The Pouakani Report 1993

1 The Claim and the Proceedings

1.1 Introduction

This claim was lodged with the Waitangi Tribunal on 27 March 1987 by John Hanita Paki on behalf of himself, the trustees and the beneficial owners of the lands in the Titiraupenga and Pouakani B9B Trusts. The lands of these two trusts are part of the original Pouakani block, and from this the claim became known as Pouakani, and we have titled our report the Pouakani report. The claim involved some changes in the boundaries of the Pouakani block, in particular a dispute over the survey of part of the boundary of Pouakani B9B block and an alleged loss of land to the Maraeroa block. These two large blocks north-west of Lake Taupo (map 1.1) comprise nearly 70,000 hectares, straddling the traditional boundary between lands settled by descendants of Tainui and Te Arawa canoes. The details of the claims can be found in appendix 2.

The Pouakani claim is not a tribal claim in the usual sense. The term "Pouakani people" was used in submissions to the tribunal but this is not a tribal or hapu name. Te Pou-a-kani was the name of one of the boundary posts on the aukati, the boundary of the Rohe Potae, the King Country, on the western boundary of the Pouakani block. We have interpreted the term Pouakani people to mean, depending on the context, the descendants of all the hapu - Ngati Wairangi, Ngati Moe, Ngati Korotuohu, Ngati Ha, Ngati Hinekahu and Ngati Rakau - who were listed as owners in the various subdivisions of the Pouakani block. By means of the whakapapa (genealogies) given to us, the people of these hapu could relate to ancestral lines of Raukawa, Maniapoto, Tuwharetoa and Te Arawa. In some contexts, the term Pouakani people appears to have been used to refer to either or both the beneficial owners of lands of the Titiraupenga and Pouakani B9B Trusts, and a larger group which includes all the descendants of owners of Pouakani B9 and C1 blocks, of which the trust lands Pouakani B9B and Pouakani C1B1 and C1B2 blocks, are parts. The trust lands involved are shown in map 1.2.

The Pouakani claim arose over a dispute in the early 1980s with the New Zealand Forest Service and later with the Department of Conservation over the boundaries between the Pouakani B9B block and the adjacent Pureora Forest Park. This dispute over the logging of indigenous forest led to proceedings in the High Court and the Maori Land Court. During these proceedings it was claimed that the western boundary of the Pouakani block, shown as Horaaruhe Pouakani block on William Cussen's survey plan ML6036 in 1886, had been shifted in 1892 by another surveyor, Don Stubbing (map 1.2). The effect of this appeared to be that some 2000 hectares had been taken from the Pouakani block and given to the Maraeroa block. This action, it was claimed, deprived Pouakani owners of some land, and in turn affected the surveyed and unsurveyed boundaries of Pouakani B9B block. The boundaries between the Crown land in Pouakani B9A and Maori land in Pouakani B9B blocks had not been surveyed. Furthermore, a registered surveyor, Mr J M Harris of Te Kuiti (who had been employed by the trusts following discussion with the New Zealand Forest Service in 1986), found that a survey would not "close" in a manner which

would include the area described in the title orders issued by the Native Land Court in 1891 and 1899.

An amended statement of claim was submitted to the tribunal on 27 October 1987 which, in addition to the boundary problems already stated, raised questions about the operation of the Native Land Court and the way lands in the Pouakani block were allocated to Maori owners, the activities of Crown land purchase officers in the 1880s and 1890s, the agreements made to open up the King Country in 1883 (the Rohe Potae of which Pouakani block was a part), and the Crown acquisition of lands for payment of survey charges. These matters raised issues which affect Maori tribal interests beyond the immediate scope of Pouakani block owners or their descendants.

On 27 April 1989 an "Addendum" to the amended statement of claim was submitted which alleged that the "act of Crown in taking lands for survey costs was a breach of the principles of the Treaty". Additional claims were also made in respect of the Waikato river, the taking of lands under the Public Works Act for hydro-electric power purposes, the nature of water rights granted for power generation, and the ownership of the river, in particular the provision of s261 of the Coal Mines Act 1979 which vests the bed of a navigable river in the Crown.

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1.2 The Claim Hearings

The first hearing of the Pouakani claim was held at Te Papa o te Aroha marae, Tokoroa, in the week 15-19 May 1989. At this hearing the claimants, including Mr Paki, put their case. The kaumatua were heard first, including Mr Tamati Wharehuia of the Tapuika tribe of Te Arawa, whose narrative of the journey of Tia to Titiraupenga is transcribed in appendix 4. Mr Waea Mauriohooho expressed the interests of the Tainui Trust Board in the Waikato river aspects of the Pouakani claim. Detailed evidence on surveys was presented for the claimants by their surveyor, Mr J M Harris. Other evidence for claimants included that of Mr Kevin Were, a farm management consultant of Te Kuiti, who had acted for the Titiraupenga Trust. Counsel for claimants was Mr Paul Heath of Hamilton, assisted by Mr Richard Boast of Wellington. A legal submission on s261 of the Coal Mines Act 1979, prepared and presented by Mr Graeme Austin of Wellington, has been reproduced as appendix 15 of this report. Research reports commissioned by the tribunal were also presented: Mr Paul Harman on historical background and Mr M Cox on survey aspects of the Pouakani claim. At this hearing a large amount of documentary evidence involving proceedings in the Native Land Court since 1886 concerning the Pouakani block, records of the Tauponuiatia Royal Commission 1889, plans and other government archival material from the Department of Survey and Land Information and National Archives were admitted to the record of documents (see appendix 17).

At the second hearing of the Pouakani claim, held in the conference room of the Timberlands hotel, Tokoroa in the week 21-23 August 1989, submissions from the Crown were presented to the tribunal. Crown counsel was Mr C T Young. Evidence on behalf of the Crown was presented by Mr David Alexander in three reports:

1. The Crown award of Pouakani No 1 block;
2. The western and southern boundaries of Pouakani with Maraeroa and Tihoi blocks respectively;
3. The partitions of Pouakani block.

Mr Tony Walzl presented a report on Crown purchases in Pouakani block 1885-1899 and Sister Josephine Barnao reported on the evidence on timbercutting rights, which had been produced by the Maori Trustee. As a result of this last report the claims in respect of the Maori Trustee's administration of timber-cutting rights were withdrawn by counsel for claimants and are not commented on further in this report. Evidence on aspects of forests and wildlife in Pureora Forest Park was introduced by counsel for the Department of Conservation, Mr N Watson, and presented in reports prepared by Mr J Leathwick, Ministry of Forestry, on the Waipapa, Pikiariki and Pureora mountain ecological areas, and Mr A J Saunders, Department of Conservation, on wild life and habitat values of Pureora Forest Park. Evidence prepared by Dr A S Edmonds, Department of Conservation, giving a national perspective on the three

ecological areas was read by Mr Watson, in the absence of Dr Edmonds due to illness. Ms Hilary Talbot, counsel for the Electricity Corporation, a state-owned enterprise, introduced a submission on behalf of the corporation with respect to Whakamaru and Maraetai hydro schemes and the corporation's commitment to seek new water rights.

Because the matters in dispute were largely between Maori and the Crown, and the lands concerned were still in Crown or Maori ownership, private interests were not involved. Two state-owned enterprises were concerned, the Forestry Corporation and the Electricity Corporation, but no submission was made by the Forestry Corporation. Two parties were given the right to make a submission as having an interest greater than that of the public. The Maniapoto Maori Trust Board, through its spokesman, Reverend Rapata Emery, made a statement on the Maraeroa block and the ancestor Matakore. At the first hearing, Mr Rana Waitai, as deputy chairman of the Mangakino Incorporation, had registered the interests of Ngati Kahungunu ki Pouakani, as owners of land in Pouakani block granted by the Crown in exchange for the Wairarapa lakes. During the second hearing some statements were made on behalf of Ngati Kahungunu ki Pouakani, but no evidence produced, and it was agreed that the Ngati Kahungunu ki Pouakani concerns be the subject of a separate claim (registered as Wai 85). This issue is explained briefly in chapter 17 of this report.

An additional issue in respect of the Crown acquisition of Waipapa No 5 block, as part of the "Waipapa Consolidation Scheme", was raised in papers provided by Mr Pius Hepi and produced for the tribunal by Crown counsel at the end of the first heating. In a submission by Crown counsel during the second hearing the tribunal was informed that some research had been carried out by the Department of Survey and Land Information. This research was produced for the information of the tribunal. The Waipapa block was derived from parts of Pouakani and Tihoi blocks and incorporated in a land development scheme. Waipapa No 5 block was formerly part of Tihoi block. No written statement of claim was produced with these documents. While it may be theoretically possible to make a verbal claim to the tribunal, we have not treated this material as a claim because we think that, if there are matters relating to Waipapa lands that should be considered by the tribunal, then these matters should be the subject of a separate written claim to the tribunal. Without further information, we can make no specific comment on this "claim".

The third hearing of the Pouakani claim was held at Te Papa o te Aroha marae, Tokoroa, in the week 9-12 October 1989. More documents were entered into the record but the hearing was largely taken up with the closing submissions of counsel for claimants, Mr Heath and Mr Boast, and counsel for the Crown, Mr Young.

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1.3 The Role of the Waitangi Tribunal

The jurisdiction of the Waitangi Tribunal to hear the claim of any Maori or group of Maori is set out in s6 of the Treaty of Waitangi Act 1975. Under sub-sections (3) and (5) of s6, the tribunal has the power to make recommendations as it thinks fit on any aspects of the claim which it considers to be well-founded, in a report to the Minister of Maori Affairs, other relevant ministers, the claimants, and other persons with an interest in the claim. The tribunal also has certain powers in respect of land transferred to state-owned enterprises under s8A of the Treaty of Waitangi Act, as amended by the Treaty of Waitangi (State Enterprises) Act 1988.

The Waitangi Tribunal is also deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908. The hearing of the Pouakani claim had a superficial resemblance to the adversarial procedures in other courts. Both counsel for claimants and counsel for the Crown called evidence and made submissions and both counsel made final submissions. At the conclusion of formal hearings many may have assumed that the tribunal would immediately produce a report based on the large amount of evidence placed before it. However, like any commission of inquiry, the Waitangi Tribunal has an inquisitorial role. It is concerned with finding out what happened that led to the sense of grievance felt by claimants. It is not restricted to considering only the evidence placed before it.

In reviewing that evidence, the tribunal separated the various claims into issues which affected the particular claimant group (that is the Pouakani B9B and Titiraupenga Trusts and their beneficial owners), and the issues which had broader implications for the tribes of the Rohe Potae. In the first group we placed the matters related to the surveys and boundary dispute over Pouakani B9B block and adjacent Pureora Forest Park. However, this specific dispute could not be understood without a broad understanding of the processes and procedures of the Native Land Court, Crown land purchase and the survey requirements of the 1880s and 1890s when the transactions complained of on the Pouakani block occurred. Much of the evidence presented to us raised general questions about Crown practices and legislation which applied not only to the Pouakani block but to the many other blocks in the Rohe Potae. We had to make certain whether the detailed evidence given to us of the transactions on Pouakani block was typical, or whether there were any unusual features, any act of omission or commission by the Crown, which would make this grievance specific to the Pouakani block. The tribunal therefore undertook further research, and this has taken us some time to complete.

We have established that within the Rohe Potae (which we define as the area described in the schedule to the Native Land Alienation Restriction Act 1884), there is a large area of the central and western North Island in which the Crown right of pre-emption, agreed in the Treaty of Waitangi in article 2, and waived by the Crown in the

Native Lands Act 1862, was reimposed by the Native Land Alienation Restriction Act 1884 and maintained by the North Island Main Trunk Railway Loan Application Act Amendment Act 1889, the Native Land Purchases Act 1892 and the Native Land Court Act 1894. It is well known that the several New Zealand governments of the 1870s and early 1880s entered into negotiations with the tribes living within the Rohe Potae for the purposes of allowing construction of the North Island main trunk railway and the "opening up" of the King Country for Pakeha settlement. An agreement was reached to allow surveys for a railway line, and for major triangulation of the King Country in the early 1880s. On 19 December 1883, an agreement for the survey of the boundary of the Rohe Potae (called the "Aotea Agreement" in submissions to us) was confirmed in a letter signed by Wahanui and others. The claimants stated that government had broken the "Aotea Agreement" by allowing subdivision and survey of the Pouakani block. The first Crown purchase of lands in Pouakani block in 1892 was funded under the provisions of the North Island Main Trunk Railway Loan Application Act 1886 and amendments.

In January 1886 the Taupo Native Land Court began hearings for investigation of title to lands in the Tauponuiatia block, part of the lands of Ngati Tuwharetoa, on the application of Te Heuheu and others. On 27 June 1886 the Native Land Court began hearings at Kihikihi, and later at Otorohanga, for the investigation of title in the Aotea (Rohepotae) block, part of the lands of Ngati Maniapoto. It is well established that there was a dispute between Ngati Maniapoto and Ngati Tuwharetoa over the boundary between the Aotea and Tauponuiatia blocks, and over the inclusion of Maraeroa in Tauponuiatia. This dispute led to litigation in the Supreme Court, petitions to parliament, and the appointment in 1889 of a royal commission to investigate matters related to the Tauponuiatia block. The Tauponuiatia Royal Commission reported in August 1889. One outcome was s29 of the Native Land Court Acts Amendment Act 1889 by which the Native Land Court orders made in 1887 for lands in the Pouakani block (with the exception of Pouakani No 1 block awarded to the Crown) and the Maraeroa block were cancelled. The investigation of titles for Pouakani and Maraeroa blocks were heard anew in 1891 and new title orders were issued.

Large areas of Pouakani and Maraeroa blocks were acquired by the Crown during the 1890s and early 1900s by means of Crown purchase of individual interests in land through government land purchase officers. Surveys were required both for purposes of investigation of title by the Native Land Court and for defining areas which the Crown had purchased. However, because the Crown was actively purchasing land, the Survey Office did not always commission surveys on the ground. The practice of "scaling and protracting" (a method of calculating lines and drawing them on a survey plan in the Survey Office) became acceptable in Crown land purchase procedures, on the grounds that it would save the owners money by not charging the lands for unnecessary surveys. If there was a possibility of the Crown acquiring more lands in a block, survey of those lands may not be required. The practice of charging Maori owners for all costs of survey, was established in Maori land legislation since the original Native Lands Acts of 1862 and 1865 which established the Native Land Court. Legislation in 1878 enabled the court to award land to surveyors in payment of survey costs, and legislation in 1880 enabled the court to order the sale of part of the land for payment of survey costs. The Native Land Court Act 1886 gave the court

power to charge the land with money owing to the Crown or a private surveyor for survey costs.

Waitangi Tribunal, Department of Justice, Wellington.

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1.4 Summary

In short, the tribunal decided that in an administrative and political environment where the Crown was the sole purchaser, a good deal of explanation was needed in order for the intricacies of the interwoven operations of the Native Land Court, the surveys and definition of boundaries and Crown purchase to be fully understood. We also began to comprehend the complexities of tribal relationships on the border zones between major tribal areas of Tainui and Te Arawa, and among the tribes of Ngati Raukawa, Ngati Maniapoto and Ngati Tuwharetoa in particular. We have also tried to comprehend the nature of Maori complaints, beginning with the tribal petition to parliament in 1883:

> We have carefully watched the tendency of the laws which you have enacted ... they all tend to deprive us of the privileges secured to us by the second and third articles of the Treaty of Waitangi, which confirmed to us the exclusive and undisturbed possession of our lands.

During the period since the first hearing of the Pouakani claim in 1989, a number of other claims have been lodged with the Waitangi Tribunal which concern many other blocks in the Rohe Potae, the operation of the Native Land Court, Crown purchases, surveys and the acquisition of lands in payment of survey charges. These claims have been grouped together as Whanganui ki Maniapoto (Wai 48 etc). Without presuming on these claims which are currently being researched and are likely to begin hearing in 1993, we are conscious that the issues we are reporting on in the Pouakani and Maraeroa blocks are also relevant to the Whanganui ki Maniapoto claims.

We have also been made aware of the paucity of historical writing which addresses in detail the precise nature of the Native Land Court, Crown land purchase and survey procedures. We have discovered a wealth of archival information in the minute books and files of the Maori Land Court, in the original field books, survey plans and related files in the Department of Survey and Land Information, and in the land purchase files and other documents, including the minutes of evidence of the Tauponuiatia Royal Commission held in the National Archives. Sadly, some crucial documents have been lost, and we comment on these losses as appropriate in our report. However, in general, there is a wealth of other information which corroborates, and from which we have been able to reconstruct, the transactions on the Pouakani and Maraeroa blocks in the 1880s and 1890s.

On 16 April 1992 a preliminary draft of this report containing no findings or recommendations was released to counsel for claimants and the Crown to enable them to respond to material found since the hearings ended and make further submissions, if they wished, by 22 May 1992. The Crown responded indicating that no further submissions would be made. Mr Paki responded in a letter dated 23 April stating "I do

not have the financial resources required to present the requested submissions". He requested funds to pay his "professional advisers" to prepare submissions and appear before the tribunal. Mr Paki also stated:

> If funding is not approved I realise that our inability to produce a submission will substantially disadvantage our claim. The Crown clearly has the resources available to make indepth submissions from their viewpoint ....
>
> Given the very substantial costs of the claim to date and the very important issues involved in the claim - issues that are of importance in a significant number of other claims - I hope that you are able to provide the funding support we require to address your request in an appropriate manner.

The Waitangi Tribunal was not able to provide the funds requested. Payment of counsel for claimants now comes under the provisions of the Legal Services Act 1991. Mr Paki instructed his counsel to return the draft copy of the Pouakani report to the tribunal office in Wellington. These matters were reported in the media.

The Waitangi Tribunal has always been aware of the considerable costs involved for claimants to bring their grievances before it. When appropriate, the tribunal has made a recommendation to the Crown concerning costs, for example in the Ngai Tahu claim. We have considered the matter of claimants' costs in our recommendations in chapter 14. We are also aware that the Crown has also made an interim payment to the claimants reported in the media in September 1990 to cover existing debts.{FNREF:0-86472-117-XA:1:3} The tribunal was concerned that claimants felt they were unable to respond to the invitation to make further submissions. The tribunal decided in these special circumstances to offer to underwrite, subject to claimants applying for legal aid under the Legal Services Act 1991, the costs of a one-day hearing, to be restricted to submissions on the boundaries of Pouakani B9B, C1B1 and C1B2 blocks and the boundary between the Maraeroa and Pouakani blocks. Other issues such as matters related to the operation of the Native Land Court, lands taken in payment of survey and other costs, and the Waikato river, would not be heard, as these matters would be considered in other tribunal hearings. The Crown would also be given an opportunity to respond to any submissions made by claimants. This offer was declined by the claimants and the tribunal had no alternative but to complete this report without the benefit of submissions by claimants on any material found since the conclusion of hearings.

The Waitangi Tribunal is deemed to be a commission of inquiry under the 1908 Act. We agree with counsel for claimants who in his closing submissions summarised the obligations of the Waitangi Tribunal:

> The Tribunal's task is to enquire whether the claim is "well-founded". Nothing is said in the Treaty of Waitangi Act about the standard or burden of proof cast upon the claimants. In its reports the Tribunal does not generally refer to burdens or standard of proof at all, and this is no doubt because of the Tribunal's status as a commission of inquiry. Its task is inquisitional [sic] - to enquire into, and make

recommendations. Concepts of standards and burdens of proof are inappropriate except to the extent that the Tribunal must find to its own satisfaction that a claim is "well-founded".

We do not consider that the claimants are significantly disadvantaged by our proceeding to issue our report without benefit of claimants' submissions in this instance. The "new material" comprised mainly a review of relevant files in the National Archives, and the Taupo minute books of the Native Land Court before 1886, in order to fill in the gaps in the historical evidence placed before us. We felt we needed to establish a good understanding of the setting within which the transactions on Pouakani and Maraeroa blocks were enacted. We were concerned to find out whether these were typical or departed from what became normal operations of the Native Land Court, surveyors and land purchase officers in the Rohe Potae in the 1880s and 1890s. One document of substance should be noted which was not before the parties at the hearings and which is reproduced as appendix 8 and discussed in chapter 10. No evidence was produced during hearings on the Tahorakarewarewa section of the disputed boundary between Aotea and Tauponuiatia blocks. The report of the Native Land Court in appendix 8 provided an explanation which we have checked against the evidence that was before us. On the substantial issues of survey, or lack of it, affecting the Pouakani B9 and C1 blocks and the boundary between the Pouakani and Maraeroa blocks, no new information has been found which alters what was placed in evidence before us. We have tried to reconstruct the transactions in detail. We have tried to let the documents speak for themselves. We have checked other sources to corroborate. The result is a lengthy, and at times laborious narrative. We have drawn maps to illustrate our narrative and acknowledge the contribution of Mr Max Oulton for his skilled cartographic work.

This report is not the end of the matter in understanding land transactions in the Rohe Potae. We agree with Mr Paki's comment that there are issues of importance in a significant number of other claims. These issues will be investigated by the tribunal which will be hearing a group of some 12 claims (Wai 48 etc) involving lands in the Rohe Potae. There will therefore be further opportunity for these issues to be canvassed by the tribunal with the benefit of submissions from representatives of all the tribes concerned.

We are also aware that there are applications before the Maori Land Court under s30(1)(a) and s452 of the Maori Affairs Act 1953 The two s30(1)(a) applications were adjourned on 9 June 1988.{FNREF:0-86472-117-XA:1:4} The s452 application was adjourned sine die.{FNREF:0-86472-117-XA:1:5} The material placed before the Maori Land Court during hearing of these applications was available to the tribunal. Because there were matters raised that were more appropriate for investigation by the Waitangi Tribunal, the s452 application was adjourned. On 30 August 1989 the deputy chief judge gave notice that the applications would be dismissed unless "a meritorious written objection" was received by 2 October 1989, but in dismissing the applications leave would be reserved for the applications "to be re-instated without further fee if the applicant considers that necessary". No objection was received and the s452 application was dismissed on 1 November 1989. {FNREF:0-86472-117-XA:1:6} The s30(1)(a) applications are still before the Maori Land Court. The way is still open for the claimants to make further submissions to the Maori Land Court which has jurisdiction to arbitrate on boundary disputes involving Maori land.

We hope that in a spirit of cooperation and partnership the parties may be able to negotiate agreement. We have framed our recommendations in the hope that they will provide a framework for negotiation which will be reported back to the Maori Land Court in such a way that new titles can be surveyed, ordered and properly registered on the Pouakani B9B block. Other recommendations are of more general concern and may be taken up by the Crown agencies involved in consultation with tribal representatives. Our function is to produce a report and make recommendations as appropriate. It is the function of government representing the Crown as a Treaty partner to follow up those recommendations.

References

1. AJHR 1883 J-1
2. *New Zealand Herald* 4 and 18 May 1992
3. ibid 21 September 1990
4. Taupo minute book 65 p 11
5. C J 1987/42; Chief judge's minute book 1988 p 78
6. Chief judge's minute book 1989 pp 203 and 240

Waitangi Tribunal, Department of Justice, Wellington.