Te Whanganui-a-Orotu Report 1995

4 The Deed, Translation, and Plan

4.1 The originals

4.1.1 A primary source of evidence

The Ahuriri deed, its English translation, and the deed plan are currently held at the head office of the Department of Survey and Land Information (DOSLI) in Heaphy House, Wellington. They are registered in the Hawke's Bay deed book as HB37.

It was unfortunate that the importance of closely examining this primary source of documentary evidence on whether or not Te Whanganui-a-Orotu was included in the purchase was not sufficiently appreciated when the research on this claim was commissioned, and that the original deed and map were not central to claimant research.

Only one of the witnesses called to give evidence for the claimants, Dr Gilling, had inspected the originals at DOSLI in Wellington. Mr Parsons worked from published copies of the deed and a black and white photocopy of the plan held by DOSLI in Napier (E27(b):12), while Mr Boast worked from document A3(b), which included a much reduced 1936 copy of the plan (D1:23). Dr Gilling questioned whether the plan was the original as it was not attached to the deed (E1(b):26; E27(a):28-30).

In a further assessment of the plan after Mr Brown had cross-examined Mr Parsons and Dr Gilling, Mr Walzl stated that he was not fully satisfied that the plan was in fact the purchase plan.

Crown researchers, who did closely investigate the original documents at DOSLI in Wellington were not called by the Crown to give evidence. Instead, the Crown relied on 'The Supporting Papers to the Evidence of Stephanie McHugh re: Te Whanganui-a-Orotu' (A21(a)-(f)) and other new material presented through claimant witnesses under cross-examination. The supporting papers were issued by the Crown Law Office to claimants and the Tribunal on 21 October 1991 to facilitate claims research, but, by this time, the Tribunal's and the claimants' research had been largely completed. Mr Brown exhibited full size, colour photographs of the original deed, translation, and plan as supporting documents in the course of these cross-examinations.

From our point of view, the lengthy, detailed cross-examination of the four claimant witnesses on these documents and what was included in the purchase departed from the Tribunal's customary inquisitorial method of investigation. It did, however, serve to show that some of the evidence on the deed and plan given for the claimants was, as Mr Brown submitted in opening, `flawed with errors' (H15:13).

Members of the Tribunal and Crown and claimant counsel visited DOSLI on 1 July 1994 to view these documents and to compare them with the deeds, plans, and

translations for the Waipukurau and Mohaka blocks, which are also currently held by DOSLI (I5). All three sets of documents were obviously executed about the same time by the same people in the Ahuriri Survey Office and are remarkably similar in size and appearance. None of the plans, however, are attached to the deeds.

4.1.2 The separation of the plan from the deed

Because the plans are not attached to the deeds, before our visit to DOSLI, counsel and several witnesses for the claimants had questioned whether the plan for Ahuriri is in fact the deed plan (D9:34; E27(a):28-30; I4:131-133). The department, however, has never doubted that it is the plan that was attached to the deed and exhibited by McLean to the assembled chiefs and people on 17 November 1851 and dispatched to the Colonial Secretary of New Munster on 19 November 1851. In a report, `Maori Claims to Te Whanganui-a-Orotu - Old Napier Inner Harbour', on 28 June 1984, J W Campin, the Commissioner of Crown Lands in Napier, observed that `there was a plan attached to the Deed which had red edging showing the boundaries of the purchase' and that `The original Deed, the plan and the translation of it are lodged in the Head Office of the Lands and Survey Department' (A21(e):724).

The circumstances that led to the separation of the deed and the plan were explained by Frank O'Leary and Derek Long of DOSLI. After the Department of Lands and Survey split up and the documents first came under DOSLI's control, they were kept together, folded in one envelope. Late in 1988 or early in 1989, when DOSLI began a conservation project, they were taken out of the envelope, flattened, microfilmed, and, because of their unusually large size, stored in a plan draw, not an A3-size box in which the majority of deeds are stored.

At some stage, the plan, which had been attached to the deed with green ribbon sealed on the back, was separated from the deed. Mr O'Leary could not recall whether this was before or after he removed them from the envelope. They could have been separated on another occasion for copying, or the ribbon could have frayed, perished, or broken away (I5:7). Apparently they were attached when John Salmond viewed them in 1916 (D1:24) (see para 10.6.3). Possibly they were separated when a true copy of the plan was made in 1936 (see A3(b)).

On the top left-hand corner of the Ahuriri deed plan is a piece of green ribbon threaded through ribbon slits. This has been cut on the front but is still sealed to the back of the plan. Matching ribbon slits on the deed indicate that the deed plan was once attached to it. Extra ribbon slits on the deed were probably made by mistake, although they could conceivably indicate that at some time another plan was attached to the deed (I8(b):35). Matching ribbon slits on the Waipukurau deed and plan suggest that attaching plans to deeds with ribbon was standard practice. Matching looped pinholes on the Ahuriri deed, plan, and translation suggest that the translation was once pinned to the deed and the attached plan.

Tiny pinholes all the way around most of the boundary features on all three deed plans indicate that they were traced from field sketch plans (I5:15-16, 31).

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4.2 The copies

In his report to the Colonial Secretary on 29 December 1851, after his return to Wellington, McLean says that copies of the original Ahuriri deed and the attached plan were being prepared to forward to Te Hapuku and the other principal chiefs (A5(a):316). No such copies have been located.

The Ahuriri deed (certified as a true copy by Elwin B Dickson, a clerk in the Native Office, and Henry Monro, an interpreter) and the translation (certified as a true translation for the chief commissioner by W B Baker, an interpreter with the Native Land Purchase Department from 1861 to 1865) were certified true copies by H Hanson Turton on 17 February 1876 and published in his *Maori Deeds of Land Purchase in the North Island of New Zealand* (A2).1 The deed plan, however, was not published in the plans volume (A21©:724). Turton did not initial the Ahuriri deed, plan, and translation, although he did initial the Waipukurau plan '25/6/77' and the Mohaka deed and translation '19/2/76'.

At the direction of the Maori Land Court, a new translation was made for Judge Harvey by J H Grace and Hari Wi Katene, both licensed interpreters, because, as the judge saw it:

> the deed is in a foreign language - ie, the Maori language . . . No translation . . . appears to have been part of the deed when it was signed in 1851. An incorrect and very untrustworthy translation became attached to the deed at some time, and this translation [was] reproduced with the deed in Maori in Turton's *Book of Deeds*. (A5(m):15)

The Grace and Katene translation was published in Judge Harvey's 1948 report on a petition concerning Te Whanganui-a-Orotu (A5(m)).

Another translation, dated 21 July 1993, was submitted to the Tribunal by a witness for the claimants, Hirini Moko Mead of Ngati Awa, previously professor of Maori at Victoria University of Wellington and now involved in Te Whare Wananga o Awanuiarangi at Whakatane (D22:16-18). This was a revision of his first translation, which was included in the opening submissions of counsel for the claimants (D9:31-33). In these submissions, Mr Hirschfeld explained that the claimants sought to rely on this second translation, which, they said, reflected a better understanding of Maori words than the standard English version (D9:31).

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4.3 The Deed

4.3.1 Introduction

Figure 9: Plan showing boundaries of the land described in the Ahuriri deed of 1851. Based on E24 and E25.

For the purposes of this claim, we are particularly concerned whether or not the original deed and translations included Te Whanganui-a-Orotu in the purchase. In considering this issue, we will look, firstly, at the description of the boundaries of the land (nga rohe o te whenua) (see fig 9), secondly, at the clause lamenting and farewelling ancestral lands, thirdly, at the reservation of the island of Roro o Kuri, and, fourthly, at the reservation of a fishing right and a canoe landing place.

4.3.2 The boundaries in the original deed

In the original deed, nga rohe o te whenua are described as follows:

> Nga rohe i wakaaetia e matou kia hokona i te timatanga o a matou hui huinga korero ki a te Makarini koia enei. Ka timata i te huinga e puta ai nga wai o Tutaekuri raua ko Puremu ki te moana ka haere i te wai o Puremu te rohe puta noa ki Tamihinu ka tae ki reira ka haere i roto i Tutaekuri puta noa ki Ahakau ka tae ki reira ka mahue a Tutaekuri ka haere i te ruritanga puta noa ki te pou o Tareha ki te Umukiwi ka haere tonu i te ruritanga o matou tahi ko Paka te kai ruri ki Kohurau ka tae ki reira ka haere tika tonu ki te huianga o Waiharakeke ki Ngaruroro ka tae ki reira ka waiho tonu te rohe kei runga i te tihi o te Kaweka puta noa ki te huinga O Mangatutu ki Mohaka kia haere tonu te rohe i roto o Mohaka puta noa ki Mangowhata ka haere i roto i te wai o Mangowhata tae noa ki te ara haerenga mai o Taupo ka haere tonu mai i runga i taua ara ki Titiokura ka waiho tonu i runga i taua ara tae noa mai ki Kaiwaka ka haare i roto i te wai o Kaiwaka puta noa ki Opotamanui tae noa ki te Wai-o-hinganga ka haere tonu te rohe i roto i te Waiohinganga puta noa ki te Whanganui o Roto haere tonu ki te wahi e wakatapua mo matou ki te Niho puta atu ki te Rereotawaki (ka mutu te wahi ki a matou) ka haere tonu te rohe ki te Puka puta noa ki te wai o Puremu. A ekore ano hoki matou e tuku i etahi tanga ta Maori kia wakararu i nga pakeha ana noho kei roto i enei roho.
>
> No etahi huihuinga korero o matou tahi ko te Maikarini raua ko Paka ki te Awapuni ka wakaaetia e matou kia tukua katoatia te tahuna kohatu i Ruahoru puta noa atu ki Ahuriri i wakaaetia ano hoki e matou i taaua huihuinga kia tukua katoatia a Mataruahou ko Pukimokimoki

> anake te wahi o Mataruahou i puritia mo matou me te wahi iti i tanumia ai nga tamariki me te whanau o Tareha ki nga wa e takoto kau ai taua wahi i nga mahinga o nga pakeha.
>
> Kua oti i a matou i o matou huihuinga korero te mihi te tangi te poroporoake te tino wakaae tapu kia tukua rawatia enei whenua o a matou tipuna tuku iho ki a matou me nga moana me nga awa me nga wai me nga rakau me nga aha noa iho o aua whenua ki a Wikitoria te Kuini o Ingarini ake tonu atu. (A2; E25; E26)

4.3.3 The boundaries in the translation

McLean's English translation is as follows:

> The boundaries of the land as agreed upon by ourselves at our first meetings for negotiation with Mr McLean are these: Commencing at the place where the Tutaekuri and Puremu Rivers discharge themselves into the sea, the boundary runs in the Puremu to Tamihinu on reaching which place it runs in the Tutaekuri to Ohakau when it leaves the Tutaekuri and proceeds along the survey line to Tareha's Post at Umukiwi and along the survey line of Mr Park the surveyor and ourselves to Kohurau on reaching which place it proceeds to the confluence of the Waiharakeke and Ngaruroro rivers thence the boundary runs along the ridge of Te Kaweka to the confluence of Mangatutu and Mohaka Rivers and on in the course of the Mohaka to Mangawhata and on in the Mangawhata Stream to the Taupo road and along the said road to Titiokura and along the said road to Kaiwhaka and in the course of the Kaiwhaka to Opotamanui then to Waiohinganga to Whanganui-o-rotu thence to our reserve at Te Niho thence to Rere-o-tawaki where our reserve ends, the boundary continues thence to Te Puka and on to the Puremu River. And we will not permit any Native to molest the Europeans within these boundaries.
>
> At former meetings for negotiation between ourselves and Messrs McLean and Park at Te Awapuni we agreed to entirely give up all the stony spit from Ruahoru to Ahuriri, we also agreed entirely to give up Mataruahou, Pukimokimoki being the only portion of Mataruahou reserved for ourselves, together with a small piece of land where the children and the family of Tareha are buried during such time as it remains unoccupied by the Europeans.
>
> Now we have in our assemblies sighed over wept over and bidden farewell to and solemnly consented entirely to give up these lands descended to us from our ancestors with their sea rivers waters timber and all appertaining to the said land to Victoria the Queen of England forever.

4.3.4 The boundaries in the new translations

The description of the boundaries of the land in the so-called `Baker translation' in Turton (A2:491) is the same as in the original. The Grace and Katene translation does not produce any real difference, notwithstanding Judge Harvey's reasons for procuring it.

The passage that particularly concerned Judge Harvey related to the boundary line between the point where the Waiohinganga (Esk) River discharged into Te Whanganui-a-Orotu and Te Niho. In the original deed it is described as follows:

> tae noa ki te Wai-o-Hinganga ka haere tonu te rohe i roto i te Wai-o-Hinganga puta noa ki te Whanganui-o-Rotu haere tonu ki te waihi e wakatapua mo matou ki te Niho . . . (A5(m):15)

The original translation published in Turton, as cited in Judge Harvey's report, is:

> (To Opotamanui) thence to Waiohinganga to Whanganui-o-Rotu thence to our reserve at Te Niho . . . (A5(m):16)

Grace and Katene re-translated this as follows:

> (The boundary goes to Opotamanui) thence to Wai-o-Hinganga river where it continues down the Wai-o-Hinganga river until it reaches the Whanganui-o-Rotu thence to the place reserved for us at Te Niho. (A5(m):16)

In his report, Judge Harvey included `a more literal translation':

> The boundary proceeds within the waters of the Esk river until it emerges upon the Whanganui-o-Rotu continuing on (from there) to . . . Te Niho. (A5(m):16)

Professor Mead's more recent translation of this passage differs little in meaning from the Grace and Katene translation or from Judge Harvey's:

> the boundary continues along the river course of Te Wai-o-Hinganga and reaches Whanganui o Rotu it continues and comes to Te Niho, a place reserved for us and comes out at Rereotawaki which completes our reserve. (D22:17)

4.3.5 Judge Harvey's suggestion

The differences in the translations of the boundary description from the Waiohinganga River to Te Whanganui-a-Orotu to Niho did not appear to Mr Campin `to produce any real difference about the boundary or about the inclusion or otherwise of the harbour [ie, Te Whanganui-a-Orotu]' in the Ahuriri purchase (A21©:731).

Judge Harvey, however, suggested that, since the boundaries of the land clearly did not include the harbour, and the island of Roro o Kuri was reserved in a later clause for the sellers, this particular section of the boundary must have run in a direct line from the mouth of the Waiohinganga River to Te Niho. In this case, a small portion of

Te Whanganui-a-Orotu as well as Roro o Kuri would have been included in the purchase of the inland block negotiated on 20 December 1850.

In the wake of the 1932 petitioners who gave evidence before Judge Harvey, the present claimants reject this suggestion. Rather, they contend that, from the point where the boundary reaches or merges into Te Whanganui-a-Orotu to Te Niho, it veers west and continues round the inner shoreline (D9:43). They further contend that there are other reasons for the reservation of Roro o Kuri (see para 4.5). Given McLean's strong preference for making use of natural features such as rivers and shorelines for boundaries in the early days of Crown land purchasing, if only to avoid the delays and costs of field surveys, this seems a reasonable commonsense point of view. Moreover, it was readily understood by Maori, who would have pointed out natural features as `oral boundary pegs' to McLean and the surveyors.

In any event, Judge Harvey's suggestion does not warrant further consideration in this report because it is not a point at issue in the claim.

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4.4 Lament and farewell to ancestral lands

4.4.1 In the deed

The final passage in the section of the deed describing the boundaries of the lands is the lament and farewell to ancestral lands, the so-called `tangi clause' or `all appertaining clause'.

In the original deed it is as follows:

> Kua oti i a matou i o matou huihuinga korero te mihi te tangi te poroporoake te tino wakaae tapu kia tukua rawatia enei whenua o a matou tipuna tuku iho ki a matou me nga moana me nga awa me nga wai me nga rakau me nga aho noa iho o aua whenua ki a Wikitoria te Kuini o Ingarini ake tonu atu. (A2:488)

This was translated as follows:

> Now we have in our assemblies signed over wept over and bidden farewell to and solemnly consented entirely to give up these lands descended to us from our ancestors with their sea rivers waters timber and all appertaining to the said land to Victoria the Queen of England forever. (A2:491)

4.4.2 The Mead translation

Professor Mead translated the passage as follows:

> At our meetings we have completed our greetings, our weeping and our farewells and (offered) our solemn agreement to gift these lands for ever (to really let go of these lands) that were handed down to us as ancestral treasures and these include the seas or lakes, and the rivers and the waters and the trees and whatever other benefits come from those lands, to VICTORIA, THE QUEEN OF ENGLAND for all time. (D22:17)

Professor Mead considered that the passage identified and listed taonga tuku iho (treasures handed down). The use of the plural was evidence that the list was meant only as an explanation of the notion of tuku iho (handed down from ancestors) or taonga tuku iho. The text did not in any way refer to a particular lake or sea or, in this case, Te Whanganui-a-Orotu. The list was an aside, a deviation from the main substance of the deed (D22:12).

The passage included:

> many emotive notions such as mihi (greetings) tangi (mourning) poroporoaki (farewell) o matou tipuna (our ancestors) tuku iho ki a matou (handed down to us) and tapu (sacred) and includes a list of symbols which are usually associated with the identity of the tribe. (D22:12)

The wording indicated that:

> the Crown took advantage of the situation and forced Ngati Kahungunu to surrender not only their land but also some of their rights in respect of Article Two of the Treaty of Waitangi . . . The words did not say they were gifting or `allowing to go' the whole of the lake . . . this important food basket of the people . . . why should they give it away? (D22:13)

Professor Mead also pointed out that:

> In Maori there is no distinction between a lake and a salt water bay. Both are large bodies of water called `moana'.
>
> . . . . .
>
> The two words `nga moana' (the lakes or oceans) might have been used by devious agents of the Crown to include the sale of Te Whanganui-a-Orotu in the Deed. But as the words mean lakes (or seas) in the plural how is one to know which lakes are intended. (D22:13-14; see D44(18):3)

In response to a question from Mr Hirschfeld, Mr Parsons confirmed that there are two inland freshwater lakes within the external boundary of the Ahuriri purchase to which the words `nga moana' could refer.

4.4.3 Dr Gilling's evidence

Dr Gilling noted that the inclusion of `seas' in addition to `rivers' (me nga awa) and `water' (me nga wai) in the all appertaining clause was, among the three 1851 Hawke's Bay deeds, unique to the Ahuriri deed. He further noted that Judge Harvey's translation retained the word `seas', and that if this word had real significance it was difficult to see to what apart from the lagoon it might have referred. Judge Harvey therefore dismissed this as being purely a stock phrase of no real import (E1(b):22-23; cf A5(m):33).

4.4.4 Crown submissions

Mr Brown noted the 1920 Native Land Claims Commission's conclusion (A5(l)) that when the Crown `included, according to the Deed, "the sea [moana], and the rivers, and the waters and the trees, and everything else appertaining to the said land", they intended to give over the use of the harbour' (I15(a):6-7). The problem he had with

both the Harvey and the Mead analyses was that they did not have regard to the deed as a whole (I15(a):8) or to the use of the word `moana' in the deed and its correlation with Te Whanganui-a-Orotu. He drew attention to five such correlations:

- (a) The use of `moana' at the commencement point of the boundaries of the land where the Tutaekuri and Puremu Rivers discharged.
- (b) The use of `Te Whanganui-a-Orotu' as a boundary point where the Waiohinganga River discharged.
- (c) The use of `me nga moana' in the all appertaining clause.
- (d) The use of `moana o Te Whanganui-a-Orotu', in which the island of Roro o Kuri was located.
- (e) The use of `moana' in the purchase productions of the sea to which the fishing right pertained (I15(b):5).

Given this usage, the Crown submitted there could be no doubt that the word `moana' was used in the deed in association with Te Whanganui-a-Orotu (I15(a):10). In other words, Te Whanganui-a-Orotu was being lamented and farewelled.

4.4.5 Claimant submissions

The claimants, however, considered that the sellers were only lamenting and farewelling all that was included within the boundaries of the land. In opening, Mr Hirschfeld submitted that the Maori vendors were farewelling the `appurtenances surrendered under the sale . . . the seas, rivers, waters, timber and all appertaining to the said lands' (D9:38).

In closing, Ms Wickliffe insisted that `The list was not in any way referring to a particular lake or sea, in this case Te Whanganui-a-Orotu' (I9:92).

4.4.6 In the Mohaka deed

In our *Mohaka River Report*, we discussed the significance of a similar passage in the Mohaka deed, noting that it was modelled on earlier McLean deeds (eg, the Waipukurau deed) and that it was to become a standard clause in later deeds for Crown purchases. We described it as `an attempt by McLean to create an absolute transfer of title to land that would be explicable in Maori cultural terms using metaphors of the tangi'.2

4.4.7 In old land deeds

After our report was written, the Tribunal commissioned Lyndsay Head to do a study of references to river boundaries in the McLean collection in the Alexander Turnbull Library. In her report, she says that:

> Early land deeds more often than not describe the resources on the land in question. It is often the case that Maori versions of deeds have different emphases from the English, apparently to highlight matters important to Maori.3

The majority of pre-Treaty deeds, she continued:

purport to buy the landscape, with everything in it, in an area defined by boundaries. Resources are variously defined. . . . The English translations for these `landscape clauses' are often fuller than the Maori . . . A printed form deed extensively used in the 1850s was more elaborate . . . A comparison with deeds in England would show whether landscape clauses were imported from English conveyancing practice, or represent a local development.4

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4.5 The reservation of Roro o Kuri

In the final section of the deed on native reserves, the island named Te Roro o Kuri in `the Whanganui-a-Orotu lake' is reserved for the sellers. On the deed plan, it is shown as a wahi tapu. The Crown submitted that it was reserved because Te Whanganui-a-Orotu was included in the purchase. The claimants submitted that there were other reasons. Of some 70 acres in extent, the octopus-shaped island had ancient pa sites on almost every tentacle (E27(b):141). Two of these pa, Otiere and Otaia, had a long history in tribal warfare before the exodus to Mahia. Because blood was spilt on them, they were not reoccupied after the return from Mahia (D1:11-14). The ancestress Taotahi (the wife of Te Kereru) was slain at Otiere, and Tahara Pura (the father of Wiramina Ngakura) was buried there. The promontory Okahungunu commemorated the ancestor Kahungunu (A12:132).

In addition to the spiritual and cultural significance that it had for the sellers, Roro o Kuri was greatly valued as an island base for netting fish, mainly patiki (flounder), and for gathering pipi and other shellfish. Indeed, it was still being used for this purpose in the 1920s.

We think that Roro o Kuri was reserved because land, not water, was being sold and the sellers wished to ensure that it was not sold along with the land.

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4.6 The fishing right and canoe landing places

4.6.1 In the original deed

The final clause in the deed agreeing to a fishing right and to canoe landing places reads as follows:

> Ko nga mahinga ika pipi kuku me etahi atu kai o te moana e wakaaetia nei kia mahiatahitia e matou tahi ko nga pakeha aua kai. Ko a matou waka Maori e tukua ana hoki kia ki uta ki nga wahi o te taone e wakaaetia e te Kawana o Nui Tireni hei uranga waka mo matou. (A2:488)

4.6.2 The English translation

McLean translated the final clause as follows:

> It is agreed that we shall have an equal right with the Europeans to the fish cockles muscles [sic] and other productions of the sea and that our canoes shall be permitted to land at such portions of the town as shall be set apart by the Governor of New Zealand as a landing place for our canoes. (A2:491)

4.6.3 The Mead translation

The Mead translation of the fishing right and canoe landing places clause differs materially from that in Turton and in Judge Harvey's report:

> It is agreed that we and the Pakeha working as one shall have access to pipi, kuku (mussels) and other foods of the sea and that our canoes are allowed to land at places at the town that the Governor of New Zealand agrees shall be set aside as landing places for our canoes. (D22:18)

4.6.4 The claimants' submissions

In his opening submissions, Mr Hirschfeld put it this way:

- The Maori vendors agreed to grant the right to (not that they would have an equal right with) the Europeans to the fish, cockles, mussels and other productions of the sea.
- The Maori vendors had the right that their waka were to be permitted to land at portions of the town.
- The governor was to set apart landing places for the vendors' waka. (D9:39)

The opinions of claimant witnesses on the reservation of fishing rights and canoe landing places differed. Mr Parsons questioned whether it was fair dealing. It appeared to him that the Treaty of Waitangi already guaranteed the Maori people the right of access for canoes and the right to share kaimoana equally with Europeans. Yet McLean represented it `as a sort of special concession or favour' (E27(b):42).

Dr Gilling considered that the English text of the clause, taken at its face value, stated that:

> the Maori signatories did not consider themselves to retain exclusive rights over any rivers and waterways within the purchase area. Such rights as they retained were shared equally with the Europeans, as the right of access to kai moana. (E1(b):22-23; E27(a):47-48, 54-56)

Mr Boast considered that Maori were simply worried about their fishing rights in, and their access to, the lagoon because they were alienating land around the perimeter. They wanted protection and McLean agreed (H3(a):11-12).

Mr Walzl argued that as a result of McLean's purchase of Mataruahou and part of the spit Maori got the idea that their access to fishing places was being lost and they realised that their original attempt to exclude Te Whanganui-a-Orotu was being undermined. He believed that they requested Te Whanganui-a-Orotu, not a fishing right, but that it was interpreted by McLean as a fishing right (I4:82).

Heitia Hiha said in his evidence:

> The canoe reserve at Boyd's Town was part of the Ruahoro [Te Taha] sale. This was where the traders were. Our people supplied them with produce from the fertile valley on the opposite side of Te Whanga.

He recalled that his matua whangai (foster parent) Te Mete, who was born in 1877 and died in his home in 1964, had chuckled when he spoke about this; `he said it was a ploy and added protection from other tribes who may have wanted to take the lagoon for themselves' (D21:7).

To claimant counsel, this was confirmation that `all the canoe reserves signified to Maori was a competitive advantage and access to traders on the banks of the Spit'. It did not reflect `a concern to ensure continuing access to the lagoon for fishing. This was not necessary because it was never sold' (I9:97).

4.6.5 The Crown's submissions

Mr Brown dismissed the Mead translation of the fishing right and canoe landing places clause as `quite untenable evidence' and `a contemporary attempt to place on the wording of the Deed an interpretation which it might be thought accords better with the objective of the claimant in this claim' (I15(a):12). It did not support the proposition that the claimants sought to extract from it, presumably that the vendors agreed to grant the rights to fish to Europeans. Furthermore, it was `entirely at odds' with the Maori evidence of 1875 and McLean's 29 December 1851 evidence (I15(a):12).

The fishing reservation clause was:

> significant in an assessment of the intended effect of the transaction documented the Deed. If the harbour had remained quite unaffected by the transaction, there would have been no need to include such provision.

As the 1920 Native Land Claims Commission observed (A5(l):14):

> *It is only to the harbour that the reservation of fishing rights and landing places could apply.* [Emphasis in original.] (I15(a):13)

We agree. There is every need to reserve your fishing and access rights if you are parting with the land from which you exercise control over them.

4.6.6 One canoe reserve

In the event, McLean set aside only one canoe landing place - the canoe reserve on the Westshore spit (A12:161). Yet Karaitiana Takamoana said in his 1875 evidence:

> It was perfectly clear at the time about Wharerangi and Pakake, which was the place for the canoes. The people did not understand about the landing place where Sir D McLean proposed inland. They wanted the islands. (F9: app II, p 896)

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4.7 The Deed Plan

4.7.1 The external boundary

Figure 10: The Ahuriri deed plan

The external boundary of the Ahuriri purchase is delineated on the deed plan by a light-red wash line or edging. A similar but double line in light and dark red wash on the deed plans for the Waipukurau and Mohaka blocks indicates that this was the usual way of delineating the external boundaries of Crown purchases in Park and Pelichet's day.

Included or embraced within the red line on the Ahuriri plan are the inland block, Mataruahou and Te Taha, most of Te Whanganui-a-Orotu, and the mouths of the Tutaekuri and Puremu Rivers. In fact, the area between the river mouths and Mataruahou was not included in the purchase, and the red line should have been omitted between those points. The red line also included a strip of land north of Ruahoro, which in 1866 was put through the Native Land Court and Crown granted to 10 `owners' (see para 5.5.3). This land was also excluded from the purchase. We can only conclude that the extension of the red line as described above reflected McLean's and Park's understanding that the harbour belonged to the Queen under English common law. Its continuity, which implied that all within it was included in the Ahuriri purchase, was a mistake.

The deed plan also incorporates the final arrangements that were made on 13 and 14 November 1851 in respect of reserves and boundaries. It shows three wahi tapu (the term used in early purchase deeds for areas not being purchased or to be returned to Maori) (A21©:729), namely, Puketitiri (500 acres), Te Roro o Kuri, and the Wharerangi block (1845 acres). It does not show Te Pakake or Pukemokimoki as wahi tapu reserves.

A close inspection of the red line delineating the southern boundary of the purchase, however, reveals that a section of it has been erased and redrawn to exclude Pukemokimoki (E27(a):29(WT), 39, 45). Originally the red line ran in an easterly direction along the southern end of the inland block and the lagoon to the coast, encompassing all of Mataruahou, including Pukemokimoki and a triangular-shaped wedge of mudflat on the south-eastern shoreline. The altered section runs in a north-easterly direction along this shoreline to the coast, cutting Pukemokimoki and a wedge of mudflat out of the sale. The alteration must have been made after 13 November 1851, when McLean went with Park and Tareha to fix the boundaries of Mataruahou (A12:39).

4.7.2 Maori place names

A number of Maori place names are shown running along the external boundary (the red line) of the purchase, which was the Maori way of establishing general boundaries.5 Such place names would have been recited, pointed out, and walked round by the sellers in the course of the negotiations with McLean and Park over the boundaries (I8(b):24). Many of these place names are still well known to the claimants (indeed, we heard stories about them on our site visit), while others have been forgotten.6 Maori place names are similarly shown on the Waipukurau and Mohaka deed plans. Place names were, in effect, Maori's boundary pegs.

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4.8 Was the red line on the plan before the deed was signed?

4.8.1 A point at issue

A point at issue between the Crown and the claimants before the visit to DOSLI was whether or not the red line was on the plan attached to the deed exhibited by McLean to the assembled chiefs and people on 17 November 1851 before they fully assented to all the conditions of sale and the names of the boundaries and commenced to sign their names.

4.8.2 The claimants' submissions

In the second amended statement of claim, the claimants sought a finding that the map attached to the deed was not shaded red at the time that the deed was signed (1.2(d):5; see also D9:17 issue 9).

In opening, Mr Hirschfeld submitted that the red shading was `of significance since its purpose is fundamental to the issue of boundaries' (D9:35). He cited Mr Boast's opinion that:

> although the text of the deed gives no ground for assessing that Te Whanga is within the area purchased, the plan does arguably include it, . . . Should there be any conflict between the text of an instrument of sale and any plan which forms part of the constraint . . . the usual practice is to place primary weight on the text of the argument. (D9:35)

He also cited Judge Harvey's observation that:

> It will be noticed that the red edging includes Te Whanga . . . There is no mention in the deed of colours or of colour having any significance, and it is therefore possible that the plan annexed to the deed was not in any way coloured when the deed was signed. (D9:35)

4.8.3 The Crown's submissions

In opening, Mr Brown agreed that the red shading was of significance in the boundary issue but submitted that at the end of the day there was simply no evidence that the red shading was not on the plan on the date that the deed was executed. Indeed, all the evidence pointed to it being on the plan as originally drawn (H15:9). In his cross-examination of claimant witnesses, he presented new material through them to support this submission. This included a record of Park's request on 22 February 1851 for three cakes of the colour `lake', and the dispatch of this and other supplies from Wellington about a fortnight later - `very clear evidence that at the material time the

surveyors at Ahuriri had a significant amount of drawing equipment including a cake of red dye' (I15(a): app 3, p 62).

Under cross-examination, Mr Boast and Mr Walzl acknowledged that the use of red colouring on deeds and plans was standard practice at that time and that the surveyors at Ahuriri had the drawing equipment required to delineate the external boundary of the purchase by a red line on the plan (H3:7; I15(a):19-20).

In closing, Mr Brown submitted that this evidence, together with the erasure and redrawing of the red line excluding Pukemokimoki from the transaction, pointed to a conclusion that the red line was placed on the plan at the time that the map was first drawn and was actually the subject of an alteration between the agreement to exclude Pukemokimoki on 13 November and the deed signing on 17 November 1851 (I15(a):20-21).

He noted that there was no indication that Judge Harvey was aware of this alteration. If he had been, it would not have been possible for him to suggest that the plan attached to the deed was not coloured when the deed was signed (I15(a):21).

Mr Brown also noted that the Crown did not accept either the correctness or the appropriateness of Mr Boast's proposition that, should there be any conflict between the text of the deed and the plan, primary weight should be placed on the text (I15(a):1-2).

4.8.4 The claimants' closing submissions

In closing, Mr Hirschfeld submitted that the Crown's conclusion was based on the assumption that, before they signed the deed, Maori saw the red line on the plan and therefore understood that Te Whanganui-a-Orotu had been included in the purchase. This type of reasoning led to an incorrect conclusion, which was contrary to the Maori viewpoint, as expressed by Maori themselves (I8(b):26). `Any markings that may exist on the map,' he further submitted, `are nullified by other processes that occurred during the purchase negotiations . . .' (I8(b):26). The wording of the deed does not include Te Whanganui-a-Orotu. Any differing interpretations creating an ambiguity that would purport to include Te Whanganui-a-Orotu as part of the sale should be resolved in favour of the claimants (I8(b):24).

4.8.5 Conclusion

For the reasons expressed by Mr Brown, it is, we think, probable that the red line was on the plan at the time that the deed was signed. In the final analysis, however, there is no firm evidence that before they signed the deed the sellers ever saw, let alone understood, the red line on the plan that McLean exhibited. Nor is it critical whether they did or did not. The description of the boundaries of the land in the deed, which McLean read aloud three times, would have been what the sellers understood before they signed. This would have confirmed their belief that Te Whanganui-a-Orotu was excluded from the sale. It must be remembered that Maori identified boundaries (rohe) by place names and by natural features of the landscape. Furthermore, few, if any, would have seen a deed plan before. Since theirs was an oral culture, far more

emphasis would have been placed on what was spoken aloud than what was written on paper.

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4.9 Two different viewpoints

4.9.1 Introduction

In the course of the hearings, we were taken through various facets of the Ahuriri purchase four times by claimant witnesses and eight times by counsel in submissions and cross-examinations. Certainly there were many different stories and viewpoints. For the purposes of this report, these can be boiled down to a Crown viewpoint and a Maori viewpoint (cf I8:1).

The Crown viewpoint was based on the deed and plan and other documentary evidence contemporaneous to the record of events. The Maori viewpoint was based on iwi and hapu history, structured by whakapapa and mana and transmitted orally, as well as on the written record, in particular, the deed of sale. We believe that the differences in viewpoint stem from different cultural imperatives and understandings at the time of the purchase and subsequently. The Treaty of Waitangi, we think, specifically accommodated Maori cultural imperatives but it appears that these were not the order of the day when McLean negotiated this sale.

4.9.2 The Crown's viewpoint

In opening and closing, Mr Brown submitted that a conclusion as to the scope of the purchase reached by focusing on only one part of the deed and an analysis of the area encompassed in the transaction by a line drawn through identified locations was flawed (H15:13; I15(a):5). In particular, it conveniently ignored the following words, which precede that list of identified locations.

Turton:

> The boundaries of the land as agreed upon by ourselves at our first meetings for negotiation with Mr McLean are these.

Judge Harvey:

> The boundaries of the land that we agree to sell at our first meetings with Mr McLean are these.

Mead:

> The boundaries that were agreed at the beginning of our negotiations with McLean to sell are the following. (I15(a):5)

It was apparent to Mr Brown that the deed had `a chronological structure which reflected the way the purchase developed during a series of discussions over a significant period of time'. The chronology comprised:

> the initial purchase discussed in December 1850, the further meetings at Te Awapuni in connection with the spit, the inclusion of Mataruahou and finally the exclusion out of the sale transaction of Pukemokimoki.

There followed `the statement of the nature of that which is sold', which embraced Te Whanganui-a-Orotu in the expression `nga moana' (their seas) (I15(a):5-6).

The reservation of Roro o Kuri, the fishing right, and the canoe landing places was a further indication that Te Whanganui-a-Orotu was included in the sale. The Maori sought to preserve both their entitlement to fish in Te Whanganui-a-Orotu and, as McLean said, valuable land on both sides of the harbour from a fear that they might eventually be deprived of the right to fish and collect pipi and other shellfish. They also sought to preserve canoe access to their fishing grounds. If Te Whanganui-a-Orotu was not included in the purchase, there would have been no need to include such provisions in the deed. As the 1920 Native Land Claims Commission observed, `It is only to the harbour that the reservation of fishing rights and landing places could apply' (A5(l):14).

Mr Brown said that it was clear from a proper reading of the deed and the red line on the plan that Te Whanganui-a-Orotu was included in the purchase transaction. This accorded with McLean's aim to include the harbour in the purchase and reflected his and Park's understanding of the nature and outcome of the transaction. It was also the conclusion of the 1920 commission:

> We think, however, that whether they appreciated the full extent of the dealing (of which there is some doubt) or not, it was made clear to the Natives that the Crown was buying the land and thus interests in the harbour, and when in the sale of the land they included, according to the Deed `the sea [moana], and the rivers, and the waters, and the trees, and everything else appertaining to the said land', they intended to give over the use of the harbour. . . .

In closing, Mr Brown submitted that the Crown had put a wealth of such material before the Tribunal that spoke for itself and did not need testing by cross-examination. There was an important role for the Tribunal to play in assessing the significance of the predominance of oral history evidence presented by the claimants. In the Crown's view, there was a difference between oral tradition, which it did not test because it was absolute, and mere oral evidence, such as statements made subsequently by persons on the basis of their own knowledge of events and statements made in 1993 or 1994 on the basis of `What they've been told'. He cited an opinion expressed by Keith Sinclair in *Kinds of Peace* that:

> Oral history has a shallow time depth - no one can have personal memories going back beyond, say 1910 . . . Tradition, while a rich source of valuable data, is more concerned with validating present

> behaviour than with establishing what actually happened in the past. (I15(b):26)

In response to a question from the presiding officer, Mr Brown added that oral evidence should be subject to the same scrutiny as documents.

4.9.3 The claimants' viewpoint

In an evaluation of the weight that should be given to all evidence, Ms Wickliffe observed that:

> Witness after witness recounted for the Tribunal their accounts of the history, culture and customary and spiritual values associated with this taonga, Te Whanganui-a-Orotu. As we piece this evidence together, we discover a Maori story, a Maori perception and a Maori understanding that is quite different from the Crown's perception of events relating to Te Whanganui-a-Oroto . . . we start to appreciate the Maori proverb, 'Na to raurau na taku raurau ka ora ai te iwi' (Through our joint contributions our iwi will prosper). (I9:2)

Many of the witnesses, Ms Wickliffe continued, had not had the opportunity to learn about their taonga by any other means than by oral tradition, that is, the passing down of information from one generation to another. This method should be viewed by the Tribunal `as of equal value to that of the written record' (I9:2). It had been said before that:

> An important feature of oral tradition is its public nature. That is the histories and stories are retold in a public forum, thereby testing the authenticity and accuracy with other members of the iwi at hui and tangi. . . .
>
> The Tribunal must not view the traditional oral evidence and the direct oral evidence of the claimants witnesses with the same prejudice the Crown has viewed them over the past 140 years. (I9:2-3)

This could not be said of documentary evidence:

> It is rarely publicly tested . . . That is particularly so of self-serving file notes and the like that sit on files in Government offices . . . on occasions such as this . . . the unjustified bias in favour of written evidence is exposed.

We think that the incorrect continuous red line on the deed plan is an example of perpetuating an error in documentary evidence.

In this particular claim, Ms Wickliffe submitted:

> the Maori story, perception, and understanding was supported by `the overwhelming weight of historical opinion (Parsons, Ballara, Gilling, Boast, Walzl)'. (I9:4)

The oral tradition of the claimants was quite clear:

> They did not sell and they have never understood that they sold Te Whanganui-A-Orotu. (I9:4-5)

In the footsteps of their tipuna, the claimants:

> have continued to assert their rights to own, use and care for/manage Te Whanganui-a-Orotu . . . The Crown has systematically eroded their rangatiratanga, mana and customary use of Te Whanganui-a-Orotu and thereby has failed in its duty to actually protect their interests as required by the Treaty of Waitangi. (I9:5)

Taken with the whakapapa evidence in chapter 2, Ms Wickliffe's submissions clearly discounted Professor Sinclair's opinion (cited by Crown counsel) that oral history has a `shallow time depth'. Rather, they reflected Professor Judith Binney's scholarly analysis of the Maori form of telling history in her article `Maori Oral Narratives, Pakeha Written Texts' (I9(g):3).

In a closing historical analysis of the Ahuriri purchase, Mr Hirschfeld submitted that the story had not been correctly told until the hearing of this claim by the Tribunal. Former consideration of the issue by the Government, land courts, and commissions of inquiry had not fully assessed all the available evidence and had relied heavily on the official recordings of the Crown agents who conducted the purchase. Any Maori viewpoint that might have existed independently of that source of evidence was not heard (I8(a):25).

Maori comments before, during, and after the purchase clearly and consistently expressed the view that Te Whanganui-a-Orotu was excluded. There was no evidence of any direct negotiations to purchase Te Whanganui-a-Orotu or of any specific agreement by Maori to relinquish it. Nor was there any evidence that the Crown agents communicated to Maori their belief that they had acquired Te Whanganui-a-Orotu. Any semblance of agreement by Maori to the purchase was based on a belief that the things that they sought to retain, including Te Whanganui-a-Orotu, had in fact been retained by agreement with McLean. While they were willing to share the use of Te Whanganui-a-Orotu with the settlers, they would never have knowingly and willingly sold it to the Crown.

While acknowledging the existence of two contrary viewpoints on the exclusion of Te Whanganui-a-Orotu from the Ahuriri purchase, Mr Hirschfeld concluded that `it is not the Maori who misunderstood the Crown's intention, but it is the Crown who misunderstood Maori intentions' (I8(a):26).