

Te Roroa Claim

03 Nga Whenua Rahui (Reserves)

3.1 Official Attitudes and Policies

Take 3

NGA WHENUA RAHUI (RESERVES)

3.1. Official Attitudes and Policies

Under each of the four heads of claim, Te Roroa have stated that they are prejudicially affected by the failure of the Crown to ensure that particular areas of land defined by their tupuna were reserved from sale. These areas are particularised in the claim.

Right from the beginning of British intervention in New Zealand official attitudes and policies on reserves reflected the conflicting objectives of protection and assimilation.

Clearly the Crown's intention was that the Maori should retain sufficient land for their present and future needs. Furthermore "a sufficient land base" would enable Maori to enjoy some of the added value to land accruing from British settlement. This would be some compensation for the Crown's practice of purchasing Maori land as cheaply as possible and re-selling the same land to settlers at a much higher price (I1(c):11).

In practice there was a general reluctance on the Crown's part to set aside native reserves. {FNREF:0-86472-088-2:3.1:1} Rather, Maori were to participate in the market economy, be brought directly under British law and institutions and become part and parcel of colonial society. {FNREF:0-86472-088-2:3.1:2}

Under the native land legislation 1865-1909, various kinds of native reserves were created by the Native Land Court. By the 1866 amending Act, all judges were required to take account of the needs of Maori claimants with regard to land for their present and future use. But, as the Waitangi Tribunal noted in its report on the Orakei claim:

In fact the Crown had no policy favouring reservations in any manner akin to those secured for North American Indians. Restrictions on alienation were regarded as temporary aberrations to maintain a status quo until things had settled down. They could be removed by the Court or the Crown at any time! Orders in Council were regularly used to remove existing restrictions on particular blocks when owners wished to sell and the Crown wished to buy. {FNREF:0-86472-088-2:3.1:3}

In response to a question from the Crown about the status of reserves created by the court pertinent to the Maunganui-Waipoua claim, Dr D V Williams stated:

There was no consistent legal usage with respect to the term "reserves" one should not read back into the 19th Century the current meanings of "Maori reserve" ... or "Maori reservation". (B34:att 20-21)

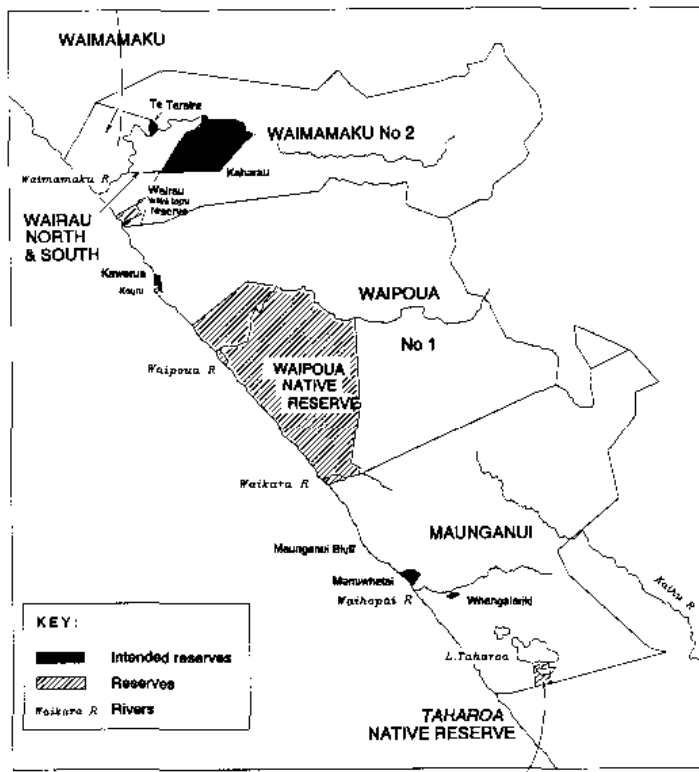


Figure 16: Blocks and reserves within the claim area

Dr Williams attributed the lack of any consistency to the number of Acts and amendments concerning native land passed between 1865 and 1909, which he described as "the legislative morass" created by "law making bedlam". Sometimes:

The term "reserve" ... referred to Tribal land which had been reserved from a sale by the owners, i.e. it continued to be Maori customary land. It could refer to Wahi Tapu, Papakainga and other areas within a block going through the Court with a view to alienation, but the Wahi Tapu etc were reserved and vested in up to 10 owners.

It could refer in the mid-1870s to land set apart not by the Crown but by the District Officer and the Governor in Council pursuant to Section 24, Native Land Act 1873 ("The 50 acres per head" Rule). The reserves might for a time have been vested not in Maori owners but in the Native Reserves Commissioner established by the Native Reserves Act 1873.

... Each particular piece of land must be considered in accordance with the laws then in force at the time it came before the Land Court. (B34:att 21)

The 50 acre per head rule, Dr Williams concluded:

would indicate a desire to ensure that there was a rural land base for Maori subsistence. By the time of the Native Land Court Act 1894 the 50 acre guideline had been watered down to a requirement that "the owners have sufficient other land left

for their maintenance" (Section 131(2)). It was, of course, entirely up to Government Officials to decide how much land would be "sufficient". (B34:att 23)

Various restrictions were placed on the alienation of reserves in law but between 1867 and 1909 they were gradually whittled away and finally removed. {FNREF:0-86472-088-2:3.1:4} Orders-in-council were regularly used to remove existing restrictions on particular blocks when owners wished to sell and the Crown wished to buy (B34:att 22). As the native office explained in a press release to local papers in 1886:

It is not meant to restrict permanently the alienation of any native land, but only to retard the alienation of some small portion till the Maori race have taken their ultimate position in the colony, and can be relied on to provide for themselves as the European does. {FNREF:0-86472-088-2:3.1:5}

Waitangi Tribunal, Department of Justice, Wellington.

Te Roroa Claim

03 Nga Whenua Rahui (Reserves)

3.2 What Land was Reserved from Sale

3.2. What Land was Reserved from Sale

KOUTU (AT KAWERUA)

3.2.1 Koutu was the traditional canoe landing place in the vicinity of the tauranga (channel) which comes ashore on the southern end of Kawerua. Literally Koutu means promontory or point of land (C7:att 2.11).

The claimants have stated that the Crown omitted to ensure that an approximately four acre area was in fact reserved and remained under the unrestricted control of Te Roroa; further, that the Crown omitted to provide legal mechanisms capable of recognising Te Roroa tribal title to the Koutu reserve (A1(i):41). We have already seen how early attempts to have Koutu reserved as a trust for Te Roroa and possible model for preserving mana whenua over a larger area of land foundered in 1872 and how no further action was taken to execute a declaration of trust before the sale of Waipoua No 1 block (see above, pp 42-43). {FNREF:0-86472-088-2:3.2.1:6}

The next round of activity by Crown officials was provoked by an inquiry from an Auckland solicitor, Peter Oliphant, on behalf of a client, George Wyatt, storekeeper of Kawerua, to the undersecretary, native office, 8 July 1884 (H60:13). Wyatt had taken an eight year lease from the trustees, but, on making inquiries at the registrar's office in Auckland, could find no trace of a certificate of title. The certificate was in the Crown Law Office and was assigned to the chief judge to report upon the case and advise "what action if any should be taken" (H60:13).

On 21 August 1884, Chief Judge Macdonald recommended that either a fresh application for investigation of title be sent in or the case be taken up from the moment Judge Maning verbally declared "Te Roroa" tribe to be owners (B16:15-18). {FNREF:0-86472-088-2:3.2.1:7}

Ballance approved a fresh application but thought it would be better if the chief judge disclosed the situation to Oliphant in person rather than by letter (B16:12, 14).

An application to the court from Tiopira Rehi and another for an investigation of title was notified for hearing at Rawene on 12 March 1885. The court sat but as nobody appeared the application was dismissed (B16:4, 8-9). These initial delays may have been a result of plans to establish a township to service the gum industry in the area, for in 1888, a surveyor, J I Philips, was sent to Kawerua to survey a series of sections on Crown land surrounding the Koutu reserve. His instructions from the chief surveyor have not been located. The Crown researcher suspected that "he was required to make sure that the sections he surveyed did not encroach on the Koutu

Reserve, thus requiring him to carry out sufficient survey measurements to define the reserve" (E12:1). Philips's survey plan (ML 2193A) was on a larger scale than Campbell's 1871 plan. The south-eastern corner of 28 perches was cut off and marked "taken for road". The total acreage was therefore shown as 3 acres 2 roods 32 perches (E12:doc 1). Yet in the Maori Land Court register Koutu was still entered as 3 acres 3 roods 20 perches (B16:50).

The fourth statement of claim particularises the action of the Crown in 1887 in compulsorily taking without compensation, under s96 Native Land Court Act 1886, 28 perches of the Koutu reserve for roading purposes (A1(i):41). The Crown researcher believed that the most likely explanation was that the area was already occupied by a road and that the land was defined as legal road to acknowledge an existing use. He pointed out that the status of such land at the time was covered by s96 Native Land Court Act 1886, which did not provide for any compensation to be payable. The grounds for this, he believed, were "that the owners of the Native land would receive the benefits of having a road over their land, and the value of their remaining lands would increase accordingly" (E12:2-3).

The claimants objected to this compulsory taking of land on the grounds that:

- (a) The land has been used for private not public purposes;
- (b) Te Roroa gardens on the area were taken in breach of s94 Native Land Court Act 1886 under which maara, urupa, etc were excluded; and
- (c) The compulsory taking of the land was in clear breach of the claimants' rights under article 2 of the Treaty, that is, the principle of tino rangatiratanga (C12(a):11).

The Crown found no evidence that the road reserve was occupied by maara (food gardens) (E12:3).

The claimants believed that the old Kawerua hotel was located on the Koutu reserve. The Crown researcher was unable to provide a definitive answer from the historical evidence and recommended that the boundaries be resurveyed. The surveyor located two of Philips' 1887 survey pegs. Department of Survey and Land Information Whangarei, plan 844-A2, 10 April 1990, showed that the hotel building was not located on the reserve (E12:doc 6). Nevertheless the Crown and the claimants were unable to agree on the original location of the boundaries.

Tiopira Rehi (Kinaki) died in 1887 and on 28 February 1894 Rewiri Tiopira applied to the Native Land Court to be appointed as "new trustee to Tiopira in Koutu Reserve" (C7:att 2.5; C12(a):10). Apparently he was advised to make another application to ascertain who the proper owners were under s14(10) of the 1894 Native Land Court Act conferring jurisdiction over native trusts on the Native Land Court. {FNREF:0-86472-088-2:3.2.1:8}

In accordance with the chief judge's recommendations, an order-in-council conferring jurisdiction on the Native Land Court in respect of the Koutu block was approved and gazetted on 16 July 1895 (B16:5-7; C7:att 2.6). Rewiri Tiopira, Tiopira Rehi (deceased) and Peneti Pana were notified on 22 July (B16:5).

A court sitting was held at Rawene on 6 April 1897 before Judge J A Wilson and assessor Karaka Kereru Tarawhiti (B16:42). Hapakuku Moetara was sworn and asked that he and others of Te Roroa might be included in the title. The trustees, Tiopira Rehi and Peneti Pana were of Te Roroa and "owners of this land with the rest of us". Tiopira Rehi was dead. Rewiri Tiopira was his successor. The case was adjourned "to enable the interests to produce a list of the persons interested and the shares of the same" (B16:46).

When the hearing resumed the following day, Hapakuku Moetara handed in a list of 12 persons entitled to the land which was read and, as there was no objection, passed. The court ordered the certificate of title for the land, dated 28 June 1871, be excised and a Crown grant be issued to 12 persons sharing the land equally. These were Hapakuku Moetara, Wiremu Rangatira (Moetara), Iehu (Moetara) Hapakuku, Raniora Te Rore, Peneti Pana, Rewiri Tiopira, Hone Tuoro, Hohaia Paniora, Matene Naera, Ahenata Rewiri, Te Rore Taoho, Wiremu Tuwhare. As Rewiri Tiopira had died on 7 August 1896 (D1:25), Hapakuku Moetara claimed for his sister Hiria Tiopira. There being no objections an order was made (B16:46-48).

The certificate of title was dated 26 July 1872 (B16:42). {FNREF:0-86472-088-2:3.2.1:9} A clause was added stating "that the land be inalienable by sale only" (ibid).

The claimants alleged that there was an apparent discrepancy between the assumption underlying the 1897 court order that a trust existed, and the registrar's report to the chief judge, 17 June 1895, that "there is no information in this office to show that the declaration of Trust was ever executed". From this it was concluded that: "Consequent upon this hearing twelve individuals were named as beneficial owners under the said non-existent Trust" (C7:att 2.6).

The court order was worded as follows:

Upon enquiry made into ... the existence (if any) of an intended trust it appearing such a trust do exist. (B16:42)

The claimants further argued that a number of objections could be taken to the court order. In his original application Rewiri Tiopira merely sought to be appointed as "a new trustee", but in his letter of 18 June 1895, he specifically asked for a s14(10) Native Land Court Act 1894 inquiry which clearly were not his "own unprompted words" (C12(a):10). After his death, his application was taken over by Hapakuku Moetara who simply asked that he and others be included in the title. It seemed self-evident to the claimants that the application was for new trustees, whereas under the Act they were absolute owners.

It was submitted that "Maori failed to understand the Pakeha distinction between trustee and beneficial ownership and did not perceive a grievance" and that this was further evidenced by the 1904 and 1911 applications for succession in Koutu reserve (C31:3).

In our view, the claim that Koutu reserve had always been recognised as a hapu communal estate held under kaitiaki (trustee) ownership (C31:3) needs to be re-

assessed in the light of Waipoua No 2 alienations which are examined in the next section of this report. These indicate that by 1895, Rewiri Tiopira and Hapakuku Moetara were well aware that those named on the title were in law absolute owners; as do subsequent applications for succession orders to those named on the title for Koutu which were not heard. {FNREF:0-86472-088-2:3.2.1:10}

The claimants claim that administrative and legal confusion and irregularities occurred in the Crown's dealings from the outset also needs some re-assessment. The question of title to Koutu had been left in abeyance for some years when Rewiri Tiopira applied to the court to succeed his father. It seems to us that he was clearing up his father's affairs and was rather nervous about Koutu. Leaving successions in abeyance was a means of preventing its alienation by absolute owners entered on the title by the court.

It was further claimed that the Crown's prime motive for bringing the matter to court was to "facilitate the alienation of the Waipoua block" (C7:att 2.6). We found no evidence of this. Rather it was the court system of awarding the title to ten persons who in law became absolute owners, that was to generally facilitate the purchase of Waipoua No 2 (see below, Take 4).

More administrative and legal confusion with respect to the Koutu reserve resulted from Ata Paniora's requests of 21 November 1944 to the registrar of the Native Department for a tracing of the Rahui Tauranga o Kawerua showing the boundaries and the area, and if there were trustees appointed, for a list of their names. He was advised that a 6s search fee was required and sent off a 10s note as he did not have access to a post office. On 17 January 1945 he was sent a list of the 12 names set out in the 1897 court order as beneficial owners and the three who succeeded Hone Tuoro, plus a receipt for 10s (B16:60-64; C12(a):10). The list was headed, "Trustees appointed by a meeting held in the Waimamaku hui house for the Kawerua Landing Reserve" (C12(a):10).

On 16 April 1945, Daniel Mackie, on behalf of Piipi Tiopira, requested from the registrar full details on the ownership of Kawerua Landing Reserve, known as Koutu, and whether Tiopira Kinaki (Rehi) had any rights in the said block, and was requested to send the 6s fee. On 15 May 1945, he was advised that:

it may be wise now for the descendents [sic] of the owners appointed by the Court on the 6th April, 1897, to make application under Section 5 of the Native Purposes Act, 1937 to have this land set apart as a Native Reservation. (B16:57) {FNREF:0-86472-088-2:3.2.1:11}

At a meeting held in the "Waimamaku hui house", trustees were appointed. Dan Mackie handed in the list to the court on 28 June 1945 (B16:55). The claimants identified the appointees as "representatives of the families of the several deceased individuals" whose names were listed in the same order that had been set in 1897. This, they said, would seem "to indicate the importance of Koutu to the people" (C7:att 2.8). Nearly two years elapsed before the registrar recommended that the "Best course seems to file and await further action to be initiated". {FNREF:0-86472-088-2:3.2.1:12}

In this regard, one of the claimants, Alex Nathan, stated:

It may [be] argued that due process was not adhered to by our people However, nothing that would indicate that this was communicated to our people has been found The tone of the appendments conveys a sense of at best ineptness and at worst conspiracy or cover up [As a result of the] failure to register Trustees appointed by the people; the convoluted manner in which officials conducted the Crown[']s actions and the responses given Koutu does not have any Trustees to this day and its status is unclear. (C7:att 2.9)

We do not accept the conspiracy claim. Rather it was for the descendants of the deceased to bring the matter back to court. Had they really wanted to do something about Koutu they could have.

On 24 June 1949, the conservator of forests wrote to the director of forestry recommending that section one, Koutu be purchased. The forest service had already acquired sections two to four from the Trounson estate, and the director-general of lands and survey was promptly requested to arrange the purchase of Koutu on its behalf.

The commissioner of Crown lands discussed the proposed purchase with the deputy undersecretary of Maori affairs who stated:

the land is held in trustee ownership under Order No. 6497 which was made under the provisions of subsection 10 of Section 14 of the Native Land [Court] Act, 1894 this land is regarded as a Wahi-tapu area ... [he was] extremely doubtful if it would be possible to acquire the land if the Maoris were prepared to sell, the cost of taking the necessary action to purchase would prove much too expensive and far beyond the true value of the area. (B16:65; C12(a):10-11)

On 1 February 1950, the director-general of lands and survey recommended that no further action be taken to purchase the 3 acres 2 roods 32 perches, apparently overlooking the existence of the road reserve of 28 perches.

The Kawerua area was gazetted permanent state forest in 1950. The claimants alleged that "from this point on it would appear that the NZFS assumed control of Koutu and the surrounding area" (C7:att 2.9). The boundaries of Koutu reserve were demarcated by forest service staff in 1952 and the conservator of forests in Auckland sought approval from his head office to lease the old Kawerua hotel buildings to the Auckland University Field Club in 1966. After confirmation that the building was within state forest, it was leased at a pepper corn rent for a full term of 33 years, should the lessee so desire. The lessee was to be responsible for maintenance (E12:3-4 & docs 3-5).

Of the original Hotel, gum store, and post office that stood here [at Kawerua] only the hotel building remains. Today the coastal area is administered by DoC and the pines by Timberlands. (B26:2)

In response to a question raised at the tribunal hearing, a witness for the Department of Conservation admitted that the coastal walkway from the Hokianga harbour to the

Kai Iwi lakes, opened after the passing of the New Zealand Walkways Act 1975, passed over the Koutu reserve near Kawerua. The formal line of the walkway was between the mean low and high water marks on adjoining Crown land. The area adjacent to the mean high water mark, where the walkway would pass at high tide in this area, was a rocky outcrop that was not ideal for a walkway. For this reason walkway marker posts were placed along a previously formed path or roadway to provide an alternative more pleasant route for walkway users. When the Department of Conservation placed the walkway markers across the Koutu reserve, the precise location of the reserve was not known. It had not been taken into consideration that this alternative (unofficial) route was passing over private or Maori land. No consultation or permission was sought from the trustee responsible for the management or administration of the reserve. In closing their evidence, the Department of Conservation witness gave an undertaking that if the existence of the walkway within the reserve was unacceptable to the claimants, then the department would have the walkway markers removed and the alternative route relocated outside the reserve (E25).

WAIPOUA NO 2 (WAIPOUA NATIVE RESERVE)

3.2.2 (a) Waipoua as it was.

According to the late E D Nathan:

Waipoua is so named after the poua, a large sized pipi that tastes like a toheroa. The Waipoua River entrance had rock formations, was navigable, and abounded with paua, kutae, kina, poua, pipi, and all the popular species of fish.

In early times the river flowed directly out to sea along the northern foothills of the valley

Pahinui pa was the main fortification for the people of the Waipoua River valley defending them from attacks from the eastern and seaward approaches. Tirakohua, the high point opposite Pahinui, was the sentinel for the western and south-western approaches [it] was not strategically defensible and became a permanent look-out point, and on occasions a semi-permanent kainga

Manumanu settled in Waipoua, in a place named Whenuahou (new land) It is from [his son] Manumanu (II) that the name Te Roroa originates. {FNREF:0-86472-088-2:3.2.2:13}

According to an archaeologist, Michael Taylor:

Traditional Maori accounts place occupation of the Waipoua area back 27 generations or about 1000 years ... and archaeological evidence supports these traditional accounts of a long Maori presence in the forest There are strong Te Roroa traditions of settlement in the Waipoua valley, at Waikara and elsewhere on the No. 2 Block and there is widespread evidence of this including the remains of kainga, pa, gardens and a variety of less frequent sites, many of which have known Maori histories

During the more recent history of Waipoua, settlement has been located at what was generally known as Tiopira's settlement The centre of this settlement is the location of the modern Pahinui Marae. (B2:4)

Along the Waipoua river on either side were fertile river flats of varying width, suitable for cultivation. South of the river and inland was a kauri gum field. People living at Waipoua were isolated from European contact but highly mobile. They camped seasonally at the beach and moved to Waimamaku and the Kaihu valley to participate in the timber and gum trades. The 1878 census recorded only 11 Te Roroa living at Waipoua but 97 at Waimamaku (B1:5).

According to tribal historian, Garry Hooker, Te Roroa oral tradition is "fairly clear" that the original intention of the tupuna was that this ancient, ancestral land:

with its myriad of pas, kaingas, urupas, wahitapu, food gathering places and paths, be set aside as a papa kainga, a village settlement, for the people. (C12:9)

The landscape was "encrusted with the wahitapu, deeds and mana of generation after generation of tupuna" and formed "an inextricable part of the very fibre of existence of the tangata whenua" (A12:1). "Tradition records that Te Roroa's tupuna have resided there for a millenium Archaeological evidence ... supports this tradition ..." (I1(c):20).

In a personal communication to Garry Hooker, the late Piipi Tiopira (Cummins) said:

Te Roroa wished to have the Crown as a buffer against their Nga Puhi enemies and for that reason were encouraged by the Crown's Land Purchase Officers to sell to the Crown all the land surrounding their settlement, Waipoua 2 Block... (C12:5)

This block was, in fact, "an enclave completely surrounded on three sides by Waipoua 1 Block and on the fourth side by the Tasman Sea" (C12:5).

(b) The identification of Waipoua No 2.

We have seen how Waipoua No 2 block first came into existence when it was surveyed by the Wilsons, who were commissioned and instructed by Tiopira Kinaki. We have also seen how it was designated Waipoua Native Reserve on the Wilsons' plan of Waipoua block, ML 3277A, in May 1875, and on Smith's compiled plan, ML 3277. The total acreage shown on the Wilsons' plan was 12,153 acres and on Smith's plan, 12,220 acres. Yet Waipoua No 2 was not a native reserve in terms of the 1873 Native Land Act and 1873 Native Reserves Act. Rather it was Maori land outside the blocks that Tiopira Kinaki and Parore Te Awha sold to the Crown.

Neither the memorial of ownership for Waipoua No 2 nor the memorials of ownership for Waipoua No 1 and Maunganui showed Waipoua No 2 as a native reserve (A4:452-458(j)). However it was designated Waipoua Native Reserve on Weetman's check survey of part of Waimamaku and Waipoua blocks, 25 January 1876 (D2:7); also on the deed of sale, 5 February 1876, for Waipoua No 1 (A5:721(a)-721(d)). In the Kaipara minute book it was referred to as a native reserve (A12:1).

The claimants argued that at no time did the Native Land Court investigate the title to Waipoua No 2 block (C12:9). The only reason Waipoua No 2 block came before the Kaipara court and was the subject of a court order for a memorial of ownership was that it was part of the voluntary agreement of 2 February 1876 between Tiopira Kinaki and Parore Te Awha concerning the ownership of Maunganui-Waipoua. It was "the piece outside Waipoua" which Parore Te Awha wrote to Tiopira Kinaki was "to be for you only". Thereafter it was commonly spoken of as "Tiopira's reserve". "It was on that basis-and on that basis alone", the claimants submitted, "that the Roroa kaumatua in 1876 collectively consented to the sale to the Crown of the adjoining Waipoua 1 Block, the Waipoua Forest" (A12:1). In the opinion of counsel for the claimants, this voluntary agreement was the legal condition of the Maunganui-Waipoua sale.

We have seen that the memorial of ownership for Waipoua No 2 listed the ten names given to the court by Tiopira Kinaki. With regard to the ten names, Garry Hooker stated in his evidence:

The claimants say ... that they clearly were trustees

... The Maori Land Court order of 3/2/1876 respecting the Reserve was "in favour of Tiopira Kinaki's party." (Kaipara Minute Book 3 p 174). The claimants say that this amounted to an order in favour of Te Roroa, it already having been agreed by the other Ngati Whatua hapus that they would share in the proceeds of sale of Waipoua 1 and Maunganui Blocks, but not the Reserve. The claimants also say that it is ridiculous to suppose that such a famous fighting hapu as Te Roroa ever consisted of only ten persons and that the inescapable conclusion is that those ten held as trustees. (C12:10)

In clarification of this submission, the claimants further stated:

The Order of the Court is misleading in referring to three of the 10 owners, viz Hapakuku Moetara, Wiremu Moetara and Peneti Pana as being other than Te Roroa the Moetaras and Peneti Pana were entitled to be on the Order because they were of Te Roroa.

...neither Hapakuku Moetara nor Peneti Pana claimed other than as Te Roroa in the Maunganui/Waipoua 1 minutes of evidence ... and ... Waipoua 2 Block was part of the same tribal estate

... The 10 trustees were not of equal standing nor did they have equal rights through ancestral occupation

It is not possible to think of the 10 as heads of whanau as this was a concept only applied by the Maori Land Court in the defining of relative beneficial interests the Order was concerned only to establish trustees for customary land, all reference to relative beneficial interests being deleted in the Order and the land being declared by the Order inalienable by sale.

The absence of relative beneficial interests coupled with the absolute prohibition against sale ... display all the hallmarks of a communal estate held under trustee

ownership-which marks are reinforced by numerous designations of the land as a Reserve and the magical number of 10 owners, i.e. the 10 trustees of communal estates authorised to be appointed by the Native Lands Act 1865. (C31:1-3)

In his summing up, associate counsel for the claimants endorsed these earlier submissions concerning the ten "owners":

Although the tribal affiliations of Hapakuku Moetara and his brother Wiremu were identified on the title as Ngati Korokoro and that of Peneti Pana as Ngati Pou, their entitlement in Waipoua came through their Te Roroa lines. (I1(c):47)

The claimants say the ten were trustees for the hapu (I1(c):49).

It was further submitted that the title to the Waipoua Native Reserve was issued in breach of the 1873 Act. Under s46 the court was permitted to adopt and record any arrangement claimants and counter claimants came to amongst themselves; but it had to enter the names of anybody who consented to any such arrangement or whose claim was settled by any such arrangement in the record (I1(c):45).

In the case of Waipoua Native Reserve:

there is no evidence that the Memorial or the Court's records reflected a "voluntary arrangement" reached between claimants and counterclaimants that was in accordance with section 46. There is no evidence at all that the Court recorded the names of anybody who consented to an arrangement over the title to Waipoua No. 2.

However, it is unlikely that even if Te Roroa had been aware of the 1873 requirements the hapu could have done anything about it. The Court of Appeal, in an important test case in 1902 on the validity of Land Court titles, refused to go behind the Land Court's certification that a 10-owner title was in fact in accordance with Maori custom: *Timu Kerehi v. Duff* (1902) 21 NZLR 416.

Accordingly, the question of the precise capacity in which the 10 owners took title to the land became of the utmost importance. (I1(c):48-49)

Clearly the ten persons were perceived by Te Roroa to be kaitiaki who:

were expected to '... act together as tribal representatives in any dealings with the land', especially in sales and leases where the nominal owners were to act only with the full knowledge and consent of the entire body of owners, i.e. the tribe or sub-tribe. {FNREF:0-86472-088-2:3.2.2:14}

The continued reference to Waipoua No 2 as a native reserve and the restriction on alienation in the memorial of ownership, it was submitted, would surely have served to confirm Te Roroa's perception that the land was permanently reserved to the hapu (I1(c):55-56). Yet in law the ten named were absolute owners as tenants in common, not trustees (B34:att 9). All other members of Te Roroa were disadvantaged and eventually disinherited. Under a restrictive clause in the memorial of ownership, the ten might not sell or in any other way dispose of the land except by lease for a period not exceeding 21 years. But, as we have already pointed out, such a restriction was

easily removed. Under the ten-owner rule adopted by the Native Land Court any one of them or their successors could apply to the court for a partition or subdivision of his or her interests and then sell. In the event, partitions and subdivisions were to prepare the way for piecemeal alienations which eventually reduced the 12,000 or more acres Te Roroa intended to retain as papakainga, to about 690 acres (see below, p 165).

In the claimants' view, Waipoua Native Reserve is a further example of the ten owner rule creating individual interests in land transferrable as property rights, and eliminating the trusteeship of rangatira and hapu or whanau (B34:9). Once again the Crown had failed to ensure that land deliberately set aside by Te Roroa from the Maunganui-Waipoua sale through the Native Land Court was permanently reserved in tribal ownership and under tribal control.

(c) The outcome.

In order to consider these arguments by the claimants, it is necessary to examine in greater detail just how a title to Waipoua No 2 block was issued, the practices of the Native Land Court at that time, and the legislation under which the court acted.

On 3 February 1876, the Native Land Court concluded its hearing into the ownership of the Maunganui and Waipoua Blocks, the latter comprising Waipoua No 1 which was subsequently sold to the Crown by deed of sale dated 8 February 1876, and Waipoua No 2, having an area of 12,220 acres, which was described as "Native Reserve". The memorial of ownership for Waipoua No 2 listed ten people as "the owners according to Native custom" and further provided that the owners "may not sell or make any other disposition of the said land except that they may lease the said land for any term not exceeding twenty one years ..." (A4:458(g)).

The hearing before Judges Monro and Symonds concerning the Waipoua block came at the conclusion of lengthy hearings into the Maunganui block. It was brief. The minutes record:

Mr District Officer Kemp announced that a Voluntary arrangement had been Entered into between the Claimants and Counter Claimants in respect of these two blocks [Maunganui and Waipoua]. Two letters read-one from Parore and one from Tiopira.

Tiopira said the matter had been arranged. Parore said the same. (A4:451)

The minute concludes by referring to the "owners of the Reserve (Waipoua No 2)" and orders a memorial accordingly.

The court's jurisdiction was by virtue of the Native Land Act 1873. We can only suppose from Kemp's reference to "Voluntary arrangement", that the court was relying on s46 of the Act, which associate counsel for claimants submitted was breached.

If this supposition is correct it is most important to remember that the issue of a title under s46 did not mean that the court was not required to carry out other provisions in the Act.

It is unnecessary to dissect the 1873 Act in order to identify all these provisions. We need only to refer to the intention of the Act and some specific provisions.

The preamble to the Act expresses that it is of the "highest importance" that record be made of the ownership of native land "with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance". A "Local Reference Book" for each district was to be prepared and made available to the court during its proceedings. Section 24 required that reserves be set apart "for the support and maintenance of the Natives ... to an aggregate amount of not less than fifty acres per head for every Native man woman and child resident in the district". Section 28 required that a memorial of ownership be prepared following an investigation of the title providing "the names of all the owners" which were to be entered individually. Section 47 required the court to inscribe on the court rolls a memorial of ownership:

giving the name and description of the land adjudicated upon, and declaring the names of all the persons who have been found to be the owners thereof, or who are thenceforward to be regarded as the owners thereof under any voluntary arrangement as above mentioned, and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner. Every such Memorial shall have drawn thereon or annexed thereto a plan of the land comprised therein, founded on the map approved as hereinafter mentioned, and shall be signed by the Judge and sealed with the seal of the Court.

At the February 1876 hearing, it was accepted that the evidence given in respect of the Maunganui block applied equally to the Waipoua block. This was incorrect. The court was aware that Maunganui and Waipoua No 1 were being sold to the Crown. Waipoua No 2, however, was being set apart as a "native reserve". The intentions of the owners of Waipoua No 2 differed from those of the other blocks and different provisions in the Act were applicable.

The Act provides first for an "inquiry", and secondly, a "determination" by the court. In respect of Waipoua No 2, there was neither. There was no inquiry as to the "sufficiency" of the reserve in terms of the intention expressed in the preamble to the Act and in s24; there was no "investigation of the title" pursuant to s28 by which a "Voluntary arrangement" pursuant to s46 could be adjudged. Furthermore s44 provided that "the investigation of title shall be carried on by the presiding Judge without the intervention of any counsel or other agent". In fact, in respect of all the hearings, there was considerable intervention by other agents. In the "hearing" of Waipoua No 2 block, the court did not make any inquiry with the parties themselves but simply accepted the letters produced by Kemp.

In addition to ignoring these other provisions of the Act, the court ignored the requirement in s46 itself that the names of the people consenting to the arrangement be recorded. The provision unambiguously draws a distinction between the persons who consent and "the persons by whom any claim shall have been settled". It was Tiopira and Parore who settled the claim. The ten people whose names were entered on the memorial of ownership were determined to be the "owners", but they were NOT necessarily those who consented to the arrangement and the court did not record them as such.

Finally, under s47, the majority of owners may require the court to determine the proportionate share of each owner. The court neither inquired nor gave an opportunity to the "owners" to record any agreement as to the allocation of shares in the land among them.

In accepting the voluntary arrangement and entering the names of the ten people on the memorial of ownership as absolute owners without an "inquiry" and a "determination", the court was adopting a practice described by Judge Monro in 1871:

where the Natives agreed that certain persons should be the owners of certain portions of the land, that was in accordance with Native custom, and the Court did not inquire into the arrangement, but accepted it. (A19:56)

Not having inquired into the arrangement, awarding absolute ownership was an assumption by the court unsupported by any evidence. If the arrangement was that these people stood as owners in a representative capacity for others of their hapu, by declaring them absolute owners, the court failed to give effect to the arrangement.

The claimants allege that the arrangement was that the ten people entered on the memorial of ownership were trustees for their respective hapu, in accordance with "native custom". There is ample evidence to support the view that others not included in the ownership of Waipoua No 2 had understood that either they were or should have been included, as for example, the subsequent applications to the court for succession.

Nonetheless in our view, those named on the memorial of ownership regarded themselves as representatives of their people.

The order for the memorial of ownership made on 3 February 1876 for Waipoua No 2 lists ten people as "the owners according to Native custom" (A4:458(g)-(i)). "Native custom" as to land tenure is described by Professor I H Kawharu whereby "The chief naturally REPRESENTS and defends the rights of his people" (emphasis added). {FNREF:0-86472-088-2:3.2.2:15} But the court's order vested the interests as tenants-in-common which conferred absolute title upon the named individuals. By ordering a memorial of ownership to ten persons in this manner the court released them from the necessity to perform their chiefly obligations. Yet in custom, these obligations were still recognised. The chief's customary obligations to his people were finally extinguished when the court made succession orders vesting his land interests in all his children equally. The social structure of the hapu was buried with the chief. {FNREF:0-86472-088-2:3.2.2:16} As Dr David Williams said, the court "was in the business of eradicating Maori customary land title rather than ascertaining it" (A19:19).

There is no doubt that this was understood by the court, and by the Crown who were aware of the court's practices. Judge Monro made no secret of this practice-that the memorial of ownership was falsely represented as being in accordance with "native custom" (A19:36).

The claimants allege that the owners of Waipoua No 2 never extinguished "the customary title" to the block. In other words the owners themselves never applied for

Crown grants that would have extinguished customary (Maori) title and replaced it with a general title (known as title in fee simple).

Whilst there was no application to the court to partition the Waipoua block in 1875-1876, it nevertheless occurred as a consequence of the voluntary agreement between Tiopira and Parore. Waipoua No 2 was the residue of the partition of the Waipoua block for the purposes of selling Waipoua no 1 to the Crown.

(d) Why did the Maori owners themselves not try to rectify the situation?

The answer can be inferred from what happened over the Opanake block at Kaihu, awarded to Te Rore Taoho and Parore Te Awha in 1873.

Subsequently Tiopira claimed an interest, and according to his son Rewiri, applied several times to the court prior to his death in 1887 to be included on the title. Rewiri took up the matter after his father's death and sought to obtain rectification in the court on 16 February 1889. Failing, he wrote to "the Government of New Zealand" on 2 April 1889, alleging that the "land was secretly adjudicated upon" in 1873 and Parore and Te Rore Taoho's names only were entered on the title (I14).

Hapakuku Moetara also claimed an interest in Opanake and sought to have his name included when the court had heard Te Rore Taoho's application to partition the block in 1885. Because Te Rore Taoho would not consent to Moetara's name being included on the title, the application was declined. Moetara felt "much aggrieved that the land belonging to the whole tribe should have been awarded to one man Te Rore".

In 1890 the matter was referred to the chief judge of the Native Land Court, Seth-Smith, who after receiving a report from Judge Scannell, recommended that legislation would be required for the court to rehear the matter. In 1892 a Bill was duly prepared {FNREF:0-86472-088-2:3.2.2:17} and was "introduced but dropped by the House". Rewiri Tiopira's efforts to have the case reheard were unsuccessful.

On 5 July 1893, Hapakuku Moetara wrote to the speaker of the House of Representatives saying that, at the 1873 hearing:

the Europeans said it would be better to have only two persons names entered as owners to the block so as to prevent any trouble arising in the sale of the timber and to wait and insert the names of the other owners when the block was subdivided. In 1895 a further application was lodged with the Chief Judge of the Native Land Court by the solicitors for the complainants. In a memorandum to the chief judge the court registrar stated:

You will see by the evidence on the investigation (Kaipara MB no.3 pp 51-53 [ie the hearing in 1873]) which I forward herewith that these persons [Parore Te Awha and Te Rore Taoho] were clearly put in as representatives of the tribes to which the land belonged.

By order in council, 3 February 1896, jurisdiction was conferred on the Native Land Court to further investigate the title to Opanake No 1 block. The court duly

investigated the title and made five orders awarding various portions of the block to 355 people.

That, however, was not the end of the matter. Before the orders were enforceable, they had to be presented to Parliament under s14 Native Land Court Act 1894. They were "laid on the table of the Legislative Council" on 29 June 1900, and that is where they stayed. Tiopira Kinaki, Hapakuku Moetara and their descendants had failed to obtain redress for mistakes which the Native Land Court itself had acknowledged.

(e) Conclusion.

Undoubtedly, in respect of the title to Waipoua No 2, there was neither an inquiry nor a determination by the Native Land Court as required by the 1873 Act. The court did not inquire whether all the interested parties had been consulted. The court did not explore the different intentions of the parties for Waipoua No 2, Maunganui and Waipoua No 1. The court directed its mind to the settlement of the dispute between Tiopira and Parore to enable the sale of Maunganui and Waipoua No 1 to proceed, rather than to the ownership of Waipoua No 2. In effect, the court failed to determine the ownership of Waipoua No 2 block.

Tiopira had tried previously with the Koutu reserve to establish a precedent for representative ownership. Not being successful, he apparently gave way to the pressure of the Crown purchase agents and the accommodating court, and handed in a list of ten names, intending, as Hapakuku Moetara pointed out, that each "owner" would make provision for his respective hapu. What in fact happened, however, was quite different, as we shall see in the next section of this report. Succession and partition orders resulted in extreme fragmentation which facilitated Crown purchasing.

As the New Zealand Herald in 1883 observed:

The working of the Native Land Court has been a scandal ... for many years past, but as the chief sufferers were the Maoris, nobody troubled themselves very much. (A19:67)

The Crown did nothing to remedy the situation, and indeed continued to take advantage of the problems it had itself created.

TAHAROA NATIVE RESERVE

3.2.3 The claimants have stated that the Crown failed to protect the Taharoa Native Reserve by omitting to give effect to Parore's intention that it be inalienable by sale or long term lease and be retained by tangata whenua forever (A1(i):42). The Taharoa Native Reserve was provided for in the deed of sale for Maunganui, 8 February 1876. A clause appended to the deed made the sale subject to a Crown grant being issued to Parore Te Awha for 250 acres, shown on the plan attached to the deed. The grant was to be made inalienable except by lease for a term not exceeding 21 years (A10:1(a)). A translation of the Maori version of the deed, reads: "To Parore Te Awha some acres, that is 250 acres, set out in the map attached" (C18:5).

Why did Parore Te Awha insist on this reservation? In the fourth statement of claim, it is assumed that Parore Te Awha wanted to ensure that the area he defined for the Taharoa Native Reserve "be reserved, in perpetuity" to his descendants "as wahi tapu, papakainga and mahinga kai for tangata whenua" (A1(i):11). The evidence we were given by claimants on a site visit to the Taharoa lakes, 20 June 1989, and at the first and third hearing supported such an assumption.

The claimant Robert Parore described Lake Kai Iwi as:

a mahinga kai of some renown a wahi tapu used by tangata whenua from time immemorial down to the present day as an important seasonal source of tuna, and also of inanga [whitebait] and kawai [fresh water crayfish]. (C18:3)

The reserve in 1876 was "surrounded by Crown Kauri Gum Reserves and was used as a base by Maori gum-diggers". Graham's survey plan showed five huts labelled "gum kainga" on the land and a track from the kainga and lake to Kaihu. The reserve was "a gateway to the lake system". There was "an old pa site overlooking the lake in the reserve and on the shores of Lake Taharoa there are two urupa". In Robert Parore's view the boundaries of the reserve were "quite arbitrary as in Maori terms the entire lake and surrounds are an essential ancestral food source and wahi tapu" (C18:3).

The kaumatua, Lovey Te Rore shared with us his recollections of the lakes from the time he first went there with his father about 1922-23. He remembered Johnson's swamp, where over 100 people lived in the 1920s, mostly digging gum:

It was a real papakainga.

... The people living there were from Kaihu. Some were Te Roroa. Others were Waiariki and Hokianga. Those families eventually settled around Kaihu and live there till this day.

... access to the lakes was by way of the Ngakiriparauri track used to transport gum from the settlement to meet the train at Kaihu. There was an 18 horse pack train which carried it over the track.

... others of our people settled around the fringes of both Lakes Kai Iwi and Taharoa.

... partly because of access to gum, but also because of proximity to both the eel fishery in the Lakes and the coastal Toheroa and Mussel beds.... plentiful around Pahekeheke Rock. The Lakes and coastal fisheries provided a plentiful food supply for the settlement

... I know there are wahi tapu around the Kai Iwi Lakes. There are both urupa and pa two urupa ... on the lake shore. One ... at the Promenade point on Lake Taharoa. The other ... on the north eastern shore of Lake Waikeri they must be very old urupa

Ngakiriparauri is an urupa to the east of the Lakes Taharoa and Waikeri outside the Domain, but ... fenced off from the surrounding farmland.....

... not far from where the old track to Kaihu went. As far as I know, the area was named by the Waiariki people [of Ngawha] who moved down into the area under Parore. I feel that part of the reason for reserving the lake estate was to make provision for these people as well as for Te Roroa.....

... There is another lake in the area called Shag Lake.... important to us because this is the lake which feeds the spring at Whangaiariki

Use of the fishing resource has always been an important part of our relationship with the Kaiwi lakes.(C16:1-4)

Lovey Te Rore believed in his heart that Parore "sought the reserve in order to preserve this valuable source of food for the hapu living in and around the lakes". He had "never heard of him [Parore] or his descendants ever seeking to stop Te Roroa, Te Hokakeha, Waiariki or any of the other hapu from this area taking eels from the lake". He believed Parore "saw himself as a trustee over the resource in favour of all the hapu who used it". That was why Parore "wanted the land reserved and made inalienable". He thought Parore "intended to protect access to all of the lakes for tangata whenua. The reserve provided a sort of gateway into all of the lakes" (C16:6-7).

Eruera Makoare told us about eeling at the Kai Iwi lakes "in the way that our ancestors have done for generations" when the eels are running between February and April (C17:1).

Why Parore's reserve only encompassed most but not all of Lake Kai Iwi remains "a mystery" to the claimants (I1(d):4).

The boundaries of a 250 acre reserve and outline of Lake Kai Iwi were roughly drawn on plan ML 3253 of the Maunganui block probably "at or around the time of the agreement reached between Parore and Preece" (H7:5). Compiled by Percy Smith from adjoining block boundaries, it did not show the Taharoa lakes system.

The copy of plan ML 3253 attached to the deed of sale for Maunganui, incorporated plan ML 3457 showing the Taharoa reserve of 250 acres and the lakes system in the Maunganui block. The reserve was bounded to the north-east by Lake Taharoa and to the south-west by the Kaihu block. The boundary line cut off the north-east corner of Lake Kai Iwi, excluding it from the reserve (A10:1(d)). Plan ML 3457 was produced by W A Graham, a private surveyor, on 22 March 1876 and was submitted to the survey office on 3 April 1876 (A10:1; H7:5-6).

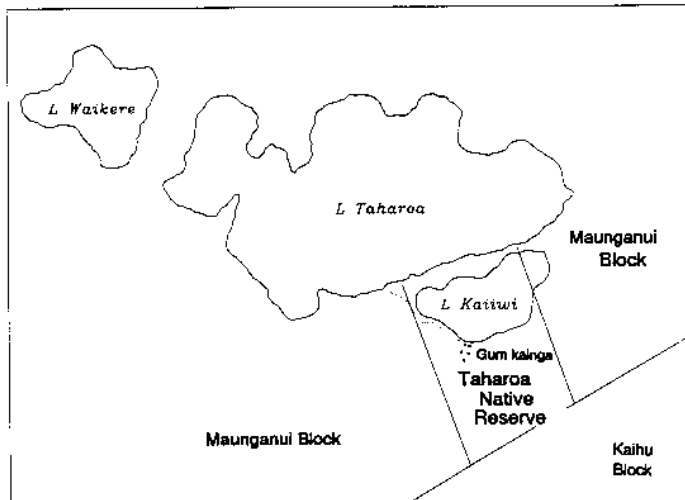


Figure 17: From Graham's survey plan of the Taharoa Native Reserve, ML 3457, 22 March 1878. Source: Department of Survey and Land Information, Auckland

On plan ML 3457 it was noted that: "portion of the Kaiwi Lake has been included in the area at request of Parore Te Awha" (A10:1). Graham had previously done survey work for Parore, and presumably Parore instructed him to reserve the area traditionally used for eeling, estimated by Preece to be about 250 acres, and he turned this into exactly 250 acres on the map (H7:16). The shoreline of Lake Taharoa was shown as the north-eastern boundary. Consequently the owners of the reserve were to enjoy riparian rights over part of Lake Taharoa (I1(d):4). The other three boundaries were shown as straight lines, regardless of natural features.

The claimant Robert Parore believed that Tiopira Kinaki possibly knew of Parore Te Awha's claim to Taharoa well before the sale and that, as a result, did not protest the subsequent Crown grant (C18:6).

Tiopira's reaction to the grant clearly indicates that he had no prior knowledge of Parore's claim. In a letter to McLean, 5 May 1876, stating that he should have received a like sum to Parore's, that is, £2500 not £2000, Tiopira referred to "a piece of land containing 250 acres out of the Maunganui Block, which was given back to him [Parore] by the Government... out of Maunganui" (A10:6-8; C18:6). On 22 April 1877, he applied to the colonial secretary, Dr Pollen for £500 and 150 acres "to make the quantity equal to that given to Parore" (A4:352). Again on 3 April 1878 he wrote to John Sheehan, McLean's successor as Native Minister, asking the Grey government to "rectify the wrongful actions of the late Government" and:

give me five hundred pounds and one hundred acres of land and fifty acres that is the half of Maunganui which was lost (with held) by the late Government. (A4:344-345){FNREF:0-86472-088-2:3.2.3:18}

Finally, on 14 September 1885, he wrote to Chief Judge J C Macdonald:

with respect to the half of my land, of Maunganui. Let it be considered by you the Chiefs managing the lands procured by the Government....

Parore got £200500 [sic] and 100 acres of land, and I got £2000.... Why was more given to Parore and less to me? (A4:341)

The different acreages referred to in these letters and errors in the translations led to some confusion and speculation in both the Crown and the claimants' evidence on the size of the reserve and exactly what land Tiopira sought (H7:14-16); I1(d):4-5). As we have seen he did not define blocks of land by English square measure. The claimants were inclined to think that the Taharoa Native Reserve should have included the whole of Lake Kai Iwi and a total of 300 acres, but, in the end, they accepted that there was "no evidence that the Reserve was intended to be anything other than 250 acres". Nevertheless, doubts arising from the failure completely to include the lake remained (I1(d):5).

Although Tiopira's letters are ambiguous, they clearly indicate he did not object to the reservation as such. Nor did he object to the Crown granting land to Parore that the court had vested in both of them jointly. This does not mean that he had any prior knowledge of Parore's claim as Robert Parore suggested. But he may have appreciated that the land was being (as Preece said) returned by the Crown to Parore, not set aside from the sale. Probably Tiopira understood, as the claimant does, that Parore was asking for a reserve that was a wahi tapu, papakainga and mahinga kai for all the local hapu including Te Roroa, Te Hokakeha and Waiariki as well as Te Kuihi (I1(d):3). The crux of Tiopira's objections was the insult to his mana implicit in the extra payment and the grant of the reserve to Parore. As he saw it, the Crown had breached the principle of equality of interests embodied in the voluntary agreement of 2 February 1876 with Parore and in the court award of a memorial of ownership for Maunganui to both of them. His objections were in vain.

On 15 March 1881, the Native Minister, William Rolleston, directed that a Crown grant for Parore be prepared under s5 Volunteers and Others Land Act 1877. According to Robert Parore "tradition maintains that Parore had to persist with the authorities to finally obtain his grant" (C18:7).

Section 5 of the 1877 Act legally enabled the governor, with respect to any lands acquired under the provisions of the Immigration and Public Works Act 1870 and its amendments, to reserve or grant any portion of land stipulated in a sale "in [a] manner required by the Natives" (A8:11-12). The purpose of this provision was to enable the government to carry out any promises it had made in respect of reserves when it re-vested any such land (H7:9; I2:(b)(ii):41-42).

A Crown grant and land transfer title were signed by the governor, Sir Arthur Gordon, on 25 August 1881 (A10:33). The grant was registered on 27 August (A10:29) and the land transfer title entered on 7 September 1881 (A10:34). The grant, as from 8 February 1876, was made to Parore Te Awha, his heirs and assignees for ever. In law Parore Te Awha became the absolute owner, not the trustee, of the Taharoa Native Reserve. This was clearly contrary to the Crown's understanding of Parore's interest in the land at the time of the Maunganui-Waipoua purchase. In this report of 12 February 1876, Preece stated:

concluded with Parore, WITH THE CONCURRENCE OF HIS PEOPLE, to purchase HIS INTEREST in the whole of the two blocks... (A3:99) (emphasis added)

The restrictions on the standard form for a Crown grant applied. The land was made inalienable except with the consent of the governor, by sale or mortgage or by lease for a longer period than 21 years. The right to take roads through the land was reserved on the land transfer title (A10:32-33).

A point at issue between claimants and the Crown is whether these restrictions were contrary to the clause appended to the deed of sale making the grant inalienable except by lease for a term not exceeding 21 years (C18:7-8). Had the governor failed to reserve the land "in [a] manner required by the... Natives" under s5 of the Act?

Robert Parore told us he firmly believed that Parore Te Awha intended the land to be inalienable and remain a native reserve forever (C18:1). His belief was borne out by the oral evidence we were given on the continued use of the land for traditional purposes by tangata whenua. The claimants were aggrieved that the grant effected a partial "watering down" of the restrictions on alienation (I1(d):17).

The Crown researcher was of the opinion that the restriction on alienation was a reflection of statutory requirements going back to the 1866 and 1867 Native Lands Acts, rather than a wish by Parore for the reserve to be retained by tangata whenua forever (H7:9). Crown counsel, on the evidence available, submitted, that it did not appear that the alienation clause was inserted in the deed of sale at the request of Parore. Preece was following the letter of the legislation by adding the inalienation clause to it. The claimants had not shown that Parore expressed this intention to the Crown land purchase agents. There was no express clause restricting alienation in the Maori version of the deed which was read to Parore. In her opinion, ss48-49 Native Land Act 1873 (which was not repealed until 1886) applied to the transaction. Section 48 denied all owners named on a memorial or nominated as owners by voluntary agreement the power to sell or dispose of their land except by lease for a period not exceeding 21 years. Section 49 provided that nothing in s48 precluded any sale of the land "where all the owners of such land agree to the sale" (H7:9-14).

Associate counsel for claimants pointed out that the restriction on alienation in the 1866 Act was repealed by the 1867 provision which was in turn repealed by the 1873 provision which did not accurately reflect the limitation contained in the 1881 grant (I1(d):21-23). "The Crown was certainly not empowered" by s5 Volunteers and Others Land Act 1877 "to vary the terms of its agreement with Parore ex poste facto in any manner that it chose" (I1(d):22).

A perusal of the Maori language version of the Deed... reveals... there was simply no room for any reference to the restriction on alienation. The English language version... states that Parore signed the Deed "after the contents had been explained to [him] by an Interpreter of the Court and [he] appearing clearly to understand the meaning of the same".

It must be assumed that the honour of the Crown was upheld in this respect and the Deed was fully and truthfully explained to Parore. Furthermore, as the Crown's agents had drafted the Deed the contra proferentum rule... applies: the Deed must be interpreted in favour of the non-drafting (Maori) party. That is, the Crown should be held to the bargain its agents had recorded.

...it is more likely than not that the restriction on alienation was a specific negotiated term of the agreement between Parore and the Crown rather than just Preece's sloppy attempt to mimic repealed legislation. The restriction on alienation is also consistent with Parore's cultural understanding of the transaction, that is that he took the land as a kaitiaki. (I6(c):11-12)

As to Crown counsel's rhetorical question:

that if Parore Te Awha's agreement with the Crown was that the Taharoa Native Reserve be made inalienable by sale or long-term lease... to what degree could the rangatiratanga of one generation be fettered by the rangatiratanga of an earlier later generation? (I6(c):12)

Associate counsel for claimants submitted that it was misguided:

The restriction on alienation was an essential quid pro quo for the fact that the title was to be individualised.... [It] would have been likely to have eased any concern Parore may have had about the individualisation and effectively nullified (at least for [the] time the restriction remained in force), the effects of that individualisation. (I6(c):12-13)

The evidence we were given clearly demonstrates that the Taharoa Native Reserve was never used exclusively by Parore's tupuna, nor was there any effort to exclude any Maori from exercising traditional methods of fishing there or living there or using the reserve for a base for gum-digging:

Parore was a trustee of this land, if not in law, then in fact and Maori tradition, for all tangata whenua who had connection with that place. (C18:4)

Parore Te Awha died on 27 September 1887 and on 14 September 1891 his grandson, Pouaka (Waata) Te Awha applied to the court for a succession order and was advised to send for the will (A10:36). A granddaughter, Te Pouritanga Waata, asked for a succession order for herself and her brother in January 1892 (A10:38-39). The will, dated 30 November 1885, was produced in court and on 21 January 1892 ten succession orders were made in favour of the persons mentioned in it (A10:41, 46). This was amended to eight persons after a deed dated 3 December 1887 was produced, signed by two persons making over their interests in Parore's estate to Pouaka Waata. Thus Pouaka Waata received three shares and the other seven one share each (A10:47-48). Although in law they were beneficial owners of the Taharoa block, tangata whenua continued to exercise their traditional fishing rights and to protect their wahi tapu.

Meanwhile, on 14 March 1888, a governor's warrant had been obtained to take land for a road (A10:34) which was surveyed through the Kai Iwi gumfield in 1889. The road line through Taharoa, area 4 acres 0 roods 20 perches, is noted on the survey plan as being "taken by consent of owners" (H8(a):1; H8:4). The Crown researcher was unable to locate any information about the agreement with the owners. A number of tracks ran through the Taharoa block at this time and it seemed to him that there was a strong possibility the road was in existence before it was surveyed as a public road; which might explain the apparent willingness of owners to consent (H8:4-5). As

Parore had died and succession orders had not been made, the identity of those who consented remains a mystery. The commissioner of Crown lands was to comment in 1950, "it is most unlikely that the Maori owners were compensated for this loss" (H8(a):69-70; H8:19).

The land surrounding the Taharoa Native Reserve was declared a kauri gum reserve at the turn of the century. In accordance with a recommendation from the Auckland Scenery Preservation Board, 1908, the Department of Lands and Survey recorded that a wide strip around Lakes Taharoa and Waikere was suitable for a scenic reserve (H8(a):12-14; H8:6). In 1909 the way was cleared for future land purchasing activities with the removal of all prohibitions or restrictions on alienation of native land.

Crown interest in purchasing the Taharoa Native Reserve was aroused in 1920-1921 by a subdivision scheme for soldier settlers, a request from the Hobson County Council for the reservation of the whole catchment area and the continuing intention to make the Kai Iwi lakes a scenic reserve. But the land was too poor to bear the cost of roading and no funds to purchase it were available. Part of it was let for short term grazing and part was set aside for systematic gum recovery 1921-1924 (H8:7-9).

Between 1921 and 1950 several offers and counter offers were made. First a European who seems to have been an advocate of scenic preservation, provisionally bought the reserve at £1 per acre but one Maori owner refused to sign. The European's solicitor then offered the land to the Crown at double the price he had paid to the Maori owners but the Crown declined to purchase it at that price (H8:10-12). In 1925 an inquiry from the chairman of the Hobson County Council about forming a road to service both farmland and the lakes revived proposals for a scenic reserve. Two European sections fronting Lake Taharoa were purchased but a further attempt to acquire the reserve foundered because it was now leased for 25 years and the owners wanted at least £2 per acre (H8:14-15). Contrary to the oral evidence we were given, government officers of the day believed the land was of no value to the owners. Presumably they failed to realise it was used by local hapu seasonally as an eel fishery and spasmodically for gum digging.

An inquiry about the lakes in 1948 from the Department of Internal Affairs, renewed interest in purchasing, this time "in connection with the conservation of game" (A10:119; H8:17). An offer of £75 (a 25 per cent premium on government valuation) was offered to a meeting of owners in January 1950. Five of nine owners holding 36 per cent of the shares unanimously voted against the proposal but intimated they would support a resolution to sell at £1 per acre (H8:18-19). As the area now formed "an isolated wedge into Crown land" which the Department of Lands and Survey "were scheming for development" and there was some doubt that the owners had ever been compensated for the road reserve taken in 1888, approval was granted to increase the Crown's offer to £1 per acre (H8(a):69-70; A10:101; H8:19).

At another meeting in August 1950, six owners representing 50.8 per cent of the shares agreed to sell for £250 nett and the Crown met unpaid rates (£9 6s 0d) and survey charges (£1 18s 0d). The sale was confirmed by the Maori Land Court on 23 January 1951, adopted by the Board of Maori Affairs on 26 June 1951 and gazetted on 28 February 1952 (A10:76, 93; C18:10-11). As a straight majority of owners

present at the meeting had agreed to the sale, it complied with the requirements in ss417-418 Native Land Act 1931 (H8:21).

The largest single shareholder in the reserve was Parore Te Awha's great great grandson, Te Puma Louis Wellington Parore who, in 1949, held 34.8 per cent of the shares. A counsel for Maori in land transactions who for many years had worked as a licensed, first grade interpreter {FNREF:0-86472-088-2:3.2.3:19}, he was not present at either of the owners' meetings; nor did he participate in the sale (H8:21). The Crown researcher conceded that it was unclear if he knew about the meeting in August 1950 that led to the eventual sale. Only two weeks' notice was given of the meeting which was held in Dargaville. The only contact address the Maori Land Court had for Lou Parore was care of the member for northern Maori. The Crown researcher went on to point out that no record had been found of any subsequent protest from Lou Parore although he would have been well aware of the avenues of protest open to him (H8:21-22).

Robert Parore explained that his grandfather spent the greater part of the years 1948 to 1953 in Auckland, and for a lot of the time was in and out of hospital. Clearly he was not fit enough to attend the meeting. Nor was there any evidence that he was aware that the block was in any way under threat. He died in March 1953, aged 65 years (C33:1-2). In an exchange of views with associate counsel for the claimants, the Crown researcher questioned whether Lou Parore's absence was coincidence. In his opinion the Crown only succeeded in purchasing the reserve because Lou Parore was not present. Robert Parore found it incredible that the largest shareholder:

a respected Rangatira opposed to the further alienation of ancestral land and by far the most able member of the hapu concerning dealings with the Maori Land Court... did not participate in the sale.... [and] was sold out without his consent. (C18:11)

In our view the Maori Land Court should have informed and consulted the owner with the largest share, namely Lou Parore. The Crown purchase of the Taharoa Native Reserve breached the agreement between Preece and Parore that the reserve be made inalienable, that is, the terms on which Parore agreed to sell the Maunganui block to the Crown. Furthermore it seems unlikely that any officer of the Crown explained to Parore Te Awha that reserves made under the Volunteers and Others Land Act 1877 could be alienated with the governor's consent. We share the claimants' view that Parore singled out this reserve to keep for tangata whenua and that it "was only lost after the Crown changed the rules" (I1(d):14). Even after the Crown's purchase in 1950 tangata whenua continued to use the land and eel fishery in traditional ways.

WAIRAU NATIVE RESERVE

3.2.4 The 171 acre Wairau Native Reserve was cut out of Wairau south when it was ceded to the Crown on 28 January 1879 to preserve and protect the Wairau he wahi tapu and a traditional fishing area. The external boundaries of the reserve were those delineated on Campbell's 1870 survey plan (ML 2012).

Oral evidence by Waimamaku witnesses at the fourth hearing and on a site visit demonstrated the continuing value and importance of the reserve to tangata whenua.

Simon Reuben talked about burial caves in and around the Wairau wahi tapu. When the time was ripe for his father and his Uncle Pera to show him the caves, the bones had already been collected and buried next to the church. He had been in one of the caves and seen where their tupuna had been laid to rest in a sitting position opposite each other-you could see the black marks left by the head and shoulders on the sandstone. He had counted 45 bodies. The entrance to the cave was well hidden. There were markers at the entrance but you had to know what you were looking for in order to see them. To find those caves you had to be the right person, the right descendant (D7:6-7). At Te Pure a lot of people were buried in the sand, for the last time during the influenza epidemic of 1918. The sand was easier to dig and the graves were braced with ti trees. But the river changed its course and took Te Pure with it (D7:9)

Reihana Paniora told us the coastal area south from the Waimamaku river to Motuhuru was a traditional place for kai moana (Motuhuru, the yellow rock, marked the traditional boundary between Waipoua and Waimamaku (D12:7)). Meri Wihongi, a descendant of Moetara, still remembered the days they camped at the Wairau and Reihana's mum would get crayfish with grandmother Ria Paniora. The kai they lived off at the beach were kina, paua and pupu (D19:3-4).

In 1897 an application to the Native Land Court for an investigation of title to Wairau he wahi tapu was made by Reupena Tuoro and six others and dismissed (D3:54-55). A further application was made in 1902, this time from Ngakuru Pana and Peneti Pana. Plan 2012B was produced in court. Three separate orders were made by the court on 9 June 1905 for Wairau wahi tapu No 1 (153 acres 7 roods), No 2 (12 acres) and No 3 (5 acres 7 roods). Seventeen names of owners with equal shares were listed for No 1, four for No 2 and four for No 3. The standard restriction making the share of each owner "inalienable, or inalienable except by lease for a period not exceeding twenty-one years" was crossed out on the court order for Wairau wahi tapu No 1. The shares of each owner for No 2 and No 3 were declared to be "absolutely inalienable" (D3:43-48).

Wairau wahi tapu No 1 was included in a scheme of consolidation under s161 Native Land Act 1931 known as the Hokianga Consolidation Scheme (D3:49) and was utilised for Maori land development.

The beneficial owners of Wairau wahi tapu No 2 and No 3 were in effect "trustees" as their shares were absolutely inalienable.

Te Roroa Claim

03 Nga Whenua Rahui (Reserves)

3.3 What Areas Te Roroa Believed Should Have Been Reserved.

3.3. What Areas Te Roroa Believed Should Have Been Reserved.

ADDITIONAL LAND AT KAWERUA

3.3.1 The claimants have stated that the Crown should have reserved to Te Roroa the whole of the area known as Kawerua (including Koutu) in view of its significance as a wahi tapu, a kai moana resource, and a hapu estate (A1(i):10).

Turi Birch's evidence demonstrated that Kawerua is one of the places by which Te Roroa identify themselves:

Maunganui is the mountain.

Kawerua is the sea.

Waipoua is the river.

Tiopira is the man.

This is the person that we are going to talk about for most of the day.

We descended from Tiopira, from Tiopira Kinaki.

We are the descendants here in Waipoua.

We, the descendants of Te Roroa, the direct descendants that were left behind by that ancestor. (B50:2)

Kawerua (two straps) is where Tohe on his last journey south broke the strap (kawe) on his sandal (I1(a):102; see also A33:3). {FNREF:0-86472-088-2:3.3.1:20}

We have already distinguished the Kawerua area as the traditional site of Whakatau's home and the final resting place of Rongomai.

It is also the place where Kaikino composed a lament for her friend, Ngahuia referring to Kawerua and Rongomai (C7:7). The claimants' evidence demonstrated how rich it is in oral history of particular significance not only for Te Roroa but for other hapu of the Hokianga and Kaihu districts (C7:7-9).

When the tribunal visited Kawerua and Koutu on 17 July 1989, the claimants pointed out wahi tapu and other culturally important features of the land and seascape. {FNREF:0-86472-088-2:3.3.1:21} Kawerua was described as "an area known for its kaimoana", "a site of early Maori settlement", "the centre of extensive gum digging" and "a shipping point served by the Hokianga-Onehunga steamer and the original coastal road" (B26).

Claimant Alex Nathan asserted:

Our oral traditions maintain that the people were cheated over the land and that their intention was that 30 acres encompassing the whole of Kawerua would be reserved to them. (C7:att 2.3)

Tribal historian, Garry Hooker amplified this:

The claimants say that upon the original survey of Te Koutu it was pointed out by Tiopira to the surveyor that the total area for wahitapu at Kawerua, including urupa, was 30 acres, that Tiopira pointed out the boundaries of the whole 30 acres to the surveyor and that it was arranged that an amended survey plan would be made once a Crown Grant for Te Koutu issued. The claimants believe that this arrangement was proposed by Judge Maning who may have suggested that only the tauranga initially be brought into Court to avoid objections.

The claimants also say that although that arrangement was repeated by Tiopira to the Land Purchase Officers and to the Messrs Wilson in 1875, a survey plan for the additional 26 acres never appears to have been done. As a consequence urupa at Kawerua remain on Crown land.

In the absence of official documentation, the claimants are only able to rely on tradition and on notes made by the late Ata Paniora.... They do however draw the attention of the tribunal to remarks made by Judge Acheson during the Manuwetai and ... Whangaiariki hearing respecting the Crown permitting arrangements for wahitapu to sink into oblivion and the evidence of Mr Darby for the Crown: "It was often the case that reserves were arranged for but not excluded from the deed and later the reserves were Crown granted back to the Natives". (C12(a):11-12)

On 5 June 1950, Te Atarangi Paniora of the Waipoua Settlement recorded in his diary (translated by K Souter):

Today I spoke with the Head Officer [Waipoua Forest Headquarters] about the Rahui for the Tauranga of Koutu and the Wahitapu.

(1870) The year Tiopira pointed out the areas for Rahui.
30 acres-4 acres were taken out of the 30 leaving 26 acres. This acreage is at Kawerua
4 acres have been marked for Wahitapu and Tauranga Whapuku. (C7:att 2.10).

An entry made in the Waipoua forest journal on 28 September 1952 recorded a discussion with Mr Paniora at Kawerua on the possibility of setting aside certain coastal land at Kawerua as a wahi tapu:

According to Mr. Paniora important ancestors of the present people at Waipoua, first landed at a certain point on the Coast.

In addition Mr. Paniora pointed out places where there had been some settlement by very early Maoris and also the position of burial caves now blocked up [with] sand.

The land in question... would be of nil value to the Forest Service.

It was pointed out to Mr. Paniora that his proposal would be put forward through the correct channels....

Mr Paniora favoured an idea of handing over to the Forest Service all Section 1, Block 1, Waipoua S.D. (Koutu Maori Fishing Reserve of 31/2 acres) excepting the coastal margin of approximately 1 acre. This action would benefit the Forest Service as a road and/or firebreak could then be readily constructed from the Kawerua building to an area of land approximately 60 chains to the south west....

It was left to Mr. Paniora to interview his people on these proposals. (B25:1-4)

This entry reflects the very typical attitude of a paternalistic officer in position of authority, trying to buy off an inexperienced person subservient to him. A discussion occurred without commitment. The officer did not look into the justice of the matter. The proposals merely served to keep the issue alive.

Alex Nathan considered that Mr Paniora was obviously concerned that the area (Koutu) demonstrated by the original survey, excluded features it was intended to reserve from the sale of Waipoua No 1 (C7:att 2.11). Probably Mr Paniora was also concerned about the on-going use of the Kawerua area by the forest service.

In view of the lack of any further documentary evidence, the tribunal requested that a second site inspection be arranged to record the oral evidence more fully. {FNREF:0-86472-088-2:3.3.1:22}. This visit provided a substantial amount of detailed evidence that the area of occupation at Kawerua was much more extensive than that included within the Koutu landing reserve and in all probability exceeded 30 acres.

To the south of Koutu reserve on the spur running out to sea named Matatuahu was Whakatau's pa site and tapu marae overlooking a fresh water spring and sand covered burial caves in which Tutenganahau Paniora remembered seeing koiwi (bones). Higher up the ridge was a large garden area with a northerly aspect and open spring where kumara and potatoes were grown and another pa site, Puke-nui-o-Rongo (Rongomai's pa). Tai Tokerau people lived at Kawerua seasonally and the area provided plenty of mamakai (nurture) for visitors.

Kawerua was the only safe landing place between the Hokianga and the Kaipara. A small mixed beach community developed there in the nineteenth and twentieth centuries to service the gum diggers on the Waipoua kauri gum reserve and the Wairau, and the coastal trade. In 1887 land was purchased and subdivided and a township was laid out to the north of Matatuahu. In the 1890s and 1900s Kawerua was a flourishing little community with a hotel, a gum store, a post office and a hall. Outside the subdivision was a race course, a marae, living places and gardens. The land was owned by Trounson who grazed sheep and cattle but was open to everyone. No rent was charged and the Maori apparently thought that they still owned the land. A wide coastal strip was reserved from the subdivision for a road but the road was never surveyed and people used the old fishing tracks.

Dawson Birch's recollections of the gum fields at Kawerua in the 1920s were recorded by Peter Mathews in 1979-80. All along the coast there were camps, permanent for Dalmatians, and short term for local Maori when they needed cash.

Kauri climbing gangs of three or four worked in the forest for wages. Every three months Nick Yakas and his brother packed the gum out to Kawerua by horse to sell, and packed food back. {FNREF:0-86472-088-2:3.3.1:23} Philip Matich had the hotel and gum buying license and packed by boat to Omapere. People got annoyed with the store as everything took too long to come through. Trounson had the place after Matich went. Jarby ran merino sheep at Kawerua, local Maori knocking them off. {FNREF:0-86472-088-2:3.3.1:24}

By 1939, when the Crown bought the hotel land and buildings, Kawerua was "well and truly dead" as a gum digging centre and the inland road through the Waipoua forest had supplanted the old coastal route (E12:10). The land was acquired by the forest service who wished to keep people out because of the fire risk. Nonetheless Kawerua has remained an essential source of kaimoana for Te Roroa of Waipoua.

The oral evidence we have been given of the traditional and continuing importance of this area clearly supports the claimants' view that their tupuna intended to exclude the Kawerua area as well as the Koutu landing place from the sale of Waipoua No 2 block. It also supports the view we have already considered that the vendors themselves did not detect the Crown's failure to reserve it in the deed of sale. Clearly the Crown had a duty adequately to protect this food resource and wahi tapu for tangata whenua.

As this particular claim is based almost wholly on oral evidence observations, one from Crown counsel, the other from Garry Hooker, seem pertinent. Crown counsel said there was much truth in Chief Judge Seth-Smith's comment:

A tradition generally accepted and acted on, and of which the several accounts do not materially differ from one another, may, with considerable confidence, be regarded as an authentic record of actual fact. {FNREF:0-86472-088-2:3.3.1:25}

With respect to submissions of claimants on wahi tapu and urupa, Garry Hooker invited the tribunal to:

focus on Te Roroa tradition as to the original arrangement and Maori custom relating to wahi tapu and urupa, rather than the absence of early contemporary pakeha documentation.

...[namely] the spoken word of Tiopira as established by tradition.

In terms of Maoritanga... the sanctity and protection of wahi tapu which is of overriding concern. (C12(a):15)

Manuwhetai and Whangaiariki

3.3.2 A question of overwhelming significance to Te Roroa in respect of the Maunganui-Waipoua sale is whether or not Manuwhetai and Whangaiariki should have been reserved (I1(b):31; A1(i):7, 19).

Manuwhetai and Whangaiariki are famous places named by Tohe of Kapowairua (Spirit's Bay) on his last journey south with his slave, Ariki, to see his daughter who had married into Ngati Whatua and migrated to the northern Wairoa, before he died.

At Whangaiariki, Ariki prematurely unwrapped the food intended for the completion of their journey and offered it to Tohe. That sacrilegious act, it is said immediately destroyed the tapu of their spirit forms and killed them both. Whangaiariki [feeding by Ariki] commemorates that event. (I1(a):103)

On the last leg of his journey Tohe descended Maunganui Bluff and died on the beach. Ariki hastened on to summon his daughter and her people. On arrival they found that the sea birds had pecked his eyes; hence the place name Manuwhetai (A21(a):1-2).

Manuwhetai was one of the most tapu urupa of Tai Tokerau. The powerful tohunga, Pinea asked his children and the tribe to take him there and directed his son to bury him alive with his head above ground so he could look upon Maunganui and fix the area in his spirit. The great fighting chief, Taoho, also died there (A21(a):3-4). A grove of pohutukawa mark the entrance to one of many burial grounds in the small dunes. The Waikino stream was used as a cleansing place for the bones of important tupuna taken out of the burial places before they were removed to caves on higher ground (A18:4). Manuwhetai was also a training ground for battle and a resting place after battle where warriors would wash their wounds (A34:3-4, 6)

Both Manuwhetai and Whangaiariki were places where people lived, gathered food and cultivated. The adjoining beach at Maunganui Bluff was noted for its fishing and a rich source of kai moana. Pa sites included Patenga on Whangaiariki, Onetahi on Manuwhetai and Tirohanga-ki-te Rangi on the Bluff. The Bluff itself was a lookout point and signal station, its strategic significance to Te Roroa being recognised in the old Ngati Whatua saying:

Ka titiro a Maunganui,
Ka titiro ki Kaipara,
Ka titiro a Kaipara,
Ka titiro ki Maunganui. (A18:5)

The late E D Nathan said that one of their ancestors was "reputed and known to have been a seer" who used to go to the top of the Bluff to meditate and to write and recite patere (songs) there. Mr Nathan had two of his patere and the names of 29 or 30 sites "which have some historical significance if we knew where they were" (B22:92-93).

It seemed obvious to tribal researchers, T H Te Rore and Sharon Murray:

that land with so much history, tradition and Tapu would not have willingly been sold by anyone who had connection with it. (A18:5)

We have seen that Manuwhetai and Whangaiariki were surveyed as two reserves by Frank Smith in August-September 1875 and that his plan ML 3297-8 was entered in the Maori Land Plan Register. But it was not sent to the inspector of surveys for approval nor was it sent to the January 1876 court hearing. The reserves were not

shown on Smith's plan ML 3253 of Maunganui which was produced in court, nor were they on the tracing sent to the Native Department on 20 August, that is, before the plan was entered in the register. They were not cut out of the 1876 sale of the Maunganui block.

In May 1990, following the presentation of claimant and Crown evidence, the Crown and Te Roroa prepared and executed an agreed statement that Manuwhetai and Whangaiariki should have been reserved from the sale (see below, appendix 4).

In his final address, claimants' counsel said that this statement disclosed:

at the very least a breach of Article 2 of the Treaty. That is of the guarantee of exclusive possession of Te Roroa's lands "which they may collectively or individually possess so long as it is the wish and desire to retain the same in their possession..." (I1(b):37)

The claimants accepted that the failure to reserve was "due to human error rather than malice", but all these errors could be:

attributed to the pressure placed upon the Maori Land Purchase system and those... who administered it to cut corners and bend or even break rules in order to acquire sufficient land at sufficient speed to meet settler demand (I1(b):38)

In her final submission Crown counsel said:

that by a combination of factors, including human error, the intention of all parties to the sale and purchase of the Maunganui Block that the lands known as Manuwhetai and Whangaiariki be reserved from sale was not given effect to.

... In the circumstances of the case which include pressure on land purchase agents and surveyors ... and the concern of the main chiefs involved in the transaction to have their own rights upheld the matter was overlooked.

... It is unfortunate that when the land was still in Crown hands the mistake was not rectified.

... Counsel for the Claimants has stated that "by the time Crown Agents got to Te Roroa the rhetoric of protection had been completely dispensed with ["]. Nevertheless the Crown agents did take cognisance of the requests for reserves, even if in some cases these were not ultimately actioned. (I2:(b)(ii):36-37)

The agreed statement of facts related only to the issue of the reservation of Manuwhetai and Whangaiariki. It was implied that the failure to reserve Manuwhetai and Whangaiariki was overlooked at the court hearing partly because the rangatira in court were preoccupied with the contest over titles. It seems unlikely to us that any of the rangatira would have overlooked such an important matter. There is no doubt in our minds that they understood that Manuwhetai and Whangaiariki were to be reserved from the sale.

The fact that all the local hapu went on using and occupying the reserves for many years after the sale provides strong additional evidence that they understood that the intentions to reserve Manuwhetai and Whangaiariki from sale had been carried out.

"PAPAKI"

3.3.3 This is a cautionary tale about the need for care in research based on English translations of Maori documents and of how a mistake can bring up fascinating arguments to create something that does not exist. "Papaki" was alleged by claimants to be a 3000 acre area in the vicinity of Maunganui Bluff which should also have been reserved from the Maunganui-Waipoua sale (A18:58).

The claimants considered that two factors should be looked at in support of this claim. First, the acreage of the area named forest reserve lying between the boundaries of Manuwhetai and Waipoua No 2 which would be close to 3000 acres; secondly the name Papaki which is translated in Williams A Dictionary of Maori Language as "Cliff against which the waves beat", is an apt description of Maunganui Bluff (A18:58; A39:5).

The claimants found an area marked reserve on plan 1457 approved 5 June 1895, in the Auckland survey office and wondered if this could be Papaki. The area was in the vicinity of Maunganui Bluff. The plan was slightly torn. Above 1457 was a higher number "2338" ruled out. This suggested to them that the plan might have been drawn in the 1870s and might be the Wilsons' original plan (A18:58; A39:2-3).

Subsequent Crown research established that the plan number "2338a" did not relate to the Maori Land Plan Register but was a provisional number assigned to a departmental plan which was subsequently re-numbered 1457. The plan was drawn by A L Foster. The reserve marked on it was Crown forest reserve on block 12 of the Waipoua survey district (E2:150-151).

The only written evidence to substantiate the "Papaki" claim was a Native Department translation of a statement made by Tiopira Taoho when he was writing to Dr Pollen, the colonial secretary, 22 April 1877:

I also consider one of our pieces of land called Papaki was not included in that block which contains three thousand acres hence we apply to you for re-hearing of the same. Should this not be granted then I say let the land be subdivided giving twelve hundred acres to Parore. (A4:352-353)

Further Crown research revealed that:

On May 5, 1877 the Native Department requested Preece's opinion on the matter of Papaki.... Preece, on May 14, replied that he was "not acquainted" with this land "or the circumstances connected with it"... Captain Symonds "would probably know."....

On May 23, 1877 H. T. Clarke, of the Native Department, replied to Tiopira's letter of April 22.... [informing him] that his request was denied as the land had been sold to the Crown and would not be readjudicated upon. It is not known whether or not Symonds was consulted. (E2(d):1-2)

From this reply, it was concluded that:

The Crown clearly felt that as the land in question had been dealt with by the Court and subsequently purchased by the Crown, there was therefore not sufficient justification for reopening the proceedings. (E2(d):2)

In response to questions from Crown counsel with regard to Papaki, claimants stated that Tiopira did not define the locality in his letter but they were sure it was the area between Manuwhetai and Waipoua, that is, the eastern most part ending at Waikara. As to its significance to Te Roroa:

It is most unlikely that the coastline [and main track north-south] would be reserved, minus this area. It consists of the Maunganui Bluff, an important Tribal landmark; the site of the Whare Wananga used in the days of warfare by Chief Taoho, the favoured mussel rocks, a resting place for war parties and the source of spring water for lower areas. Also the word Papaki refers to the slapping of the water against the rocks, as it does in this area.

Te Rore Taoho and Tiopira were related closely to each other. To have sold this area would cut off the easiest access to each other's kaingas.

It was unnecessary for Te Rore to ask for this area as a reserve. It was their right to retain any lands they chose not to sell. In Tiopira's case, the 12,000 acres he kept proved to be detrimental during later financial negotiations with the Crown. That in itself would have deterred him from mentioning Papaki. Also, it was his opinion the Court was only for the purpose of adjudicating on blocks to be sold, not on lands excluded from sale. (B34:19-20)

Initially the Crown agreed that Papaki probably did consist of the Bluff/Waikara area, as this was the area of most disputes between Tiopira and Parore. Tiopira's offer to share the area with Parore was:

a last ditch effort to secure at least part of the area.... Te Roroa based at Waipoua may well have initially intended to reserve this area, and this intention may have been subsumed by the bitter dispute over boundaries and Te Roroa's insistence on exercising of their rights over the whole of Maunganui.... There is no evidence to suggest that any discussion took place between Te Roroa and the land purchase agents with respect to this area... [nor] of any complaint by Te Roroa with respect to its non-reservation during the next 112 years. (E2:201-202)

In her closing submissions, Crown counsel acknowledged that Te Roroa based at Waipoua might well have initially intended to reserve Papaki but this intention was possibly subsumed by the dispute over boundaries. In the absence of any evidence to show that this intention was ever communicated to Crown land purchase agents or that such a reserve was sought at the time of the purchase negotiations and sale, she submitted that no breach of Treaty principle could be found against the Crown. Furthermore, she wondered at there being no further documentary record of protest (I2:(b)(ii):38-39).

At no stage in the argument was any particular significance attached to the fact that there were no oral traditions concerning Papaki. Rather the Crown's re-examination of the one piece of documentary evidence on Papaki arose in response to a question from the tribunal's request for a new translation of the Maori original of Tiopira's letter to Pollen, 22 April 1877, which referred to "Whenua ko Panaki" and to "Whenua Ki Opanaki" (I14:att A), not Papaki. H T Clarke's reply to Tiopira, 23 May 1877, made it clear that Tiopira had requested a re-hearing about the "Opanaki" block, which the court had awarded to Parore Te Awha and Te Rore Taoho in 1874 (I14:att B). In an application for a re-hearing dated 2 April 1889, Tiopira's son, Rewiri stated that his father had made several applications to the Native Land Court for "Opanaki", to which he had a very strong claim (I14:att C).

In response to this irrefutable evidence that "Opanaki" was incorrectly translated into "Papaki", the claimants pointed out that only whenua (land) was sold to the Crown in the Bluff area; no mention was made in the deed of sale of wahi tapu:

Papaki is sacred to Te Roroa.... an area of great spiritual and tribal significance.... unless there was an express provision allowing for the extinguishment of "wahi tapu", the spiritual relationship between Te Roroa and Papaki was never severed. (I18:2)

This clearly indicates to us that the claimants are deeply concerned that the wrong identification of Papaki may prejudice their valid claim with respect to Maunganui Bluff.

We conclude that there is no place name "Papaki" in the Maunganui Bluff area. Nor is there any documentary evidence that Tiopira arranged to reserve 3000 acres of land in this area from the 1876 sale. Nonetheless the claimants do have a valid claim to Maunganui Bluff. The footnote to this case is that here we have a case where documentary evidence and theorising is not supported by any oral evidence. Clearly this should have alerted all of us much earlier to the probability that the documentary evidence was wrong. In short, documents are not necessarily any more reliable than oral traditions. Both kinds of evidence need to be carefully considered and scrutinised.

MAUNGANUI BLUFF

3.3.4 We are left with two related questions, first, did Te Roroa wish "to retain a wahi tapu of great significance to them", namely, Maunganui Bluff itself. Secondly did any of the vendors indicate "that they wished it reserved from sale". We agree with counsel for the claimants that:

Such a finding is important in terms of the obligation upon the Crown in more modern circumstances to protect the sacred mountain of Te Roroa and to involve the iwi directly in its administration. (I1(b):50)

From what we know of Te Roroa's cultural heritage it is most unlikely that the vendors wished to include the Bluff in the sale to resolve the dispute over title and to ensure its protection by the Crown.

In our view, there are two sets of circumstances which help explain the loss of Maunganui Bluff. The first is that it is situated in the area that had not been surveyed

by Wilson when the survey was discontinued; nor was it surveyed when Frank Smith returned to the district to survey Manuwhetai and Whangaiariki. It was simply sketched on S P Smith's compiled plan ML 3253 of Maunganui. Consequently, there was no occasion when Tiopira or any other person could have instructed the surveyor on the ground to cut out or reserve Maunganui Bluff. Possibly no one ever conveyed the wishes of Tiopira and others concerning Maunganui Bluff to the surveyors and Crown land purchase agents.

If, by any chance, their wishes were known to Brissenden and Nelson and/or Smith and the Wilsons, none of them were present at the court hearing or the sale. The dispute with Parore over title was only settled four days before the sale. During the sale negotiations, Tiopira was preoccupied with securing his "equality of interests" with Parore. He may have assumed that Maunganui Bluff was excluded from the sale along with Manuwhetai and Whangaiariki or he may have been confused by the pressures being exerted on him by the native land purchase system and not realised that Maunganui Bluff was included in the sale. The absence of Te Rore Taoho from court was probably another reason for the failure to reserve the Bluff. The oral evidence transmitted to us on site visits to the Bluff and at the first hearing in Kaihu clearly indicated that tangata whenua have kept their fires burning at the Bluff ever since the sale.

The second set of circumstances relates specifically to the lack of any documentary record of protest. In fact Te Roroa had no particular reason to protest until the construction of a radar station on or near the site of a whare wananga on the Bluff during the second world war, and the subsequent installation of telecommunications equipment there without the consent of Te Roroa Ngati Whatua.

Prior to the sale of the Maunganui block to the Crown in 1876, the Bluff was used as a trigonometrical station and observation point. When the block was surveyed and subdivided in 1881, the Bluff area was delineated as a reserve (A5:724). The following year the Crown reserved 754 acres "for growth and preservation of timber" which were declared state forest in 1906. Acting on a submission from the Hobson City Council, the state forest area and an additional 469 acres of adjacent forest were proclaimed a scenic reserve in 1911 (H2:2-4). There is no evidence that tangata whenua were informed or consulted about any of these developments. Nor is there any evidence that they objected. For the time being they simply continued to exercise their traditional rights to kaitiakitanga and mahinga kai. Furthermore they expected the government to initiate public works in the area which would increase their opportunities to participate in the market economy in return for the land they had sold.

On 7 February 1876 Tiopira Kinaki and Te Rore Taoho wrote to Sir George Grey, superintendent of the province of Auckland, asking that a road might be made through the 100,000 acres of the land between Hokianga and Kaihu they had recently sold to the government. Such a road would facilitate their "egress to the European settlement" and their sale of kauri gum, cattle and pigs to Europeans. "Should this line of Road be constructed a very great number of the Northern people would come this way to Auckland, because the route via the Bay of Islands is a circuitous one" (E2(a):362). They had heard that a sum of £60,000 was voted by the Parliament the session before last for the construction of roads but "none of the money was spent on Roads in this District.... Let a Surveyor be sent to examine the line" (E2(a):363).

W A Tole, the commissioner of Crown lands, thought that "application deserving the strongest recommendation which can be made in its favour to the General Government" (E2(a):361). Sir George Grey concurred and asked the Minister of Public Works favourably to consider it (E2(a):358). A good bridle or "cantering" road was constituted from the Wairoa river to Waikara beach round the inland side of the Bluff, 1881-1884 (E8:3-5). From Waikara to just south of Kawerua, travellers continued to use the beach. A 20 mile coastal strip south of Kawerua remained unalienated Crown land.

From all the evidence we have been given on the traditional history of Maunganui Bluff and its material and spiritual importance to Te Roroa Ngati Whatua we believe that it would have been Te Roroa's wish to retain it forever. The Crown had absolutely no business to purchase a place of such significance.

KAHARAU, TE TARAIRE AND OTHER WAIMAMAKU WAHI TAPU

3.3.5 The claimants allege that the Crown failed to reserve from the Waimamaku No 2 purchase certain places of great spiritual and historical significance to the people of nga hapu o Waimamaku (A1(i):12). Most of these places were situated on 1472 acres of land which was included in the Waimamaku No 2 sale and are known as the Kaharau reserve. This extends from Te Moho in the east through to Tutaepiro in the west, encompassing Te Rereapouto, Kohekohe, Piwakawaka and Kukutaepa. These places are of great spiritual and historical significance to the hapu of Waimamaku. Te Roroa are the acknowledged guardians of these places (I1(b):56). Another of these places is Te Taraire which consists of 60 acres and was also involved in the sale (A1(i):14, 54-55).

From the evidence we were given by Emily Paniora (D12:2) and Dr Patrick Hohepa (D11:12) it seems likely that the name is connected to Kaharau, son of Rahiri and the tupuna of the area. The Kaharau reserve contained "ancestors of Te Roroa, Ngati Korokoro, Ngai Tu, Ngati Pou and others" (D11:13). There were burial caves in the bush which contained the bones of their ancestors and were extremely important wahi tapu (D31:4-5; D5:6; D11:12-13). According to Emily Paniora, their tupuna:

always intended to protect Kaharau and the other Wahitapu as Maori reserves, and it was on that basis that Tiopira and the other Rangatira agreed to sell Waimamaku No. 2 block to the Crown.....

... at the time of [the] sale the Tupuna believed that Kaharau had been cut out of Waimamaku No. 2. block. (D12:2)

Te Taraire, an area of approximately 60 acres was an ana tupapaku, a special place where the dead were prepared for burial. Simon Reuben explained how the tupapaku (body) would be left for a year in the trees to decompose. The bones would then be washed and taken to the caves. If the tupapaku was a person of particular mana the bones would be put in a carved waka tupapaku or burial chest (D7:4-5).

Simon Reuben told us he knew about and had been told about the burial sites of their tupuna from Waimamaku right back to Maunganui. There were two lots of burial caves: at Kohekohe and Piwakawaka situated at the two ends of a cliff face on the

ridge known as Kaharau. There were many other caves in between. Until the land fell into the hands of James Morrell, the existence of the caves was a secret to all but their kaitiaki, who handed down information on them by word of mouth (D7:3).

On the eastern corner of Kaharau there is a rocky hill, Te Moho, which contained burial caves. His grandfather, hearing that Pakeha were trying to get into them, camped there, and on the third night heard rocks giving way or crumbling. He came down the next day and told his grandson nobody would find the tupuna now. Te Moho had caved in (D7:4).

Tutenganahau Paniora also told us that there were koiwi at Te Moho which was "a very tapu place" to him. He said "Te Moho is a sound, my dad said, a kissing sound. He said to me if you walk past that place and hear that kissing sound you're in trouble" (D10:3).

Simon Reuben and his brother Prince Reuben had roamed all over Kaiparaheka where there were still bodies (D7:8) and Simon had been to Te Niinihi where he had heard there were urupa but didn't know for sure (D7:8).

Prince Reuben's father, Aperahama Reupena Tuoro was the person designated to pick up the koiwi of their ancestors from traditional burial grounds in the area of Waimamaku and Wairau for reburial in Ahuriri cemetery. His uncle, Te Ngoiere Tuoro, would help him and on occasions he went with his father who taught him not to be afraid of his ancestors (D9:1). Kaiparaheka had been a pa site and became a burial ground after people there were massacred (D9:3). He had stood outside Piwakawaka when his father had been there to collect bones (D9:3). His father had also removed bones unearthed by the wind from Te Moho to the cemetery (D9:3-4).

Tutenganahau Paniora was told about the burial caves at Kaharau by his father and the tohu or signs to mark where they were and protect them. He had heard about wahi tapu at Te Rereapouto, an ana koiwi, the Wairau wahi tapu where many tupuna rested and some but not all had been taken out for reburial; Te Moho where there were koiwi and Kaiparaheka where there were many koiwi from a big battle. In Waimamaku he concluded:

our ancestors.... left behind more than just their footsteps. They left their last earthly remains into our care (D10:3-4).

In her closing address Crown counsel partially conceded the claim that the full area known as Kaharau should have been reserved:

It appears... there was an agreement with the vendors of Waimamaku 2 to either reserve "Kaharau" from sale or to grant "Kaharau" back to the vendors after sale. The evidence tends to point towards the first option as "Kaharau" is likely to have been treated as being an extension of Wairau North which was excluded from the sale. (I2:(b)(iii):26)

Nonetheless Crown counsel was reluctant to admit that agents of the Crown acted for any reasons other than "misunderstanding" of the extent of the reserve asked for and of the terms of the sale. Perhaps chiefs did rely on oral undertakings rather than

written word but, by 1876, they and their advisors were "experienced land sellers ... surely aware of the nature and meaning of these documents" (ibid:27).

In respect of Te Taraire, the Crown submitted that the evidence was not so clear. Moreover lack of protest in the intervening years was also a telling indicator, especially when compared to the profusion of petitions and complaints in respect of Kaharau (ibid:28).

It is as inconceivable to us, as it is to claimants (I1(b):83), that the vendors, having expressly excluded Te Taraire from the sale, would have changed their minds and agreed to sell it. We consider that the apparent lack of protest is understandable in that there was no incident comparable to the desecration of Maori burial caves that sparked off the petitions and protests over Kaharau (see below, pp 264ff).

The oral evidence we were given on the great spiritual significance of Kaharau, considerably strengthens the circumstantial and documentary evidence on which the Crown largely relied in partially conceding that the Maori vendors intended to exclude the full area of Kaharau from the sale. It also clearly indicates that they intended to exclude Te Taraire. The reason Te Taraire was not shown as a reserve on Weetman's check survey can be traced back to the confusion created by the forked boundary on Smith's sketch plan.

Sharon Murray's belief "that the dealings concerning Manuwhetai and Whangaiariki are mirrored in Kaharau, with each case supporting and substantiating the other" (D15:1) contains grains of truth.

There are striking parallels and similarities in the survey, the negotiations and the purchase by the same Crown agents; also in the failure to mention reserves at the court hearings and in the deeds. Moreover in both the Maunganui and Waimamaku No 2 sales, the chiefs relied on oral undertakings of Nelson, Smith and the Wilsons.

Viewed in historical perspective the failure to reserve Kaharau and Te Taraire arose not only from the omission of Crown agents to ensure an approved and proper survey plan was produced at the Native Land Court investigation of title and the attachment of a compiled plan to the deed of sale. It also arose from the methods used by agents of the Crown at that time to purchase Maori land and from prevailing attitudes to reserves.

The failure to exclude Kaharau and Te Taraire from the sale of Waimamaku No 2 block clearly breached the terms on which vendors agreed to the sale.

The survey lien

A survey lien of £162 10s 8d was registered in October 1875 in respect of the Wilsons' plan ML 3278. The area given in the lien was 27,200 acres, which was 2700 acres more than the total acreage on the plan (D1:15; D18:10). According to Emily Paniora:

It is unclear why a lien was charged as the plan was never completed, nor was it recognised by the Inspectorate of Surveys or the Court, nor were the boundaries as surveyed by Wilson used. (D12:5)

According to Emily Paniora, the charge of a lien for the survey demonstrated that the survey was intended to define the boundaries of Kaharau and Te Taraire (D12:6). The amount of the lien normally would have been deducted from the monies paid to the owners on the signing of the deed of sale (D12:5).

In his evidence Garry Hooker pointed out that surveys were usually charged on an acreage basis and the Wilsons' lien amounted to almost one and a half pennies per acre on 27,200 acres. This area must have been made up of the 24,500 acres shown on the Wilsons' plan, ML 3278, plus Kaharau 1471 acres, plus Wairau south 1229 acres. He questioned the propriety of charging on an acreage basis "for merely cutting a line across the already surveyed boundaries of Wairau" and of charging the owners of Waimamaku No 2, who were different from the owners of Wairau, for the costs of the Wairau survey; also of charging them for a survey of the eastern portion of Kaharau when the Crown took that land without payment. He also raises the question:

as to general Crown responsibility and propriety in approving payment to Wilson of such a high survey cost out of the pittance that the Crown usually paid Maori for their lands. (D18:10)

The evidence clearly supports the claim that a survey lien of £162 10s 8d was charged against Waimamaku No 2 block for the Wilsons' unapproved plan, ML 3278. As Preece's report on the sale has been destroyed there is no documentary evidence to show that the normal procedure of deducting the amount from the monies paid to the owners of Waimamaku No 2 block on the signing of the deed of sale was carried out.

Did the Crown pay for Kaharau?

The claimants allege that the Crown expropriated without compensation of payment, the 1472 acres of Kaharau that was not reserved from the sale contrary to the terms of sale. On the deed of sale the sum of £1203 6s 6d is filled in for 27,200 acres (D2:28). Both Garry Hooker and David Armstrong calculated that the Maori were paid £1318 6s 6d for the whole block which worked out as 11.6d and 11.5d per acre (D18:6; H3:47-50). According to Hooker, the £115 in excess of £1203 6s 6d was an old advance by Brissenden of which Preece was not advised in time.

Both Hooker and Armstrong are agreed that this acreage rate was significantly lower than the various rates negotiated with vendors and at which they received down payments, namely, 1s 5d - 1s 6d per acre for Kahumaku and 1s 1d per acre for Waimamaku land (D1:11).

Hooker calculated that even if the Wairau south purchase money of £92 was taken into account (originally the intention was to include Wairau south in the Waimamaku purchase), the total sum was £1410 6s 6d and the average acreage rate 12.44d, still less than the lowest rate negotiated for Waimamaku land.

Hooker also calculated the deficits which would have occurred in three different scenarios of acreages in Kahumaku at 1s 6d per acre and Waimamaku at 1s 1d per acre if the Crown had paid separately for 1192 acres of Wairau south at 1s 6d per acre and had not paid for the 1471 or 1472 acres of Kaharau which should have been reserved (D18:6-8).

The deficits were £191 11s 10d, £97 9s 9d and £274 16s 11d. These were equivalent to 3537.07 acres, 1799.76 acres and 8806.15 acres respectively at 1s 1d per acre.

Hooker then endeavoured to establish whether the Crown paid for Waimamaku No 2 block at the various rates agreed on if 1471 acres of Kaharau and 1129 acres of Wairau south were excluded. Progress reports on the purchase of Kahumaku and Waimamaku land seemed to indicate three possible ways in which the remaining 24,600 acres could have been apportioned between Kahumaku at 1s 6d per acre and Waimamaku land at 1s 1d per acre. His calculations in each case revealed a deficit which was greater than what would have been the price of 1471 acres of Kaharau if it had been purchased at 1s 1d per acre. From this he concluded the Crown could not possibly have paid for the 1471 acres of Kaharau reserve (D18:9).

David Armstrong was of the opinion that the figures did not seem to add up to any definite indication that Kaharau and Te Taraire were not paid for. However, he accepted that whatever acreage was paid it was below that agreed to which:

may indicate that the sale of 27,200 acres did in fact represent a provisional transaction, with the areas reserved to be subtracted later. Hence, Preece would not include payment for the area consisting of 'Kaharau' and any other reserves in his total. (H3:50)

Without Preece's report, destroyed in the Parliament buildings fire, the exact basis of sale cannot be determined. Either 1471-1472 acres of Kaharau were expropriated without payment and the rest of the block was purchased at a slightly lower rate than 1s 1d per acre or the whole block was purchased at an even lower acreage rate.

ADDITIONAL LAND IN THE WAIRAU NATIVE RESERVE

3.3.6 The claimants state that a small piece of land south of the Wairau river should have been included in the Wairau Native Reserve. As Emily Paniora explained, Te Roroa always understood that the southern boundary of the reserve ran to Motuhuru in a straight line, without any "doglegs", and did not start from the river mouth or some hundreds of metres up the river, and wanted the Crown to recognise this boundary. The small piece of land contained important wahi tapu including burial grounds and also the pa Pakiri:

For as long as we can remember this flat area of land has been used by some of the whanau of Waimamaku as a place where families moved to and lived for most of the summer taking their whole household and stock with them....

In 1935 John Paniora, Bill Iti, and Terry Brady fenced the boundary line from Motuhuru under the direction of Jim Brown the forest fire guard who lived at Kawerua. (D12:8)

Paekoraha Paniora confirmed this in an oral statement following his evidence and on a site visit, 1 March 1990 (D28:4). He had worked for Bill Trounson, and had come to Kawerua to run the fence line for cattle up to the wahi tapu and the bend in the river. He pointed out the fence line which runs along a straight line from Motuhuru to the Wairau river.

Prince Reuben remembered his father pointing out the boundaries of the Wairau wahi tapu. The fence was built there because it was the boundary and not the creek. The boundary went straight up to the skyline on the south side of Motuhuru, because that is also a wahi tapu, to a peak or stand of totara. In 1988, when he and his relatives were camping at Wairau a chap from the forest service had come along and told him he should be on the north side. Almost two months later a letter came from Rod Young of the forest service containing a fairly recent map with the boundaries he had pointed out, admitting their mistake (D9:2).

Inland along the southern bank of the Wairau river, which claimants say is part of the reserve, we were shown the camp site used until recently. Alex Nathan and others pointed out the wahi tapu and pa site.

The failure to include the small piece of land south of the Wairau river in the reserve arose from the choice of Campbell's southern boundary for purposes of sale and cession in preference to the boundary arranged by local chiefs and S P Smith in 1875 which ran from Motuhuru, a traditional boundary marker. This renegotiated southern boundary was shown on Smith's sketch map of Waimamaku (ML 3268) as far as the river. The line was cut and surveyed by the Wilsons and checked by Weetman and is shown on their survey plans (ML 3278 and ML 3435 respectively). Why Wilson did not close it in from the river to Motuhuru is not known.

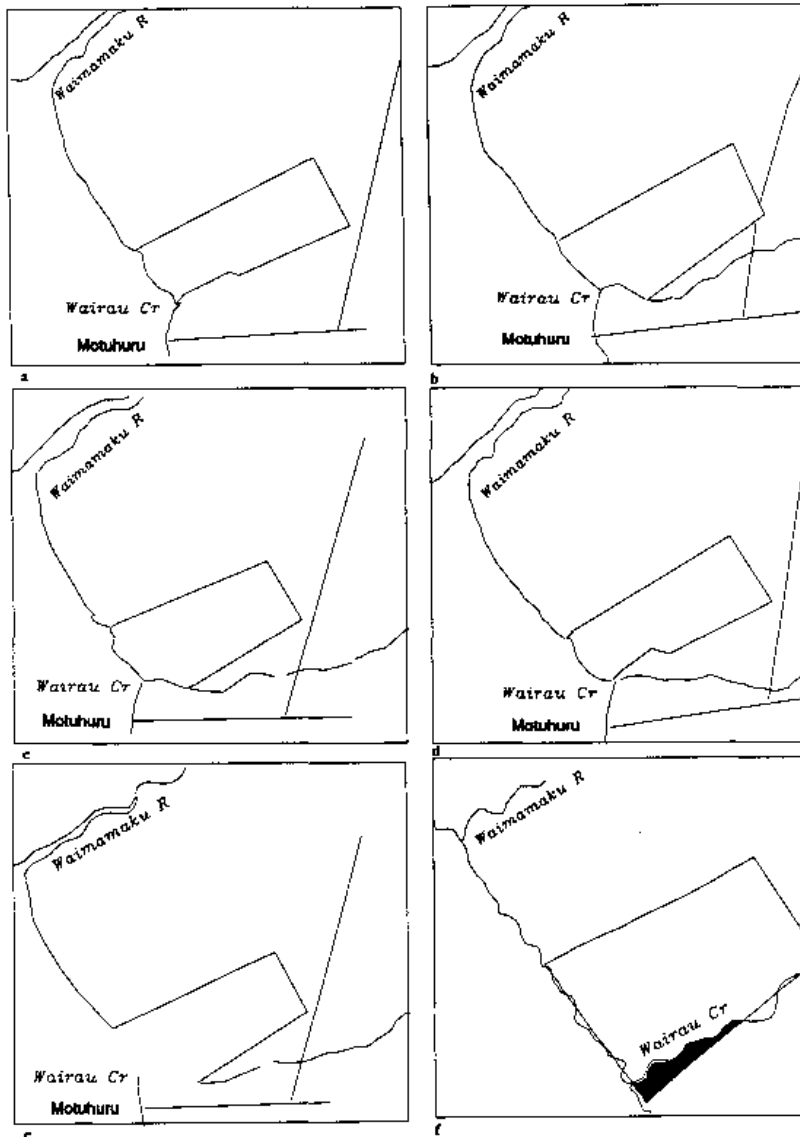


Figure 18: Diagrams of the Wairau wahl tapu reserve illustrating different southern boundaries (a) Campbell's plan, ML 2012, September 1870 (b) Smith's compiled plan, ML 3268, 11 June 1875 (c) The Wilsons' plan, ML 3278, 14 July 1875 (d) Kensington's plan ML 3278A, 21 December 1875 (e) Westman's check survey, ML 3435, 25 January 1878 (f) Reupena Tuoro's sketch map, 1897. Source: Department of Survey and Land Information, Auckland

When Kensington compiled his plan of Waimamaku No 2 (ML 3278A) he incorporated Campbell's southern boundary of the Wairau Native Reserve. The plan of Wairau south, which was placed on the deed of cession (ML 2012B), did the same. Nevertheless the chiefs who signed the deed of cession believed that the change they had negotiated concerning the southern boundary had been accepted. Even if they saw and read the map and document in court, which seems unlikely, they would hardly have detected that Campbell's southern boundary had been preferred to theirs. No traditional boundary marker or place names were included. Moreover no judicial oversight or advice was provided in court to ensure that they understood exactly what area of land they were ceding to the Crown.

Their understanding that the oral arrangements they had made with the surveyor had been accepted is borne out by a sketch plan and a written description of the reserve included in a request from Reupena Tuoro and others in 1897 for a survey of the

block so that the title of the Wairau wahi tapu could be investigated (D3:524-525). The southern boundary on the sketch plan is a straight line running to Motuhuru which is named as the traditional boundary marker. It is consistent with the boundary shown by Smith, Wilson and Weetman except that it is extended from the river to the coast. On the sketch plan, Reupena had written in Maori: E tono ana ahau kia koe hanga te mapi irunga i te ruri tawhiti (I am sending you the map made (based) on the old survey).

Kensington informed Reupena that a survey plan (Campbell's) already existed, but did not point out that the southern boundary shown on it was different from the one Reupena had sketched and described (the Wilsons') (D3:525-528). Possibly Reupena was aware of this, for on his application to the court the southern boundary ends at the river not Motuhuru (D3:55).

When Ngakuru Pana and Peneti Pana made a further application in 1902, Campbell's plan 2012 was produced in court and no complaint was made about boundaries. Possibly the applicants still did not appreciate the difference between the boundary they had pointed out to the surveyors in 1875 and Campbell's boundary on plan ML 2012.

The lack of any further protest probably indicates the absence of any European encroachment on the traditional camp site rather than acceptance of Campbell's boundary (H3:96). Oral evidence given by the claimants demonstrated that tangata whenua continued to act as if the southern boundary ran straight from the south east corner of the reserve across the river to Motuhuru and as if the piece of coastal land between the lower reaches of the river and this boundary was reserve.

Counsel for the Crown submitted "that another boundary altogether is what was sought by the vendors" (I2:(b)(iv):7). The evidence does not substantiate this. Having pointed out the traditional boundary marker, Motuhuru, to the surveyors, the vendors naturally expected that Campbell's boundary would be altered to run in a straight line to Motuhuru. Moreover they would not have understood Pakeha notions about water rights which may well have been the reason the boundary between the river and Motuhuru was not closed in by the surveyors they instructed.

It would seem fair and reasonable for the Crown, in the circumstances, to have extended the Wilsons' southern boundary from the point where it reached the river to Motuhuru or to have cut a line and surveyed this section before Wairau south was ceded. Its failure to do this was later compounded by its failure to investigate the accuracy of the southern boundary described and sketched by Reupena Tuoro, and to inform him of the difference between his southern boundary and the boundary shown on the plan attached to the deed of cession. The lack of protection for and access to wahi tapu and allegations of trespass complained of by the claimants, were the outcome of these failures.

REFERENCES

{FNTXT:0-86472-088-2:3.1:1}1 In the New Zealand Company settlements, native reserves were promised and to some extent provided, but fell well short of Maori needs. In Port Nicholson they were scattered among sections selected by land

purchasers "with an almost total disregard of the natural wishes of the Natives" to retain their pa sites, cultivations and burial grounds, and with the deliberate intention of encouraging the spread of civilization and Europeanisation (John Miller Early Victorian New Zealand (London, 1958) p 49). In the southern settlements "there was a deliberate determination on the part of some officials" to keep reserves small "so that Ngai Tahu should not persist with a traditional lifestyle" "The Ngai Tahu Report" (Wai 27) 3 WTR (Wellington) p 467. Under the Native Reserves Act 1865, existing native reserves were placed under the control of commissioners and leased at low rents for long periods to settlers (Alan Ward A Show of Justice (Auckland, 1973) p 93)

{FNTXT:0-86472-088-2:3.1:2}2 J Rutherford Sir George Grey KCB, 1812-1898: A Study in Colonial Government (London, 1961) pp 206-207; see also "The Ngai Tahu Report" 3 WTR pp 274-275.

{FNTXT:0-86472-088-2:3.1:3}3 Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) (Wellington, 1988) p 39

{FNTXT:0-86472-088-2:3.1:4}4 Under s5 Native Lands Act 1866, native reserves were inalienable by sale or mortgage or by lease for a longer period than 21 years except with the assent of the Governor in Council (H7:10). This provision was slightly amended in the Natives Lands Act 1967, s13, to "except with the consent of the Governor". "All prohibitions or restrictions on the alienation of land by a Native, or on the alienation of Native land ... imposed by any Crown grant" were removed by the s207(1) Native Land Act 1909 (I1(d):25).

{FNTXT:0-86472-088-2:3.1:5}5 cited in Report of the Waitangi Tribunal on the Orakei Claim (Wai 9) (Wellington, 1988) p 39

{FNTXT:0-86472-088-2:3.2.1:6}6 Furthermore, as associate counsel for the claimants pointed out, the Crown's failure to act continued after the repeal in 1873 of the Native Lands Act 1865 which provided under s23 that the court could only issue title to iwi and hapu if the area was over 5000 acres (I1(c):39).

{FNTXT:0-86472-088-2:3.2.1:7}7 It appeared to him that the form of declaration of trust in favour of the tribe had been before Judge Maning "for some purpose" because of the note Maning had written on it (B16:16). Macdonald believed that both Maning's certificate in favour of the tribe and Fenton's in favour of Tiopira and Peneti were bad at law. A certificate of title should have been ordered under s17 Native Lands Act 1867 then in force, that is, to not more than ten persons with the consent of interested members of the tribe.

{FNTXT:0-86472-088-2:3.2.1:8}8 Departmental action on his second application commenced before it was filed. The application was dated 18 June 1895, yet the Justice Department's date of receipt was 10 June 1895. On 11 June 1895, the department referred the application to the chief judge to ascertain whether it was a proper case for inquiry. On 26 June 1895, the chief judge replied that it was and recommended that an order-in-council be issued accordingly (B16:7, 10-11).

{FNTXT:0-86472-088-2:3.2.1:9}9 This was the date on which Fenton had notified the governor that Koutu was not affected by s36 Native Lands Act 1867 (s36 made provision for the issue of a Crown grant, not a certificate of title, where land was charged with moneys borrowed for costs of survey etc).

{FNTXT:0-86472-088-2:3.2.1:10}10 An application for a succession order from Reupena Tuoro, Hori Tuoro and Hana Tuoro for Hone Tuoro's share, was made to the court on 26 December 1902 and awarded on 7 April 1904 (B16:52). An application from Piipi Tiopira for Hiria's share, August 1911 was advertised six times for court hearings, between 15 November 1911 and 18 August 1914, but not heard (B16:51).

The knowledge that if they succeeded to shares in the title they were beneficial owners not trustees restrained applicants from proceeding to have their applications heard in court.

{FNTXT:0-86472-088-2:3.2.1:11} 11 Section 5 empowered the governor-general acting upon a recommendation of the Native Land Court or Maori Land Board, by order-in-council to reserve any "native" freehold land or land owned by "natives" as a native reservation for common use, such as a landing place or fishing ground.

Following the issue of such an order-in-council, the registrar explained, a list of trustees could be submitted to the court and appointed (B16:57).

{FNTXT:0-86472-088-2:3.2.1:12} 12 On 21 April 1947 it was noted that trustees had already been appointed by the court. On 3 May 1947 it was further noted that the list appeared to relate to their letter of 15 May 1945, but it did not appear that an application had been made under s5 of the 1937 Act. A request to file was dated 5 May 1947 (B16:56; C7:att 2.8).

{FNTXT:0-86472-088-2:3.2.2:13} 13 E D Nathan in M Taylor & A Sutton "Waipoua State forest 13 archaeological project stage one report submitted at the completion of archaeological contract no. 13", unpublished New Zealand Forest Service report, October 1985, app 1

{FNTXT:0-86472-088-2:3.2.2:14} 14 I H Kawharu Maori Land Tenure (Oxford, 1977) pp 76-77, cited in A12:2

In the application for succession vesting orders to Wiremu Tuwhare (deceased) in respect of Waipoua 2A and 2C the court sat on 2 February 1900 and the minutes record the following:

Hohi Paniora-on former oath I claim to be included with the gr-children in this share. The reason: these shares in this block Waipoua were apportioned between 10 ancestors-the Kawhakahaere for this land when it passed the Court was Tiopira and Wi Tuwhare was put in that share-they were put in this way. Hapakuku knows-Tiopira put him in and he said this was my ancestor[']s share in Wi Tuwhare's hands. Wi Tuwhare's share was given to his "child" Naera Te Ngaru (a nephew). This was Wi Tuwhare's share that he gave to his child. The share he got for himself belonged to my ancestor. (The original block Waipoua No 2 consisted of 12,220 acres and was awarded in the name of ten owners of whom Wiremu Tuwhare was one (Feby 1876)-has been since partitioned in July 1886. Waipoua No 2A 3819 acres awarded to four owners and Wiremu got about a tenth of the original area between A & C). As Wiremu is the representative of my ancestor I ask to be included in the order. (B4:11)

The application was dismissed as Hohi Paniora was not a person entitled to succeed pursuant to s14(10) Native Land Court Act 1894.

In the application to succeed to the interests of Ruka Heremaia (deceased) in Waipoua 2B3 the minutes of the hearing on 8 April 1904 record:

This is a large block (over 5000 acres) only ... ten names could be admitted at that time deceased was the only member of his family admitted. The matua of Kora Kora [the deceased's son] claims that other members should now be admitted. (B4:25)

The minute then records the names of the children of the deceased's three sisters etc.

There are other examples of disputed succession applications and cases where an application had been lodged to succeed to interests in Waipoua No 2 by applicants believing a deceased had an interest only to have it dismissed.

{FNTXT:0-86472-088-2:3.2.2:15}15 "An extract from a Pamphlet by Sir William Martin, in 1861" in *Opinions of Various Authorities on Native Tenure* (Wellington, 1890). See also n 13, p 58, cited in A19:9.

{FNTXT:0-86472-088-2:3.2.2:16}16 The vesting of absolute ownership in this manner was recognised as being contrary to "native custom" by the 1873 Hawkes Bay Native Lands Alienation Commission. Where "native owners" were omitted from a certificate of title, C W Richmond said:

The Court is thus put in the false position of certifying, that the natives chosen by the whole body are "owners according to native custom" of the land in question-this plainly importing that they are exclusive owners. Such a certificate is necessarily false... (AJHR, 1873, G-7, p 7. See also A19:33)

{FNTXT:0-86472-088-2:3.2.2:17}17 "An Act to Confer Jurisdiction on the Native Land Court to Determine the Title to Opanaki Block"

{FNTXT:0-86472-088-2:3.2.3:18}18 The English translation is cited here. The original in Maori is addressed to Honehini Makarini (A4:379-381) suggesting Tiopira may have thought Sheehan and McLean were one person. A new translation procured for the tribunal puts the last sentence cited here in the present tense: "are being withheld" (Wai 38/0, vol 9, L Head to S Woodley, 20 May 1991)

{FNTXT:0-86472-088-2:3.2.3:19}19 *New Zealand Biographies* file, 1953, vol 1, p 103, Alexander Turnbull Library, Wellington

{FNTXT:0-86472-088-2:3.3.1:20}20 For another version of this story see *He Korero Purakau Mo Nga Taunahanahatanga A Nga Tupuna: Place Names of the Ancestors*, A Maori Oral History Atlas (Wellington, 1990) pp 22-23

{FNTXT:0-86472-088-2:3.3.1:21}21 These included Ngakuratore, Owetenga, Opeperu, Papatea, Te Awa Mango, Maihirua, Matatuahu, Whawhanunui, Okuratore, Pukenuiorongo, Mahuhu o te Rangi, Waiotane, Taunganui, Nga Tiheru, Okotare and Koutu (C7:7)

{FNTXT:0-86472-088-2:3.3.1:22}22 Transcript of site visit, Kawerua, 26 May 1991

{FNTXT:0-86472-088-2:3.3.1:23}23 Peter Mathews collection, interview with Dawson Birch, LC 479, Oral history collection, Alexander Turnbull Library, Wellington

{FNTXT:0-86472-088-2:3.3.1:24}24 *ibid* LC 480

{FNTXT:0-86472-088-2:3.3.1:25}25 Norman Smith *Maori Land Law* (Wellington, 1960) p 90. See also E1:16.