

Rangiteaorere Land Claim

4 - Additional Grievances

1 - Introduction

Additional Grievances

During the course of the hearing Ngati Rangiteaorere placed a number of ancillary grievances before the tribunal. These were not dealt with by counsel in their final submissions, but we believe there is sufficient evidence and agreement on these to report briefly, or to refer them elsewhere. Evidence on these issues was contained in two reports commissioned by the tribunal by Mr Paora Maxwell and Mr Bill Patrick, and in a report by Mr David Alexander which was commissioned by the Crown with the agreement of the claimants.

Waitangi Tribunal, Department of Justice, Wellington.

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2 - Lake Rotokawau

4.1. Lake Rotokawau

4.1.1 This concerns the integrity of the title of Whakapoungakau 4C Block (Lake Rotokawau). Ngati Rangiteaorere claim that when lands surrounding the lake were developed, it was understood that Rotokawau, which lies in a natural crater, would be left undisturbed. In 1925 the Maori Land Court partitioned the lake and the surrounding slopes up to the lip of the crater, creating Whakapoungakau 4C Block with an area of 194 acres (74 Rotorua MB 213). It appears that survey of blocks adjoining this lake title resulted in another title, now in European ownership, which encroached down one lip of the crater right to the water's edge.

Evidence put before the tribunal convinced us of the justice of Ngati Rangiteaorere's complaint, but we consider it is unnecessary to proceed with it since Ngati Rangiteaorere reached agreement with the European owner, during the course of our sitting, to resolve the matter between themselves. The two parties presented us with their written agreement on 7 December 1989 (A7)

The rating of Rotokawau

4.1.2 There was also a separate complaint also relating to Rotokawau: the rating of the lake by the local authority - then the Rotorua County Council - from the mid-1960s. At that time the Crown investigated the possibility of buying Rotokawau but Ngati Rangiteaorere clearly let it be known that they would not sell their lake. This refusal prompted the then minister for Maori Affairs to instruct the Rotorua County Council to rate the lake. They did so and it has been rated ever since.

The other lakes in Rotorua County, are not rated. We regard the decision of the Minister of Maori Affairs to advise the Rotorua County Council to rate Rotokawau, in retaliation for Ngati Rangiteaorere's refusal to sell it, is a breach of the principles of the Treaty which we have spelled out above in relation to Te Ngae, namely, that the Crown, far from pressuring Maori to sell their lands, should endeavour to preserve them in Maori ownership, for Maori benefit. This would seem to us to be especially so in the case of a lake virtually surrounded by Maori land. We are pleased to note that the Crown's advisers have accepted that the ministerial intervention was ill-advised and that the Crown has requested the local authority (now the Rotorua District Council) to grant rate relief. The Rotorua District Council has advised Ngati Rangiteaorere to apply to the Maori Land Court to set the land apart as a reservation pursuant to s 439 of the Maori Affairs Act 1953 and at the same time to apply for rates exemption. Should this application be unsuccessful, we give leave to Ngati Rangiteaorere to come back to this tribunal for further remedies.

Finding and recommendation

4.1.3 We regard the Crown's action in advising the Rotorua County Council to levy rates a clear breach of the principles of the Treaty. We recommend that the Crown refund the beneficiaries of Whakapoungakau 4C any rates they have paid over the years, plus interest, and also pay any outstanding arrears.

Waitangi Tribunal, Department of Justice, Wellington.

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3 - Compulsory Taking Of Ngati Rangiteaorere Lands For Roads Without Payment Of Compensation

4.2. Compulsory Taking of Ngati Rangiteaorere Lands for Roads without Payment of Compensation

4.2.1 During the course of the hearing the Ngati Rangiteaorere claimed that the Crown in the 1890s had compulsorily taken a considerable amount of their lands for roads and they had never received compensation. At the hearing, counsel for the Crown undertook to investigate this matter. The Crown's counsel and the claimants' counsel agreed that research should be undertaken on this issue and Mr David James Alexander was commissioned to research the matter.

Mr Alexander later delivered his evidence in a comprehensive report to the tribunal. The following text is his examination of the issue, which we believe fairly summarises the events surrounding the taking of roads (B4).

Compulsory taking for roads: David Alexander's report

4.2.2 A road from Rotorua to Maketu had been put through Ngati Rangiteaorere lands prior to 1871, and this route was upgraded during 1871 and 1872. During 1889-1890 an additional road was constructed to Tikitere, the survey department reporting in its annual report:

Tikitere Road (2.5 miles). This is a new road formed for tourist traffic. The work has been done by contract, native labour being employed. (B4:doc 3)

Following construction a need arose for the Tikitere and other roads to be declared public roads. The Minister of Lands received a petition from "inhabitants" asking to have roads and landing places laid off round the Rotorua lakes area. From subsequent references it would seem that the "inhabitants" referred to were European business people or civic leaders concerned for the tourist trade at Rotorua. The minister approved of surveys being carried out by a surveyor, J C Blythe, with the further instruction that Blythe was to report back "if any trouble [was] likely to arise from Natives". The Native Minister was advised by the Minister of Lands that Blythe would "do nothing rash".

A warrant was issued by the governor to Blythe for the survey of roads through the Whakapoungakau-Pukepoto Block, and Blythe attempted to start work on the ground. During January and February 1891 a sequence of correspondence shows that he encountered some difficulties.

Blythe: I had to act in hurry on warrant ... so made no proper survey, and natives dispute the road. Shall I make a survey of road further along?

Under Secretary: Has matter of Te Ngae landing been settled?

Blythe: The only arrangement I could make with Native owners was that they would not obstruct tourists landing at Waiohewa etc.

Under Secretary: It would be better to take permanent road to the north of cultivations etc.

However, before Blythe could take the matter any further, he died.

The difficulty over access for tourists remained, and the local member of the House of Representatives expressed his concern:

Re landing place at Te Ngae. Natives are causing obstruction.

Blythe's successor as roading surveyor, C W Hursthouse, was instructed:

To proceed to the ground and see natives, and if they still object to road, telegraph to me and a fresh warrant to take the road will be sent.

Hursthouse did report back, but there is no record of the contents of his report . All that can be stated is that no warrant was issued as a result.

One year later the matter resurfaced, when the chief surveyor in Auckland was instructed to:

Furnish a plan and description to enable a warrant to be issued to one of your officers for purpose of proclaiming road, so as to prevent natives levying blackmail from tourists.

This request was probably prompted by an approach from the Rotorua Town Board:

Drawing attention to excessive charges made by natives upon tourists. The chief surveyor replied:

Enclosing litho showing the several roads for which Governor's warrant is required to make them legal.

As a result a warrant was issued in March 1894 to another surveyor, J Baber.

While Baber was carrying out his surveys, the correspondence continued.

Chief Surveyor: Tikitere natives have reduced their charges from 4/- to 2/-. Object to loop road around heights. Shall I proceed with survey?

Surveyor General: If you mean the old road over the hills to Tikitere, I do not know of any reason to retain it.

Chief Surveyor: Advising that additional warrants required in favour of J Baber re connection with roads now being surveyed at Rotorua.

Surveyor General: Warrant issued.

Baber's survey plans show both the main road from Te Ngae junction to Tikitere, and a side road to Lake Rotokawau. His plans were approved by the chief surveyor as conforming to the technical survey standards, and by the governor for the purpose of declaring the land to be taken for road. In 1898 the roads shown on the plans were proclaimed to have been duly taken. No compensation was paid.

The warrants were issued in terms of the legislation applying at the time, s 93 Native Land Court Act 1886. This stated that:

It shall be lawful for the Governor, at any time hereafter, to take and lay off for public purposes one or more line or lines of road through [Maori] lands provided that the total quantity of land which may be taken inclusive of any already taken, for such line or lines of road shall not exceed one-twentieth part of the whole.

Officials were conscious of the effect this could have on the Maori landowners. The form covering letter sent to the chief surveyor with the Blythe warrant stated:

Will you be good enough to instruct Mr Blythe accordingly and to direct him to inform the owners or occupiers of the land of what he is about to do, and to invite their inspection of the road as it is laid out, producing the Governor's warrant if desired...

As complaints have been received from Natives and others that the roads taken through their lands are not only injurious to their properties but in some cases unnecessary before approving the plans will you please ascertain not only their technical accuracy, but also that the position of the road as affecting the block it intersects is so far as you know the best.

The surveyor to whom the warrant was issued would also have been given a form notice of explanation in Maori which he could show to the landowners.

The main road was further proclaimed to be a public road in 1911 under the provisions of the Thermal Springs Districts Act 1910. I am not aware of the reason for this action, though the 1911 proclamation refers to the line of the formed road in public use at that time, which may have been different to the line of road proclaimed in 1898.

4.2.3 The sketchy nature of the information that I have uncovered makes it difficult to draw any firm conclusions. The bulk of Baber's survey seems to have been of a road which had already been constructed, from the Te Ngae junction to Tikitere. The difficulty with the Maori owners may have related to the area immediately around the Te Ngae landing place at the mouth of the Waiohewa Stream, and may have been concerned with approvals for tourists to have access from the landing place on the lakeshore up to the public road at Te Ngae junction. This would involve access through the area occupied by the marae today. It is worth noting that this short stretch was not roaded until 1896-1897, when the Lands and Survey annual report recorded that:

Te Ngae Landing Road: A distance of 20 chains of formation has been constructed from the lake tip to the main road, enabling passengers from the launches to get into the coach for Tikitere or elsewhere on the shores of the lake.

From Mr Alexander's research he was unable to say whether the side road to Lake Rotokawau was constructed prior to Baber's survey in the same way that the main road seems to have been. If not, I have found no reason to explain why the roadline should have been defined and taken for a public road. I can only speculate that the taking of such a roadline for a future road could have been motivated by the opportunities for tourism provided by a lake in such an attractive setting. Lands and Survey Department was at the time the Crown agency involved in the provision of tourist facilities in the Rotorua region.

4.2.4 This completes Mr Alexander's evidence on the taking of these roads. The evidence clearly demonstrates that Ngati Rangiteaorere were against this invasion of their tribal domain, but their objections do not appear to have been considered. The Crown compulsorily took their land for roads and did not pay compensation. We now consider each of these issues in turn.

Compulsory acquisition of land

4.2.5 In its Mangonui Report (1988) the tribunal briefly considered the compulsory taking of land - in this case for a sewerage scheme, but raised no objection because the land concerned was not traditional Maori land, having been acquired by the Ngati Kahu claimants from a Pakeha landowner after the land had become subject to a public works designation. Because of this and also because there had been no legal argument on the matter, the tribunal did not examine the question of "whether the Treaty forbids the compulsory acquisition in any circumstances". We too have not had any legal argument on the compulsory taking of Ngati Rangiteaorere land for roads and for that reason refrain from making a finding. Nevertheless we believe that it is appropriate to make some observations for future legal argument.

As mentioned earlier in this report, kawanatanga in Maori eyes is and has always been something less than rangatiratanga. In the context of land, rangatiratanga includes the exclusive rights and control over who may live there, pass through, hunt or harvest the land's bounty, in fact the absolute dominion and authority over the land against all persons subject only to the gods. In pre-European times these rights were jealously guarded and any encroachment by other iwi without consent usually resulted in warfare. On the other hand, kawanatanga as Maori Treaty signatories understood it from missionaries, was a new concept which was primarily associated with the control of Pakeha who were beginning to stream into the country. It did not involve taking control or rangatiratanga from Maori. Had Maori been told in 1840 that kawanatanga would mean the limiting and eventual loss of rangatiratanga over their lands, they would not have signed the Treaty. Indeed some who feared that this might happen did refuse to sign.

If we turn to the English text of the Treaty, as it was understood by the English, then it could be argued that the Maori, in ceding sovereignty or kawanatanga (governance) in article 1 of the Treaty, were conceding to the Crown the right to ensure the free passage of its subjects, of both races, throughout the land, and in this respect the right to acquire land for public roadways. The argument could be extended to allow for

compulsory acquisition, in the last resort, of necessary public rights of way, on payment of fair compensation. This principle was in fact embodied in the Public Works Act 1882 which was in force at the time the Ngati Rangiteaorere land was acquired. But against this attribute of sovereignty we must balance the promise to Maori in article 2 of the Treaty of "the full exclusive and undisturbed possession of their lands..." and the reservation to the Crown of a sole right to purchase such land as Maori wished to sell; or, in the Maori text, the rather stronger guarantee of "te tino rangatiratanga o o ratou wenua" which allows a chiefly control over, as well as possession of, their lands.

The question at issue goes to the very heart of the Treaty: it is whether the Crown's exercise of sovereignty (kawanatanga) guaranteed to it in article 1 can override the chiefs' exercise of rangatiratanga guaranteed to them in the second article. That question is insoluble, unless we are prepared to assume that one article can override the other, or find a compromise. Where the Treaty is contradictory, as it is in this case, we must try to find a compromise if it is to work at all. Fortunately, in this respect we can find some guidance in previous tribunal reports. In the tribunal's Motunui and Manukau reports it was held that the gift to the Crown of the right to govern and to make laws was in exchange for the protection by the Crown of Maori rangatiratanga Motunui Report (1983) p 61 and Manukau Report (1986) p 90. The Muriwhenua Report (1988) p 195 spoke of a need to reconcile the concepts of kawanatanga and rangatiratanga: "neither partner in our view can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit". The Mangonui Report spoke of a need for a priority of Maori interests in some cases and "a careful balancing of interests" in others, with the Mangonui sewerage scheme in the latter category. The Crown's exercise of kawanatanga was to be constrained by the need of the two Treaty partners to behave towards one another reasonably and in good faith. This requires proper consultation.

In exercising our statutory function, we note that in any claim before us we have an exclusive authority to decide issues raised by differences between the two texts of the Treaty. We are also aware of the well known principle in international law, cited by the Tribunal in its Motunui Report pp 53-58, that ambiguities in a Treaty should be construed against the party writing the document.

If we apply these principles to the claim before us, we must express doubt whether the Crown could properly assert its kawanatanga over Ngati Rangiteaorere's rangatiratanga - by compulsorily acquiring their land for roads. In any case, the Crown failed to carry out the necessary pre-requisites. It failed to consult Ngati Rangiteaorere in the first instance about the need for a public road; and it failed to negotiate genuinely with them to purchase the land. The Crown therefore had no right to proceed to compulsory acquisition. It was clearly in breach of article 2 of the Treaty, which provided no sanction for compulsory purchase of land, either in the English or the Maori text. And it infringed Ngati Rangiteaorere's rangatiratanga which included the right to control entry to as well as ownership of their land.

Taking land without compensation

4.2.6 We now consider the second issue: the compulsory taking of land without compensation. This turned an acquisition into a confiscation. Whatever the merits of compulsory acquisition, as a last resort, there can be no justification for the failure to

pay compensation. The Public Works Act, which was the normal mechanism for acquiring private land for public purposes, provided for the payment of fair compensation. But in this instance the Crown chose to use s 93 of the Native Land Court Act 1886 which allowed it to take Maori land for roads without compensation. We find that section and the use of it by the Crown discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects. If it was necessary to take the land at all, it should have been taken under the Public Works Act and compensation paid.

Recommendation

4.2.7 We recommend that the Crown commission a registered valuer, acceptable to the claimants, to value the land in the public roads taken from Ngati Rangiteaorere without compensation, at the dates of acquisition, with the valuation updated by actuarial calculations to the present to take into account the loss of use of the money. The aggregate sum, to be paid as compensation to Ngati Rangiteaorere.

Waitangi Tribunal, Department of Justice, Wellington.

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4 - Additional Grievances

4 - Road Alignments

4.3. Road Alignments

4.3.1 There are two further minor claims addressed by Mr Alexander in his report on roading matters. These arose out of separate roading re-alignments, first at Te Ngae near Waiohewa and secondly involving mission farm lands. The roading work resulted in closed road being available for disposal.

4.3.2 Insofar as the Te Ngae lands near the junction of the Rotorua-Whakatane and Rotorua-Tauranga highways are concerned (see figure 1) there have been negotiations by the Crown with Ngati Rangiteaorere that appear fair and reasonable and we can only support the offer by the Crown to sell the lands to Ngati Rangiteaorere for \$2000.

4.3.3 The second matter concerned the upgrading of the state highway fronting the New Zealand Mission Trust Board farm and resulted in slivers of surplus land being left along the western side of the road. These small parcels obviously should be added to the various land titles fronting the western side of the highway and the Crown has offered them to the Ngati Rangiteaorere concerned for a sum of \$7200. The land was originally taken from the CMS block and when the road was realigned in the 1960s and remained in Crown hands dividing the road from the Maori owned Whakapoungakau 7 blocks. The Crown's decision to return the land to the owners of these blocks and so give them full access to the road was a sensible one. Since the land was originally part of the Church mission station block, and we consider that the Crown has an obligation under the Treaty to facilitate the return of this land to Ngati Rangiteaorere, we recommend that these slivers be returned to the adjoining blocks, without any cost to the owners concerned.

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5 - The Taking Of Ngati Rangiteaorere Lands For Survey Costs

4.4. The Taking of Ngati Rangiteaorere Lands for Survey costs

In developing their case in respect to the mission farm, Ngati Rangiteaorere expressed concern that a considerable amount of their tribal estate had been awarded to the Crown in payment for survey costs. This question was researched for the Crown by Mr Patrick who found that 348.5 acres of land had been awarded to the Crown for survey costs (A4). Moreover this land had been taken along the road frontage, effectively bisecting many of the parcels of land, and causing other parcels to lose road frontage. However, after Mr Patrick's report was filed, the claimants failed to follow up the matters.

There are two matters at issue. First there is the question of whether the Crown, in taking land via the Native Land Court for survey charges, was in breach of the principles of the Treaty. We believe that another division of this Tribunal is currently addressing this in relation to the Pouakani claim. It has the assistance of more in depth research and legal argument and will be in a better position to rule upon the principles at issue. Accordingly, we have decided not to take the matter of Ngati Rangiteaorere's survey claim any further but give them leave to re-open it, should they wish, when the Pouakani Report is published.

The second issue concerns the location of the land taken for survey charges. But, since the claimants have not taken action on it, we take the matter no further.

Waitangi Tribunal, Department of Justice, Wellington.

Rangiteaorere Land Claim

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6 - Geothermal Issues

4.5. Geothermal issues

A further ancillary matter raised by Ngati Rangiteaorere orally before the tribunal in December 1989 and by formal written claim on 2 April 1990 (appendix 1.3) concerned the geothermal resource centred on and about Tikitere B Block, land which Ngati Rangiteaorere have owned since time immemorial. The area is an internationally renowned tourist resort, owned by Ngati Rangiteaorere, and commonly known as "Hell's Gate". Initially, Ngati Rangiteaorere complained that the Crown was shortly to introduce legislation into Parliament (the Resource Management Bill) which, amongst other things, proposed to deal with the control and exploitation of geothermal resources in New Zealand, without consultation with them. As a result, this tribunal formally made an interim recommendation to the Minister of Maori Affairs (appendix 5) on 7 December 1989 that the government should not introduce legislation that dealt with geothermal resources until it had consulted Maori who have customarily utilised this resource. We regarded any attempt to legislate for control over geothermal resources, without consulting the Maori concerned on a matter that involves their taonga, as a breach of the Treaty guarantee of rangatiratanga over such resources.

The Resource Management Bill was subsequently introduced and is still before the legislature. Ngati Rangiteaorere indicated to us in the amendment to this claim that they intended to make submissions to the select committee considering the Bill. We regard this as a rather late stage for consultation. We recognise that we are unable to comment on the Bill while it is before the House, unless it is specifically referred to us by resolution of the House, under ss 6(6) and 8(2) of the Treaty of Waitangi Act 1975. The House has not passed such a resolution.

Finally, we note the possibility that Ngati Rangiteaorere's claim might be the subject of joint investigation by the tribunal with similar such claims.

Waitangi Tribunal, Department of Justice, Wellington.

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7 - Referencee

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6 see n 4, vol 1, p 107

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11 R G Webb The Anglican Church in the Hot Lakes District (Rotorua Post, Rotorua, 1949) p 29

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24 *ibid*

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27 Chapman journal, vol. 3, p 532 see n 22

28 3 NZ Jur [NS] SC 72

29 Sinclair to Vidal, 21 September 1852, Correspondence between government officials and home and mission secretaries, ms micro, 4 CMS, Alexander Turnbull Library

30 Whitaker, 4 September 1855, minutes to Vidal's letter of 16 September 1855, see n 18

31 see n 28, p 79

32 *ibid*, p 78

33 *Johnston v Pedlar*, p 276

34 *New Zealand Maori v Attorney-General* [1987] 1 NZLR 641, 644

35 *ibid*, p 702

36 Crown grant, Department of Survey and Land Information, Wellington

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38 Whitaker, 2 August, 1855, see n 30

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43 Ollivier C Morton A Visit to the Boiling Springs of New Zealand (J Hughes, Christchurch, 1871)

44 Bay Of Plenty Times, 21 June 1876

45 see n 6

46 *ibid*

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48 AJHR 1890 C-5, p 23

49 Minister of Lands to Under Secretary for Lands, 15 May 1890. Lands and Survey Head Office file 12898. It appears this file no longer exists, having most likely been destroyed in the Hope Gibbons Building fire in 1952. The only surviving record is a register book held by DOSLI Head Office which records in summary form (ie approximately one line) the contents of each letter or memorandum on the file.

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