

# Te Whanganui-a-Orotu Report 1995

## 1 Introduction

### 1.1 Te tono a te iwi (the claim)

This claim is about the loss and despoliation of Te Whanganui-a-Orotu, also known as Te Whanga, Ahuriri Lagoon, or the Napier Inner Harbour. It is concerned solely with this area and not with the land around it, although what happened to the land served to define what eventually happened to the lagoon. Like the Manukau Harbour claim, it is 'important for the whole community not only because of its far-reaching nature but also because of the deep-seated sense of injustice that Maori people feel'.<sup>1</sup> Many of the grievances stated in this claim have already been the subject of a number of petitions and two important investigations: the 1920 Native Land Claims Commission and a Native Land Court inquiry, which was conducted by Judge Harvey in 1934 but not reported on until 1948. A settlement of these and subsequent grievances is long overdue.

The claimants say that 'Te Whanganui-a-Orotu is their taonga over which they have rangatiratanga and which, but for statute law, rightfully belongs to them'. The Crown says that Te Whanganui-a-Orotu was included in the Ahuriri purchase of 1851, and that, anyway, it is an arm of the sea, which under English common law is the property of the Crown. Furthermore, in 1874 and 1876 Parliament passed legislation vesting Te Whanganui-a-Orotu in the Napier Harbour Board, and, in 1989, legislation was passed empowering the board's successor, the Hawke's Bay Harbour Board, to sell the land vested in it by the 1874 and 1876 Acts.

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### 1.2 The claim area

#### 1.2.1 In pre-European times

The traditional Maori view of Te Whanganui-a-Orotu is well summed up in Judge Harvey's 1948 report as:

a fresh-water or brackish-water lagoon which had to be opened occasionally when the waters from the streams feeding it caused the water-level to rise to a point that menaced their homes and cultivations situated on the low ground bordering the lake. While the lake was open to the sea certain sea-fish would enter, but the main catch was of fresh-water fish. (A5(m):38)

The historical and scientific evidence presented to us supports and amplifies the judge's words. As claimant witness Gary Williams noted, compared to the tidal salt water, there is a substantial freshwater inflow into Te Whanganui-a-Orotu. Mr Williams argued that the smaller amount of salt water would remain as an intact wedge below the river inflow, and the two would not mix (E5:4-12; F3:12-13).

Before European settlement, the lagoon covered an area of about 9500 acres (3800 ha) (I9(e):13) and was separated from the sea by a narrow sand and shingle bank or spit. Two main rivers discharged into the lagoon, the Waiohinganga (Esk) and the Tutaekuri. Periodically, the Ngaruroro and Tukituki Rivers flowed north to join the Tutaekuri.<sup>2</sup>

Maori tradition relates how openings to the sea were made at Keteketerau and Ruahoro near Petane, and at Ahuriri near Mataruahou (Scinde Island) (A5(m):38-39).<sup>3</sup> Claimant consultant David Young explained that openings were made only when home sites and crops were endangered:

While the spit was intact, influxes of fresh water into the lagoon ensured it was virtually a freshwater lake. But when the lake overflowed it was breached - sometimes . . . by human intervention - then the sea was able to enter at least parts of it again. Technically it then became a lagoon, if not an estuary. If there was considerable long-shore movement from the seas, then the chances are that the spit, usually at least two metres above sea level, would have soon closed and remained closed. At least until water levels built sufficiently to force a breach of the spit. (E5:7)

The oral record shows that Te Whanganui-a-Orotu was 'a place of abundance' for freshwater fish, shellfish, and birds and much prized as a food resource by the people

who have been living on its shores and islands for over 1000 years (D4:30-37; E5:6, 23-26). Indeed, with the coming of Ngati Kahungunu, it was also known as Te Maara a Tawhao (the garden of Tawhao), Tawhao being the chief who imposed a tapu on it.<sup>4</sup>

### **1.2.2 In post-European times**

When European trade and shipping began, the Ahuriri opening provided an entrance channel to what Donald McLean, the Land Purchase Commissioner, was to describe as the safest and only harbour on the east coast between Wellington and Tauranga. Following the 1851 Crown purchase of the Ahuriri block, the establishment of the town and port of Napier, and the settlement of the hinterland, the Ahuriri channel was dredged and parts of the lagoon bed were gradually reclaimed. Even so, the inner harbour still 'provided a vast habitat for water birds finfish, and shellfish species' and operated as a valuable food store for the tangata whenua (I9(e):19).

### **1.2.3 After the earthquake**

In 1931, 2230 hectares of 'sprawling, smelly mudflat' that were thrust up by the earthquake that year were vested in the Napier Harbour Board. The water still flowing into the inner harbour via the bed of the Waiohinganga River was reduced to a trickle. In 1934-36, the Tutaekuri River was diverted from the inner harbour to a new mouth on the coast at Waitangi. In the last 30 years, some 1100 hectares have been drained and reclaimed for suburban housing, heavy industry, the Hawke's Bay Airport, and a Landcorp farm. Only the Ahuriri Estuary, consisting of about 275 hectares at high tide, remains. Napier's 'gift from the sea' destroyed a substantial amount of a taonga that the tangata whenua valued for its spiritual and cultural, as well as material, sustenance, particularly the kaimoana that it provided (1.2(d):4). But pollution destroyed the purity of the water and made the shellfish unsafe to eat. By the 1970s, the gathering of kaimoana from the Ahuriri Estuary had stopped.

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### 1.3 The claimants

This claim is brought by seven hapu of Te Whanganui-a-Orotu (1.2(d)):

- Ngati Parau;
- Ngati Hinepare;
- Ngati Tu;
- Ngati Mahu;
- Ngai Tawhao;
- Ngai Te Ruruku; and
- Ngati Matepu (I9:12).

These seven hapu lived on the shores of Te Whanganui-a-Orotu and belong to the iwi Ngati Kahungunu (1.2©:1). Through whakapapa, waiata, and whakatauki evidence, they established their ancestral rights to use, occupy, control, and enjoy Te Whanganui-a-Orotu.

A working group of the hapu concerned with the claim was established in March 1988 and is called Te Whangaroa ki Kahungunu Incorporated Society. The marae represented in the claim are Waiohiki (Ngati Parau); Moteo (Ngati Hinepare, Ngati Mahu); Wharerangi (mainly Ngati Hinepare); Petane (Ngati Matepu, Ngati Tu); and Tangoio (Ngati Tu, Ngai Te Ruruku, Ngati Kurumokihi, Ngai Tawhao) (D21:10).

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### 1.4 The claim

The claimants say that Te Whanganui-a-Orotu is their taonga, over which they have rangatiratanga, and which, but for statute law, rightfully belongs to them (1.2(d):1). By 'Te Whanganui-a-Orotu' they mean 'the lake and its boundaries in 1840'. Within those boundaries they particularise water (fresh or otherwise), bed, islands, fisheries, vegetation, animal life (such as birds), all organic and inorganic matter (such as soil, stones, peat, minerals, and the like), all deposited matter (such as the foregoing, shells, bone, fossils, timber, and the like), and everything left by tipuna (including their remains) and all that they handled and possessed (1.2(d):2-3).

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### **1.5 The development of the claim**

#### **1.5.1 The first submissions (1.2(a))**

In their first submissions to the Waitangi Tribunal on 16 March 1988, the claimants stated that they were or are likely to be prejudicially affected by legislation, and they asked the Tribunal to recommend that the title and rights to Te Whanganui-a-Orotu be restored to the hapu that they represented. They also asked the Tribunal to commission a researcher to report on the claim and to appoint a lawyer to assist them before any hearing. To research their claim they nominated Patrick Parsons, then a history teacher at Hastings Boys' High School, who lived at Poraiti and had a long association with Te Whanganui-a-Orotu. Mr Parsons was commissioned to report to the Tribunal, and Deborah Edmonds of Kensington Swan was appointed as counsel for the claimants.

#### **1.5.2 The first statement of claim (1.2(b))**

The first statement of claim, dated 17 May 1990, concerned the prejudicial effects of the Crown purchase of the Ahuriri block in 1851, the loss of reserves and rights to mahinga kai, and the Crown's assertion of ownership and control of Te Whanganui-a-Orotu. It sought an urgent recommendation from the Tribunal asking the Crown to take action to forestall the imminent sales of reclaimed land that it had vested in the Hawke's Bay Harbour Board until the claim could be heard.

#### **1.5.3 The first amended statement of claim (1.2(c))**

The first amended statement of claim, dated 15 April 1991, particularised what was sought from the Tribunal, namely, declarations concerning boundaries and recommendations as to compensation and other remedies. It also expressed a wish to reserve the right to argue at a later stage whether land within the parameters of both the claim and the Hawke's Bay Harbour Board Empowering Act 1989, which empowered the sale of land vested in the harbour board, was transferred from iwi control in breach of the Treaty.

#### **1.5.4 Incorporation in Wairoa-ki-Wairarapa claim (Wai 201)**

On 14 May 1991, following a Tribunal direction, the first amended statement of claim was condensed and incorporated into one comprehensive group claim for Wairoa-ki-Wairarapa (Wai 201), which was signed by Ms Edmonds for four named claimants on behalf of themselves and members of the Ngati Kahungunu tribe.

#### **1.5.5 Request for urgency**

Because of possible sales of land lying within the claim area (permitted by the Hawke's Bay Harbour Board Empowering Act 1989), urgency was requested and granted for the Te Whanganui-a-Orotu claim. Like the Mohaka River claim (Wai 119), it was severed from the wider claim, which related to tribal lands of Hawke's Bay and the Wairarapa. Although the Tribunal had a full programme ahead of it, it wished to deal with this matter expeditiously, and, on 29 March 1993, it directed that arrangements be made to hear the claimant case in the five days beginning 19 July 1993 (2.82).

#### **1.5.6 The second amended statement of claim (1.2(d))**

On 28 June 1993, counsel for the claimants advised Crown counsel of the issues that would be put to the Tribunal for its determination and, on 14 July 1993, filed the second amended statement of claim (see app I). Amendments to the second amended statement of claim, dated 14 July 1993, listed the names of the seven claimant hapu (see app I) and added a statement that any recommendation made by the Tribunal for the return of land would not be affected by the August 1993 amendment to the Treaty of Waitangi Act 1975.

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### 1.6 The findings and recommendations sought

The second amended statement of claim seeks findings and recommendations from the Tribunal to the effect that Te Whanganui-a-Orotu is the claimants' taonga, that they have never knowingly and willingly relinquished their tino rangatiratanga over it, that everything that has been done since the Crown asserted ownership over it and vested it in the Napier Harbour Board has been done without reference to or consultation with the claimants or their forebears, and that no compensation of any kind for the loss of any right in respect of it has ever been offered or paid to them.

Among the recommendations that the claimants seek from the Tribunal are the repeal or amendment of legislation vesting the title to Te Whanganui-a-Orotu in others, the return of all Crown lands and all other public lands in Te Whanganui-a-Orotu, and the payment of compensation for those parts of Te Whanganui-a-Orotu that have passed from the Crown into private ownership.

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### **1.7 The Waitangi Tribunal Hearings**

#### **1.7.1 The first hearing**

The first hearing of this claim was held from 19 to 23 July 1993 at Omahu Marae. The Tribunal heard opening legal submissions from claimant counsel, claimant evidence on their relationship with Te Whanganui-a-Orotu, and comments on the Maori text of the Ahuriri deed of purchase from Professor Hirini Mead. The claimants were represented by Charl Hirschfeld, assisted by Caren Wickliffe, and the Crown was represented by Brendan Brown, assisted by Ellen France. The Tribunal went on a field trip to see Te Whanganui-a-Orotu and its environs for themselves and heard further oral evidence on the places they visited from claimant spokespersons.

#### **1.7.2 The second hearing**

The second hearing was held in the Napier City Council chambers from 4 to 8 October 1993. The Tribunal received further claimant evidence on water issues from Professor James Ritchie, on the people's history from claimant researcher Patrick Parsons, and on the Ahuriri purchase from Dr Bryan Gilling, who had been commissioned to research it by the Crown Law Office in 1990. A substantial part of this hearing was devoted to Crown counsel's detailed cross-examination of Mr Parsons and Dr Gilling on the purchase and, in particular, on the deed map and other related maps that were exhibited. The Crown produced new historical matter through these witnesses.

#### **1.7.3 The third hearing**

The case for the claimants was completed at the third hearing from 6 to 9 December at the Great Wall Conference Centre in Napier. Gary Williams gave evidence based on 20 years' professional experience in the field of water and soil resources and on investigations of the Heretaunga Plains and the Hawke's Bay coast. David Young gave evidence on the environmental background and environmental impacts, having spent much of the previous 25 years writing on such matters. Legal historical evidence was presented by Richard Boast, senior lecturer in law at Victoria University of Wellington. Tony Walzl, a freelance historian, re-analysed the contemporary written evidence on the 1851 Ahuriri purchase presented at the previous hearing in the light of the recorded transcript of the evidence heard by the Native Affairs Committee on the 1875 petition.

An early evening visit was arranged for the Tribunal to view the Otatara Pa project, an impressive attempt by tangata whenua to restore this ancient pa and wahi tapu in a way that more appropriately reflects the mauri inherent in the area. The project was being administered by the Department of Conservation, in cooperation with the

Waiohiki Marae, which employed Kurupo III Te Pakitu Tareha, a direct descendant of Tareha Te Moananui, as the coordinator.

#### **1.7.4 The fourth hearing**

A fourth hearing was arranged at the Tribunal's offices in Wellington on 31 January 1994 to enable Ngati Pahauwera to present submissions on their interests in Te Whanganui-a-Orotu. After Wiki Hapeta had given evidence and Crown counsel had sought clarification of the status of the evidence, the hearing was adjourned to enable Ngati Pahauwera to discuss the matter with their counsel. In the event, they decided to discuss their interests with the Wai 55 claimants at a local weekend hui, and the hearing was aborted. Following the hui, a hui-a-iwi, and further discussions, Ngati Pahauwera resolved to support the Wai 55 claimants and to proceed with an overlapping claim (see ch 11; app I).

#### **1.7.5 The fifth hearing**

A substantial part of the fifth hearing, held at the Great Wall Conference Centre from 2 to 5 May 1994, was devoted to hearing Ngati Pahauwera's claim. Opening submissions were made by their counsel, Kathy Ertel. Six Ngati Pahauwera claimants gave evidence. Issues arising from their evidence were examined by a Wai 55 witness, Heitia Hiha, and responded to by claimant witness Toro Waaka.

Crown counsel continued to present new historical material in cross-examining Mr Walzl. Pamela Bain, conservancy archaeologist in the Department of Conservation (East Coast and Hawke's Bay conservancies), surveyed recorded archaeological information on Te Whanganui-a-Orotu. John Ombler, regional conservator for the Hawke's Bay conservancy, gave evidence on the lands administered by the Department of Conservation in the Te Whanganui-a-Orotu area, the conservation values of those lands, and the management regime for them.

The hearing concluded with the Crown's opening submissions, presented by its senior counsel, Mr Brown.

#### **1.7.6 The sixth hearing**

At the sixth hearing, held at the Great Wall Conference Centre from 18 to 21 July, Mr Ombler was further questioned and further evidence in reply was presented from Ngati Pahauwera. Submissions were made by Max Courtney, counsel for the Port of Napier Ltd, the only interested party that wished to be heard.

Closing submissions were then heard from counsel for the claimants, counsel for Ngati Pahauwera, and Crown counsel.