing technology that was adapted to the various marine environments of Te Waipounamu and to the particular species to be found in them. The development of barracouta lures and composite hooks, as well as the use of a variety of small nets, allowed Ngai Tahu to take species not readily available to North Island Maori;
- the Ngai Tahu use of shellfish resources, lagoons, estuaries, harbours and river mouths was intensive in the vicinity of permanent settlements, particularly at Kaikoura, at Kaiapoi, and at the mouths of the Ashley, Waimakariri and other Canterbury rivers, in the harbours of Banks Peninsula, at Waihora and Wairewa, along the south Canterbury and north Otakou coast, in Otakou harbour, and on the northern shore of Foveaux Strait. Use of the sea fisheries in these areas was considerable up to a mile or so from shore. Seasonal and less frequent use was made of the seas beyond this distance, particularly to take hapuku. This fishing extended to some 12 miles or so from shore. Fishing beyond this distance could have taken place. Ngai Tahu had the craft to fish beyond 12 miles from shore in good sea conditions. It is not likely they fished beyond this distance on a regular basis. There was little need for them to do so and the risks to life involved increased the further out they went;

- fish and other marine resources were taken elsewhere along the extensive coastline of Ngai Tahu as part of their seasonal foraging expeditions. These expeditions allowed Ngai Tahu to utilise marine resources along most of the shoreline from Parinui-o-Whiti south on the East Coast of Te Waipounamu. Residential mobility, the technology available to the tribe, and their knowledge of the fishery allowed Ngai Tahu to take whatever species they wished along their shoreline. They were also able to fish off the shore where necessary, and several miles from shore if desired. The evidence suggests that given their limited population they were able to concentrate on places where marine resources were abundant and easily acquired;

- on the West Coast the Ngai Tahu use of marine resources was more limited than on the east. There were significantly fewer Ngai Tahu, and substantial parts of the coast provided only limited resources. However Ngai Tahu settlements in the north and the south were dependent on shellfish and other shoreline, estuarine and lagoon resources. They also fished in the sea around their settlements. Areas which were intensively fished were limited and could not have extended far out to sea. The sounds and fiords of western Murihiku were also fished by Ngai Tahu, largely on a seasonal basis. While this fishing was very important to those concerned, it cannot be regarded as intensive;

- fishing for barracouta was a major tribal activity which was undertaken by southern Maori from their earliest habitation of the island. Barracouta fishing had a role in Ngai Tahu social and economic life not evident elsewhere;

- the archaeological record shows a specialised fishery which was concentrated on barracouta, red cod, wrasses, blue cod, ling and hapuku. Other species found in this record, although to a considerably lesser extent, include tarakihi, sea perch, trumpeter, black cod, butterflyfish, gurnard, southern kingfish, snapper, stargazer, flounder, leather jacket, sole, marblefish, blue moki, conger eel, scorpion fish, warehou, trevally and brill;

- the archaeological record understates the varieties of fish taken, and cartilaginous fish such as dogfish, sharks and skates and crayfish were clearly taken by Ngai Tahu, and in substantial quantities considering the tribe's numbers;

- Ngai Tahu fishing expertise and technology allowed the tribe to take all species of fish inhabiting depths less than 50 metres, including deep sea species which frequent shallower seas at some times of the year. Ngai Tahu undoubtedly caught all of these species some of the time, but the frequency with which these fish were caught and the quantities taken remains unknown. Ngai Tahu are most unlikely to have known or taken deep water species such as orange roughy, alfonsino, silver and white warehou, hake and the deep water dories. They are also unlikely to have taken, except by chance, oceanic pelagic species such as large tunas, marlins and swordfish;

- Ngai Tahu were, however, aware of and did take hoki and other deepwater fish which can be found in shallower waters seasonally or periodically;

- European contact allowed Ngai Tahu to adopt technological advances suited to their fishery such as iron barbed hooks, oars and rollocks and eventually sealing and whale

boats. This process was well under way prior to the Treaty, and continued in the decades immediately following;

- Ngai Tahu traded fish amongst themselves and with other iwi and they preserved fish for their own consumption and for trade. With the coming of Europeans they had the opportunity to trade fish with visiting vessels and to supply European whaling shore stations. Some Ngai Tahu fish may have been exported at least as far as Australia by the late 1830s;

- off-shore whalers were able to take whales without interference from Ngai Tahu, and Ngai Tahu had little ability to control this fishery, even if they had the inclination. Shore or bay whaling was, in contrast, extensively controlled by the iwi. There is no evidence of any permanent waiver of the Ngai Tahu right to fish to European whalers and sealers prior to 1840. Periodic negotiations appear to have been undertaken between whalers and their Ngai Tahu landlords over the establishment and maintenance of shore whaling stations, including the right to fish. Ngai Tahu did not assert an ownership of whales, nor is there any evidence of their attempting to exclude either sealers or whalers. Nonetheless, while these negotiations may have allowed for individual whalers to monopolise the use of particular stretches of coastline, there is no evidence that these agreements involved or implied any permanent waiver of rights. On the contrary, they were consistent with, indeed a reflection of, Ngai Tahu tino rangatiratanga over their sea fisheries; and

- finally it needs to be said, that this survey of the Ngai Tahu fishery up to the time of the Treaty is based on the evidence which has survived over 150 years. In the case of archaeological evidence modern techniques have enhanced our understanding of past fishing. At the same time a great deal of traditional evidence has been lost. The ravages of dispossession have taken their toll on Ngai Tahu culture. Language has for many been lost in the pressure to assimilate and with this loss has gone knowledge of many of the traditional practices. For these reasons our overview should be taken as a conservative assessment of the extent of Ngai Tahu use of marine resources.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.3 Ngai Tahu Sea Fisheries Treaty Rights at 1840

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- The English version of article 2 confirms and guarantees to Maori the full, exclusive and undisturbed possession of their fisheries; and

- Ngai Tahu Treaty fishing rights at 1840, that is, "their fisheries" refers to their activity and business of fishing, and that necessarily includes the fish that they caught, the places where they caught them, and the right to fish. They are not limited to site specific grounds, favourite fishing places or a mere right of access to the sea.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.4 Nature and Extent of Ngai Tahu Sea Fisheries Treaty Rights in 1840

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- Ngai Tahu fished in diminishing degrees of intensity out to some 12 miles or so off many parts of their eastern and southern coasts and appreciably less so off their western coast. Some waters particularly in the west were inhospitable and were seldom if ever frequented;
 - Ngai Tahu had the capacity to fish further out from 12 miles or so from the shore as necessary. In at least one instance they went out to a distance of between 30 and 60 miles;
 - there is no evidence that in 1840 any other tribe was challenging the Ngai Tahu right to fish wherever they chose off their coastline or that, had their fishing been so challenged Ngai Tahu lacked the will or ability to defend it;
 - Ngai Tahu had no need to fish intensively in all available fishing grounds. They took all the fish they required, and their needs were considerable, within the broad confines of an outer limit of some 12 miles or so from the shore;
 - they fished regularly, in substantial quantities and with discrimination as to species caught. They were familiar with a wide range of fish;
 - Ngai Tahu rangatiratanga over the waters off their rohe was not confined to those more favoured areas where they chose to fish. To find rewarding fishing grounds they necessarily had to travel over less fruitful and on occasions, inhospitable waters. Their rangatiratanga extended to all the waters over which they travelled or could travel to engage in fishing;
- Ngai Tahu in 1840 exercised effective tino rangatiratanga over their sea fisheries out to a distance of not less than 12 miles or so from the shore off the whole of the land boundaries of their rohe. They had full exclusive and undisturbed possession of their sea fisheries;
- they carried out their business and activity of fishing within such parts of these waters as were practicable and suited their convenience and needs. The fact that for various reasons not all of it was fished or that some parts were fished more intensively or extensively than others in no way diminished their mana and rangatiratanga over their sea fisheries; and
- their sea fisheries today are more extensive than those at the time of the Treaty.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.5 Ngai Tahu Involvement in Sea Fishing after 1840

13.5. Ngai Tahu Involvement in Sea Fishing after 1840

- For the two decades immediately following the signing of the Treaty, Ngai Tahu continued fishing without any significant involvement by Europeans apart from diminishing activity by Europeans involved in sealing and whaling;
- during the 1840s and 1850s as settlers arrived in Otago and Canterbury in increasing numbers Ngai Tahu actively traded with them in the supply of sea fish. Ngai Tahu also continued to trade on a gift-exchange basis among themselves;
- as European settlement built up in the 1850s and 1860s a viable market for a Ngai Tahu commercial fishery developed. Various reef species were caught in the inshore zone year round and the pelagic species in that zone between December and May;
- by the mid 1860s, if not earlier, Ngai Tahu commercial fishing extended out as far as 20 to 30 miles from the shore in some locations with the aid of marks books. Whaleboats or adaptations of these were used, often fitted with sails. These came to be favoured by European commercial fishermen also. They were the basis of the South Island fishery until early this century;
- European commercial fishing began slowly in the 1860s. For some time the settlers lacked the detailed knowledge of Ngai Tahu of the location of good fishing grounds. European involvement accelerated in the 1870s and continued to grow thereafter;
- as early as the late 1860s the Port Adventure oyster bed was seriously depleted. A decade later the Halfmoon Bay oyster beds were in similar danger. Whether Ngai Tahu or Europeans were chiefly at fault is not known. We suspect both must accept responsibility;
- by the 1880s there were some signs of overfishing, examples being a scarcity of fish in the Otago harbour in 1882 with a further decline in the 1890s. Overfishing in Akaroa harbour was reported in 1885;
- throughout the whole of the period 1840 to 1900 Ngai Tahu whanau or hapu continued to fish for their own sustenance and for special tribal occasions;
- following the catastrophic effects of the Crown acquisition of virtually all their land, commercial fishing came increasingly to be carried on by individual Ngai Tahu. They fished commercially for their livelihood either singly or in association with family members and with the aid of closely guarded marks books;

- the individual Ngai Tahu who were so engaged were often descended from European whalers and had access to whale boats and associated fishing equipment, whereas following their post land sales impoverishment, most Ngai Tahu whanau or hapu lacked the necessary capital to engage in commercial fishing;
- while the rate and timing of the transition from tribal to individual fishing would have varied from place to place, it dates from the 1860s and would almost certainly have been completed in the 1880s;
- throughout this present century Ngai Tahu has continued either individually or in family groups to fish for their sustenance and to meet the demands of tribal occasions;
- over time and more particularly in recent years through a combination of over-fishing, pollution and faulty management by the Crown the previously bountiful supplies have been greatly diminished. As a consequence Ngai Tahu has found it increasingly difficult to take sufficient kai ika and kai moana for their own consumption and that of their guests;
- the advent of steam trawling and, later, Danish seining impacted seriously on sea fisheries in coastal waters, including various bays and harbours where Ngai Tahu traditionally fished;
- individual Ngai Tahu continued to fish commercially throughout this century. Their involvement for much of this period was significantly less than the increasing numbers of non-Maori who took up commercial fishing;
- an assessment of individual Ngai Tahu involvement in the South Island fishery in 1988 shows that Ngai Tahu owned 40 percent of all fishing vessels and 25 to 30 percent of all crews were Ngai Tahu. The workforce in fish processing plants and in all aspects of the Bluff oyster fishery was between 60-70 percent;
- these figures represent only a small part of the overall southern commercial fishery as the great bulk of the southern fish catch is taken in offshore waters. There is only a very small Ngai Tahu presence in the offshore fisheries. They are very largely confined to small scale fishing throughout the continental shelf and inshore waters;
- virtually all the current Ngai Tahu commercial fishers descend from Pakeha whalers and have an unbroken family history of involvement in the fishery since the collapse of whaling in the early 1840s;
- the loss of their land and the consequential impoverishment of the Ngai Tahu people has had a two-fold effect. It put an end to the involvement of the Ngai Tahu tribe or the various hapu in commercial fishing sometime before the end of the 19th century. Secondly, it resulted in only those individual Ngai Tahu who inherited capital in the form of boats and fishing gear from their Pakeha whaling antecedents being able to participate in the commercial fishery this century; and
- as a consequence Ngai Tahu as a tribe has not had any involvement in the southern commercial fishery for at least the last 100 years and almost certainly for longer.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.6 Ngai Tahu Attitudes to Sea Fishing

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- Ngai Tahu for centuries had relied for an important part of their sustenance on their sea-fisheries. There is nothing to suggest they intended to surrender this traditional and highly valued resource, guaranteed to them by the Treaty, when they agreed to British settlement and sold their land to the Crown. They contemplated that they would continue to have access to all sea fish they required for their own sustenance and other needs and to continue to trade commercially with the settlers;

- subject to this essential pre-condition Ngai Tahu, in the spirit of partnership, were prepared to share their abundant fishery with the settlers. But their willingness to sell their land and to share their sea fisheries did not constitute a diminution or modification of their tino rangatiratanga over their sea fisheries. On the contrary, it was an exercise or expression, indeed an affirmation, of their rangatiratanga and was entirely consistent with it;

- there is no evidence to suggest that Ngai Tahu when not objecting to non-Maori taking sea fish were thereby waiving their Treaty fishing rights. Nor did the non-Maori use of Ngai Tahu sea fisheries demonstrate that the tribe no longer wished exclusively to retain their rights to their fisheries. An implied permission is not a waiver; and

- while they wished to retain exclusive possession over all the fish they required for their present and future needs, both general and commercial, they were willing that non-Maori should also have access to the fishery. That access should, however, be subject to the prior rights of Ngai Tahu. It was at the point where non-Maori usage began to deplete the sea-fishery that Ngai Tahu protested and sought to invoke their Treaty rights.

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Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.7 Settler Attitudes to Sea Fishing

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- the settlers brought as part of their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. This belief stemmed from the common law doctrine that the Crown is prima facie owner of the foreshore. The settlers and indeed successive settler governments simply assumed that the Crown prerogative overrode or qualified the fishing rights guaranteed to Maori by the Treaty; and

- for several decades so bountiful was the supply of fish in and around the South Island that no problem arose from the uninhibited access by Europeans to Ngai Tahu fisheries. But as settlement built up and Ngai Tahu came to be heavily outnumbered the pressure on sea-fisheries was felt and gave rise to protest by the tangata whenua. In the meantime the Crown assumed the right to legislate.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.8 The Crown's Legislative Intervention 1866 to 1982

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- The Crown's legislative initiatives fell into three broad categories; oysters and later, other shellfish; introduced species such as trout and salmon; and sea-fisheries generally;
- an important reason for this legislation was the conservation of resources. The Crown appears never to have entertained any doubt about its right thus to assume control over Maori fisheries. Nor, except for a short period, is there any evidence that in doing so it should be mindful of the fishing rights guaranteed to Maori by the Treaty. As a consequence, no effort was made first to consult with Maori before exercising legislative control over their fisheries;
- in the case of land the Crown recognised that Maori owned the land and it was necessary to negotiate with Maori for its acquisition. Despite the Treaty guarantee of Maori fisheries the Crown for the most part acted as if it, not Maori, owned this extremely valuable resource;
- the Crown assumed the right not only to regulate and control the taking of oysters but to dispose of their ownership without Ngai Tahu consent;
- the acclimatisation statutes and regulations worked to the prejudice of Maori;
- the general sea-fisheries legislation and regulations between 1877 and 1885 exempted Maori from their control provisions. This constituted some recognition of their Treaty rights. But the 1885 ultra vires regulations sought to limit Maori exemption to the taking of oysters and fish for personal consumption only;
- the 1892 and later provisions for exclusive oyster reserves near Maori villages were inoperative in the South Island. The later 1900 and 1903 provisions for Maori District Councils to control or make exclusive fishery reserves for Maori were not implemented anywhere in New Zealand;
- the 1894 Act entirely removed all protection of Maori Treaty sea fishing rights;
- the 1903 reinstatement of a watered down saving provision omitting all reference to the Treaty has continued since and with a few recent exceptions has so far proved of little if any benefit to Maori;

- the exercise of legislative control over Maori fisheries and their regulation equally in favour of non-Maori has been characterised by a failure of the Crown until very recently to consult with Maori;

- for a brief period of eight years (1877-1885) Maori were wholly exempt from the control provisions of the sea fisheries legislation. But from the first Act of 1866 onwards the legislation provided for the general public exploitation of the fish resource, and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. How any conflict between Maori and non-Maori interests was to be resolved nowhere appears;

- the Fisheries Act 1908 remained in force subject to some amendments until repealed and replaced by the Fisheries Act 1983. Relatively minor additions were made in 1912 and 1923, the first significant change being in 1945;

- in 1937 government concern at problems facing the industry along with longstanding concerns about the depletion of fish stocks as a result of trawling led to the first major inquiry into the state of New Zealand fisheries and the fishing industry;

- the enquiry confirmed that depletion of certain fishing grounds had recurred and emphasised the need for more effective conservation measures. The committee recommended a new form of restricted (limited) licensing;

- accordingly a new regime, initially implemented under the Industrial Efficiency Act 1936, saw the number of permissible fishing vessels being restricted. The previous practice whereby anyone who wished to fish could do so subject to registering the vessel was abandoned. The 1945 amendment to the Fisheries Act continued the 1937 scheme by prohibiting the use of a boat for commercial fishing unless it was registered and the boat owner was granted a licence by the Sea Fisheries Licensing Authority;

- neither the 1937 Committee of Inquiry nor the legislation which implemented its recommendations had any regard to Maori Treaty fishing rights;

- legislation has been in place since 1892 for setting aside exclusive oyster-fisheries for Maori, the most recent provision being in 1965. No such reserves have been made for Ngai Tahu and only a few have been established in the North Island;

- section 33 of the Maori Social and Economic Advancement Act 1945 replaced the earlier 1900 and 1903 Maori Councils Act provisions with minor changes. Exclusive Maori fishing grounds could be reserved on the recommendation of the Minister of Marine. No such reserve was created despite many requests, including several from Ngai Tahu. This provision, intended to benefit Maori, was totally undermined by administrative and political intransigence;

- the advent of improved technology and the arrival in 1959 of Japanese fishers in New Zealand waters led government to institute a Parliamentary select committee enquiry. As a result the restricted licensing system was abolished by the Fisheries Amendment Act 1963;

- the 1963 Act substituted fishing permits for licences. Unlike the licences, permits were available on demand. Methods of fishing and the kind of fishing gear which could be carried on boats were, however, controlled. These it was thought, would be sufficient to conserve resources;
- with restrictive licensing abandoned the seas were open to all who sought to go fishing and could afford to do so. Maori Treaty fishing rights continued to be ignored;
- the Territorial Sea and Fishing Zone Act 1965 established a nine mile fishing zone outside the three mile territorial sea. This followed concern at the time of delicensing over the increased operations of foreign fishing vessels. From the end of 1970 only domestic fishing vessels could work within the territorial sea;
- in the late 1960s and early 1970s Russian, Japanese, Taiwanese and Korean fishers comprising a fleet of some 130 vessels were in and around New Zealand waters taking very large catches;
- the Territorial Sea and Exclusive Economic Zone Act 1977 gave New Zealand power to control conservation and management of resources out to a limit of 200 miles off New Zealand. Again, there was no recognition of any Maori Treaty rights;
- while the 1977 Act, accompanied as it was by government incentives, encouraged new entrants, many found it difficult to cope offshore. They returned to inshore waters and subjected those waters to intolerable pressures leading to serious overfishing. From the late 1970s commercial catches fell dramatically; by 1982 it was apparent that remedial action was necessary. The result was a new Fisheries Act in 1983;
- a 1972 amendment to the Fisheries (General) Regulations 1950 permitted the taking of the more common shellfish in excess of the normal limits by Maori for use at a tangi or hui. This provision is now in regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986. Approval of a Maori community officer is required as to quantity and location. Unlike the 1945 exclusive fishing reserve provisions this regulation has not been sabotaged by the administration; and
- the rangatiratanga of Ngai Tahu in and over their sea fisheries has, except for some eight years last century and then only to a limited extent, been denied or ignored by Crown legislation until very recently. The Maori Fisheries Act 1989 now gives partial statutory recognition to the Maori Treaty rights to rangatiratanga over their sea fisheries.

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Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.9 The Crown's Attitude to Maori Fishing Rights

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- from a relatively early stage the Crown adopted the widely held settler view that the fisheries belonged to the Crown and no rights, whether under Maori customary law or treaty, could be held by any person, Maori or non-Maori, without a specific land grant from the Crown or by legislative provision;

- in 1914 the Supreme Court in *Waipapakura v Hempton* accepted the Crown argument by the Solicitor-General that apart from legislation the Treaty of Waitangi was "merely a bargain binding on the conscience of the Crown and is not the source of legal rights". Nor did s77(2) of the Fisheries Act 1908 help. It was merely a saving clause and did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation;

- the Crown failed to take remedial action by passing appropriate legislation giving effect to the Maori sea fishing rights guaranteed by article 2 of the Treaty; and

- the Crown refused to give any effect to the legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds notwithstanding applications by Maori including Ngai Tahu.

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Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.10 Ngai Tahu Response to Crown Control of Sea Fisheries

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- in the last quarter of the nineteenth century and increasingly during the present century the sea fisheries came under pressure from non-Maori fishing. As a consequence the resource suffered serious depletion;
 - from the 1870s through to the beginning of the present century Ngai Tahu made a series of complaints to the Crown. Some reflected a general concern at the failure of the Crown to protect Ngai Tahu Treaty fishing rights and others a particular concern that fisheries in specified locations were being adversely affected by non-Maori fishing;
 - the failure of Maori in the 19th century to obtain any permanent recognition of their Treaty fishing rights by parliamentary petitions or direct appeal to government led them to resort to the courts;
 - in the present century Ngai Tahu unsuccessfully invoked their Treaty fishing rights in various cases concerning their fisheries;
 - given the Crown's negative attitude to Maori sea fishing rights under the Treaty, Ngai Tahu, dispersed and demoralised as they were, saw little purpose in publicly protesting the intrusion into their sea fisheries by non-Maori commercial vessels when as a tribe they lacked the resources to engage in the fishery other than for their own personal use. Of more immediate and pressing concern was their parlous situation ensuing from the loss of their land and inland mahinga kai. Our Ngai Tahu Report 1991 demonstrates Ngai Tahu was continually engaged in efforts to obtain relief from the Crown for its many Treaty breaches arising out of the Crown land purchases;
 - Ngai Tahu have not asserted that non-Maori should not be fishing. But they have never waived their Treaty rights or willingly accepted any diminution in their tino rangatiratanga over their sea fisheries. Nor have they ever sold or otherwise agreed to dispose of their sea fisheries; and
 - Ngai Tahu have throughout shown a willingness that non-Maori should be able to share the resources of the sea provided adequate protection is given to Ngai Tahu fishing rights guaranteed by the Treaty. Implicit in this approach is an assertion by Ngai Tahu of the priority which attaches to their Treaty fishing rights accompanied by a recognition that, provided these are respected and protected, non-Maori should be free to engage in fishing in the Ngai Tahu rohe. The tribunal is unable to distinguish in this regard between commercial and non-commercial fishing by either Maori or non-Maori.
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Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.11 Ngai Tahu Sea Fisheries Treaty Rights Today

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- the Ngai Tahu sea fisheries at the time of the signing of the Treaty extended some 12 miles or so from the foreshore from the northernmost eastern boundary Pari-nui-o-Whiti around the South Island coast to the northernmost western boundary at Kahurangi. We have not accepted the Ngai Tahu amended claim that there was at the time no seaward limit to their fishery;

- but Maori Treaty rights are not frozen as at 1840. Since 1840 there have been notable advances in the size and means of propulsion of fishing vessels; in fishing technology and in the discovery of species unknown to Maori and non-Maori at the time of the signing of the Treaty. One consequence of these developments has been the recent dramatic shift in fishing effort from the confines of the continental shelf to the offshore deepwater fisheries;

13.11.1 The development right

- It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right to development;

13.11.2 Commercial fishing

- The Crown accepts that the traditional Maori fishing rights included a commercial element and that the right to develop the fishery also included the right to employ new techniques, knowledge and equipment for commercial purposes. This was concurred in by the fishing industry. It was also the view of the claimants. The evidence clearly justifies this view;

13.11.3 Fisheries beyond those fished in 1840

- In 1840 the Ngai Tahu business and activity of fishing extended out to some 12 miles or so from the shore and in one instance between 30 and 60 miles offshore;

- by the mid-1860s if not earlier Ngai Tahu, with the aid of marks books, were fishing commercially some 20 to 30 miles from the shore. They were now using whale boats or similar vessels with sails. Over time their fishing operations extended out to the edge of the continental shelf;

- implicit in the recognition of the Treaty right to make use of new sea fishing technology is a right to take full advantage of it. If improvements in the design and

means of propulsion of fishing vessels enabled fishers to go further out to sea to exploit new fishing grounds, to stay there longer and employ more sophisticated catching equipment, it follows that Ngai Tahu as a Treaty partner was entitled to a reasonable share of the new fisheries thereby opened up. The Treaty must be interpreted as including this right;

- this necessarily applies not only to fishing operations out to the edge of the continental shelf but to the recent extension over the past 25 or so years into offshore or deepwater fisheries;

- to deny that this is so is to assert that the rights of one Treaty partner (Maori) but not the other party (the Crown) are confined to those existing in 1840. It is surely idle to recognise on the one hand that the Treaty provides a right of development in the future and on the other to circumscribe its effective operation to the factual situation pertaining at 1840;

- the two Treaty parties are required to act reasonably and in good faith towards the other. Ngai Tahu raised no objection to the new settlers sharing in the abundance of their fisheries so long as such use did not impinge unduly on their own requirements;

- likewise, as technology opened up access to new fishing grounds off their tribal rohe the Crown's duty to act reasonably and in good faith towards Ngai Tahu required it to ensure that a reasonable share of the new available fisheries were secured to their Treaty partner, Ngai Tahu. In this regard there can be no distinction between an extension of fishing out to the edge of the continental slope and further offshore into deepwater fisheries. There was to be a mutual benefit to both parties to the Treaty; and

- we consider it reasonable to accept that Ngai Tahu, given the abundance of their sea fisheries and their long and successful experience in the business and activity of fishing, would have emerged as a dominant force in sea fishing in the South Island. As such they would have taken their place alongside other New Zealand companies in the active development of the deepwater fisheries. That the tribe had no possibility of doing so was due in large measure to the Crown's action in depriving them of an economic base at a time when Ngai Tahu was engaged in a prosperous fishing enterprise, and in subsequently failing actively to protect Ngai Tahu sea fisheries.

13.11.4 New Species

- If, as we believe, Ngai Tahu had a Treaty right to employ new technology in extending their fishing operations further out from the shore, including the deepwater fisheries, it necessarily follows that they had and have a Treaty right to catch a reasonable share of all commercially viable fish whether these were earlier known to them or not. It is a right they share with their Treaty partner who had no more knowledge of new species than Maori in 1840 or indeed until quite recently;

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.12 Territorial Seas

13.12. Territorial Seas

- we reject the Crown suggestion that by 1840 claims to areas of territorial sea had consolidated to an agreed three-mile zone which was generally accepted as a rule of the law of nations and that Maori including Ngai Tahu should be bound by it;
- there is no evidence that Maori were even remotely aware of any such agreement. Certainly they were not party to it. Nor is there any evidence that the governor explained this so-called rule to Maori before inviting them to sign the Treaty;
- there was, in fact, far from universal acceptance of the so-called three-mile limit at 1840. During the whole of the nineteenth century the three-mile rule for fisheries remained one of controversy;
- if Britain chose in 1840 to assert no more than a three-mile territorial sea limit for her new colony of New Zealand that was not because of any binding rule under international law. Certainly it was not done with the assent or even knowledge of Maori;
- we are satisfied that the Treaty required the Crown to take all reasonable and practicable steps, should the occasion arise, to implement its guarantee to Maori of the full, exclusive and undisturbed possession of their fisheries and that this obligation did not stop at any three-mile limit;
- we agree with the Muriwhenua tribunal that the Crown has always possessed the constitutional power to regulate the fishing and other activities of its subjects on the high seas. In fact it did so, in making laws that affected New Zealand vessels;
- New Zealand, in common with other states, has extensive extra-territorial jurisdiction to legislate for the peace, order and good government of the state. If any event occurs outside the state's territorial limits the fact that the act or the actor was beyond the territorial boundary of the state is irrelevant provided the occurrence bears on the peace, order and good government of the legislating state;
- legislation designed to ensure compliance with the legislating state's treaty obligations to its indigenous people is surely for the peace, order and good government of that state and therefore in conformity with international law;
- the Treaty expressly guaranteed to Maori, including Ngai Tahu, their fisheries. These unquestionably extended beyond three miles, certainly out to 12 miles or so and in at least one place well beyond. We find Crown counsel's argument that the Treaty

guarantee was simply that their fisheries would be protected when there was Crown authority to do so - that is out to three miles - unconvincing. The three-mile limit was not at the time a requirement of international law; if the Crown chose to restrict itself in this way it was a self-imposed restriction at odds with the clear and unqualified guarantee given Maori by article 2 of the Treaty. It was never communicated to Maori. Nor was it what the Treaty said;

- even as recently as 1965 the New Zealand government showed a willingness to enact the Territorial Sea and Fishing Zone Act 1965 contrary to then international law because it was in the interests of this country to do so;

- when in 1965 the Crown extended the New Zealand fishing zone nine miles out from the three mile territorial sea limit it had no justification for failing to protect Ngai Tahu sea fisheries which extended to that distance;

- Ngai Tahu Treaty sea fishing rights included the right to extend their fisheries in accordance with developments in technology. One result of new technology was the discovery of a variety of deepwater fish. To control and protect this resource the Territorial Sea and Exclusive Economic Zone Act 1977 was passed. This gave the Crown power to control and manage the resources of the sea to a limit of 200 miles from New Zealand shores; and

- the Treaty right to development recognises the right of Maori, including Ngai Tahu, as a Treaty partner to a reasonable share of the sea fisheries brought within Crown sovereignty and control.

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Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.13 Individual Ngai Tahu Involvement in the General Fisheries Regime

13.13. Individual Ngai Tahu Involvement in the General Fisheries Regime

Those Ngai Tahu who elected to go fishing as individuals did no more than exercise their rights as British subjects under article 3 of the Treaty. Ngai Tahu continued to fish commercially as a tribe until after the land sales when impoverishment and the absence of an economic base, the direct consequences of the Crown purchases, left Ngai Tahu without the resources to actively pursue their article 2 Treaty sea fishing rights on a commercial basis. This was not, as the Crown suggests a deliberate choice; on the contrary the disastrous consequences of the Crown's many Treaty breaches left Ngai Tahu with no alternative other than to abandon their earlier prosperous tribal fishing business.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.14 Summary of Ngai Tahu Sea Fisheries Treaty Rights Today

13.14. Summary of Ngai Tahu Sea Fisheries Treaty Rights Today

The tribunal finds that Ngai Tahu have:

(a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so their being no waiver or agreement by them to surrender such right.

(b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the limit of the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu;

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.15 The Quota Management System

13.15. The Quota Management System

- The restricted definition of commercial fishermen in the Fisheries Act 1983 resulted in many Maori and non-Maori part-time fishers being excluded from any further commercial fishing. A substantial number of Ngai Tahu part-time fishers were so affected;
- the genesis of the quota management system (QMS) lay in s89(1)(g) of the Fisheries Act 1983 which authorised regulations prescribing a quota or total allowable catch for any fish or fishery in New Zealand waters. It was later superseded by a statutory scheme in 1986;
- the statutory scheme applies to both inshore and deepwater species. Input from Maori, including Ngai Tahu, at the iwi level to the lengthy discussions leading to the 1986 legislation was virtually non-existent;
- while conservation was the scheme's rationale, the scheme rested on the creation by the Crown of a property interest in an exclusive right of commercial fishing in the form of an individual transferable quota (ITQ). This ITQ is readily transferable by sale, lease or licence;
- the right to catch fish in terms of the ITQ has the characteristics of a property right. Those who qualified for the initial allocation of the ITQ were not required to pay for such allocation which became a valuable monopoly right;
- Maori, including Ngai Tahu, generally objected strongly to the scheme as enacted in 1986. To Ngai Tahu, as to other tribes, it appeared that the Crown first took away from Maori tribes the fishing resources which rightfully belonged to them and not to the Crown, and then the Crown purported to give those resources, or the beneficial use of them together with tradeable property rights on an individual transferrable basis of title, to other persons;
- the passage of the 1986 legislation generated a spate of litigation concerning the QMS instigated by Maori including Ngai Tahu. This litigation at present stands adjourned in the High Court;
- as enacted, the QMS is in fundamental conflict with the Treaty and, specifically, with Ngai Tahu sea fishing rights under the Treaty;
- the 1986 amendment which gave statutory force to the QMS effectively guaranteed to those allocated ITQ (almost all of whom were non-Maori) the full exclusive and

undisturbed possession of the property rights in fishing that the Crown had already guaranteed to Maori; and

- the 1986 Act is based on the erroneous premise that no fisheries subject to quota belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or dispose of as it saw fit.

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Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

13 Summary of Findings and Conclusions

13.16 The Maori Fisheries Act 1989

13.16. The Maori Fisheries Act 1989

- This Act expressly states that it is intended to make better provision for Maori fishing rights secured by the Treaty and to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing. This is a welcome statutory acknowledgment by the Crown of Maori sea fishing rights guaranteed by the Treaty;

- by October 1992, 10 percent of quota should have been transferred under the Act to the Maori Fisheries Commission for the benefit of Maori. Ngai Tahu will expect to receive the benefit of their proportional share;

- this tribunal is not in a position to accurately assess the value of the sea fisheries to which Ngai Tahu is entitled under the Treaty. The tribe has never disposed of its exclusive right to the sea fisheries out to 12 miles or so from its shoreline. Their reasonable share of the fisheries beyond this distance out to the limit of the 200 mile exclusive economic zone has yet to be negotiated and settled. In so doing allowance should be made for the serious depletion of the inshore fishery. Given the very extensive ocean which surrounds their long coastline and the richness of the deep sea fishery resource within it, we would expect the value of the Ngai Tahu sea fisheries to be very substantial in potential catch terms; and

- at present the Crown is obliged to transfer 10 percent of quota to the Maori Fisheries Commission by October 1992. This is intended to be for the benefit of Maori. While we are unaware of how or when this quota will be distributed to iwi we believe if justice is to be done not only to Ngai Tahu but to all other tribes, that a substantially higher percentage of quota than 10 percent of the total allowable commercial catch (TACC) will need to be made available for distribution among Maori. As we have indicated the value of Ngai Tahu sea fisheries alone must be very substantial. Moverover, allowance must be made for the very serious depletion of the inshore fisheries.

In our next and final chapter (chapter 14) we summarise our findings on Crown breaches of the treaty and then record our recommendations arising from those breaches.