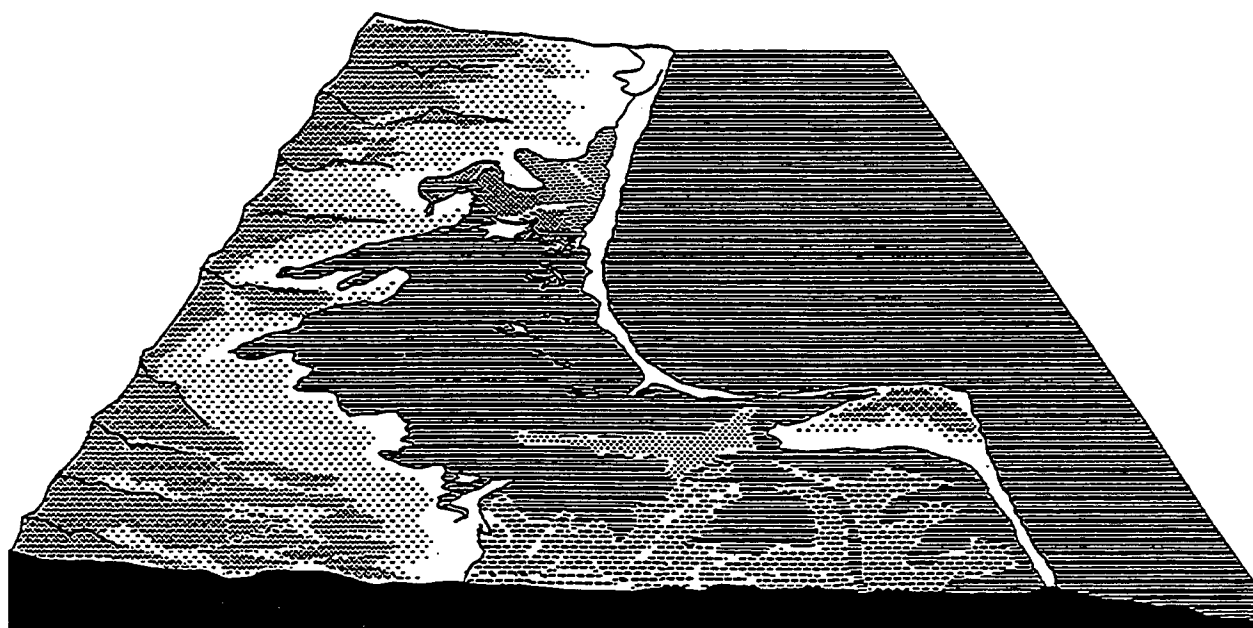


TE WHANGANUI-A-OROTU

REPORT 1995



TE WHANGANUI-A-OROTU REPORT 1995

WAI 55

WAITANGI TRIBUNAL REPORT 1995



The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

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EDITORIAL NOTE

Maori names

Variant spelling of Maori place names, iwi and hapu names, and personal names in the documentary evidence have been standardised in this report. Generally we have relied on present day spellings given in the claimants' 'Report to the Waitangi Tribunal' by Patrick Parsons (A12). The use of hyphens has been retained in certain cases, for example, Te Whanganui-a-Orotu and Ngati Kahungunu-ki-Heretaunga. Spellings of names in quotations remain as they were in sources, and [sic] is used only when the meaning is unclear.

Measurements

Measurements are given according to the system in use during the period.

1 acre = 0.4 hectares

1 mile = 1.6 kilometres

References

References in the text of this report are to the Record of Inquiry, listed as appendices III and IV.

References to the Record of Proceedings are classified and numbered, for example, 1.2(d):2 in chapter 1 refers to the claim (1.2), the order in which it was admitted (d), and the second page (2).

References to the Record of Documents are listed alphabetically in the order in which they were admitted before and during each hearing. For example, A12:13 in chapter 3 refers to the first hearing (A), the twelfth document admitted (12), and the thirteenth page (13).

Endnotes

Numbered endnotes refer to sources and documents that were consulted in the preparation of the report and are not in the Record of Documents.

The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Te Minita Maori

Tena koe, te Minita mo nga take Maori

We bring to you the Tribunal's report on the Te Whanganui-a-Orotu claim.

This is the second report on the many claims from the hapu/iwi of Ngati Kahungunu, which the Tribunal has incorporated into one comprehensive group claim for Wairoa-ki-Wairarapa. It follows the *Mohaka River Report 1992*. Te Whanganui-a-Orotu is commonly known as the Ahuriri Harbour or the Napier Inner Harbour.

The present claim, like the Mohaka River claim, was granted urgency, because in this instance it related in part to leasehold sections now owned by local authorities in the Napier area that were to be freeholded. The initial claim arose from the Crown's inclusion of Te Whanganui-a-Orotu in the purchase of the Ahuriri block in 1851 and the vesting of most of it in the Napier Harbour Board as a harbour endowment by statute in 1874 and 1876. As a result of subsequent reclamation and land development authorised by a series of empowering Acts, it developed into a multi-issue claim. Growing pollution, the uplifting of a large part of the inner harbour or lagoon by the 1931 earthquake, and the expansion of Greater Napier increased the claim's complexity. By the early 1970s virtually nothing remained for the claimants and their tipuna of their much prized taonga, food store, traditional resource area, and economic base.

The question of whether or not Te Whanganui-a-Orotu was purchased or otherwise acquired by the Crown has been the subject of a number of petitions to Parliament and previous inquiries over the last 120 years, with varying results.

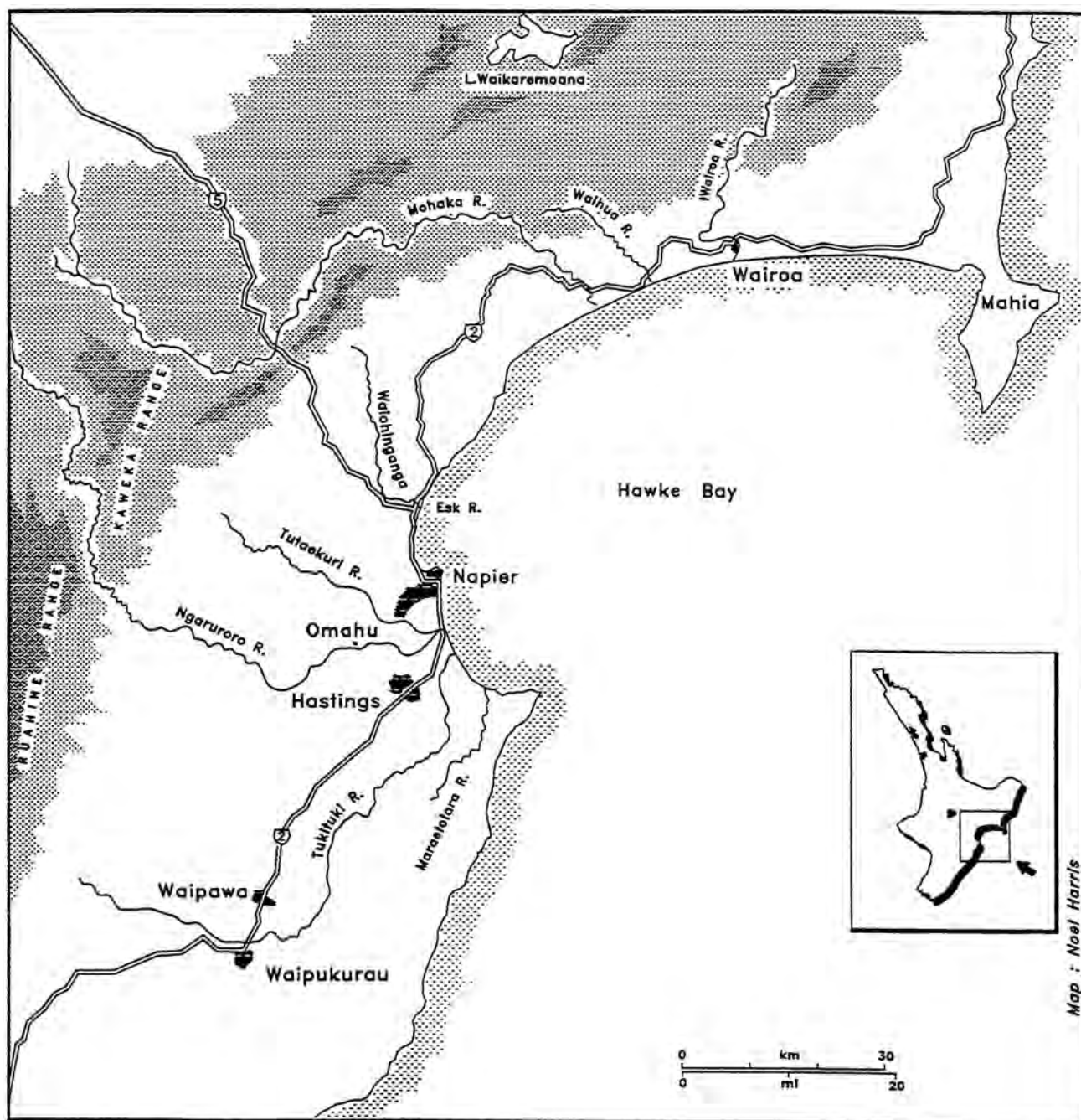
Our inquiry, however, has been the most comprehensive yet conducted. Furthermore, it is the first, and indeed only, inquiry that has attempted to assess the extent to which the actions, policies, and omissions of the Crown and its agents in respect of Te Whanganui-a-Orotu have been and continue to be inconsistent with the principles of the Treaty of Waitangi and have prejudicially affected the customary, Treaty, and contractual rights of the claimants.

For the reasons set out in chapters 2 to 10 of this report and summarised in chapter 12, we have found that, beginning with the Crown's inclusion of Te Whanganui-a-Orotu in the Ahuriri purchase in 1851, a number of clear breaches of Treaty principles have occurred. These are summarised in paragraph 12.3.6 of this report.

At this point, we are not in a position to make final and complete recommendations for the three reasons set out in paragraph 12.4.2 of this report. We do not, however, want to see the settlement of this long unresolved claim delayed any longer than is absolutely necessary. We intend to hold a further hearing in Napier later in the year to enable the claimants to reformulate the recommendations that they seek in the light of our findings.

In the interim, we recommend that there should be no further alienations of any Crown or State-owned enterprise land within the pre-1851 boundaries of Te Whanganui-a-Orotu. To assist parties preparing for this hearing, we have concluded chapter 12 of our report with a number of tentative suggestions on recommendations relating to the possible return of Crown land to Maori ownership. These include the setting up of a substantial fund as compensation for what we conclude are irretrievable losses under the 1993 amendment to the Treaty of Waitangi Act, which prevents us from considering any recommendations for the return of the parts of Te Whanganui-a-Orotu that are now owned privately or by local authorities.

Heoi ano



CHAPTER 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’.¹ 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.

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

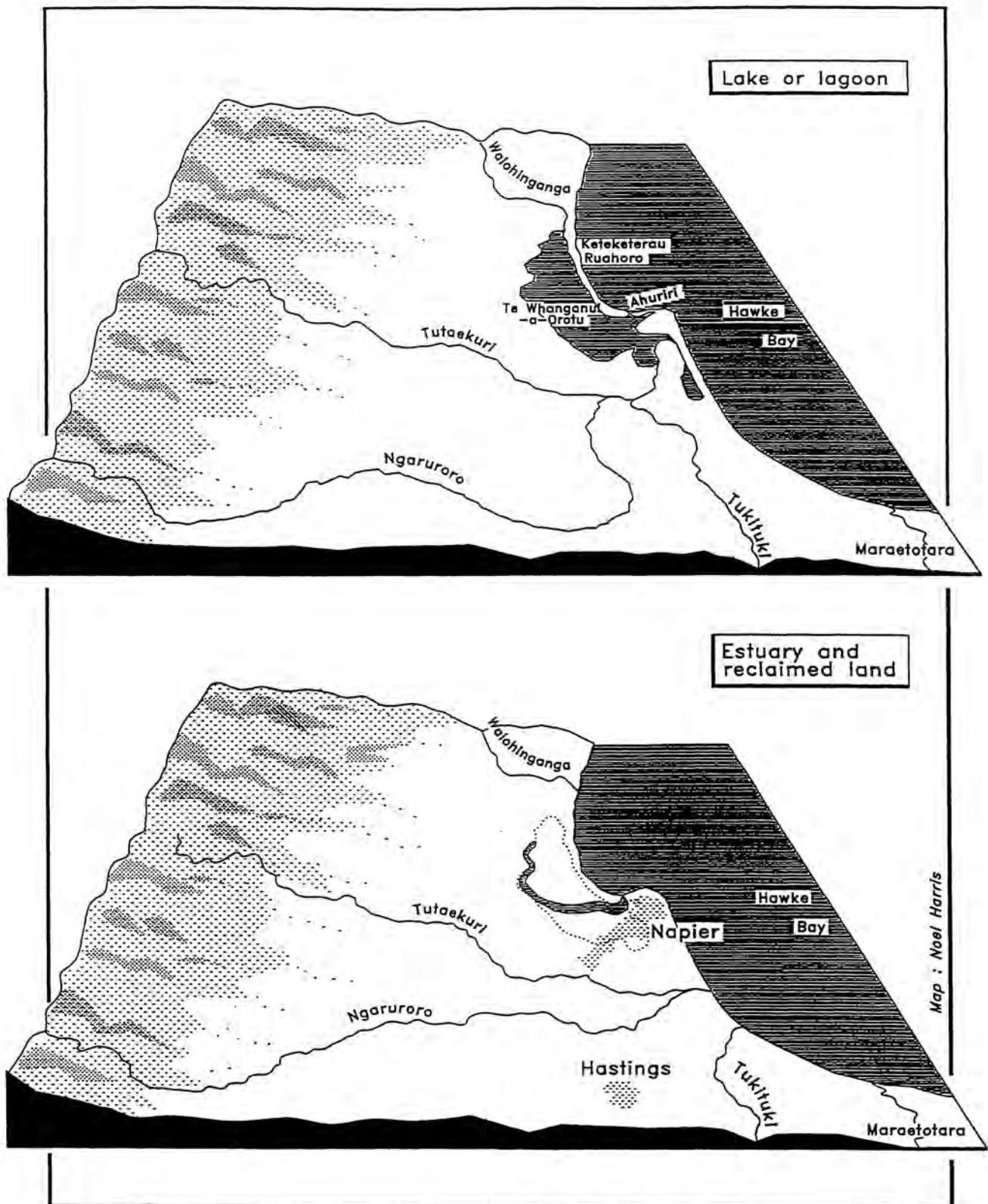


Figure 2: Te Whanganui-a-Orotu – from lagoon to reclaimed land

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.²

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).³ 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 overfilled 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.⁴

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 hightide, 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.

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(c):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).

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).

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.

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.

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.

References

1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, p vii
2. J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, Wellington, A H and A W Reed, 1973, p 30
3. Ibid, pp 50–51
4. Ibid, p 49

CHAPTER 2

NGA HAPU O TE WHANGANUI-A-OROTU

2.1 TE POWHIRI

2.1.1 Te Whakaeke (the approach)

The hearing of this claim commenced at Omaha Marae, deemed by the claimants to be the most appropriate venue, given its importance in their history and traditions. On the first day of the hearing, the Tribunal and those representing the Crown were welcomed there with all the customary ceremonial that attends any great gathering. As is usual, the kaupapa and the occasion were established in the karanga from the women of the marae and continued in the korero that followed.

In the speeches and waiata from the paepae, much was said about the identity, history, and inheritance of the people and the place, and much deference was paid to the members of the Tribunal and the Crown in such terms as ‘Haere mai te Roopu Whakamana i te Tiriti’ (Welcome to the Tribunal, who are charged with the giving of life, meaning, and authority to the Treaty of Waitangi).

To that end, all the speeches were based on memories of the past and of those who had died. They also dwelt on the basic purpose of the gathering, and the expectations of the tangata whenua for a sympathetic hearing, with reminders to the Tribunal that upon them lay the honour of the Crown for a just outcome. In both speech and song, the tangata whenua produced their credentials as claimants and laid claim to their ancestral territory.

This was followed by the final act of welcome, the whakarata, or act of physical contact through the hongi, when hosts and visitors press their noses together, signifying the sharing of the breath of life, so that, symbolically, the breath of one becomes the breath of the other. By the end of the welcoming formalities, all the participants, claimants, Crown, and Tribunal were united by the air that they breathed and the environment that they shared. Host and visitor, tangata whenua and manuhiri, had closed the gap across the marae and the stage was set, in Maori terms, for the weightier matters of mutual interest to be discussed.

There, on the first day, the Tribunal and the Crown were welcomed as one and taken into unity in that Maori sense that nothing and nobody is a completely separate or distinct entity. As we made our respectful approach, the mass of people who gathered to greet us were representatives of every hapu of Ngati Kahungunu-ki-Heretaunga, there in support of the seven of their kin hapu on whose behalf and in whose name the claim is made.

2.1.2 **The marae**

The whole environment of the marae told its story about the tangata whenua. The marae itself bears the name of an ‘especially revered’ ancestor, Mahu Tapoanui, whose descendants were the original tangata whenua of the district before Taraia I’s invasion and who is said to be ‘a marker post by which the inhabitants of Te Whanganui-a-Orotu can gauge their length of occupation’ (E3(a):7–8).¹

The elaborately carved meeting house or whare tipuna bears the name of Kahukuranui, while the building in which hospitality was extended and food and drink were provided (commonly called the wharekai) carries the name of Ruatapuwhahine. Both are ancestors of Ngati Hinemanu, the hapu of Renata Kawepo’s wife. Renata, a teacher at Colenso’s Waitangi mission station, worked both to bring his people, Ngati Upokoiri, back from exile and to resettle them at Omahu, which became his principal settlement.²

On the marae are a flag-pole and memorials to those who gave their lives in the two world wars. To one side of the marae is a wahi tapu, where stands the Church of St John’s, established by Renata Kawepo, and graves of the family and ancestors of the tangata whenua. There is also a memorial engraved with the words ‘Renata Kawepo and his faithful followers who fought for Queen and Country during the Hauhau Rebellion 1860–1872’. As we surveyed this scene, we were very conscious of all the symbols that tie the tangata whenua to their past and speak of their hopes for the future.

2.2 **THE MAORI HISTORY OF TE WHANGANUI-A-OROTU**

2.2.1 **Whakapapa**

Throughout the evidence of the claimants, whakapapa were used to connect with the environment, establish the identity of witnesses, identify ancestors, establish occupation and use rights, and explain spiritual concepts and tribal history.

Through the whakapapa produced by Rameka Pohatu (D12), the claimants established their identity as descendants of the first people of the area who are linked to ‘the cosmos, to the land and to the waters of the region’. From Toi, the line of descent extends to Mahu, ‘the very beginning of our people’, who begat Orotu, who resided at Te Whanganui-a-Orotu for at least part of his life. His son, Whatumamoa, was born at Te Whanganui-a-Orotu and was one of the original owners of the land. Finally, the line descends to Turauwha, the principal chief at Otatara when Taraia, son of Kahungunu, invaded and conquered Heretaunga 14 or 15 generations before 1850 (in about 1550). By this time there were other tribes, including Ngati Awa, living side by side with Ngati Whatumamoa (D22:2–4; I9:19–20). ‘As highest ranking chief on the Ngati Awa line combined with the senior line of Ngati Whatumamoa on his mother’s side’, Turauwha was a very important Heretaunga chief (A12:5; I9:29).

The claimants further established their descent from Tangaroa, god of the sea, down through Pania, the sea maiden, and her child Moremore, a taniwha, to link by marriage to the Toi people (D27:7; I9:29–30).

Ngati Awa shared with Kahungunu a common ancestry in the Far North and in the chiefs Kauri and Tamatea, who led the migration of Ngati Awa from Mangonui to Tauranga. Tamatea’s son, Kahungunu, who was born in Kaitaia, built

a second waka named Takitimu and joined his father, who was one of the greatest navigators of his day, in a journey down the east coast to Te Whanganui-a-Orotu and then inland up the Ngaruroro River (A12:6–7).³

Fearing annihilation by Taraia's war party after it had captured the upper Otatara Pa, Turauwha and his people, who had settled at the mouth of the Ngaruroro, retreated up the Tutaekuri River to the bush, leaving Taraia in possession of the Heretaunga Plains. Hunger, however, drove them back to Poraiti, where Taraia allowed them to remain. Hence the saying, 'The land is Turauwha's but the mana is Taraia's' (A12:10). Through peacemaking marriage alliances, they carefully preserved their whakapapa links with the earliest inhabitants. All the seven claimant hapu trace their descent lines from both Kahungunu and Turauwha.⁴ Ngati Awa, on the other hand, were dislodged by Taraia and moved south to become associated with Rangitane. Eventually they became known as Ngati Mamoe and moved to Te Wai Pounamu (D22:2–4; 19:19–20).

2.2.2

Waiata

A waiata tawhito (D13) in support of John Hohepa's and Rameka Pohatu's submissions (D10; D12) traces the descent of Kahungunu from Io Nui, the supreme being, to Papatuanuku and Ranginui and their god children, including Tangaroa, to the first humans and the voyagers from Polynesia who arrived on the Takitimu waka and married those already here. The line extends down to Kahungunu's parents, Tamatea Pokaiwhenua and Iwipupu Te Kura, and identifies him with the mountains, and the rivers, outlet, and hinterland of Te Whanganui-a-Orotu:

Ko wai Te Waka	Takitimu
Ko wai Te Tangata	Tamatea Arikinui
Ko wai Te Tohunga	Ruawharo
Ko wai Nga Maunga	Hikurangi Puketapu Kohukete
	Heipipi Haruru Mataruahao
O wai Nga Awa	Ngaruroro Tutaekuri Te Waiohinga
Ko wai Te Ngutu Awa	Keteketerau
Ko wai Te Iwi	Ngati Kahungunu (D13)

The waiata of Te Whatu records the whakapapa of his father, Te Orotu, and his people, who occupied Te Whanganui-a-Orotu, and laments Taraia's invasion and occupation:

E hara taua i te heke / i a Taraia e
He whenua tipu he tangata / tipu – tonu
He takare taua no roto / no Heretaunga
Ma te tangata e ui / mai ki e koe
Na wai ra e kia / atu e koe
Na Tangaroanui / a Te Kore
Na waira e kia / atu e koe
Na Maikanui / a Te Whatu
Na Hoakehu ano a / Haumaitawhiti
Na Orotu a Whatumamoa
Na Tamaahuroa / a Ruakukuru
Nana te awa poka / Hauhaupounamu

E tama e tangi nei / he tangi kai pea
Kaore nei tama / he kainga i a taua
Tena nga kainga kai / nga wehewehe a o tipuna
Ko Te Huhuti ano te / taha / ki Ruahine
Ko Te Rerehu ko Tamanuhiri / ki runga ki kawera
Ko Hineiao ano ki tona / tauranga ki Tawhitinui
Ko Hinekai ano ki tona wai u / ki Te Rotokare
Ko Haumahurua ano ki Ohiwia / ki te Makoparae
Ka tau mai Taraia nga utu awa / kahawai kai Ngaruroro
Ka whati mai o / tipuna
Ki runga te tehuna tapapa noa ai

We are not of the migration of Taraia
The land is permanent, the people also are permanent
We are the principals within Heretaunga
When people ask you to whom it belongs, you reply
By Tangaroanui is Te Kore
By Maikanui is Haumaitawhiti
By Orotu is Whatumamoa
By Tamaahuroa is Ruakukuru
He made the water course Hauhaupounamu
My son who is crying, are you crying for food

There is no land my son, which is ours
There the lands which were divided by your ancestors
To Te Huhuti the side at Ruahine
Te Rerehu and Tamanuhiri at and upon kawera
Hineiao to her landing place at Tawhitinui
Hinekai to her mother's milk at Te Rotokare
Haumahurua to Ohiwia and Te Mokoparae
When Taraia came to the kahawai river mouth at Ngaruroro
Your ancestors were driven away
To the shingle banks and there squatted without right (D23)

2.2.3 **Place names**

In introducing evidence on the ancestors of Te Whanganui-a-Orotu, Patrick Parsons said that one of the things that had particularly impressed him in his research was that:

Time has never quite succeeded in erasing the imprints which illustrious ancestors of antiquity stamped on Te Whanganui-a-Orotu. They survive in the place names, the wahi tapu, the little-known documentation and especially in the faces of the descendants who are here in support of the Wai 55 claim today. (E3(a):3)

At the hearings and on the site visit, the claimants recounted stories of the deeds of ancestors associated with these place names and wahi tapu. The oldest names are imprints of the journeys that Mahu, Orotu, Tamatea, and Kahungunu made down the coast. Te Whanganui-a-Orotu bears the name of Orotu, an early visitor who established his people on its shores. The island Tapu Te Ranga (a sacred place where certain tohi or baptismal rites were once performed) was Tamatea's resting place on his journey down the east coast.⁵ The Keteketerau

opening is connected with Tara, a descendant of Toi Kairakau. Coming down the east coast from Whangara in search of his missing dog, Tara beached his canoe at the lagoon's outlet, and, on finding that he had left at Wairoa the flute that he used to whistle his dog, clicked his tongue in annoyance (a sound known in Maori as *ketekete*) (A12:4). The Ahuriri opening is said to be named after a chief who was descended from Tara and who visited the district at a time of flood when Keteketerau was blocked and set his men to dig another outlet channel at the Mataruahou end of the lagoon. Ahuriri is also a common name in Polynesia for a lagoon separated from the sea by a narrow sand and boulder bank, just as Te Whanganui-a-Orotu is separated from the sea by the western and eastern spits.⁶

The name of the biggest island in the lagoon, Roro o Kuri (dog's brains), suggests that it was the scene of a feast. Facing Whareponga Bay is a promontory on Roro o Kuri named Kahungunu. In respect of the bay, there is a saying, 'Kei Konei te punga o Takitimu' (Here is the anchorage of Takitimu). A pepeha records the thoughts of Tamatea and Kahungunu on their journey inland to the Ruahine Range when they were hungry:

Nga karoro tangitararau mai i runga o Tapu Te Ranga
Nga patiki tahanui o Otiere
Nga pupu patoto o Whakaari

The many screaming seagulls above Tapu Te Ranga
The thick sided flounders of Otiere
The knocking sound of the pupu at Whakaari [Whakaari is beyond the western end of the lagoon.] (D21:5)

Ruatangahangaha, a dip behind the Westshore hotel and service station, is where Mahu stopped to rest on a very hot, thirsty day and found fresh water when his dog dug a hole and began to drink. In the hole was a fish called tangahanga (D21:6).

Otatara, one of two sentinel pa that kept vigil over Te Whanganui-a-Orotu (the food source) at the northern and southern approaches to the lagoon, was a name brought from the Hokianga by Ngati Awa. After Ngati Awa came and found relations at the other sentinel pa, Heipipi, they joined together and pushed south the Rangitane and other tribes at the Waiohiki end of the lagoon and built Otatara (D40:2).⁷

Heipipi later came under attack when Taraia led his invading force south to capture the Heretaunga Plains and open them up to colonisation. Before dawn, on the beach below Heipipi, Taraia split his war party into two groups, leaving one, covered with mud and clay and black mats, lying there. At first light, a sentry in the pa mistook them for a stranded shoal of upokohu (black fish) and roused the people to go and gather the koha from Tangaroa, god of the sea and originator of all fish. Thus Taraia was able to get past Heipipi and overcome the upper pa, Hikurangi, at Otatara (D27:1–2, 6).

To the seven claimant hapu, the stories behind the place names in and around Te Whanganui-a-Orotu are a priceless taonga, an oral record of the footprints of their illustrious ancestors, who discovered and settled the area 26 or more generations ago.

2.2.4 **Pania and Moremore**

Mystically associated with Te Whanganui-a-Orotu is Tangaroa, who begat Ruamano, the guardian whale who led and navigated the waka Takitimu on its great voyage to Aotearoa (E3(a):12). Especially important to the claimant hapu are two descendants: Pania, the sea maiden, and her son Moremore, whom she bore for her land-based lover before the sea people turned her into a rock at the entrance to Port Ahuriri (which used to be visible at high tide). The old people said that from a boat in the moonlight when the tide was out you used to see her lying there, with her legs astride and her arms outstretched to either side, seaweed all around where her head would be. They would get hapuku from under one arm, moki from under the other, and from between her legs another variety of fish (D27:5; D38:3; E16:7–8; I9:31–32).

Moremore, a taniwha who was born with the head of a fish and the body of a human, lived in a cave in the sea just off Sturm's Gully, near the Iron Pot, and his descendants used to frequent the Ahuriri Heads in particular (D4:37). He served his people of Te Whanganui-a-Orotu as a kaitiaki and caretaker, patrolling the coastal waters and inner harbours while they gathered kaimoana and fished. Strong, recurrent themes in the evidence of older claimants were the protection that Moremore gave from the perils of the sea, the maintenance of tikanga pertaining to the gathering of kaimoana, and the close affinity that Moremore had with the Tareha family (D4:38).

According to witnesses who have seen him, Moremore could change shape and turn himself into anything. More often than not, he was a shark, stingray, or octopus, but sometimes he was a rock or a big log (D14:3; D17:2; D21:4; D26:3; D29:4; E16:6–7; E19:1). He appeared to warn them when danger was present or when they failed to observe customary rituals and protocols that conserved resources and maintained water purity (E3(a):12; E19:1–2).

Kurupai Koopu (Mrs Nelson) described an incident when, as a child, she broke the tikanga by throwing a basket of cooked food into the sea. Moremore appeared and the women slapped the water as a sign for the men to come out, no shouting being allowed. As they came out, Moremore ripped one man's leg (oral evidence, 21 July 1993).

Selina Sullivan said that they always observed the law of Moremore. 'He'll come and show himself to you then you'll know what you've done wrong and get out . . . of the water.' You could see his fins coming. 'He wouldn't attack you but he'd warn you.' Nobody was harmed by Moremore because nobody disobeyed his warning. If you had done anything wrong, like eating while someone was in the water, Moremore would appear (D14).

Moremore warned you about things you should not do, said Marjorie Joe. For instance, if you broke tikanga, Moremore would appear and you would immediately head for shore (D26:3).

Heitia Hiha recounted an incident at the Ahuriri entrance, told to him by the late Wiremu Hamutana, about an octopus that Wiremu kicked away when it approached his foot. Three times this happened and each time it grew in size. His koroua told him to get out of the water immediately. On the jetty they all saw Moremore the shark swimming in the water (D21:4).

According to Kurupai Koopu, it was Tareha's privilege to go to Pania's Rock (oral evidence, 21 July 1993). 'The way the Maori looked at it,' Hineipitia (Beattie) Nikeria explained:

that rock represents the Tareha family. I reckon that place belongs to them. They can go and fish there. They're the ones who can go right up to the rock. They're the only ones allowed. Moremore doesn't mind. (Cited in I9:33)

The Tarehas were connected with Moremore, said Selina Sullivan, but they were the only ones. 'When we got our kinas they were not very big but plentiful. And pauas. But when the Tarehas went in they got the big ones' (D14:3).

Rangiaho Brown recalled that when people going to get kaimoana got nothing they would pick up his father, Kapi Tareha, and take him with them, and then there would be 'Oh, kai moana everywhere' (D29:4).

The Tareha family, however, suffered through Moremore's relation, Hinewera, who claimed the firstborn son of each generation of the family. Rangiaho's baby son died after a ghost, identified as Hinewera, visited them in the night (D29:5). Erueti Pene's mother Hineiaia told us how her father, Kurupo Tareha, saw Hinewera as a woman in his bathroom the night before he passed away (oral evidence, 21 July 1993). She also said that her father, who was a tohunga, would go to the channel opening and use the sea for healing. When his eight- or nine-year-old son George crushed his foot, his father took him into the sea and he was able to walk out. Everything except his big toe was healed.

An incident linking Pania and Moremore to the 1931 earthquake further highlighted the importance of these revered ancestors in the lives of the people. According to Kurupai Koopu, when they started blowing up Pania's Rock in about 1929, Pania was angry with them (D44(7):3, 4). At 8 o'clock on the morning of the 1931 earthquake, Werate Te Kape was warned when he saw Moremore in a form that he had never seen before – that of a completely black shark with no tail (I9:37–38). After the earthquake, the demolition work continued because Pania was right in the main entrance to the harbour. Although the area where Pania lived was desecrated and destroyed to allow for harbour development, for Maori the wai mauri remained.

2.2.5 The descent from Tangaroa to Tareha

The whakapapa that takes the line of descent from Tangaroa to Pania and Moremore comes further down to Hinetua and Tunui a Rangi, who was a powerful tohunga and Ngati Whatumamoa chief of Heipipi when Taraia arrived at Te Whanganui-a-Orotu (A12:6; D27:5–6). Tunui a Rangi, so it is said, would ride his ancestor Ruamano out to sea and back and tie him up at Whareponga, a cove within Te Whanganui-a-Orotu, thus demonstrating his mastery of the forces of the deep (D4:38; D27:4–5).

From Hinetua and Tunui a Rangi, the same whakapapa line comes down to Turauwha, and finally to Tareha (D4:39), who was, according to William Colenso, one of the five principal chiefs at Ahuriri in the late 1840s.⁸ Ngati Hinepare, Ngati Mahu, and Ngati Parau all descend from this line (A12:3). Many of the people of Tangoio descend from Tunui a Rangi (D27:6).

2.2.6 Archaeological evidence

Archaeological evidence and radiocarbon dates presented by the Crown through Pamela Bain, a conservancy archaeologist for the Department of Conservation, indicated settlement dates of between the late fifteenth and early seventeenth centuries for major ancient pa sites in and around Te Whanganui-a-Orotu (H9:11).

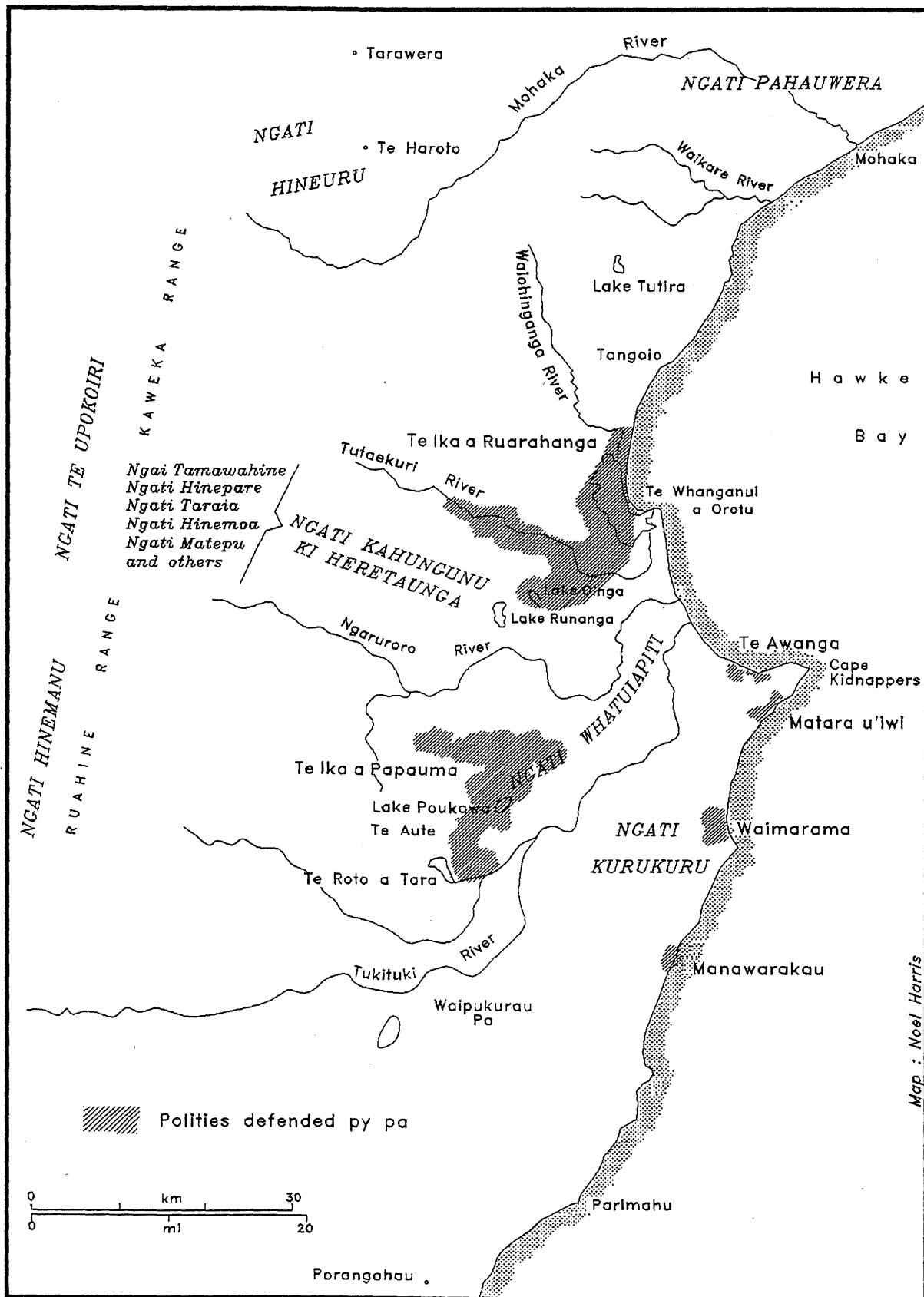


Figure 3: Location of main hapu and pre-1820 polities. Based on information in PhD theses by Angela Ballara and Mark Allen.

Excavations associated with a pa and midden on Roro o Kuri revealed evidence of very early settlement – somewhere between the twelfth and thirteenth centuries (H9:14) – while excavations of artefactual materials on Te Ihu o Te Rei indicated settlement prior to the fifteenth century (H9:15). Archaeological evidence confirmed that Te Whanganui-a-Orotu was an important place to live. Surrounding the harbour were 11 recorded pa; some, like Otatara, of spectacular size. Recorded evidence of terraced, undefended settlements was also extensive (H9:19).

Further archaeological research and field work on central Hawke's Bay pa sites was carried out with local Maori by an American Fullbright scholar, Mark Allen, in 1989 and 1990.⁹ This included limited excavation and sample collecting for radiocarbon dating, which revealed widespread pa building and occupation in the period from about 1550 to 1700, following Taraia's invasion and the split of Ngati Kahungunu into two main divisions, Te Ika a Ruarauhanga and Te Ika a Papauma, which took their names from the two wives of Taraia's father Rakaihikuroa.

Before 1550 there were two strong, well-fortified pa at each end of Te Whanganui-a-Orotu, Heipipi and Otatara, which Taraia was unable to conquer. From about 1550 to 1625, he and his followers established themselves at Otatara and built and occupied pa to secure access to and control over Te Whanganui-a-Orotu and the Tutaekuri River, the largest and most desirable resource area. The siting of the pa was related to the best type of soil for agriculture, as well as proximity to the lagoon, coast, river, and swamp. Most of the population was concentrated in six pa at or around Otatara, described by Dr Allen as a 'veritable metropolis' of a 'relatively stable chiefdom' or 'regional polity', which he referred to as Ruarauhanga. This offered 'unparalleled subsistence, security and diversity' to over 2000, and perhaps as many as 3000, persons.

A second large cluster of pa based on the freshwater inland lakes of Poukawa and Roto a Tara was built and occupied, mostly from about 1575 to 1650, by Te Ika a Papauma to secure and protect the resources and people of the second most desirable resource area. This was the period of greatest conflict between the Te Ika a Ruarauhanga and Te Ika a Papauma. The marriage of Te Whatuiapiti of Te Ika a Papauma to Taraia's daughter Huhuti in about 1625 was followed by a long period of relative peace.

Dr Allen also located four smaller coastal clusters of pa and socio-political groups on the coast at Te Awanga, Matara U'iwi, Waimarama, and Manawarakau, as well as some small individual pa sites along the Tukituki River, around Lake Hatuma, and inland towards the Ruahine Range. By linking archaeological and oral traditional evidence, he was able to demonstrate the role of pa in the formation of two large and four small polities under chiefs who could command the labour needed to build them and have some economic power over and above subsistence for the people.¹⁰ These closely related and allied polities were sufficiently strong and stable enough to deter further invasions of the region until the musket-armed taua of the 1820s (see fig 3).

2.3 TE WHANGANUI-A-OROTU A TAONGA

2.3.1 Mahinga kai

From the earliest of times, Te Whanganui-a-Orotu was highly prized for its enormous food resources and its access to major river systems and forest areas. In the lake were extensive shellfish beds and fishing grounds; in the rivers and streams, eels and freshwater fish. At the southern end was a large swampy area renowned for eeling; a large pa tuna (eel weir) was discovered in the Tutaekuri River near the old Meeanee Mission (D21:3). The swamps provided flax and raupo, which was needed for weaving and thatching (D18). North-facing slopes fringing the shoreline and river bank terraces were house sites and cultivations; islands in the lake, especially Roro o Kuri and Te Pakake, were used as fishing bases. Te Whanganui-a-Orotu was a coveted area (D21:7); a prize that tempted many invaders and that often required assistance from neighbouring hapu to defend (I9:86).

Whatu's lament ends with a tribute to this taonga:

Kia horo te haere
Nga taumata ki / Te Poraiti
Ko te kainga tena i pepehatia / e o tipuna
Ko rua te paia ko te Whanga
He kainga to te ata
He kainga ka awatea
He kainga ka ahiahi e tama e i

Go quickly to the heights of Poraiti
That is the land in a proverb of your ancestors
The store house that never closed is Te Whanga
A meal in the morning
A meal at noon
A meal in the evening (D23:2–3)

2.3.2 Seasonal occupation and use

Te Whanganui-a-Orotu, Heitia Hiha explained, was a seasonal place. People lived there during the season for gathering kai (D21:7). When the kowhai bloomed in October it was a sign that seafood was ready for gathering (oral evidence of Kurupai Koopu, 21 July 1993). When it came to the bird season, the people went up into the bush to hunt and collect food. Archaeological evidence, however, indicated that settlement in the area surrounding Te Whanganui-a-Orotu was permanent rather than seasonal (H9:19).

2.4 PRINCIPAL PA SITES

Mr Parsons gave evidence locating the principal fortified pa and kainga prior to invasions by the northern tribes, who were armed with muskets, and the exodus to Mahia in about 1824 (D4:17–18; D20(a)) (see fig 5). Those occupied by Ngati Hinepare and Ngati Mahu were Tiheruheru, a canoe landing place with a kainga on the hill above it, which had the longest tradition; Ohuarau, a fortified pa on a

promontory just east of Tiheruheru; and Kouturoa, a fortified pa at the southern entrance to Kouturoa Bay. At the northern end of Te Whanganui-a-Orotu were the island pa Te Iho o Te Rei, Otaia, and Otiere, which were occupied by Ngati Hineterangi, Te Hika O Te Rautangata, Ngai Te Ruruku, Ngati Tu, Ngati Hinepare, and Ngati Mahu from 1760 to 1820. Another island pa at the north end of what is now the Hawke's Bay Airport was Tuteranuku, the settlement of Paora Kaiwhata's father. Te Pakake, a low island or sandbank inside the Ahuriri Heads, was a communal gathering place in times of war (see fig 5). Ngati Hinepare, Ngati Mahu, Ngati Parau, Ngati Hawea, and Ngati Kurumokihi all occupied it when under threat of invasion. Separated from the south-western end of Mataruahou by shallow tidal waters, and with a canoe landing place nearby, was Pukemokimoki, which was fortified by Ngati Parau (D4:3–18) (see fig 5).

2.5 **CUSTOMARY USE RIGHTS**

2.5.1 **Strength and persistence**

A report to the Tribunal on traditional use and environmental change by Mr Parsons was based on taped interviews with Maori elders who had accompanied their old people to gather kaimoana at Te Whanganui-a-Orotu, with supporting evidence from elderly Europeans. Their recollections stretched back to about 1920. For the years preceding, we were referred to evidence given before the Native Land Claims Commission of 1920. Oral evidence given by claimant witnesses at hearings supplemented these reports.

Pieced together, this evidence demonstrates the remarkable strength and persistence of the customary use and occupation of Te Whanganui-a-Orotu for the purpose of fishing and collecting shellfish since the 1851 Crown purchase of the Ahuriri block, notwithstanding the Crown's assumption of ownership, harbour development and reclamation, and the 1931 earthquake. Although the shellfish beds and fishing grounds were increasingly damaged or destroyed by natural and human forces, customary fishing rights continued to be exercised until about 1972, by which time the waters were so polluted that the eating of kai from them was a serious health risk.

2.5.2 **The social and political order**

To understand the customary fishing rights exercised in Te Whanganui-a-Orotu, it is necessary to revisit briefly the current knowledge of custom law. As Chief Judge E T J Durie, chairperson of the Tribunal, has said, it reflects the social and political order of the people and is likely to reveal a substantial religious philosophy.¹¹

In their report to the Tribunal on the Crown purchase of Ahuriri, Angela Ballara and Gary Scott showed that the social and political order in Ahuriri/Heretaunga by the late eighteenth century was complex. The major descent groups were named for the descendants of Kahungunu, but intermarriage and other forms of alliance meant they and the older tangata whenua shared the area. Mana tangata tended to pass to the conquering newcomers but the descendants of the earlier inhabitants retained their mana whenua.

Native Land Court evidence indicated that:

The land that Taraia wanted to regard as taken possession of by him was north of the north of Ngaruroro on to the Waohinganga, Titikura and Mohaka. He had conquered to that extent. (H1:5)¹²

Taraia's descendants, known as Ngati Kahungunu or Ngati Hinepare, or by the names of other hapu, lived in the Ahuriri area. But some of these descendants made marriage alliances with tangata whenua groups further afield and gradually formed new descent groups. One of these was Ngati Whatuiapiti, who were concentrated mainly south of the old course of the Ngaruroro River, spreading towards Waipawa. Ngati Kahungunu's lands and interests, together with those of the hapu closely associated with them, tended to be concentrated within Taraia's original boundaries north of the Ngaruroro River's old course, around Ahuriri and along the Tutaekuri River to its source.

2.5.3 **Ringakaha and ahi kaa**

Claimant witness Toro Waaka described the process by which Ngati Kahungunu established rights to use, occupy, and control the lands and water of Te Whanganui-a-Orotu:

It was through ringa kaha [strong-arm] marriage and different compacts between hapu that the ownership and use rights to lands and water has been established. This became important to the maintenance of Ahi Kaa [long burning fires]. No hapu could bind themselves to the land without 'take Tupuna' [ancestral rights] and they could not hold it without 'ringa kaha'. (E14:4)

Frederick Reti explained that:

Ahikaroa means the fires that are lit and continue to burn. The term refers to occupation. The ahi ka belongs to those hapu that are represented in the claim. They hold both the whakapapa and the ahi kaa, the continued occupation. (D27:10)

2.5.4 **Two classes of customary rights**

In custom law, Chief Judge Durie wrote:

There were at least two classes of land rights – the right of the community associated with the land, and the use rights of individuals and families.

The land in an area belonged to the whole of the associated community.

At Ahuriri, this would have been Ngati Kahungunu-ki-Heretaunga, together with Ngati Hinepare, Ngati Matepu, and Ngati Mahu, and other smaller hapu closely associated with them. But they did not own the land in a European sense; rather the land owned them and the chiefs exercised tino rangatiratanga over it. Moreover, the land and waters of Te Whanganui-a-Orotu were perceived as one, not compartmentalised into the land and the bed of the lake or the arm of the sea as in English common law. Individual use rights were subject to the performance of obligations to the community. All users had to observe certain customs and rituals designed to protect and conserve the resource and its mauri (life force). Claimant evidence on the use of shellfish beds, fishing grounds, and island bases in Te Whanganui-a-Orotu amply demonstrated the workings of these customs.

2.5.5 **Fishing zones**

Oral evidence of traditional customs collected and taped by Mr Parsons indicated that the seven claimant hapu, partly for convenience, gathered their kaimoana in areas contiguous to the ancestral lands that they occupied and cultivated on the fringes of the shoreline and that they respected the territorial boundaries of others (D4:25, 29). Ngati Tu, Ngati Matepu, and Ngai Te Ruruku had rights at the northern end of Te Whanganui-a-Orotu from Keteketerau round to Whareponga Bay; Ngati Hinepare, Ngati Mahu, and Ngai Tawhao had rights on the western shoreline; and Ngati Parau had rights at the southern end. Through intermarriage, some families exercised fishing rights in two zones (D4:28–29; see also D21:7; D32:1–2; D34:2; D35:1–2).

The Ahuriri area from the heads to the Westshore Embankment Bridge appears to have been a communal fishing area, notwithstanding the special rights of the Tareha family, who were associated with Moremore. The communal area became more important as shellfish beds and fishing grounds in other areas were damaged or destroyed by harbour and public works and the 1931 earthquake (D4:28).

2.5.6 **Exercise of whanaungatanga**

Heitia Hiha, in his evidence, said that ‘Te Whanganui-a-Orotu was also open to other hapu of Ngati Kahungunu’, including Ngati Hawea, Ngati Upokoiri, and Ngati Hinemanu from Omahu Marae:

We are all connected through whakapapa. Some hapu even have links to other iwi. These linkages are often made and remembered. For instance there are marriage ties between Ngati Hinepare, Ngati Hineuru and Tuwharetoa. However we are all linked to Ngati Kahungunu. Many of these interchanges resulted through whanaungatanga, relationships and close connections with other hapu. However the tino rangatiratanga remained with the kaitiaki, the hapu who remained to care and control the use of the area. (D21:7–8)

Frederick Reti, in his evidence, stated that:

the hapu of the Te Whanganui-A-Orotu exercised whanaungatanga by allowing neighbouring tribes, who were close relations the *privilege* to come and fish and gather food for themselves and their hapu. Mountain tribes like Hineuru through their close connection with Ngati Hinepare and Ngati Mahu would often camp at places designated for them during the summer. Ngati Whatuiapiti and Kahuranaki from Te Hauke would fish and gather around the port area and Ngati Hawea also. Ngati Tu and Ngai Te Ruruku would often take their whanaunga from Tuhoe in and around Whareponga and Keterau when they were visiting. Many Hapu used the Whanga on this basis. [Emphasis in original.] (D27:10)

Te Aranui Boyce Puna (Spooner) was told by his tipuna, who stayed at Whakaarimaunga, which jutted out of the sea at Tangoio and Arapoanui, how some would cross Te Whanganui-a-Orotu or walk across the back hills to Wharerangi to get the seasonal kai that they could not get at Aranui. They lived at Wharerangi ‘for the time they had to replenish their foods’, and ‘had mahinga kai areas’, where they would catch fish, set pa tuna, and, around August, collect fresh seagull, swan, duck, and goose eggs. They would preserve kahawai, eels, herrings, and other kai, including birds, in fat in a calabash to take back to the

papakainga. When the seasons were finished they would all head back to Tangoio, Arapoanui, Tutira, and so on. That was why they could use the saying 'Ka kati Te Whanganui-a-Orotu ka tuwhera a Puketitiri' (D34:2–3).

Bevan Taylor of Ngati Tu gave evidence that nga hapu o Tangoio were:

Ngai Taatara, Ngati Kurumokihi and Ngati Tu. Ngati Tu have rights from Wairoaiti right up to Whareponga and along the northern rim of Te Whanganui a Orotu which includes Kaiarero (Bayview) and Keteketerau. (D25:2)

Some of their boundaries overlapped with those of other hapu. Ngati Tu were now the principal hapu at Tangoio. They were of Ngati Kahungunu and were one of the seven hapu of this claim. All the hapu of the claim were related. In fact, they had many links with other hapu as well. Whanaungatanga, Bevan Taylor interpolated in his brief of evidence, did not mean that they had occupation rights (D25:2). At Tangoio, most of their kaimoana came from the sea. When Bevan was young, hapu members, including his father, regularly went to the northern boundary of Te Whanganui-a-Orotu to fish and gather kaimoana. His grandfather would take him to Wairoaiti to catch crayfish, eels, and whitebait. The stream was full of eels and ran into Te Whanganui-a-Orotu. Their whanau also went to Keteketerau. Before the earthquake, Bevan's aunt used to accompany her father on a boat in Te Whanganui-a-Orotu to fish at the northern end, but the earthquake dried out most of the area where his tipuna fished (D25:2–3).

Rangiaho Brown, whose father was Kapi Tareha and whose mother was from Te Haroto, would always go to Westshore for kaimoana and sometimes to Wharerangi, 'when there were court cases down in Hastings'. She thought that:

all those people at Petane Pa are connected with that Ahuriri. Also I think Moteo around the Bay View side, it probably involves those Petane Pa Maori's and the Tangoio one's, and around that way there it would also be Wharerangi and I suppose it would come down to Waiohiki. (D29:5–6)

Selina Sullivan, who grew up with relations at Omahu, recounted how twice a month they would go by horse and dray via the Taradale road to Ahuriri to get kina and paua. They gathered flat pipi at the port, tuanga from beds in the Onekawa industrial area near the bridge, and herrings and eels from creeks. They would stay by the road with blankets for a maximum of two or three nights (D14).

Monty Murton, who lived near Park Island in the 1920s, remembered Maori from Moteo coming down each season with horses and traps to the tidal inlet into which the Taipo Stream flowed, where they netted herrings. Before the earthquake, they would camp for two or three days on Park Island to gather sack loads of pipi and eels for the whole marae (A12:185).

2.5.7

Location of different species

The types of shellfish and fish species found in different parts of the lagoon were described in Mr Parson's report (D4:30–37), in briefs of oral evidence from claimant witnesses (D14, D16, D17, D18, D21), and in taped interviews (E19, E20, E21). Further evidence was given in response to questions at the first hearing, many of which were directed to establishing whether kaimoana in the lagoon comprised saltwater or freshwater species (D44) and whether, for the purposes of

the law, the lagoon was a lake or an arm of the sea (see para 3.8). The different species gathered in the 1920s were as follows.

At the northern end of the lagoon, where the Waiohinganga River flowed in, and up river from there, were kakahi (freshwater mussels), tuna (eels), inanga (whitebait), koura (freshwater crayfish), kahawai, shrimps, and herrings. At Keteketerau, there were whekito and patiki (flounder), which were attracted by tidal seepage, and eels, which migrated to and from the sea before the outlet was blocked. In the area between Te Ihu o te Rei (Quarantine Island) and the Beacons airport, patiki were plentiful, and, in the mudflats between Westshore and the airport, whetiko were found.

On the north-west side of the lagoon, the tidal flats at Whareponga, Wairoaiti, Kopaki, Kouturoa, and Ohingora Bays were good places for gathering pipi, cockles, pupu, and other shellfish. Eels were caught on the tidal flats and in the creek where hinaki were set. At Whareponga Bay and in the creek itself, whitebait, herrings, mohohao (freshwater flounder), mussels, crayfish, and a few shrimps were caught. The tidal flats at Wairoaiti were excellent for netting flounder. After the Kaikoura Stream was diverted into Ohingora Bay, mohohao went upstream with the tide and were netted on the outgoing tide. Below the Hinewaka cliffs was a mussel bed, and where the Taipo Creek entered the tidal inlet between the Wharerangi and Park Island cemeteries was an abundant source of pipi, eels, and herrings.

The streams entering the lagoon at the southern end, including Saltwater Creek and Purimu Stream, served as a seed bed and nursery for young flounder. There were also marekoroua (round pipi), whetiko, and herrings in the southern reaches.

The Ahuriri Estuary between the heads and the Westshore Embankment Bridge was considered the best place for pipi, while kuku were plentiful in the vicinity of the sailing club. Tuangi (round cockles) were found near Pandora Point and elongated white pipi near the bridge.

An abundant supply of kaimoana could be had by wading into the tidal flats in the 1920s, and few people fished from boats. There were crayfish at Tapu Te Ranga and patu (big horse mussels) on the bottom of the lagoon, masses of which were exposed by the earthquake. The Tareha family used Roro o Kuri as a camping place when they netted flounder. Heitia Hiha remembered that his grandparents talked about owning islands and reserves in the lagoon and using them for camping and gathering kaimoana. They also talked about Te Whanganui-a-Orotu as it was before the seawater levels increased, and they knew the places where they could get kakahi (freshwater mussels), for example, in the Poraiti Hills. No one had personally gathered kaimoana from low-lying islands like Te Mara a Tawhao or Matawhero.

2.5.8 The continued exercise of fishing rights after the earthquake

Evidence from claimants made it clear that many Maori families continued to exercise their customary fishing rights in Te Whanganui-a-Orotu and gather shellfish at Westshore and Port Ahuriri after the earthquake, despite the erection of notices and warnings from the district nurse or the inspector. Wini Te Reo Spooner, who grew up at Wharerangi in the late 1930s and early 1940s, described how in those days whanau of Ngati Hinepare and Ngati Mahu living in kainga along the edge of Te Whanganui-a-Orotu (Te Kopaki, Roto Whenua, Paparakaitangi, Wharerangi, and Poraiti) would roster themselves to gather food

along its eastern shores. Some would go to Te Whanganui-a-Orotu for mahi kaimoana and others to Omaranui to cultivate kumara, while some of the men would go to Puketitiri to hunt pigs and snare birds. Manmade tracks from Wharerangi to Park Island, Poraiti, Roto Whenua, Kouturoa, and Te Kopaki were used by his people to get to Te Whanganui-a-Orotu on their trips for kaimoana. He would accompany his grandparents to Ahuriri to gather kina, kuku, paua, pipi, and whetiko (D35:1–3).

Marjorie Joe went there with her whole whanaunga to gather shellfish, as did Te Rima o Hurae Whenuaroa from Moteo. In those days, he told us, there was quite a community at Moteo. From there they used the back road across the Puketapu Bridge, past the Puketapu Hotel, then over towards Wharerangi. They would cut across the top of the hills to where there was a big spur and drop straight down to Te Whanganui-a-Orotu, which was less than a day's travel away. After the earthquake, they went around the main beach to the Iron Pot, where there used to be a lot of kina and paua. There were plenty of whetiko towards the old bridge across the estuary and a lot of pipi in the Iron Pot, and flounder used to breed in the area below Pandora Bridge (D36:3).

Heitia Hiha, who grew up in Petane, collected pipi, tuangi, and whetiko near the southern end of the Embankment Bridge, gathered kaimoana along Harding Road, and netted and speared flounder on the eastern side of the bridge, but he didn't always have easy access to mahinga kai areas in the Ahuriri Estuary because they were not allowed the use of the farm roads and the areas near the pump house when the whole area was drained (D21:3–4).

Wiari Anaru, who had lived at Kaiarero (Bay View), collected pipi and tuangi at the railway embankment bridge until they started to deteriorate, and a lot of people gathered kina at the Iron Pot/Harding Road area (D32:1).

'After the earthquake,' Beattie Nikerae said:

we carried on gathering kai moana for awhile until they decided about the hospital. It stopped the Maoris coming there. The hospital discharged its sewer into the sea there. . . . It stopped us getting kai moana there. (Cited in D4:55)

Selina Sullivan said:

I'll tell you what killed the food there was those boats. You see the Moteo Maoris, they got their pipis right across from the wharves there. No matter how deep, the Ngati Mahu and Ngati Hinepare got it – where that channel comes in on that side. But it was those boats. And then one time my daughter and I went to get some pipis. We went along picking up these things and I had a look – toilet paper! That stopped me going there. (D4:55–56)

Polly Rakuraku explained that the earthquake did not destroy their kaimoana altogether:

When the hospital emptied out there it killed the seafood. Then when they put those farms on the lagoon they emptied all their stuff into the creek there and it came down. We had to stop getting kai moana. They put a notice up there not to gather the seafood. They put a board there. Don't go there, its polluted. The pakeha reclamations destroyed our food source. (D4:56)

In the end, it was the draining and reclamation of the inner harbour and the pollution of the estuary, rather than the earthquake, that deprived the claimants of their customary rights of access to and use of the shellfish beds and fishing grounds and bases in Te Whanganui-a-Orotu. By the 1960s, all that remained of their centuries-old foodstore had been totally destroyed or seriously contaminated. As they saw it, in failing to protect this taonga, the Crown had been in breach of both article 2 of the Treaty and the fishing rights granted to them by the 1851 deed of sale. In Heitia Hiha's words:

An invitation to share a meal is not a licence to take the whole harvest. (D21:13)

We agree.

References

1. See also J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, Wellington, A H and A W Reed, 1973, pp 6–7
2. Helen Hogan (ed), *Renata's Journey: Ko te Haerenga o Renata*, Christchurch, 1994, pp 25–27. The present site of Omahu is at Te Karetu, where Renata built a house after the 1867 flood washed the former Omahu away and the Ngaruroro River changed its course.
3. For a map and account of Tamatea's journey, see *He Korero Purakau mo nga Taunahanahatanga a nga Tupuna: Place Names of the Ancestors – A Maori Oral History Atlas*, Wellington, 1990, pp 68–77.
4. For whakapapa charts, see A12, pp 15–21, D27, E3(a), p 42, and E3(c).
5. *He Korero Purakau mo nga Taunahanahatanga a nga Tupuna*, p 68
6. Buchanan, p 50
7. Ibid, p 9
8. Angela Ballara and Gary Scott, 'Claimants' Report to the Waitangi Tribunal on Crown Purchases of Maori Land in Early Provincial Hawke's Bay', January 1994 (I1), vol 1, p 33
9. Mark Wilson Allen, 'Warfare and Economic Power in Simple Chiefdoms: The Development of Fortified Villages and Politics in Mid-Hawke's Bay, New Zealand', PhD thesis, University of California Los Angeles, 1994
10. Ibid, pp 340–342, 460–461
11. In a paper delivered to the New Zealand Society for Legal and Social Philosophy on 22 July 1994.
12. Ballara and Scott, vol 1, Ahuriri file, p 5

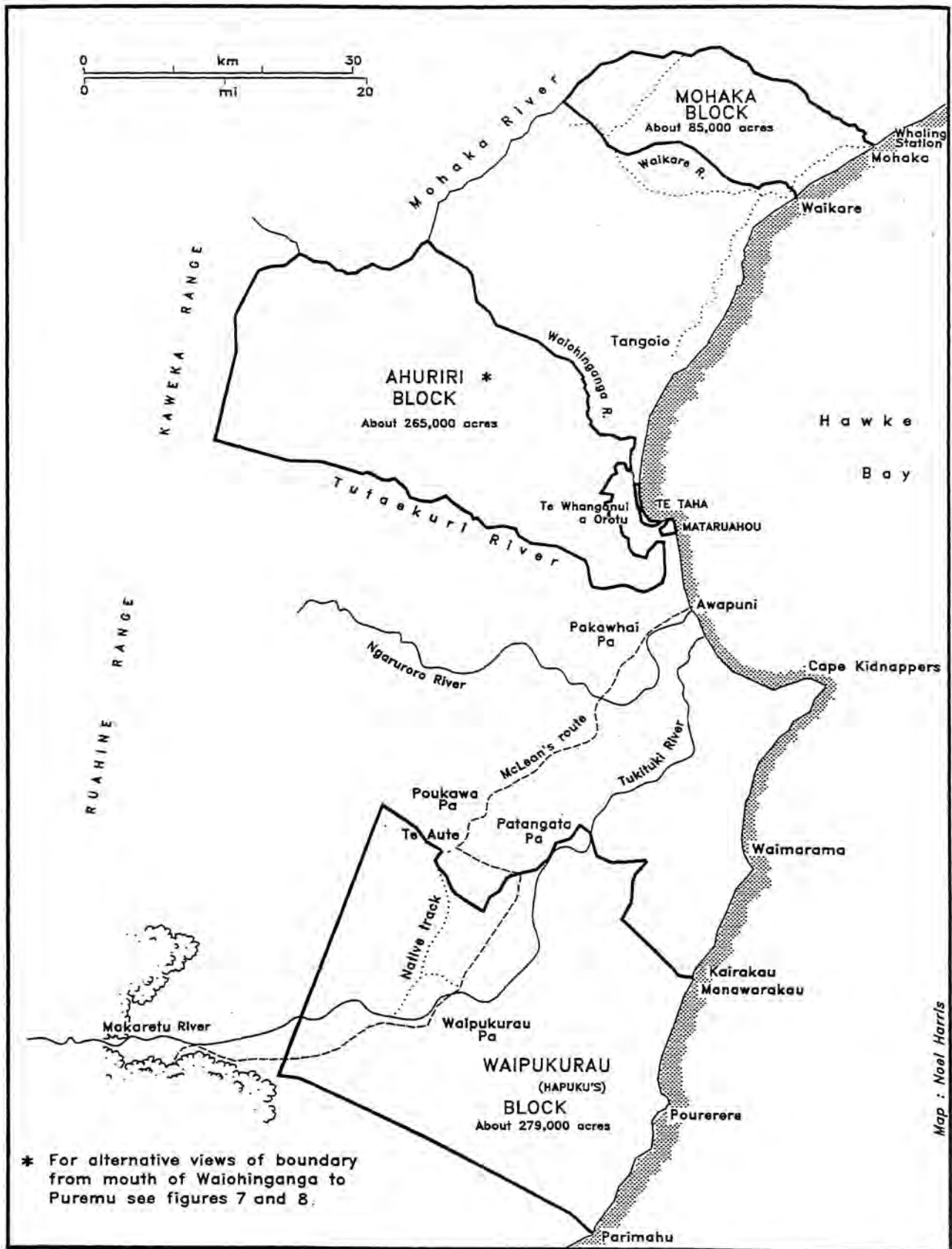


Figure 4: McLean's 1851 Hawke's Bay purchases

CHAPTER 3

THE AHURIRI PURCHASE

3.1 INTRODUCTION

Because this claim originated in the Crown's inclusion of Te Whanganui-a-Orotu in the 1851 Ahuriri purchase, in this chapter we examine the circumstances that led to the purchase, in so far as they concern Te Whanganui-a-Orotu.

3.2 EARLY EUROPEAN CONTACTS

3.2.1 Europeans discover Te Whanganui-a-Orotu

On 14 October 1769, Captain James Cook became the first European to sight Te Whanganui-a-Orotu. From the *Endeavour*, two or three miles offshore, he observed 'a bluff head . . . On each side a low narrow stone beach,' and, between these beaches and the main land, 'a pretty large lake of salt water – as I suppose'.¹ His chart shows a probable entrance, which must have been either at Keteketerau or 10 chains (200 m) or so to the south at Ruahoro.²

The next European known to have sailed along these 'little known shores' was Dumont D'Urville in the *Astrolabe* in 1827, but he saw no more than 'a fairly large island, lying alongside the coast . . . which might be a peninsula'.³

In August 1837, Captain Thomas Wing, master of the *Trent* from the Bay of Islands, found an entrance channel to the harbour of 'Hua Ridi' (Ahuriri) between the western spit (Westshore) and Mataruahou (Scinde Island). On his sketch of the harbour, he noted that it 'should not be visited by vessels more than sixty tons, the bottom being very loose and bad holding ground about the heads. The best berth for getting in and out was close around the east head of the entrance.' A good holding ground was at the mouth of the Tutaekuri River. The western side of Te Whanganui-a-Orotu was 'Nearly all Dry at low Water Sand and shell Fish' (A21(f):1542) (see fig 6).

In December 1839, a Wellington merchant trader, investor, and land purchaser, Captain W B Rhodes, attempted to set an agent ashore at Ahuriri to establish the pork trade. In a letter to his Sydney partner in January 1840, he claimed to have purchased for £150 worth of trade goods about 1.4 million acres of very valuable land in central Hawke's Bay, which included 200,000 acres at Ahuriri, although he wanted 'One man's signature yet to this deed'. William Williams, a Church Missionary Society missionary at Turanga, petitioned the Queen to have this outrageous claim overturned and it was disallowed by the old land claims commissioners (E1(b):5).⁴

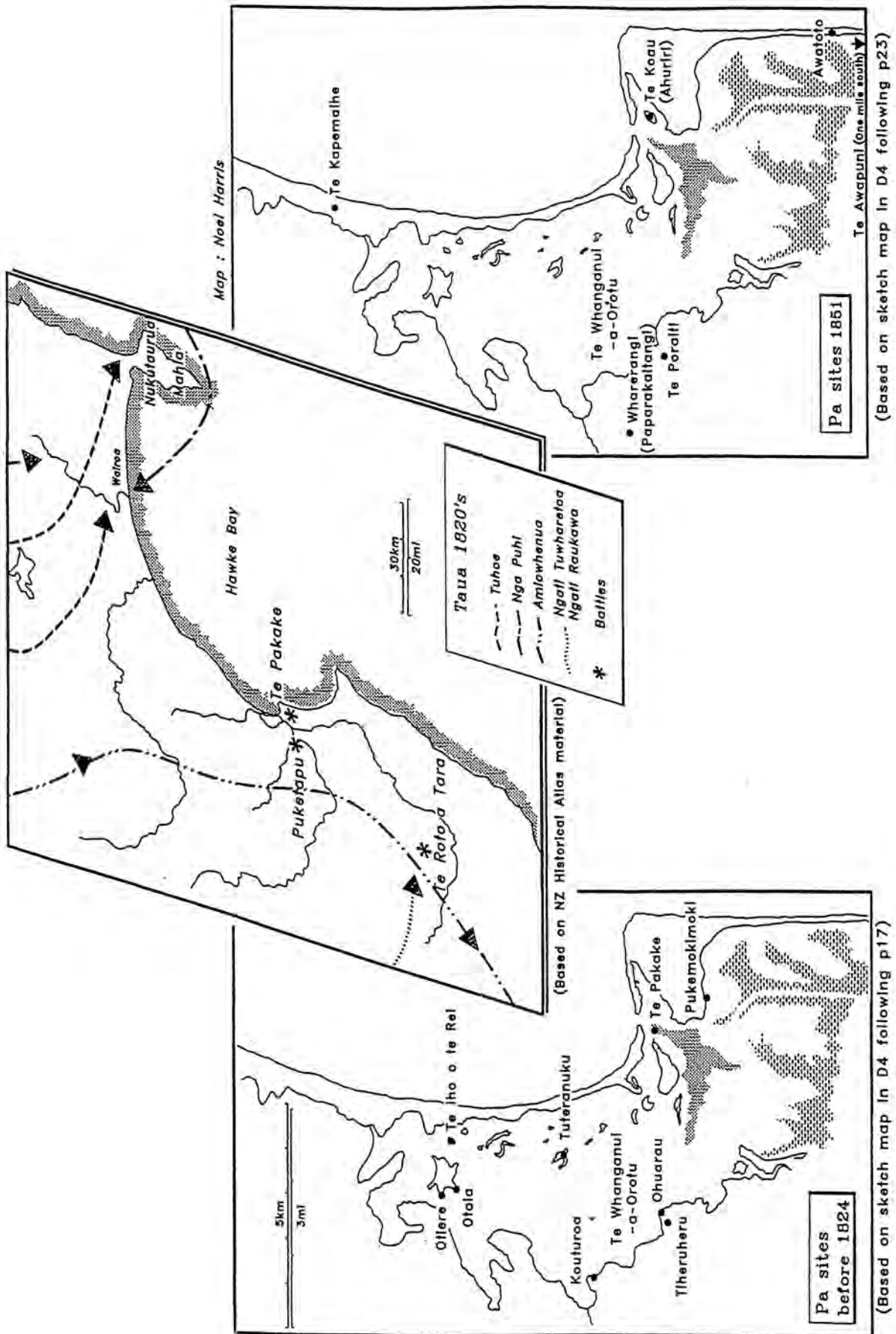


Figure 5: Pa sites and taua

After a visit in 1841, Rhodes published an account of the Ahuriri district, estimated at 880,000 acres, more or less, in the *New Zealand Gazette and the Wellington Spectator* of 21 April 1841:

The roadstead is sheltered from the prevailing winds, and there is good anchorage in 8 fathoms of water, one mile from the shore. At the entrance of the river, in the proper channel, their [sic] is 3 fathoms water; and immediately after passing the bar, it deepens to 7 and 9 fathoms, shingly bottom . . . The river shortly loses itself for a time in a large shallow lagoon, nevertheless there is a channel towards the South, into a cove or natural dock, sheltered from all winds, and out of the influence of the tides; . . . One large American whaler, requiring water and refreshments, once anchored in the river, thus proving that this place would answer as a sea port second to Port Nicholson. (A21(c):600)

Thus, about a year or more before the more enterprising New Zealand Company settlers from Wellington began to drive sheep and cattle round the coast into the lower Wairarapa and negotiate leases from local Maori, they must have heard that there was a safe harbour and anchorage and a large tract of good grazing land further north in the Ahuriri district (as Hawke's Bay was then called).

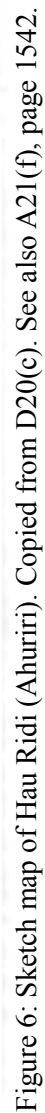
3.2.2 **Musket warfare and migration**

The chiefs and people of the principal settlements on the shores of Te Whanganui-a-Orotu had little, if any, direct dealings with Pakeha until the 1830s, when many of them were living at Nukutaurua on the Mahia Peninsula. For them, the early contact period had been marked by the intensification of tribal warfare, decimation, enslavement, and migration.

The catalyst for these unprecedented changes was a series of raids on Heretaunga and Ahuriri by musket-armed war parties from the north (see fig 5). The brunt of the invasion was borne by Ngati Whatuiapiti and the surrounding hapu at Roto a Tara (Te Aute), an area that abounded in eels, freshwater fish, and waterfowl. Most of Ngati Whatuiapiti then went to Nukutaurua at Mahia, 'from which place they could make an attack on any outsiders who attempted to occupy Heretaunga'.⁵ A general migration of people from the district followed.

Island pa commanding the outlets of valuable fishing grounds and shellfish beds in Te Whanganui-a-Orotu were then attacked and fell. Most of the defenders of Parapara and Te Ihu o Te Rei near the old Keteketerau outlet were slain by invaders armed with pu (guns) and thereafter were known as Ngati Matepu ('those who die by the gun' (D37)).⁶ Te Pakake, 'a communal gathering place in times of trouble' near the new Ahuriri outlet (see fig 5), was defended by those who had refused to accompany Ngati Whatuiapiti to Nukutaurua. They were mainly the local hapu of Ngati Kahungunu: Ngati Tuku a Te Rangi, Ngati Te Rangikamangungu, Ngati Hinepare, and Ngati Matepu, under Tareha, Tareahi, and other chiefs, assisted by Ngati Hawea and Ngati Kautere (H1:11–12).⁷ They also included Te Hapuku, then a young chief of Ngati Whatuiapiti, and Tiakitai of Ngati Kurukuru of Waimarama (H1:12, fn 42). The pa was taken with great loss of life, and the survivors took refuge with those who had migrated to Nukutaurua (D4:15–16).

For some years, hapu of the Ahuriri and Heretaunga remained at Mahia under the protection of the Ngapuhi chief Were Hauraki, who had settled there and become the acknowledged leader.⁸ At Mahia they participated in the flax and



provisions trade with European shipping and onshore agents to acquire firearms, hardware, cloth, tobacco, and rum. The establishment of a shore whaling station at Mahia in 1837 gave them opportunities to engage in whaling operations, ship building, and sailing.

At the end of 1839, the missionary William Williams took up residence at Turanga and with his native teachers began regular visits to Maori settlements at Mahia. Entries in his Turanga journals indicate that from about this time Ahuriri chiefs and people began to return to their ancestral lands. Early in February 1840, the chief Tohutohu told Williams that he was going to visit his proper home at Ahuriri to see his people and look after his land. On his return, Tohutohu told Williams that he had found Europeans arriving in 'great numbers' and had seen nine vessels. Captain Rhodes had made a nominal purchase from one chief, but the people were generally opposed to the selling of land and the principal chiefs were living upon Table Cape.⁹

3.2.3 **Missionary activity**

Ahuriri became the southern extremity of Williams's parish and was visited by a native teacher, Joseph, in June and July 1840. The following month, a chief asked Williams to send him 1000 books.¹⁰ At Ahuriri in October, Williams visited two small settlements of no more than 50 people and held two services, attended by not more than 100. Others, he was told, were scattered about on their cultivations or away hunting.

For the most part, Williams found the people willing to receive instruction and clamorous for books.¹¹ At Ahuriri on 1 November 1842, he examined 20 Maori, of whom 10 passed for baptism. At Awapuni, native teachers had erected a 60-by-30-foot chapel:

As a missionary station Ahuriri will be highly important because though the population is not large, having been decimated by attacks from natives of the Waikato, yet there are several hundreds still remaining. It is a place moreover to which Europeans are likely soon to resort, where the natives unless taken special care of, will many of them fall a prey to temptation. (A12:66)¹²

Late in December 1844, William Colenso arrived to open a permanent mission station at Waitangi on 10 acres of land granted by the chiefs. A wilderness of swamp, it was utterly unsuitable for a place of residence. Initially, with the help of his native teacher, Renata Kawepo, his success was impressive, but by 1850 his dictatorial manner and methods had led to a break with Renata.¹³ The rate of conversion to Christianity at Ahuriri in the 1840s did not match the scale and speed of conversion on the east coast in the late 1830s, where Christianity had offered deliverance and protection from vengeful enemies.¹⁴ After the signing of the Treaty of Waitangi, chiefs and people looked more to the Queen and her officials, and to a respectable class of settlers, than to the missionaries to maintain peace, good order, and quiet living.

3.2.4 **Extending the Treaty**

In April and May 1840, when most of the people from the Ahuriri district were still at Nukutaurua, Williams was deputed by his brother Henry to obtain signatures to the Treaty of Waitangi from East Cape to Ahuriri. He informed

Hobson that he intended to seek Treaty adherents among mixed tribal groupings south of Turanga at the end of July or in August, but for some undisclosed reason he did not pursue his intention.¹⁵

Meanwhile, on his way back north after obtaining signatures and proclaiming British sovereignty in the South Island, Major Thomas Bunbury put into shore in the *Herald* near the mouth of the Tukituki River on 23 June. Bunbury was trying to secure the signature of a Ngati Whatuiapiti chief, Te Hapuku, because, on 25 September 1839, he had signed the 1835 Declaration of Independence when he was visiting the Bay of Islands. At first Te Hapuku refused, alleging that Ngapuhi were now slaves through the Treaty, but Bunbury assured him that his signature could only increase his mana and a Ngapuhi chief present advised him to sign. This he did on board the *Herald* on 24 June.¹⁶

Mr Parsons cited evidence later given to the Native Land Court by F W C Sturm that Te Hapuku also signed with Puhara at Nukutaurua (D4:19). Although Sturm was at Nukutaurua in May 1840, when the Treaty was brought to the district,¹⁷ the story seems unlikely. Sturm did not witness the signing himself, and Te Hapuku later refused to sign. Mr Parsons went on to say that Te Hapuku, Harawira Te Mahikai, and Hoani Waikato signed in June after the *Herald* entered Waipureku Harbour to the north of the Tukituki River and that documents supplied by the descendants of Harawira state that he signed on board the *Herald* in the harbour on 23 June. Mr Parsons also said that three other chiefs of Heretaunga signed: Te Tore of Petane, a Ngati Matepu chief, at Uawa; and Rawiri Paturoa and his brother Wiremu Te Ota of Ngati Upokoiri in the Manawatu. The seventh chief to sign was Matenga Tukareaho of Nuhaka (D4:19).

The Wai 55 claimants seek a finding that 'Ngati Kahungunu signed the Treaty' (1.2(d):4). On the basis of the evidence, it seems more accurate to say that Te Hapuku's signature was sought and obtained, and that four, possibly five, others signed, probably by chance. Williams left no record of having sought Treaty adherents at Nukutaurua, and most Ngati Kahungunu chiefs did not sign the Treaty, although they subsequently identified themselves with Te Hapuku and others who did.¹⁸

3.2.5 **The return from Mahia and relocation**

To Ngati Kahungunu living at Mahia, the Treaty held out the prospect of their being able to return to their ancestral lands in peace. No pa or kainga in use prior to the exodus were reoccupied. Places where blood had been spilt were wahi tapu (see fig 7). Understandably, people were still security conscious and chose to be within calling distance of each other, although they spent extended periods at flax growing swamps such as Lake Oingo, dressing flax to sell for firearms (D4:20). Parehe established the principal settlement at Te Awapuni, north of Waitangi across a stretch of water. Tareha of Ngati Parau abandoned Te Pakake and Pukemokimoki for Awatoto, just north of Awapuni, and used Te Koau (Gough Island) as a camping ground for fishing. Kurupo Te Moananui and Ngati Hawea established themselves at Waipureku, south of Waitangi. Ngati Hinepare and Ngati Mahu did not return to Ohuarau or Kouturoa but reoccupied ancestral lands at Te Poraiti and Wharerangi. Hapu who had occupied island pa at the northern end of Te Whanganui-a-Orotu abandoned them in favour of two locations further north: Kapemaihe near the beach on the south side of the present Esk River mouth and Petane on the north side (D4:21–23) (see fig 5).

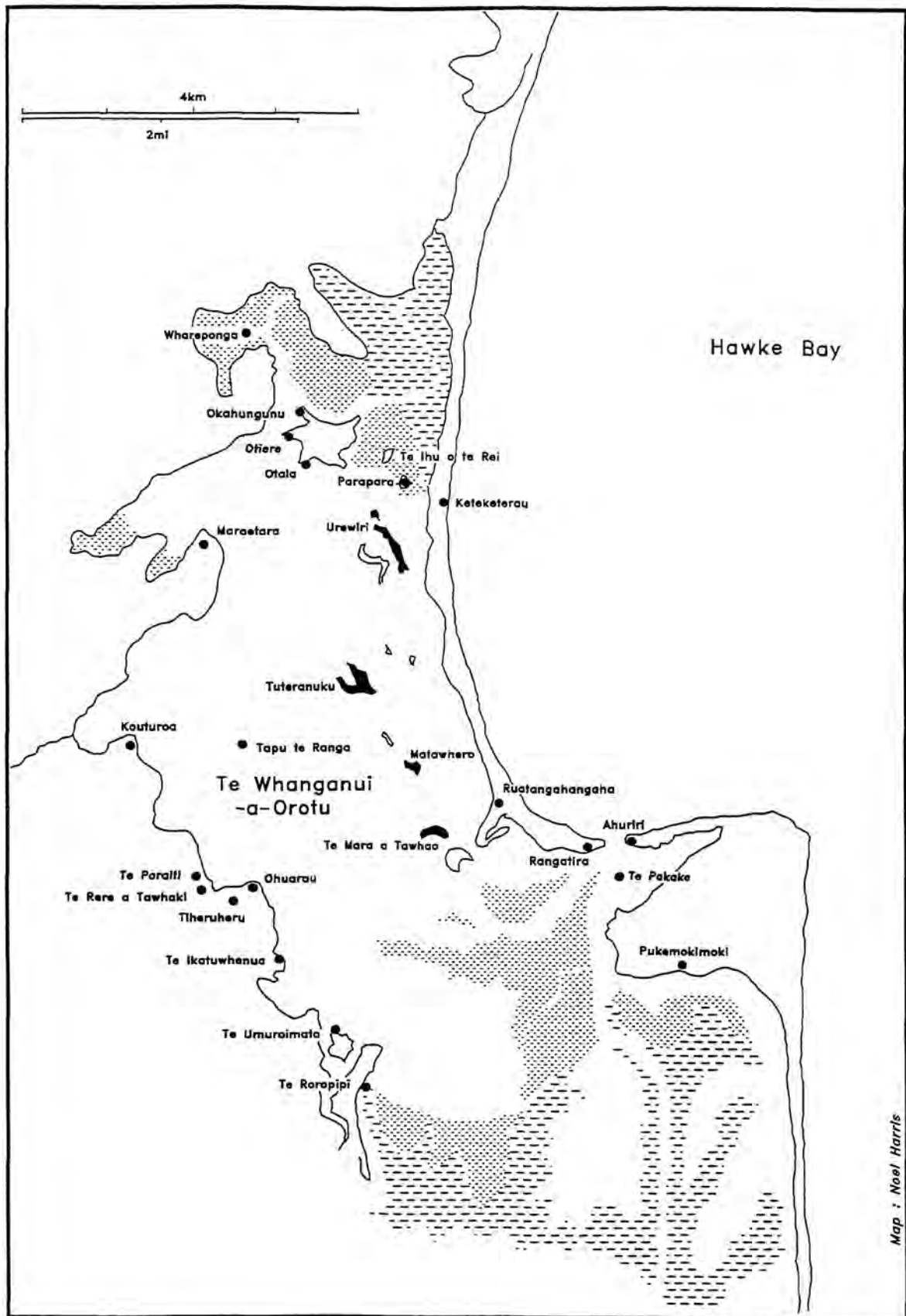


Figure 7: Wahi tapu sites. Based on the sketch map in A12 at page 131.

3.2.6 The beginnings of peaceful trade and agriculture

From these new locations, close to the shores of Te Whanganui-a-Orotu and Te Matau a Maui (Hawke Bay), people resumed their regular seasonal fishing and food gathering expeditions for subsistence and gift exchange. They also began to supply pigs, potatoes, and other provisions to Europeans visiting or settling in the district in exchange for a widening range of trade goods.

In 1846 Alexander Alexander established a trading store at Onepoto and obtained a de facto Maori wife (A12:68). Later he entered into a partnership with the first grog seller, Ankatell, who arrived in 1849 (F9:5). Subsequently, he sold his store and went to live and farm among his wife's people, the Ngati Hinepare at Wharerangi.

In 1850 James McKain and his brother-in-law, William Villers, moved from Wellington to Ahuriri to trade with the Maori. Sarah McKain and Robin Villers, each with two children, followed and settled on the western spit.¹⁹

By 1851 there were tiny beach communities on both sides of the Ahuriri Harbour, one at Onepoto and one on the western spit, as well as half a dozen or so shore whaling stations strung around the coast from Mahia to Kidnappers. Each of these stations had two or three boats and 18 to 20 men.²⁰ Being the only safe harbour between Wellington and Tauranga, and with a hinterland occupied by Maori, who were beginning to produce wheat, maize, fruit, vegetables, pigs, and potatoes for the European trade, Ahuriri Harbour had the potential to develop into a port town where both races mixed and mingled in the market place. But, as we shall see, the rapid advance of pastoralists from the Wairarapa was to overtake the development of Maori agriculture and trade, and the town and port of Napier were to become the centre of government, administration, and business for a pastoral province.

3.2.7 Roman Catholic mission

Bishop Pompallier visited Mahia twice in 1841 and, in January 1851, Father Lampila and two brothers established a Roman Catholic mission station at Pakowhai, the home of a friendly returned chief, Puhara. Father Reignier joined Lampila and took over the station early in 1852, and Brothers Basil and Floretin established a mission farm and poultry yard and opened a store that sold necessities to Maori.²¹

3.3 CROWN LAND PURCHASE POLICY AND PROCEEDINGS

3.3.1 The illegal leasing of land

According to Dr Bryan Gilling, a Crown commissioned researcher subpoenaed by the Tribunal to give evidence at the request of the claimants, none of the Europeans residing at Ahuriri in 1850 were involved with land transactions beyond what they wanted for their immediate needs. Presumably they leased or lived there 'purely on the sufferance of the local Maori for the benefits which their trading brought in'. Doubtless their presence helped to introduce local Maori to a cash economy and commercial transactions, but 'it would not have helped much in their

acclimatisation to land purchasing' (E1(b):6). As early as 1848, pastoralists moving north from the Wairarapa were illegally leasing blocks of land in the Ahuriri district from local chiefs for grazing sheep and cattle. Governor Grey and the recently established government for the southern province of New Munster were anxious to purchase this land before the chiefs realised the benefits of leasing rather than selling, as had happened in the Wairarapa (A22:21–22).²²

3.3.2 **Grey's policy and objectives**

Grey's policy was basically to exercise the Crown's exclusive right of pre-emption to purchase large blocks of land ahead of the needs of settlers as rapidly and as cheaply as possible.²³ But he repeatedly reaffirmed that the Queen would respect the Treaty of Waitangi and protect Maori in their undisturbed possession of their lands. He believed that if Maori were handled carefully they would sell land surplus to their own needs willingly and cheaply and thus benefit from the spread of Christianity, commerce, and civilisation. He wanted not only to make land available for both small settlers and large runholders but also to encourage Maori to cultivate their own lands more intensively, sell produce to buy capital goods like horses, carts, ploughs, and ships, and build their own flourmills.²⁴ His ultimate objective was the peaceful amalgamation of the races into one state and one people.

3.3.3 **The first offer to sell land**

Land at Ahuriri was first offered for sale to the Crown by the chiefs Kurupo Te Moananui and Tareha in 1844.²⁵ Their letter to the Governor is not extant but the probable reason for their offer was that after two decades of inter-tribal warfare they were looking to European settlement as a means of protection (E27(b):38–39).

3.3.4 **Early land purchase negotiations**

Reports researched and produced by Tribunal researcher Joy Hippolite and Crown researcher Stephanie McHugh show that Crown land purchase negotiations in the Ahuriri district in 1850 and 1851 were a continuation of earlier negotiations aimed at purchasing a million-acre block in the Wairarapa to use for the proposed Canterbury settlement and to provide for squatters who would be displaced. Before these negotiations began, the Colonial Secretary of New Munster asked William Colenso to help by making Maori appreciate 'the physical benefits and external advantages' that they would receive from the settlement (A22:15).²⁶ Colenso's missionary district, through which he journeyed each spring and autumn, extended as far south as Palliser Bay.

On 22 December 1850, Colenso met some of the principal chiefs at Pakowhai. After informing them of the benefits of settlement, he left them to talk the matter over among themselves so that they would be prepared to speak to the Land Purchase Commissioners when they arrived. But he also told them that he had been asked to counsel them to sell their land to the Government, which, candidly, he could not do. Rather, he stuck to what he had always told them:

Never to part with the whole of your Land and, when you part with any, be sure to have a good *natural* boundary between. [Emphasis in original.]²⁷

On 23 December, Colenso wrote to the Colonial Secretary saying that he deeply regretted that he could not ‘conscientiously aid or assist or in any ways use any influence’ that he might possess over the chiefs:

to prevail upon them to alienate the whole of their lands to the Crown or to accept ‘Reserves’ for themselves . . . in scattered or detached parcels or blocks among the whites.

In his humble opinion, both plans were ‘equally fraught with no less than the utter and speedy Extinction of the whole of the Native Race’ (A22:15–16). He would not in future comment on or interfere with any land sales in the district.

3.3.5 **The continuing desire to sell and/or lease**

In the course of purchase negotiations in the Wairarapa, the Native Secretary of New Munster, H T Kemp, intimated to two unidentified Maori from Ahuriri or Heretaunga that no more squatting would be allowed. The following month, F D Bell, who was assisting with the negotiations, wrote to say that he had received intimations from Te Hapuku and other Ngati Kahungunu chiefs living at Ahuriri of their desire to sell portions of their land.²⁸

After Wairarapa Maori had turned down the offer of £4000 for the million-acre block and had instead demanded £16,000, Kemp received news that Te Hapuku had leased the Ruataniwha Plain for £60 per annum. Prospects of lucrative annual rents notwithstanding, Te Hapuku and the Ahuriri chiefs were still prepared to sell. In April 1849, two letters were written to the Governor offering to sell land at Ahuriri for white settlement. The first from Te Poihipi and two others was translated as follows:

Friend . . . I have been considering for 15 years to have white people, some Cows, some sheep, some horses, and some Goats . . . that I may see (err [sic] I die) in what consists the wealth of the white people – let your payts [payments] be large, and let also the Number of white Men be large. (A21(d):827)

The second, signed by ‘the principal talking Men’ and approved by all the people, asked that the settlers:

be Men of high principle or Gentlemen no people of the lower order – let them be good people – let them be the Colony of Missionaries who [we] have heard are coming out. (A21(d):828)

The principal talking men included Tareha, Karaitiana Takamoana, Kurupo Te Moananui, Paora Torotoro, and Wiremu Wanga, who were to take a leading part in the sale of the Ahuriri block, as well as Puhara from Pakowhai.

3.3.6 **McLean takes over the purchase negotiations**

In May and September 1849, the provincial government of New Munster, with Grey’s concurrence, arranged for Donald McLean, ‘the most able and hitherto successful negotiator of Native Purchases’ in its service, to renew purchase negotiations for the Wairarapa, up to and including Hawke’s Bay (A22:25).

For information and guidance, McLean was sent a copy of the instructions that had been given to Kemp, along with all Kemp's reports. He was advised to act in the general spirit of the instructions, and report 'fully from time to time upon any points, any deviation from which you may consider likely to prove advantageous' (A22:25). He was to keep a daily record of his proceedings and forward a copy of it, in addition to his reports, to the Colonial Secretary for the information of the Government. Kemp, it should be noted, had been told that any reserves made for Maori must be clearly defined in number, position, and extent and be marked out distinctly on the ground. A surveyor would accompany him for this purpose (A22:13–14).

McLean was detained in Taranaki until June 1850, and he was then directed to occupy himself completing the Rangitikei inland boundary while awaiting a decision on the final purchase arrangements from Governor Grey (A22:24–30). In August he requested additional directions and recommended that the east coast purchase negotiations be commenced in Hawke's Bay rather than the Wairarapa. He believed that extensive runs might be acquired there with little trouble because the Maori in possession were the original and undisputed claimants of their districts (H1:13–14).

At an assembly of chiefs at Moutoa to discuss the sale of a large tract of land extending from the interior of the Manawatu towards the Ahuriri, McLean received a letter from Te Hapuku and other influential chiefs containing proposals concerning the Ahuriri and Wairarapa districts. These advances, he observed to the Colonial Secretary, should not be 'too hastily acted upon, neither should they be entirely overlooked or neglected'. None the less, he claimed:

the attention of the Government to the necessity of pursuing a steady course of negotiation which would give time for discussing and adjusting conflicting claims, besides affording the most favourable opportunity for concluding purchases and for neutralizing the systematic opposition of those Tribes who tenaciously resist the alienation of any of their lands.²⁹

Grey entirely approved McLean's proceedings and hoped that negotiations could continue to be pursued 'in the same steady and judicious manner as heretofore'.³⁰ On 7 October 1850, McLean was instructed to proceed with the negotiations, 'but not definitely conclude agreements for the payment . . . for the purchase of land until His Excellency's [Grey's] sanction be obtained'.³¹

3.4 MCLEAN NEGOTIATES THE AHURIRI PURCHASE

3.4.1 McLean's personal influence

McLean's purchases of the Waipukurau, Ahuriri, and Mohaka blocks in November and December 1851 were accomplished largely by personal influence. He was determined to be a success and always gave himself up entirely to the work at hand. He respected Maori rank and protocol but, like Grey, was a paternalist who could be deliberately calculating in achieving his goals. He had an imposing, dignified presence, and unlimited patience. In the lower Whanganui and Rangitikei districts, he had gained considerable experience in 'gradually reducing opposition

to his proposals' and 'patiently winning his way through obstacles that would have disheartened less persevering and less quietly determined men'.³²

Historian and now Tribunal member Professor M P K Sorrenson has written that Grey and McLean:

set up an effective system of land purchase . . . [which] required a measure of Maori approval. Once Maori offers to sell land had been received or solicited, a meeting was summoned at which all could assert their claims to land. There was usually keen debate and sometimes the purchase had to be postponed until important opponents were bought off or conciliated. In the negotiations government agents laid great stress on the 'advantages' to Maoris of selling, including the uses of ready cash, and the long term benefits from European settlement, such as the enhanced value of retained Maori land.³³

The main sources of contemporary evidence on the negotiation of the Ahuriri purchase are McLean's journals and official reports. Although his journals provide many insights into his thoughts and feelings, they are an incomplete record of McLean's meetings with and talks to local Maori. As Mr Walzl pointed out, with regard to the first land purchase meeting at Ahuriri, McLean is very descriptive in recording the scene before him on his arrival but 'failed in his attempts to write up the speeches' (F9:5). His official reports to the Colonial Secretary of New Munster show that he was very proud of his success in securing valuable and extensive blocks of grazing land and the only safe harbour on the east coast in accordance with Grey's instructions. But as Dr Ballara said, 'his own words condemn his deal from the point of the view of Maori supposedly protected by the Treaty of Waitangi' (H1:28).

3.4.2 **McLean's first journey to Hawke's Bay**

McLean and his party left Wellington for Hawke's Bay via the west coast and the Manawatu Gorge on 18 November 1850, sending messengers ahead to announce their coming. Near Waipukurau, on 11 December, their messenger came in with the intelligence that the Maori had agreed to sell a considerable portion of land to the Government and the great chiefs were assembling from their different villages and would be at Waipukurau Pa the following day. Continuing on to the pa, McLean and his party, which had grown to about 50, were formally welcomed. On 13 December, 'the whole of the principal Chiefs from Ahuriri and the surrounding settlements' assembled to meet him (A5(a):307). In accordance with his advice and instructions, all his party kept 'perfect silence' until the usual formalities were over and the people of the place had expressed their entire assent, not only to receive them but also to sell their lands (A12:49).

At a public meeting on 14 December, Maori agreed to dispose of a tract of land, the boundaries of which were given to McLean in writing by Te Hapuku, the principal chief (A5(a):307). This came to be known as Te Hapuku's block, or the Waipukurau block. At this meeting, Tareha intimated to McLean that he would be equally welcome further north:

Come, come, come, this is now your land from end to end; tomorrow you shall [see] another end of the land Ahuriri. (A21(e):1214)³⁴

McLean was particularly impressed by Te Hapuku, who had risen to eminence within Ngati Whatuiapiti and who, McLean assumed, was the principal chief. When McLean stopped overnight with Colenso and obtained considerable information from him on the way to Ahuriri, however, he learnt that, as well as Te Hapuku, Te Moananui, Tareha, and Puhara had ‘great influence’ and nothing of importance could be effected by the others without their consent (A12:22, 50; A21(e):1217).

3.4.3 **The 20 December 1850 meeting**

At Ahuriri McLean was very kindly received by Ankatell (who was running a schooner in the coastal provision trade), who provided him with a room in his house on the western spit. A large meeting of 400 to 500 Maori assembled there on 20 December to negotiate with McLean.

At about 12 o’clock, Tareha gave McLean notice that they had discussed sufficiently long among themselves about the sale of their land and were ready to meet him. In his journal, McLean recorded brief, sketchy, but telling notes of what transpired:

Te Tore of Ngati Matepu got up with . . . an old cheek bone of a hog in his hands as emblematical of his decay and said my children let your words be good welcome to the stranger among you

Te Morehu

Let us all consent to sell the land do you all do so appealing to the crowd of about 4 or 500 all replied ae old Tori shaking the old bone with his infirm hand in a most emphatic manner as he lay on the ground consenting to the sale of the land . . .

1st Speaker Paora Torotoro

Welcome McLean come to your land This is your land we give it to you

2nd Speaker Tariha

Welcome to your land the water is ours the land you see before you is yours he then named the boundaries all agreeing to them. (A21(e):1218–1219; cf 1401–1402)

Dr Gilling was of the view that since the Maori were pointing out the land from the Westshore spit the water would have been that of the lagoon and the anchorage (E1(b):8). This seemed to him a clear indication of the concerns that Maori had to retain control of and access to their sources of seafood. Mr Walzl accepted this view (F9:6).

The evidence indicates that the boundaries named on 20 December were those described in the 1851 deed of sale. Clearly, Tareha had his own idea about boundaries and it would have been an issue if they had been changed by McLean.

3.4.4 **Native reserves and the external boundary**

In his first official report to the Colonial Secretary of New Munster on 21 December 1850, McLean wrote:

There is now sufficient employment for two active surveyors to mark off the Native Reserves and cut the external boundaries, where there was no river or other natural feature to mark them. . . . It is essentially necessary that the utmost expedition should be used to acquire this splendid district . . . peculiarly adapted for sheep grazing. . . . (A5(a):307)

In his journal he wrote:

In the morning the natives wished to go and see the front boundary of the purchase and to point out some of their reserves demands for which are rather on the increase I will give them their tether to see how far they will go thence I shall bring them to reason afterwards and hold them exactly to what they agreed at the public meeting 23 December.

Mr Ankatell lent me his boat and a steersman which with no crew took our party and we went up to Petane the kainga of Ngati Matepu where we had some tutu wine and other food a korero with Natives and came back in the evening. (A21(e):1222–1223; cf 1405)

A week later, McLean crossed over to ‘the Native reserve’ where Mr Alexander had a cottage, namely, Wharerangi (A21(e):1408).

According to Dr Ballara, McLean was planning to ignore the need and demand for reserves and was failing to perform his protective duty towards the owners or occupiers (H1:16). Her view needs to be put into the context of the conflicting objectives of protection and assimilation that were inherent in Crown policy. McLean clearly intended to limit the acreage of native reserves in Hawke’s Bay, as he had already done in Wanganui, in conformity with Kemp’s instructions. But he did not consider this disadvantaged Maori, whose future would be better assured by buying land back from the Crown as individuals.

For the time being, McLean recognised, Maori needed the land they customarily used and occupied not only for traditional purposes but also to grow cash crops to sell to European traders and settlers. He anticipated, however, that Maori would be rapidly assimilated into the colonial economy and acquire individual titles to land. Accordingly, he shared in a growing reluctance on the part of the Crown to set aside permanent native reserves. When he used the term ‘reserve’, he was generally referring to tribal or customary land that Maori wished to retain, not to portions cut out of the purchase and Crown granted.

In a report to the Colonial Secretary on 28 December 1850, McLean elaborated on his reasons for applying for two surveyors: firstly, it would expedite the purchase negotiations and, secondly, Te Hapuku, the principal chief, would be exceedingly jealous and displeased if Tareha’s land were surveyed before his. If there were only one surveyor, it would be essential for Tareha’s land in the neighbourhood of Ahuriri Harbour, where settlers were more than likely to form their earliest establishment, to be attended to first. The acquisition of Ahuriri country, he stressed, would ‘of itself be of great importance, from possessing the safest, and I may say, only harbour on this side of the island between Wellington and Tauranga on the North East coast’ (A5(a):308).

3.4.5 **The importance of controlling the Ahuriri Heads**

On 1 January 1851, McLean spoke to Takamoana about purchasing the Ahuriri Heads and the island opposite, namely, Mataruahou (Scinde Island). McLean noted in his journal that they were ‘essentially necessary, to command the Harbour’, and that Karaitiana Takamoana seemed disposed to sell but Tareha and Paora Torotoro were the principal owners (A21(e):1236).

A week later, McLean ‘pulled in a canoe to Tarehas station, along a fine deep river’ (the Tutaekuri), from there he went across to Tareha’s creek, which went to

Awapuni station, where he spent a couple of days with Colenso, who was ‘such a straight forward excellent man’ that he had ‘a great respect for him’ (A21(e):1242; cf 1415). The following day, McLean called at Te Awatoto, where he met Tareha and Henare Tomoana, with whom he had a long conversation. He also spoke to Tareha about selling the land on both sides of the entrance to the harbour, ‘as the place would be an awkward purchase without it’ (A21(e):1246; cf 1418). On 16 January, Te Hapuku, Puhara, and Tareha went to see McLean, ‘respecting their unsold claims’. ‘The latter,’ McLean noted in his journal, ‘has not yet agreed to sell the entrance to the Harbour, but I believe he will soon do so’ (A21(e):1248–1249; cf 1420–1421).

In a letter to the Colonial Secretary on 23 January 1851, McLean explained that:

There are several portions of land such as the head land, and water frontage, at the Ahuriri river and harbour, which the Natives are retaining for the purpose of fishing and trading, and which, together with some belts of timber reserved by them, it would be very desirable to purchase, even at a higher price than is usually paid for waste lands. (A5(a):309)

There the matter rested for some weeks while McLean journeyed to Wairoa and Turanga to meet chiefs, settlers, and traders and adjudicate in his capacity of magistrate.

On 17 March, at Awatoto, while on his way to Waipukurau with a survey party, McLean held ‘a long korero with Tareha about the purchase of the Ahuriri Island (Mataruahou) and the price of land in Taranaki of which he had a great idea and I moderated’ (A21(e):1257–1258). Then on April 21 he went to Wharerangi to see Tareha and his party to define the boundaries and extent of their reserves. The next day, McLean walked around the proposed Wharerangi reserve, noting that it was ‘a very good one of about 2,000 acres’, and that Tareha’s party were ‘very friendly’. He also noted that Paora Torotoro had agreed to sell the land on which Ankatell’s house and the survey office were erected, and that Te Hapuku and several other chiefs all seemed ‘anxious for a settlement of the price for the Ahuriri block’ (A21(e):1317–1318). This suggests that McLean was making some progress concerning the heads.

3.4.6 **The survey**

McLean first met the two surveyors that he had requested when he returned from Wairoa on 8 March. They were Robert Park and Charles De Pelichet, who was previously an assistant to Charles Kettle when he was laying out Dunedin. In his journal, McLean noted that the external boundaries of the block were to be surveyed, partly by actual measurement and partly by sketches with the prismatic; all provisional points and hills were to be fixed on the boundaries, and the names were to be marked (A12:27). Some days later, two survey parties set out, accompanied by a great number of Maori, to point out the boundaries of the land to be sold. McLean went with Park and his party as far as Omaranui, then rode off to a ‘most satisfactory’ meeting at Patangata, where McLean wrote that he had obtained a large block of at least 200,000 acres, which included the land that Te Hapuku had agreed to sell at Waipukurau (A21(e):1266).

Back at Ahuriri on 12 April, McLean purchased a house and outbuilding for £26 from Messrs Villers and McKain as an office for himself and the survey party, which would house them comfortably for the winter.

By mid-April, Park and his party had returned from surveying the external boundaries of the Ahuriri block and the work of plotting them had begun. Entries in McLean's journal for 28 and 29 April indicate that 'the maps were going on well', despite the fact that Maori chiefs kept calling. On 2 May, Park took 'a nice sketch of the district showing the Blocks offered for sale by the natives' to a meeting at Awapuni to discuss the price of the land (A21(e):1322–1323, 1326).³⁵

3.4.7 **The 2 May 1851 agreement on the terms of payment**

In conversations with the chiefs about the price that they should receive for their land, McLean had consistently endeavoured to moderate the ideas that they entertained. At the same time he had stressed that an accruing benefit of European settlement would be the increasing value of the land that they retained. On 14 April 1851, the Colonial Secretary informed him that Governor Grey was 'entirely satisfied' with all his proceedings at Ahuriri and requested him to 'have the goodness to ascertain as soon as practicable, the lowest price which the Natives will take for their land which you are about to purchase' (A5(a):311).

At a 'grand meeting' at Te Aute on 17 and 18 April with all the chiefs and people who had agreed to sell Te Hapuku's block, McLean tried to beat down opening demands for £20,000, a sum which seemed to him 'wonderfully large compared with Taranaki which cost only £800 – Wanganui £1000 – Rangitikei £2500'. To close the bargain, he asked Te Hapuku to accept £3000 or refer the case to Governor Grey, which Te Hapuku agreed to do (A21(e):1292–1315). A further meeting with the chiefs and people who had agreed to sell the Ahuriri block was to be held at Te Awapuni on 29 April, but they were unable to attend because the wind was so severe. By the time McLean arrived there on 1 May, they had assembled. Tareha spent the greater part of the night with McLean in the tent 'on very good terms also Te Moananui' (A21(e):1325). Tareha's wife had died on 23 April, which, McLean believed, would 'more fully determine the natives to sell their land at a moderate price' (A21(e):1318–1319). McLean's journal entry is a telling account of the meeting, which commenced at about noon on 2 May. Several Maori asked for £4500, and McLean then told them that he was not clear as to what land they were offering:

[He] had repeatedly asked for two places, at the entrance to the harbour which they did not now mention as included in the sale . . . the land they were offering was very poor . . . the price they asked was enormous and could not be acceded to . . . it was foolish in them to make such demands knowing it was quite impossible to comply with them.

One of them got up and said the land is not poor. It produces food for us and if it does not please the pakeha, it does for our own pigs rats birds &c.

Tariha then got up and said McLean I will stand here till you agree to give me what I ask for my land the places you ask for Moturu [Mataruahou] and te Taha I now agree to sell, as you request give us £4,000 – that is a small sum for our large land. (A21(e):1327–1328)

Although McLean's instructions were to ascertain the lowest price that they would take, not fix the terms of payment, he felt that 'with a fickle people, like

these natives, liable to sudden changes and influences, it was best to name a sum at once'. He told Tareha that Park could not value the land at more than £500, but 'they had now certainly agreed to sell more favourable and valuable spots'. Therefore, to shorten their talk, as he was anxious to be off in the morning, he named £1500 as 'a good and ample price', but:

they almost left the ground evidently disgusted with the smallness of the amount Others endeavoured to keep them together the chiefs felt very much downfallen . . . they were all in a sad state for some time. (A21(e):1329)

McLean told them coolly that his power to grant prices for land was limited, and that he could not and would not exceed what he had mentioned. If they were displeased, he could do no more than leave them to think over the matter; 'as yet they had not sold the most valuable parts of their land and . . . the price was considering future advantages a really handsome one' (A21(e):1329–1330).

McLean was getting ready to leave the tent when the chiefs stopped him. Following some deliberation among themselves, they agreed to close the bargain. As McLean saw it, a question that would contribute greatly to the welfare of the island had been 'satisfactorily settled', and he 'thanked God for his good guidance' (A12:37; A21(e):1330). None the less, before he left for Wellington the following morning, he advised the chiefs to write to the Governor about the payment for their land and the sending of Europeans to live among them.

That very same day, Te Hapuku asked Grey to agree to £4800 for his block and to consent to that payment over four years (A21(d):777–784). There is no evidence, however, that Tareha or anyone else subsequently asked Grey for a higher price for the Ahuriri block.

3.4.8 **McLean's tactics and achievements**

Mr Walzl was of the opinion that McLean used the discussion about money as an opportunity to bring up the subject of the land at the harbour entrance and apply further pressure on the chiefs to sell it, and Mr Walzl believed that his tactics worked (F9:17). McLean's 'take it or leave it approach' made the Maori believe that they were hearing a 'final offer'; when he rose to leave while they were still disputing the price, they reconsidered and, in the belief that the price was set, agreed (F9:19).

Ballara and Scott are of the opinion that:

What McLean had achieved was, in the short term, a bargain very favourable to the Crown. He had beaten the price down from the £4,500 asked to a third – an absurd price of just over a penny an acre for a block estimated at 265,000 acres which surrounded the only safe harbour between Wellington and Turanga . . . He had managed to play on the fears of the Ahuriri chiefs for their status to force through a deal in the name of their people which was satisfactory to few of the occupants. The despair provoked, recorded by McLean himself when he announced the low price, is evidence enough. That the chiefs, at the last moment, privately in McLean's tent, committed their people to accepting the low price, is a measure of McLean's skill in setting off one set of chiefs and their fears for their mana against each other. Rather than protecting the rights of the people, he deliberately exploited the cultural imperatives and tribal agenda of the chiefs. (H1:19–20)

3.4.9 The inclusion of the harbour

On his way back to Wellington, McLean left a letter at Ngaawapurua for Colenso to pick up, informing him of the purchase of 'two large blocks of land, lying NW and SW of the Mission Station; the one (including the harbour) for £1,500' (A21(e):1158).³⁶ Then, on 9 July 1851, he reported to the Colonial Secretary that the Ahuriri block of 300,000 acres, including the harbour, was valued by Park and himself at £1500, 'which sum the Natives agree to take for it, by receiving a first instalment of One thousand pounds (£1,000), and a second and last instalment of Five hundred pounds (£500) next year' (A5(a):311). He also enclosed a report from Park, dated 7 June 1851, giving a detailed description of the Ahuriri block and its external boundaries as follows:

It is bounded on the East partly by the Waiwhinganga stream [the Waiohinganga River] and partly by the coast, a low shingly spit dividing the harbour from the sea and runs from Petane on the Waiwhinganga to Motuwahou [Mataruahou], at the entrance of the Ahuriri harbour, a distance of about 7 miles. Embracing the harbour, the Southern boundary runs across to the Tutaikuri [Tutaekuri] River and continues along it to Owihakou, where it leaves the river to run in nearly a straight line to Waiharakeke at the base of a high mountain range, Kaweka, the whole distance about 35 miles; on the West by Kaweka some 16 miles to Mangatutu on the Mohaka River; and on the North and North-East partly by the Mohaka River, partly by the Native road to Taupo, and partly by the aforesaid Waiwhinganga to Petane, a distance in all of about 32 miles.

The most valuable part however of the block is the Harbour, consisting of a large sheet of water or lagoon, about five miles long by two wide, indented on the Western shore by beautiful little bays fit for residences, and should be parcelled off in 10 or 50 acre lots; and on the coast, defended from the sea by a shingly spit; the depth of water nowhere exceeding 9 feet. At the mouth of the lagoon is the harbour proper, being several channels cut into the sea with a depth of from 2 to 2½ fathoms at low water; there is no bar, and it is perfectly safe and easy of access at present for vessels of from 40 to 100 tons; on the North Spit there is room for a small town where the present European houses are. (A5(a):313–314)

Mr Brown, in closing, submitted that the inclusion of the harbour was reflected in Tareha's agreement that Mataruahou and Te Taha should be contained within the area purchased. It was 'quite clear that McLean and Park considered that the lagoon had been included in the transaction as a consequence of those negotiations' (I15(a):16). Certainly the chiefs agreed, on 2 May, to include Mataruahou and Te Taha in the purchase, but there is no evidence that they also agreed to include Te Whanganui-a-Orotu. Indeed, since 20 December 1850, when Tareha had said 'The water is ours', Te Whanganui-a-Orotu had not specifically been mentioned. The purchase negotiations had concerned land, not water. As Dr Gilling said, McLean had asked only for Mataruahou and Te Taha, that is, the land on each side of the harbour entrance, not the harbour itself (E1(b):9).

To Ballara and Scott, on the other hand, Park's words 'Embracing the harbour' posed the question 'Had he assumed that the harbour had been purchased, or merely that the land purchased encircled the harbour?' (H1:21–22).

Dr Gilling was of the opinion that Park obviously thought that the lagoon was included in the purchase, presumably because the purchase of the western spit and Mataruahau had been agreed to, but he noted that Park had distinguished the 'harbour proper' from the lagoon (E1(b):10). For this and other reasons, Dr Gilling

was inclined to argue that only the ‘harbour proper’ was included. After searching cross-examination by Mr Brown, however, he admitted that he was not sure and was certainly prepared to admit that ‘at the very most’ it was ‘a grey area’ (E27(a):111–113 *passim*).

Mr Walzl was more firmly of the opinion that both Park and McLean presumed that the harbour and the lagoon were included in the transaction (F9:20).

If this was the case, on what grounds was McLean and Park’s presumption based? We think it likely that both of them presumed that the Crown owned the harbour and the foreshore anyway, even if they were unaware that this was a matter of English common law. In the words of Ballara and Scott:

To Europeans, once sovereignty had been proclaimed over the country, the Queen’s writ ran over its coasts and harbours; to them it was as natural as breathing to assume that it was unnecessary to pay for the land underlying the harbours; no-one had paid for the waters of the Waitemata or Te Whanganui-a-Tara. (H1:29)³⁷

Such a natural assumption would account for the apparent discrepancy between Park’s description of the boundary embracing the harbour and his later statement that the purchase payment of £1500 was for the combination of the island and the block (see para 3.4.10). It would also help explain the lack of any specific reference to Te Whanganui-a-Orotu by McLean during his negotiations with the chiefs. Such an assumption, however, would not excuse his actions and omissions in including the harbour in the purchase without clarifying the matter to the sellers.

Given his knowledge of Maori language and culture, McLean must have known that they would not knowingly and willingly relinquish their mana and tino rangatiratanga over Te Whanganui-a-Orotu, particularly in view of their expressed reluctance to sell Mataruahou and Te Taha and their wish for more extensive reserves than he was prepared to set aside.

It is hard to escape the conclusion that McLean deliberately remained silent on the future ownership and control of the harbour so as not to prejudice the success of his land purchase negotiations. Probably he believed that the end justified the means. Already local Maori were sharing the harbour and anchorages with European traders and shipping. Clearly they were anxious to acquire the benefits of increased European settlement in their district, for which control of the harbour was ‘essentially necessary’. By minimising the protection of customary rights and interests in the harbour and reserves, McLean could accelerate the ultimate goal of assimilation.

3.4.10 **Misgivings about the terms of payment and the purchase price**

On 25 July 1851, Park, in a report to McLean on the progress of the surveys at Ahuriri, expressed his and the chiefs’ misgivings about the terms of payment negotiated on 2 May:

The natives of the Ahuriri block have heard the terms upon which Hapuka is to have £4,800 and before that they had been speaking to me about the smallness of the sum for their land, having got into their head that the Island was valued at £1,000 and the block at only £500; as well as I could make them understand I have always maintained that the two separate were valueless and that it was the combination that increased the value. I think however that you might safely give them £500 more making £2,000

altogether as having seen more of the land I think it is worth that, with the above sum they will be perfectly satisfied. (A21(d):1024)

As Mr Walzl pointed out, Park was virtually admitting that he had undervalued the block and that the price negotiated was unfair (F9:22).

3.4.11 **Misgivings about losing control of Te Whanganui-a-Orotu**

According to Mr Parsons, 'the chiefs had misgivings about losing control of Te Whanganui a Orotu right up to the time of the Ahuriri purchase' (A12:52). On 3 November 1851, by which time they were in daily expectation of seeing McLean return with some Government money, they went to see Colenso, who recorded their visit in a few cryptic words in his journal:

This morning several chiefs, Tareha, Te Hira te Ota, Walker Te Kawatini, and others, came to see me, and to ask my advice about their *retaining* a portion of the harbour of Ahuriri, & *not* to part with the *whole* of it, which in May last, they had consented to sell to the Government. They also wished me to go there, to witness the transfer and payment. Notwithstanding all their entreaties, I refused either to give them counsel, or to go with them; having, in former years, talked to them more than sufficient respecting their selling their lands. [Emphasis in original.] (A21(e):1160)

This entry in Colenso's journal differs from an entry in McLean's journal for 11 November, after he had called in at Te Awapuni on his way to Ahuriri on 7 November:

Mr Colenso told me that they seemed doubtful about selling the whole of Moturuahou Island that they wanted several reserves on the Island and Mr Colenso advised them to have a clause inserted in the deed giving them free rights to their Native vessels entering and leaving the harbour besides such other hints as would no doubt be to their advantage although it does not appear to me essential that the Natives require such advice when they are in treaty with the British Govt. (A21(e):1350)

Viewed in the light of the letter that McLean had left for Colenso on his way back to Wellington in May (see para 3.4.9) and his report to the Colonial Secretary in July informing the Government that the harbour was included in the purchase, Colenso's statement that the chiefs had consented to sell the whole harbour to the Government appears to reflect his own understanding of what McLean had written, not what he had been told by the chiefs. These entries hardly justify Dr Gilling's opinion that 'some or all of the lagoon was thought by all concerned, Maori and Pakeha, to have been in the original deal' (E1(b):40). Rather, they support Mr Walzl's opinion that:

having been somewhat coerced into including Mataruahou at the May meeting in order to get a higher price, Tareha, on finding that this price was not available, did not want to relinquish all the Island and instead wanted 'several' reserves. (F9:26)

Subsequent discussions between the chiefs and McLean show that the chiefs were concerned not only about the purchase price, but also about reserves, fishing rights, and free entry to the harbour. But this does not mean that the chiefs realised, even at this late stage in their dealings with McLean, that he had included

Te Whanganui-a-Orotu in the purchase. Rather, they still had serious misgivings about selling Mataruahou and Te Taha.

3.5 **FINAL ARRANGEMENTS**

3.5.1 **Purchase payments**

On 29 September, Grey approved the mode in which McLean had proposed to pay the first instalments, amounting to £3000, for the land purchases at Ahuriri (A21(d):1080): £1800 for Te Hapuku's block, £1000 for the Ahuriri block, and £200 for the Mohaka block.

At Waipukurau on 4 November, McLean executed a deed of sale for Te Hapuku's block and paid the first instalment of the £4800 that had been agreed upon.

3.5.2 **Boundaries**

At Ahuriri on 11 November, McLean recorded that the Maori were not collecting as quickly as he had expected but that they all seemed in good spirits and, as far as he could judge, pleased with the amount of £1000 that they were to receive (A21(e):1349–1350).

McLean called to see the Maori at Ongaonga Bay and asked Tareha and Te Moananui to go over the names of the several boundaries with him before drawing up the deed of sale (A21(e):1351).

On 12 November, he had a conversation with them about the boundaries of the purchase and their relinquishing of areas that they wished to have reserved on Mataruahou. He found them 'very reasonable'; much more so than during his former visit. Wi Tako seemed to give them good advice (A21(e):1352–1353).³⁸

On 13 November, McLean went with Park and Tareha to fix the boundaries of Mataruahou.

3.5.3 **Discussion on the draft deed**

On 14 November, the draft of the Ahuriri deed was submitted to the Maori, 'who agreed to all the conditions', but only after 'some long talking, and very proper enquiries and arguments' (A21(e):1354). More specifically, McLean had some difficulty in getting them to assent to a reserve of 500 acres at Puketitiri as they had wanted several thousand acres. He also found the Tangoio people 'a very troublesome lot to deal with more than any of the rest their discontent has probably arisen from not having been more consulted in the sale during its first stages' (H1:23). They had 'urged that they should get the whole sum of £1,500 at once for their land' (A12:39–40).

3.5.4 **McLean minimises the reserves**

The last-minute negotiations on the reserves demonstrated the anxiety of the Maori to retain their taonga on both sides of the harbour, and indeed the harbour itself, and McLean's continued determination to minimise reserves. Three portions of land were already deemed to be reserved for the sellers from the Ahuriri block: the island of Roro o Kuri at the northern end of the harbour; Wharerangi, which had been surveyed by Park; and Puketitiri bush, which was reserved for bird snaring.

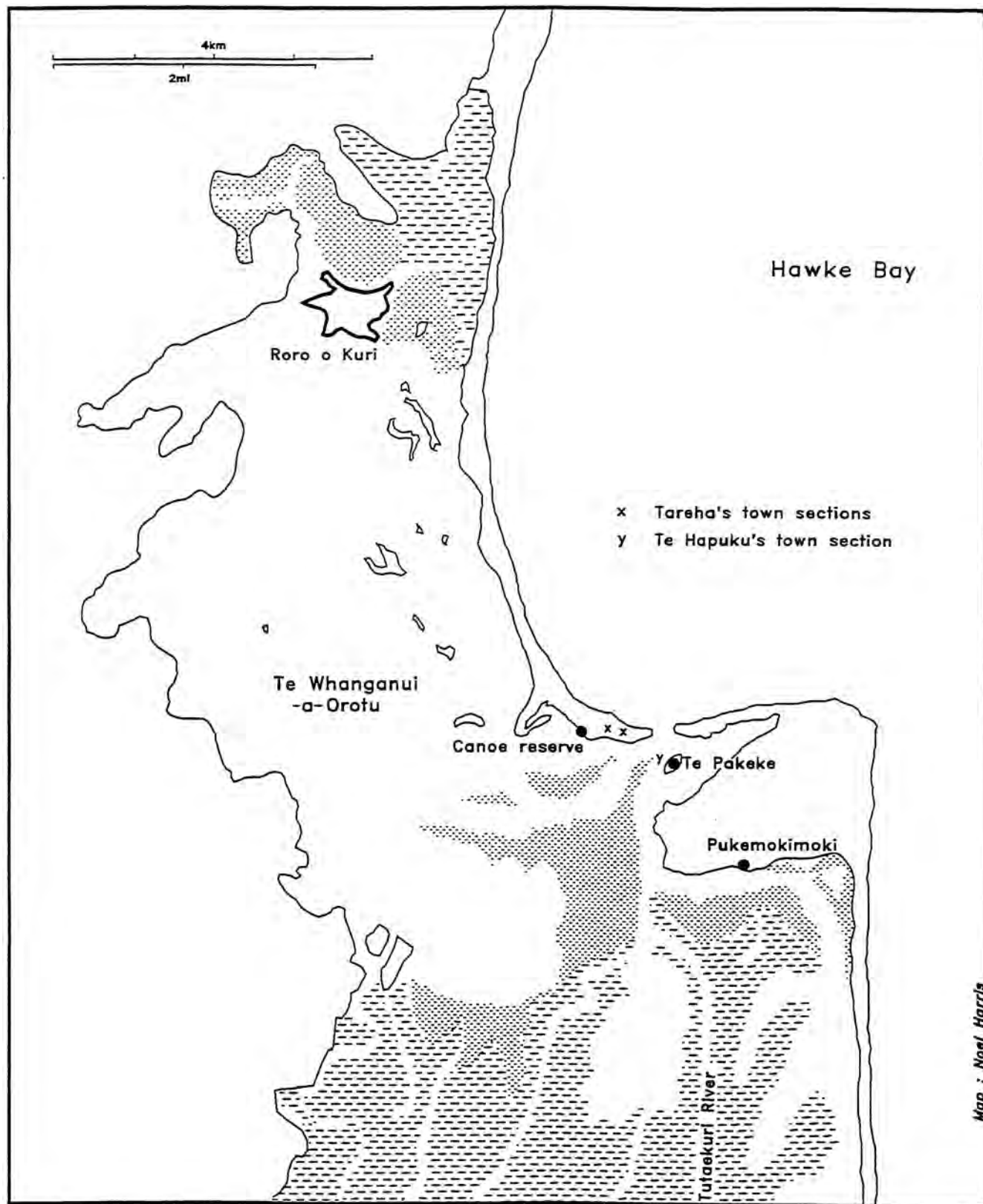


Figure 8: Plan showing areas of land reserved in the deed of sale. Based on plans in A12 at pages 114, 116, 118 and 199 and on evidence in A12 at page 119 and in E2 at page 26.

In fixing the boundaries of Mataruahou from 11 to 13 November, McLean agreed to additional reserves: two small islands off Mataruahou (Pukemokimoki and Te Pakake), a fishing right, and canoe landing places (see fig 8).

In a report to the Colonial Secretary on 29 December 1851, McLean explained his last-minute arrangements to attend to the needs and anxieties of the chiefs in respect of Mataruahou and the harbour:

Tariha and other Chiefs at Ahuriri were anxious to have several portions of valuable land reserved for them on both sides of the harbour especially on Mataruahou Island which they had always considerable reluctance in transferring from a fear that they be eventually deprived of the right of fishing collecting pipis and other shell fish which abound in the Bay; these rights so necessary for their subsistence I assured them they could always freely exercise in common with the Europeans and in order that they should be fully satisfied on this point a clause has been inserted in the deed to that effect.

With reference however to the reservations for fishing villages and other purposes I objected to all of them excepting one Pa [Te Pakake] in the occupation of Tariha where some of his relatives are buried and which he is to retain until such time as the Government may here after require the spot for public improvements such as deepening or reclaiming some portions of the harbour. (A21(d):1047–1049)

There is no evidence, however, that McLean had explained to the sellers that the Government might deepen or reclaim portions of the harbour. His stipulation concerning the reservation of Te Pakake struck Dr Ballara as being ‘particularly odd’. The McLean translation of the Maori version of the deed read ‘during such time as it remains unoccupied by the Europeans’. Yet there was ‘ample evidence that . . . burial places (wahi tapu) were and are regarded as sacrosanct’ (H1:26). Clearly the clause encapsulated McLean’s belief that arrangements for reserves should be minimal and not impede the advance of European settlement and the assimilation of Maori. A further passage in his report to the Colonial Secretary bears this out:

In lieu however of these reservations so much demanded by the natives and which would materially interfere with the laying off a town, I proposed to Tariha that he, as the principal Chief on relinquishing all claims to such spots should have a town section granted to him in any place he might select on the North Spit of the Harbour which he has agreed to accept and I hope that His Excellency will approve of this arrangement. I also informed the Chiefs that His Excellency had instructed public reservations to be made which would most probably include a site for a church, hospital, market-ground and landing place for their canoes, and that every facility would be afforded them of repurchasing land from the Government. (A21(d):1049–1050)

As Ballara and Scott have pointed out, ‘McLean’s own words condemn his deal from the point of view of Maori protected by the Treaty of Waitangi’ (H1:28). McLean had explained their desire to retain Mataruahou as ‘anxiety for their harbour fisheries and shell fish resources’, which should have told him that they ‘considered they had not relinquished their rights over the harbour’. Yet the fishing right he reserved for them was the ‘sort of right . . . villagers had over “commons” in England’. Moreover, in the same report he mentioned reclamation, an activity ‘which would affect shellfish and every fish species’. Although McLean acknowledged fisheries to be necessary for Maori subsistence, he failed to protect

them and Maori rights to the harbour, or even, in his discussions with Maori, to address the issue of who ‘owned’ the harbour (H1:29).

It was clear to Ballara and Scott that ‘in part McLean’s failures arose from a yawning cultural gap of understanding between Maori and European’ (H1:29). Furthermore, he:

talked of reserves being ‘so much demanded by the Natives’ but his response . . . was to bribe the principal chief with an offer of a personal section for himself . . . In the same breath, McLean acknowledged and ignored the communal nature of the resources of the tribe. (H1:30)

3.5.5 **The Maori understanding of the reserves**

Oral evidence given by several chiefs at later inquiries into the Ahuriri purchase suggests that the sellers had a different understanding from McLean of the arrangements for reserves and of the term itself. As legal historian Dr D V Williams explained to the Te Roroa Tribunal, ‘There was no consistent legal usage with respect to the term “reserves”’. Sometimes it:

referred to Tribal land which had been reserved from a sale by the owners, ie 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 . . .³⁹

Appearing before the Hawke’s Bay Native Lands Alienation Commission in 1873 to give evidence for the complainants on the non-inclusion of Kaiarero⁴⁰ in the purchase, Paora Torotoro stated:

When the land was sold to McLean I was the person who mentioned the places which were to be reserved for us – for the Natives. My brother said that Roro-o-Kuri and Kaiarero were to be reserved for his children. My brother is dead. When I proclaimed publicly the reserves, I did not mention Kaiarero. I mentioned the three other reserves – Wharerangi, Puketitiri and the Roro-o-Kuri. When I went back to my place, Akuhata (my brother) sent me back to McLean, and said, Let Kaiarero be left for my children. This was previous to the deed being signed. I returned to Mr McLean and said, My brother says that Kaiarero must be reserved for his children. Akuhata signed the deed. Mr McLean said, It is well; that was all . . . The day the land was given to Mr McLean those four reserves were agreed to; but it was on another day we signed the deed . . . The deed was read once. The names were signed when the land was given, but the boundaries were not shown till afterwards. (A5(i):151)

As we shall see, the evidence that the deed plan was not seen till after the signing conflicts with McLean’s own report, made immediately after the event, stating that he exhibited the map after the deed was read aloud and before it was signed (see para 3.6). Furthermore, it strengthens the claimants’ viewpoint that the signatories were selling only the land, not the water, and that Te Whanganui-a-Orotu was excluded from the sale (see para 4.9.3).

Commissioner Wiremu Hikairo, in his report on this case, was of the opinion that this complaint was correct (A5(i):83).

A wider perspective on the arrangements for reserves is provided by the evidence that Karaitiana Takamoana gave to the 1875 Native Affairs Committee that examined a petition from Henare Tomoana and others on the reservation of certain islands in Te Whanganui-a-Orotu:

All the old chiefs urged this sea Whanganui O Roto should be reserved. Ahuriri is the name of the mouth, & Whanganui Orotu is the name of the inland sea. They also asked for the Islands on that sea, because they were Pas which were occupied . . . Pakake was occupied. When the sale was completed we were under the impression that these reserves had been made for us.

We asked that our Pas and the sea should be reserved for us, and he [McLean] agreed that they should be reserved. (F9: app II, pp 889–890, 891)⁴¹

Karaitiana Takamoana was the member of Parliament for Eastern Maori; Henare Tomoana, his half-brother, succeeded him in 1879.

Wi Tako also gave evidence of a meeting at Tareha's place at Ongaonga, Ahuriri, when:

Te Moananui referred to the islands Te Koau, Pakake and Poroporo and another island named I think Motuhara [Mataruahou]. He wanted this place reserved for him as a fishing reserve and as a place where they could get . . . pipis. I did not see anything written down about this request. I only heard the talk. (F9: app II, pp 899–900)

This meeting was probably the one referred to by McLean in his diary entry of 11 November 1851 (see para 3.5.2).

The 1875 evidence was partly corroborated by evidence given before the 1920 Native Land Claims Commission by Te Wahapango, who, as a 10-year-old, was at Ongaonga when the deed was executed:

After the sale to Government was agreed upon and price fixed Akuhata te Hapua a brother of Paora Torotoro stood up and addressed Mr McLean the Government Officer. He requested one favour that there should be reserved to the Natives the Whanganui-a-Orotu as it was their source of food. He also asked that Wharerangi be reserved. Also, for Puketitiri. That was bush land where they were accustomed to snare birds for food. McLean replied and said what they asked for was just and it would be given effect to and the boundaries located. As far as the reserves were concerned that was carried out. (A7(a):39, cited in D9:40)

3.5.6 **The value and limitations of the oral evidence**

As Mr Brown pointed out in his closing submissions (I15(d):17–18), oral evidence given by participant observers many years after an event has to be scrutinised with care, particularly when it is given by persons with political objectives in mind. Although Karaitiana Takamoana and Te Moananui (cited by Wi Tako) were associated with the Hawke's Bay repudiation movement in 1875, this does not necessarily mean, as Mr Brown suggested, that these witnesses were creating and perpetuating a popular myth that Te Whanganui-a-Orotu was not sold. Their oral evidence is important, if only because of McLean's failure to record in any detail what the sellers said to him in the final stages of the negotiations on reserves and boundaries (see paras 3.5.2–3) and, more particularly, at Ongaonga Bay on 17 November 1851 (see para 3.6).

Taken with McLean's diary entries and 29 December 1851 report, the oral evidence indicates that the Ahuriri chiefs not only made strenuous and persistent efforts to safeguard their island pa, fishing grounds, shellfish beds, canoe landing

places, and wahi tapu in Te Whanganui-a-Orotu, but asked that Te Whanganui-a-Orotu be reserved and thought that McLean agreed.

Yet when McLean appeared before the Native Affairs Committee in 1875 and was asked ‘And did they not ask for the reservation of Te Whanganui Orotu?’, he answered, ‘I recollect they asked for the reservation of their pipis and fish, but I do not recollect that they said anything about the sea at the time’ (F9: app II, p 920).

As in his 1851 report to the Colonial Secretary, McLean fudged the issue. He had set his sights on commanding the harbour from the day that Tareha had welcomed him and said, ‘The water is ours. The land you see before you is yours.’ He appeared to have no compunction in including the harbour in the purchase and in reserving Te Pakake for Tareha only as long as it remained unoccupied by Europeans. Yet he must have known that the sellers would not knowingly and willingly relinquish their mana and rangatiratanga over these taonga, even if they were allowing European traders and settlers to use them.

3.6 **COMPLETING THE PURCHASE**

Observations in Colenso’s journal on the size of his congregations on 9 and 11 November and on visits to Tangoio on 11 and 13 November indicate that there was an exodus to Ahuriri for the signing of the deed and the distribution of £1000 of the purchase payment (I15:20).

An entry in McLean’s journal dated 17 November 1851 described that ‘eventful day for the Ahuriri district . . . now the property of our sovereign Queen’ (A21(e):1357–1364). About 400 to 500 Maori assembled at the Government house in Ongaonga Bay, Mataruahou. McLean had estimated the population in the area to be about 1100 at the beginning of the year (A12:24). Every preparation had been made by Tareha for the occasion. McLean’s party included the three surveyors: Captain Thomas, Park, and Pelichet. Among the local settlers, whalers, and families present were E S Curling, F S Abbott, Alexander Alexander, J B McKain, and justice of the peace J Thomas, who witnessed the signing of the deed.

The Maori were in excellent spirits, excepting the Tangoio people, who arrived fully two hours late in consequence of a quarrel with Te Moananui and Tareha about the disposal of one of the lots, a tenth of the £1000 payment, which Tareha wished to have all to himself. Te Moananui gave it to him, declaring that although he would feel himself bound to support the Europeans in their right to the land he would not take any share of the payment for himself (A21(e):1359).

McLean summed up the formal proceedings as follows:

I made a long opening speech to the Natives, when they were ready explaining fully the nature of the Engagements they were here assembled to complete, expressing a hope that it would be the means as they were on the decline, of uniting them with a stronger power, that would under the mild dispensations of our laws befriend and protect them I do not recollect all I said but the Natives crowded round and were silent and attentive all the time. I then read over the deed aloud, and exhibited the map attached to it to their views. They fully assented to all the conditions the names of the boundaries and when I had finished, they commenced to sign their names. (A21(e):1359–1360)

The deed was signed by McLean and Tareha and 299 others (E25; E26). At least 14 were minors, which was a common practice at that time (E27(b):60–62). According to Mr Parsons, there were signatories from as far north as Mohaka and as far south as Waipukurau (A12:55).

The cash was then counted in the presence of the principal chiefs and handed to the heads of the tribes in nine lots: two of £150 each to Tangoio and One One respectively and seven of £100 each to the rest, making in all £1000 (A21(e):1362).

McLean recorded that:

No speeches to signify were made by the Natives so that I had all the talk myself. It is most surprising how slow cool and patient the Natives have been in taking their payment and the length of time they been arranging and debating on the subject. (A21(e):1363)

On 18 November, McLean noted, the Maori were busy distributing their money. On the whole, they seemed to be in very good spirits and were busy expending the cash in purchasing clothes and other necessities (A21(e):1363). On 18 November, McLean wrote translations of the deeds (A21(e):1364–1365).

Colenso's journal entries were briefer and more caustic. On 18 November, he wrote:

This day, Ahuriri (so long coveted) has also passed into the hands of the foreigner! the price £1500, of which £1000 has also been paid down in gold!! 'Sic transit gloria mundi', aut Nova Zelandia!!! [Emphasis in original.] (A21(e):1164)

On 21 November, he added:

Native Chiefs calling throughout the day. The tribe of the late chief Tiakitai paid his debt, 23.15.0, which was exceedingly honest of them . . . At night, Te Hapuku and his two eldest sons called on their return from Ahuriri, all intoxicated! I find, that the Chiefs generally have *not* had money enough to pay their debts due for Horses, &c!! [Emphasis in original.] (A21(e):1165)

3.7

OFFICIAL REPORTS ON THE AHURIRI PURCHASE

On 19 November, McLean forwarded the original of the deed and the translation to the Colonial Secretary and informed him that the first instalment 'for the district and harbour of Ahuriri' had been handed over to the sellers (A5(a):315).

On 29 December, after his return to Wellington, he reported to the Colonial Secretary in greater detail:

The various questions of boundaries, Native reserves, price of land, and other details, had been so frequently and fully discussed, and all other arrangements and conditions inserted in the deed of sale were easily understood, and their importance as binding treaties fully comprehended, and readily subscribed to by the great majority of the claimants, whose conduct at the several meetings was marked with the utmost regularity and propriety. (A5(a):316)

In conclusion, he alluded to the various advantages of the Ahuriri purchase:

[It secures] to the Government and the colonists a permanent interest in the most valuable and extensive grazing and agricultural districts in the North Island of New Zealand; the best – indeed I may say the only comparatively safe Harbour from the Port of Wellington to the 37th degree of latitude on the North-east Coast of the Island; the best position for forming a new township, from having in contra-distinction to other settlements, a large extent of back country to support it; the most eligible situation to occupy for preventing smuggling, overlooking the sperm fisheries on the East Coast, and for controlling the reckless characters and runaways who have been in the habit of sheltering themselves at Hawke's Bay, and who with the Natives, sometimes influenced by their example, are beginning to feel the salutary effect of having English law administered at these distant places. (A5(a):316)

3.8 CONCLUSIONS

In summary, we conclude that the evidence on the Ahuriri purchase establishes that:

- (a) On 20 December 1850, the principal Ahuriri chiefs agreed to sell McLean the inland Ahuriri block, which lay to the north and west of Te Whanganui-a-Orotu. As Tareha said, 'The water is ours. The land you see before you is yours.'
- (b) On 2 May 1851, the sellers, under pressure from McLean and with considerable reluctance, agreed to sell Mataruahou and Te Taha. But even following this agreement, the sellers still retained large sections of land adjoining Te Whanganui-a-Orotu. The May agreement secured for the Crown the control of the entrance to the harbour, which McLean considered 'essentially necessary' for the growth of European settlement. The sellers, however, still retained several portions of land adjoining Te Whanganui-a-Orotu south of Mataruahou and north of Te Taha as well as the Wharerangi and Roro o Kuri reserves.
- (c) There is no evidence that the purchase of Te Whanganui-a-Orotu was negotiated or that the chiefs agreed to sell it. We can only conclude, therefore, that McLean thought that the harbour was 'an arm of the sea' and belonged to the Queen under English common law, but he did not explain this to the Maori.

References

1. J C Beaglehole (ed), *The Journals of Captain James Cook on his Voyages of Discovery*, Cambridge, 1955, vol 1, pp 176–177
2. J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, Wellington, A H and A W Reed, 1973, p 50; John Tattersall, *Lieutenant Thomas McDonnell and the Naming of Ahuriri*, Napier, 1970, p 10
3. Olive Wright, *New Zealand 1826–1827*, from the French of Dumont D'Urville, Wingfield Press, 1950, pp 112–113
4. *The Dictionary of New Zealand Biography*, 2 vols, Wellington, Department of Internal Affairs, 1990–93, vol 1, p 361; J G Wilson and others, *History of Hawke's Bay*, AH and AW Reed, Wellington, 1939 (reprinted Christchurch, Capper Press, 1976), p 143

5. W T Prentice, 'The Maori History of Hawke's Bay', in Wilson, p 92
6. See also Prentice, pp 93–95
7. Ibid, p 94
8. *The Dictionary of New Zealand Biography*, vol 1, pp 519–520
9. Frances Porter (ed), *The Turanga Journals 1840–1850: Letters and Journals of William and Jane Williams – Missionaries to Poverty Bay*, Wellington, 1974, pp 81, 84
10. Ibid, p 118
11. Ibid, pp 126–127
12. Ibid, p 222
13. *The Dictionary of New Zealand Biography*, vol 1, pp 88, 218
14. W H Oliver and Jane M Thomson, *Challenge and Response: A Study of the Development of the East Coast Region*, Gisborne, 1971, pp 27–50
15. Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987, p 71
16. *The Dictionary of New Zealand Biography*, vol 1, p 443; Orange, pp 81–82; Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 20
17. *The Dictionary of New Zealand Biography*, vol 1, p 411
18. Compare with *The Mohaka River Report 1992*, p 20, concerning Ngati Pahauwera and Treaty signing.
19. Miriam McGregor, *Pioneer Trails of Hawke's Bay*, Wellington, 1975, pp 64–65
20. Wilson, pp 138–140
21. J Hickson, *Catholic Missionary Work in Hawke's Bay New Zealand from its Outset in 1841*, Auckland, 1924, pp 16–17, 20
22. See also A G Bagnall, *Wairarapa: An Historical Excursion*, Masterton, 1976, p 87. In 1846 Governor Grey passed the Native Land Purchase Ordinance, a copy of which is in A21(a) at pages 24 and 25. This made lease agreements between Maori and settlers illegal, and restored the Crown's exclusive right of pre-emption.
23. *The Mohaka River Report 1992*, p 23; see also evidence for the Crown of Stephanie Louise McHugh on 'The Issue of Hawkes Bay Purchase Instructions June 1848 – October 1850', Wai 119/201, C2
24. J Rutherford, *Sir George Grey KCB 1812–1898*, London, 1961, chs 13, 16; *The Dictionary of New Zealand Biography*, vol 1, p 161
25. Evidence of S McHugh, p 17
26. Ibid, p 9
27. Ibid, p 13
28. Ibid, p 17
29. Ibid, pp 28–29
30. Ibid, p 30
31. Ibid, p 31
32. James Cowan, *Sir Donald McLean: The Story of a New Zealand Statesman*, Wellington, 1940, p 41; Rosemund Rolleston, *The Master J D Ormond of Wallingford*, Wellington, 1980, p 17; evidence of Sir Keith Sinclair concerning Donald McLean, Wai 201, A56; *The Dictionary of New Zealand Biography*, vol 1, pp 255–258
33. M P K Sorrenson, 'Maori and Pakeha', in *The Oxford History of New Zealand*, 2nd ed, G W Rice (ed), Auckland, 1992, p 147
34. The manuscript and typescript of the McLean Journal photocopied in A21(e) may be consulted at the Alexander Turnbull Library, Wellington. The typescript is also held by the Berry Library, Hawke's Bay Museum, Napier. Extracts from this are in A12.
35. Compare with J G Wilson, *The Founding of Hawke's Bay*, Napier, 1951, The Daily Telegraph Company Ltd, 1951, p 20. Wilson notes that he has a large copy of this map but obviously he was confusing it with Park's December 1851 map. The original of this was held by the Department of Lands and Survey in Napier, where it was destroyed in the 1931 earthquake. Wilson had a tracing, which was used to make a copy to replace it. This copy appears to be the so-called 1852 Bousfield map, which is now held by DOSLI in Napier (see *The Mohaka River Report 1992*, p 39).

36. The manuscript of Colenso's Journal photocopied in A21(e) may be consulted in the Alexander Turnbull Library, Wellington
37. For legal opinions on this, see paragraphs 5.6.3, 7.4.1, 10.6.3, and 10.7.2; for Colenso's attitude to settlement and land purchasing and his relationships to the principal chiefs, see Paul J Goldsmith, 'Aspects of the Life of William Colenso', MA thesis, University of Auckland, 1995, pp 76–95.
38. Wiremu Tako Ngatata was Te Ati Awa leader from Kumutoto Pa in Wellington, had given evidence on the New Zealand Company purchase to Commissioner Spain, was a member of McLean's party, and was trading with the Ahuriri Maori in horses (see *The Dictionary of New Zealand Biography*, vol 1, pp 413–414).
39. Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 91–92
40. Kaiarero is a small piece of land at Petane, a place that provided thatching for houses.
41. Mr Walzl transcribed the minutes and reports of the Native Affairs Committee regarding the 1875 petition from A21(d), pp 869–922.

CHAPTER 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).

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(c):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).

4.3 THE DEED

4.3.1 Introduction

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.

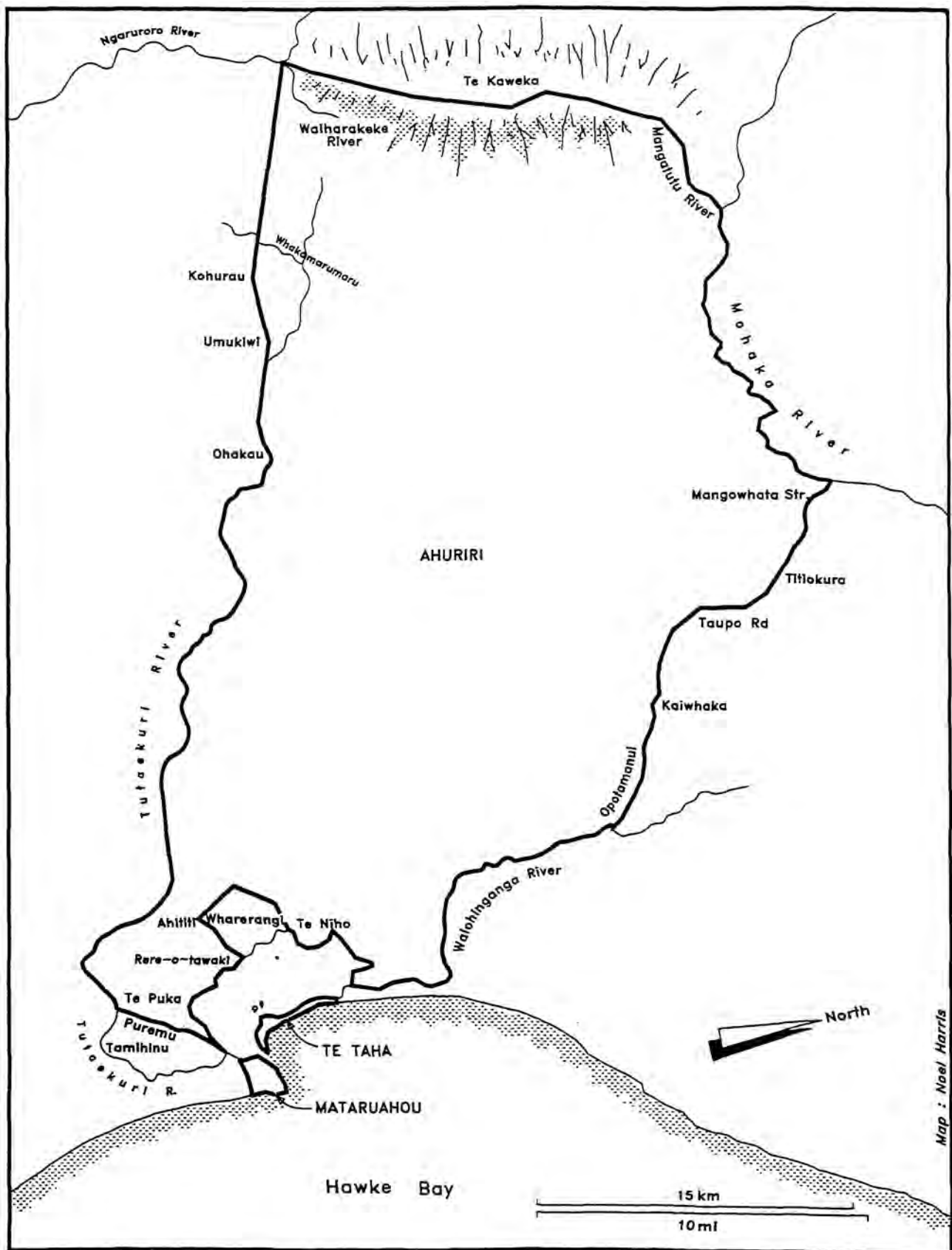


Figure 9: Plan showing boundaries of the land described in the Ahuriri deed of 1851. Based on E24 and E25.

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 haere 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-roto thence to our reserve at Te Niho thence to Rereotawaki 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(c):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 Waiohinga 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.

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 Waiohinga 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 1992*, 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

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.

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 wakaetia 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 wakaetia 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)

4.7 **THE DEED PLAN**

4.7.1 **The external boundary**

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

Figure 10 (facing page): The Ahuriri deed plan



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(c):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.

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.

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-Orotu . . . 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).

References

1. Several significant changes were made to the original deed and translation for publication in Turton. One phrase underlined in red on the original deed has been omitted, namely, ‘runga I taua’. Other omissions are the word ‘all’ before the phrase ‘the people of Ngati Kahungunu’ and the marks of ellipsis before and after the word ‘the’ in the phrase ‘to the Kings and Queens’. The word ‘on’ has been amended to ‘of’ in the phrase ‘of her part’. Turton’s house style has been followed in the listing of the signatures to the deed and translation. The misspelling of Tareha as Tariha in the original translation has been copied, which incidentally suggests that Turton did see the original, even though he did not initial it.
2. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 30
3. Evidence of Lyndsay Head (submitted by the registrar), Wai 167 record of inquiry, A23, p 33
4. Ibid, pp 35–37
5. Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 50
6. J D H Buchanan, *The Maori History and Place Names of Hawke’s Bay*, Wellington, AH and AW Reed, 1973, pp 41–42

CHAPTER 5

SETTLER ENCROACHMENTS IN THE PROVINCIAL PERIOD

5.1 SHARING THE HARBOUR WITH THE SETTLERS

5.1.1 Two communities

In the aftermath of the 1851 Ahuriri purchase and the laying out of the town of Napier in 1854 and 1855,¹ local Maori and settlers became what historian Dr James Belich categorised as:

twin communities co-operating in an often tense but more or less equal ‘symbiosis’ . . . economically interdependent, politically allied but autonomous, a more or less equal partnership . . . derived partly from mutual misunderstanding . . . based more on pragmatism than principle or policy.²

5.1.2 Continued exercise of customary use rights

For a decade or more, the Ahuriri purchase made little difference to the customary use and occupation of Te Whanganui-a-Orotu by local hapu, who continued to care for and control it, and related hapu, who visited it seasonally. In 1859 Te Koau (Gough Island), for example, was still ‘much frequented as a camping ground by fishing expeditions’ (A12:105), even though it had been laid out in sections in Alfred Domett’s 1854 town plan (see fig 11). Local Maori were happy to permit Pakeha to use the harbour for trade and shipping.

Mataruahou, with its steep hillsides and gullies and cut off from the hinterland by the lagoon and swampy mudflats, was not an attractive or healthy site for the town. The first sales of town sections were held in 1855 and 1856, and some suburban sections were also sold in 1856.³ Napier was declared a customs port of entry for the supervision of shipping in 1855. But as long as it remained essentially a beach community, servicing the provisions trade and coastal shipping, local Maori were happy to share ‘their lake’.

5.1.3 Maori trade and agriculture

Maori relocating and rehabilitating themselves near the shoreline after the return from Mahia ‘quickly learned that if they cleared an area and planted grain and wheat they were in business’. ‘By the digging of drains, the cutting back of flax and bringing on the consolidating hooves of animals’, they were able to reclaim swampland for cultivations in response to the growing European demand for agricultural products.⁴ Maize, wheat, fruit, vegetables, pigs, and potatoes were transported by canoe on inland waterways and small seagoing craft to the port,

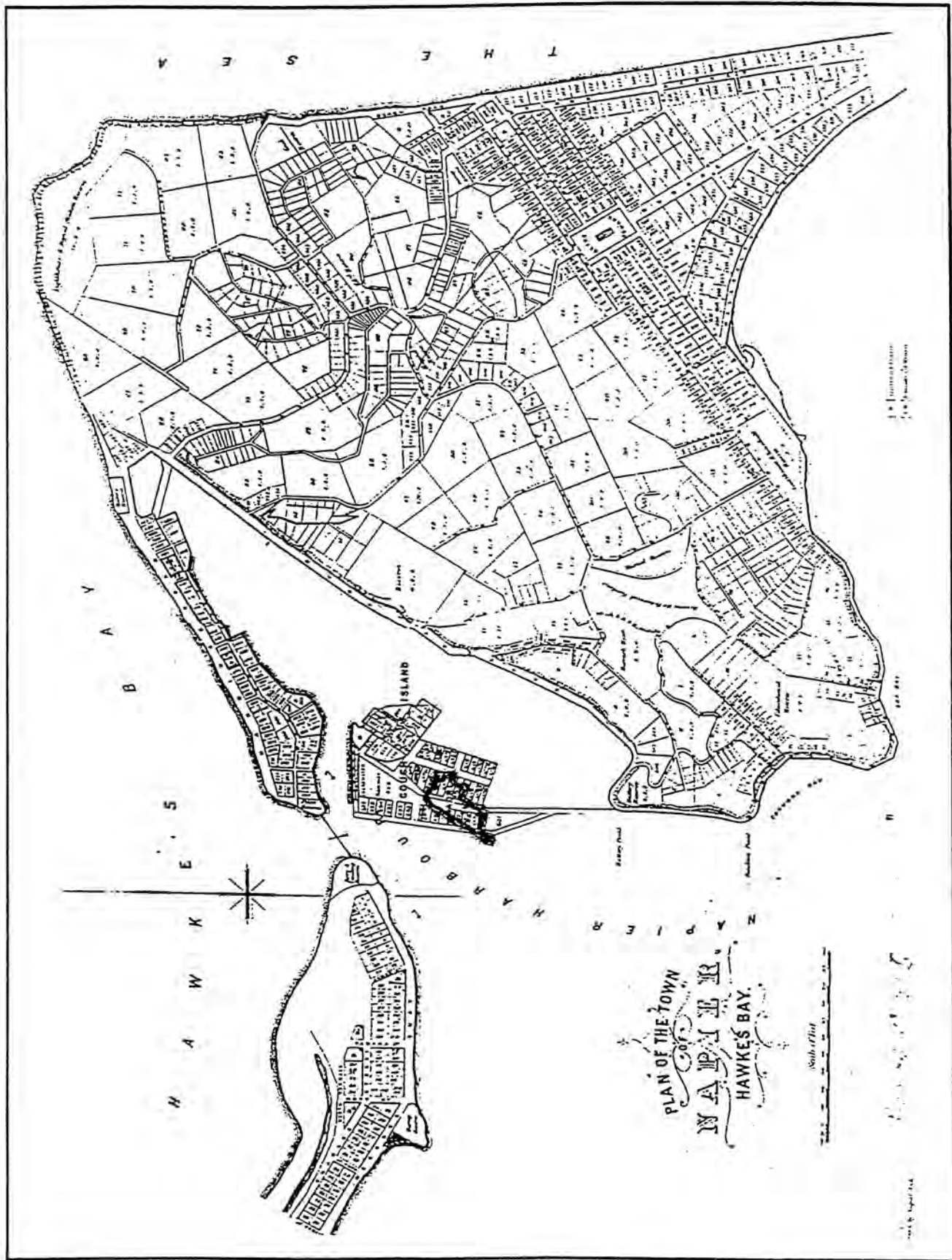


Figure 11: 1854 plan of the Town of Napier by Alfred Domett. Taken from M D N Campbell's *The Story of Napier 1874–1974* (Napier, 1975, endpages).

where they were exchanged with Pakeha storekeepers for horses, saddles, clothes, ploughs, and other goods or cash.

Wellington and Auckland merchants sent schooners and brigs to Ahuriri to procure pork and agricultural produce. Local Maori as well as Pakeha owned small vessels and participated in coastal trade and shipping. For a short time, the growth of trade, coastal shipping, and Maori agriculture produced the kind of wealth and reciprocity that local chiefs had expected when they offered to sell land and extended their hospitality to settlers. But promises held out by Grey and McLean of 'a new world of prosperity' and great benefits from a large population of good settler families and public amenities did not eventuate.

5.2 **PASTORALISM OVERWHELMS PARTNERSHIP**

5.2.1 **Wool trade and shipping services**

In the 1860s, Maori trade, shipping, and agriculture were gradually overwhelmed by the rapid development of the pastoral industry in Napier's country districts and by the London wool trade. Shipping services at the port were increasingly dominated by the local firm of Richardson and Company Ltd, which established a regular steamer service from Cape Runaway to Cape Palliser for east coast sheep farmers and operated a fleet of lighters to service the larger overseas vessels that anchored in the harbour.⁵

5.2.2 **The provincial government**

As an outlying pastoral frontier of Wellington, the Ahuriri district was largely neglected by the provincial government, which was established in 1853. Roads were practically non-existent around Napier. Wool from inland stations was brought out by barge and punt down the Ngaruroro and Tukituki Rivers to the Waipureku ferry at East Clive. A separation movement led by sheep farmers was formed, and, in 1859, Hawke's Bay became a separate province with its own elected provincial council and superintendent. As superintendents and large estate owners of 'outstanding ability', Donald McLean and his 'other self', J D Ormond, practically ran the province; McLean from 1863 to 1869, Ormond from 1869 to 1876. Napier became a centre of European government, administration, and business.

5.2.3 **A port town**

As in other Pacific island port towns, settlers 'demanded and increasingly enjoyed, supremacy in all spheres, political, economic, and social'.⁶ No longer was there any identity of interest between the 'twin communities'. By 1856–57, cooperation on the basis of rough equality and reciprocity was breaking down. Maori were unrepresented in and virtually excluded from the provincial system of government. Further Crown purchases of land, mostly for disposal to pastoralists but also for roads and bridges and, later, the beach route for the Napier to Manawatu railway, further eroded the economic base of iwi and hapu at both the southern and the northern ends of Te Whanganui-a-Orotu. Harbour improvements and reclamations to provide flat land for Napier encroached upon customary and Treaty rights to Te

Whanganui-a-Orotu and the reserves and fishing and canoe access rights recognised in the Ahuriri deed. As Mr Boast said in his evidence:

There is no indication that concern for the interests of Maori residents and their particular interests in the lagoons around Napier were seen as in any way significant. What counted was 'development' of the port and town. (D1:64)

5.3 **FURTHER CROWN LAND PURCHASES**

5.3.1 **Completing the Ahuriri purchase**

Between 1854 and 1859, G S Cooper, who succeeded McLean after he became Chief Land Commissioner in Auckland, purchased at least another 130,000 acres in Napier's country districts. These purchases were but a fraction of the total Crown purchases in Hawke's Bay, estimated by McLean to amount to about 1,404,700 acres by 1859 (A5(a):345). For the Maori population (estimated to be about 3500), only about 3000 to 4000 acres remained.

In contrast to the open methods of purchase that McLean employed in 1851, when the deals were discussed at large public meetings of local chiefs and people on the spot, the 1854–59 transactions were often conducted secretly with chiefs in town without the knowledge and consent of all the rights holders, who also did not share in the proceeds. Moreover, the sales were often solicited with advance payments, and attempts to return purchase moneys by persons repudiating them were refused.⁷ In this wider context, two smaller Crown purchases in 1855 and 1856 and two more in 1867 and 1869 under the Native Land Court system completed and extended the Ahuriri purchase at the southern end of Te Whanganui-a-Orotu. In 1869 and 1870, customary land at the northern end of the lagoon and the Roro o Kuri native reserve were Crown granted to 10 'owners', who sold it to a private purchaser.

Before considering the effects of these purchases on customary rights to use, occupy, and control Te Whanganui-a-Orotu, it would be helpful to identify the principal local chiefs who were involved and their post-1851 settlements. They were Tareha, who was living at Awatoto, Karaitiana Takamoana, who was living at Te Awapuni, Kurupo Te Moananui, who was living at Waipureku (East Clive), Paora Torotoro, who was living at Kohupatiki, and Renata Kawepo, who was living at Omahu.

5.3.2 **Land adjoining Mataruahou**

By deed receipt 6 of 11 April 1855 (A8(b)) and deed 13 of 13 November 1856 (A8(a)), the Crown purchased a piece of land adjoining Mataruahou that had been excluded from the Ahuriri purchase by the reservation of Pukemokimoki. The deed receipt records McLean's consent to a payment of £50 and two town sections, which were to be laid out on the land. Tareha signed the receipt for £25, and the other £25 was to be paid when the money arrived from Auckland. The witnesses to the transaction were Robert Park, a Government surveyor, and G S Cooper, the district commissioner. The payment was initialled by McLean.

The Mataruahou deed conveying the land to the Crown 'for ever' was signed by Cooper on behalf of the Crown and by Tareha, Karauria Pupu, and Hone Hoeroa on behalf of the chiefs and people of Ngati Kahungunu, and another £25

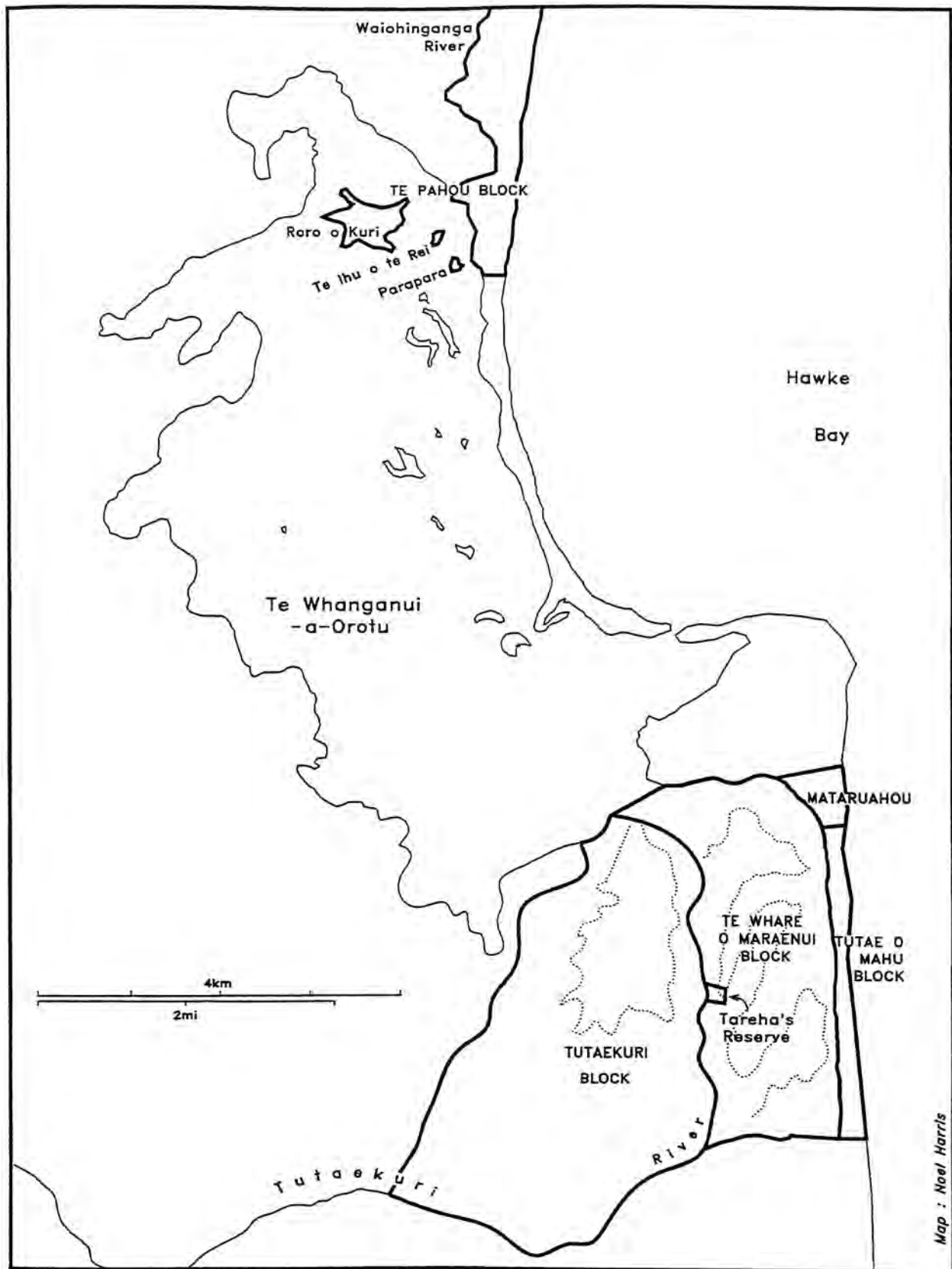


Figure 12: Plan showing post-1851 purchases. Drawn from the sketch map in A12 at page 102 and the plans in A12 at pages 99, 103, 104, and 114 and in A21(f) at pages 1549 and 1556.

was paid. Under a Crown grant made on 30 December 1862, Tareha received sections 179 and 180 in Carlyle Street (E3:26).

The boundary of the block is described in the English translation of the deed as follows:

The boundary begins at the old boundary of Oteranga and runs along the edge of the Water to Poua thence to Omoko thence to Ahi-tahu-o-te-Waru where it cuts on the bank (or spit) at Taupata and runs down to the Sea and follows the Sea shore till it closes up with the old boundary. (A8(a))

This description is slightly different in wording and spelling but not in meaning from that in the deed receipt. It is followed by the standard clause in McLean's land deeds weeping over and bidding farewell to this ancestral land. In the deed receipt the land was 'entirely given up . . . as a lasting possession' (A8(b)).

The only place name that the claimants were able to identify was Te Ahi a Te Wharu, which is at the northern end of the Tutae o Mahu block on the eastern side of McLean Park (A12:101). The 'old boundary line' was identified by Mr Campin as the section of the boundary on the deed plan of the Ahuriri purchase that runs in two right lines from the mouth of the Tutaekuri River to a point between Mataruahou and Pukemokimoki and thence to the foreshore. This would be roughly the line of Emerson and Carlyle Streets (A21(c):729).

As Mr Parsons observed in his evidence, confusion has long existed over the circumstances of this purchase because the deed title led to the erroneous belief that it was Mataruahou that was purchased (A12:100). It was also suggested that this purchase was intended to pacify Tareha over the original purchase by giving him an additional payment of £50 and two sections.⁸ Crown research on this claim established that the Mataruahou block purchased in 1856 consisted of a small wedge of land that had been excluded from the 1851 purchase when a section of the southern boundary was altered to exclude Pukemokimoki.

No separate plan of the block appears to have been produced, presumably because it was part of the town survey in 1855 (ie, over a year before the deed was signed) (A12:99, 102; A13:77). In August of that year, Alfred Domett, the Commissioner of Crown Lands and the resident magistrate, reported to McLean that they were laying out their Napier town 'famously' and that they had 'that piece you bought when here, the flat Southern end' laid out in quarter-acre or half-acre allotments (E1(b):33–34). On 22 September, he reported that the town survey was just finished: '*Lots* of sections for sale . . . the island, *spits & flat* last purchased by you all laid out' (emphasis in original) (E1(b):34). The area of the block was 650 acres.⁹ After an access road was formed over Bluff Hill and reclamation to abate 'the swamp nuisance' was begun, it developed into the town centre.¹⁰

5.3.3 **The Tutaekuri block**

By deed receipt 7 of 11 April 1855 (A8(b)) and deed 14 of 13 November 1856 (A8(a)), the Crown also purchased the Tutaekuri block from Tareha, Karauria Pupu, and Hone Hoeroa for the sum of £200. According to Mr Parsons, about a third of the acreage was inside the boundaries of Te Whanganui-a-Orotu. This reinforces the claimants' view that Te Whanganui-a-Orotu was still Maori (customary) land. Once again, McLean made the initial agreement and paid the

first instalment of £100 and Cooper completed the transaction. The deed and plan were published in Turton (A12:103–104; A13:80).

The block consisted of 1000 acres of lagoon and swampy mudflats lying between the Tutaekuri River and the almost parallel Purimu Stream and extending south to where they joined at Pukana or Tamahui where a small island lay in the river. On the thesis that Te Whanganui-a-Orotu was excluded from the Ahuriri purchase, the claimants viewed this purchase as filling the gap in the deed's description of the boundaries between the mouths of the Purimu Stream and the Tutaekuri River. The Crown, however, viewed it as extending the Ahuriri purchase to include a further portion of Te Whanganui-a-Orotu on the southern side of the external boundary (the red line) on the deed plan. In fact, the northern boundary of the Tutaekuri purchase was not the edge of the lagoon but the southern boundary of Napier.

More importantly, from McLean's point of view this purchase must have been 'essentially necessary' to control the main waterways south and east via the Tutaekuri River and Tareha's creek to Awatoto, Te Awapuni, and Waipureku (East Clive), then inland via two navigable rivers, the Ngaruroro and the Tukituki. In about 1857, a link road between Napier and Waipureku was formed, a toll-bar was erected at Tareha's bridge across Tareha's creek, and a toll-gate fence was placed across the beach.¹¹ The 200-acre Waipureku block, which controlled the routes further south, had already been purchased for the provincial government in 1855 and the town of Clive was laid out in 1857.

The swampy mudflats of the Tutaekuri block were an important resource for local Maori, especially for eels and birds; but there is no indication that they were informed or consulted about, or shared in the proceeds of, the sale. Nor were any reservations made for continued fishing and access rights. Within 20 years, the area had been drained to provide more suburban land for Napier.¹²

5.4 THE ANTI-LAND SELLING MOVEMENT

5.4.1 The 1857 war

Prominent among the chiefs selling land in Napier's country districts in 1854–59 was the Ngati Whatuiapiti chief Te Hapuku, a long-standing opponent of Te Moananui's. He continued to work with McLean and his land purchase agents in opposition to local chiefs, whose land he sold without their knowledge or consent.

Ostensibly, the armed clashes that occurred in August, October, and December of 1857 and the resulting casualties were caused by Te Hapuku's procuring of timber from Te Pakiaka bush, where Te Moananui had erected a rahui pole, to build a pa at Whakatu. But Te Moananui, Karaitiana, and their supporters also had the important objective of ending Te Hapuku's secret land deals.¹³

When McLean attempted to make peace, Te Moananui was adamant that Te Hapuku and his dwindling supporters withdraw to their ancestral lands at Te Hauke. With some inducements from McLean, they did leave in March 1858, after burning Whakatu. Peace for the iwi and hapu of Ngati Kahungunu was achieved at a meeting at Tane Nui a Rangi in September, though Te Hapuku did not attend. Meanwhile, at the request of anxious settlers, a detachment of the 65th Regiment (Royal Irish) was posted to Napier, which became a garrison town for some years.

5.4.2 **The runanga movement**

Although Te Moananui, Tareha, Karaitiana Tomoana, and other Ngati Kahungunu chiefs did not join the King movement, they followed the lead of Renata Kawepo and set up a runanga system of local self-government to maintain social order and stop the selling of land to the Government. In 1861 McLean decided that no more land was to be purchased in the Napier district without the Governor's special consent.

The chiefs at this time were attempting to use the remaining land for the benefit of their people, cultivating it or renting it to pastoralists for grass money. In 1861 Cooper reported to McLean that Maori villagers were erecting weatherboard cottages, fences, and stockyards, and purchasing bullocks, drays, horses, and carts. Land was being ploughed for wheat growing and there were two water-mills for grinding the wheat. Contracts were being made for quarrying and metalling roads. Fines imposed by runanga had almost ended drunkenness, and crime was almost unknown.¹⁴

In his opening address to the provincial council on 2 June 1868, McLean observed that the Maori population possessed no inconsiderable part of the wealth and resources of Hawke's Bay. They were rich in land, cattle, horses, sheep, mills, and agricultural implements, and were applying themselves to industrial occupations; they were generally well-disposed, amenable to the law, and contributed much to the prosperity of their province (A21(b):500).

What Cooper and McLean failed to observe was that their extensive land purchases were undermining the tribal foundations of this prosperity. Proceeds from land sales and rents were soon spent, and chiefs bought goods from local storekeepers on account and were forced to sell more land to discharge their debts. Debts were also incurred by chiefs who equipped their own expeditions to fight alongside Government forces against Te Kooti during the east coast campaigns.

5.5 **RENEWED LAND PURCHASING**

5.5.1 **The Native Land Court system**

As part of a policy of pacification and opening up remaining Maori districts of the North Island to colonisation, the settler government in 1865 set up the Native Land Court to facilitate the purchasing of land. The court's function was to investigate customary title, award certificates of title to not more than 10 named 'owners', and issue Crown grants. Direct purchasing by private individuals was re-instituted, and a new phase of extensive land purchases by private individuals as well as the Crown began in Hawke's Bay.

In 1867 and 1869, the Crown purchased two more blocks of land at the southern end of Te Whanganui-a-Orotu under this system, and in 1869 a local storekeeper purchased a block at the northern end on behalf of a sheep farmer. These purchases further eroded customary and Treaty rights in Te Whanganui-a-Orotu as well as rights recognised in the Ahuriri deed.

5.5.2 **The Tutae o Mahu and Te Whare o Maraenui purchases**

The Tutae o Mahu and Te Whare o Maraenui Crown purchases were southern extensions of the 1855 and 1856 Mataruahou and Tutaekuri purchases. They were

made in McLean's name and enabled the provincial government to push ahead with building roads, bridges, and the Napier to Pahi Pahi section of the railway to the Manawatu, which ran via the beach route. The purchases also eventually provided more flat land for suburban Napier through reclamation.

The 140-acre Tutae o Mahu block was Crown granted to Tareha Te Moananui on 15 July 1867, and the 1808-acre Te Whare o Maraenui block was Crown granted to Tareha Te Moananui¹⁵ and Wiremu Nga Maia on 18 November 1869 (A21(f):1556). Because both blocks were sold by the grantees soon after the Crown grants were issued, they were presumably put through the Native Land Court for this purpose.

The Tutae o Mahu block was a long, narrow strip of shingle beach from the southern boundary of Napier to Tareha's bridge. Te Whare o Maraenui comprised tidal backwaters of Te Whanganui-a-Orotu and swampy mudflats, which were underwater in floods, between the Tutaekuri River and the beach.

A memorandum of agreement to sell the Te Whare o Maraenui block (consisting of 1500 acres) and naming Tareha Te Moananui as the seller was entered into on 29 March 1869. The price was set at £800, of which £400 was paid when the memorandum was signed, with the balance to be paid when the deed was signed. A block of 10 acres on the eastern bank of the Tutaekuri River was reserved for Tareha personally (D1:31; E1:33). According to Mr Parsons, about half the acreage of this block was in Te Whanganui-a-Orotu, a further reinforcement of the claimants' view that it was Maori (customary) land (E3:29).

The boundary of the block was described as:

commencing at Tareha's bridge and following along the Meanee [sic] Road in a westerly direction until that road strikes the Tutaekuri River and thence down the right Bank of that River in a northerly direction to its fall into the Ahuriri lake and thence along the outer edge of the land at low water in an easterly direction and a straight line to the junction of Hastings Street with the Beach Road and along High water line in a southerly direction to the starting point at Tareha's Bridge. (E1(b):35)

This description included the 1867 Tutae o Mahu block purchase and was rectified in the deed of sale, which was signed by Tareha and Wiremu Ngamaia on 22 December 1869. The section of boundary running along the edge of the lagoon was described as follows:

commencing at the Eastern side of the mouth of the Tutaekuri River on the Ahuriri Lake in a North Easterly direction a distance of 5928 links, to the Southern boundary of the Town of Napier, following along that boundary Easterly to the Western boundary of the Tutae o Mahu Block . . . (E1(b):35)

The block now consisted of 1818 acres, out of which 10 acres were cut for Tareha's reserve.

From the claimants' viewpoint, the northern boundary of the Te Whare o Maraenui block filled in what Dr Gilling described as the remaining gap in the southern boundary of the Ahuriri purchase (E27(a):65). From the Crown's viewpoint, the Ahuriri purchase was further extended to include Te Whanganui-a-Orotu to the south of the external boundary (the red line) on the deed plan, thus acquiring a small section of the lagoon for the second time.

Following the Waipureku, Tutae o Mahu, and Te Whare o Maraenui purchases, the chiefs and people who had principal settlements near the southern end of the lagoon moved elsewhere: Karaitiana to Pakowhai and Omahu, Te Moananui's people to Pawhakairo and Matahiwi, and Tareha to Waiohiki. A rich traditional resource area and network of inland waterways and tracks was replaced by a network of roads and bridges, and by the railway and suburban Napier. In contrast to the Ahuriri purchase, these further Crown purchases appear to have been private transactions with an individual chief and one or two others. We have no evidence that all those with interests in the land consented to the sales or shared in the proceeds.

5.5.3 **The Te Pahou purchase**

The Pahou block consisted of 620 acres of land situated south of Petane and north of Ruahoro between the Waiohinganga River and the coast, two small nearby islands, Te Ihu o te Rei and Parapara (four acres in total), and the native reserve of Roro o Kuri (70 acres) at the northern end of Te Whanganui-a-Orotu (A12:120) (see fig 12).

An application from Paora Torotoro and Te Waka Kawatini to put the block through the Native Land Court was heard on 16 August 1866 by Judges Monro and Smith. Ten names were put in by Paora Torotoro. In evidence to the 1873 Hawke's Bay Native Lands Alienation Commission, Tareha said that he was not included because he had quarrelled with the applicants about the land going through the court, but three of his people (Te Waka Kawatini, Morehu, and Maihi Raukapua) were (A5(i): evidence, p 6).

Utiku Te Paeata, one of about 40 people living at Petane, said that they had argued about the names before the grant was ordered and he had applied to the court to be included. The court said that it would not be right to have 12 or 20 names in the grant and there could be only 10. The 10 who were in the grant said that they were to be guardians. Utiku and his people were sad on account of their land being devoured by those whose names were on the Crown grant; the land belonged to the whole hapu (A5(i): evidence, p 5).

An order was made that a Crown grant be issued to the 10, namely, Paora Torotoro, Te Turuhira Heitoroa, Maihi Raukapua, Hama Paeroa, Te Waka Takahari, Pera Te Ruakohai, Matiu Te Manuhira, Morehu, Te Waka Kawatini, and Hoera Paretutu. The judge, however, ordered that it be delivered to the surveyor, Bousfield, to hold until the applicants paid the survey costs. In addition, they were liable for a court charge of £3 (D1:33). A Crown grant was issued to the 10 on 3 October 1866. Five of the grantees were among those who complained to the 1873 commission about the manner in which the block was purchased (A5(i): evidence, pp 3–6).

In the first instance, the block was rented by Thomas Richardson, a Petane sheep farmer and grazier, for £80 per annum. Payments were made to the grantees through Samuel Locke, the resident magistrate in Napier, who negotiated other Government purchases. Richardson then proposed to Paora Torotoro that he purchase the block for £400, but, because Paora was obstinate, he left the matter to a Meeanee storekeeper, R D Maney, to negotiate. Over time he paid the £400 to Maney but took no part in its distribution.

Maney prevailed upon Paora Torotoro to sign the deed of conveyance at his public house on the understanding that he (Paora) would be given £100 personally.

Despite many applications to Maney, he was not paid. He therefore procured goods and spirits on account but received no statements or bills. On another occasion when Tareha visited him, Maney gave him £50 on account of Te Pahou for himself alone, because Tareha said that the land was his. Tareha then signed the deed, as did Paraone Kuare, who was also there and said he did so 'for a gig'. Paraone seems to have acted as Tareha's secretary. Four other grantees who lived at Waiohiki denied that they had signed the deed or received any payment in money or goods.

When Utiku Te Paeata tried to pay for a pair of trousers, a vest, and a shirt in wheat, he found that Maney wanted to put them on the land. He told Maney that he might put them on Te Ihu o te Rei, not Te Pahou. His mark on the deed for that debt was Maney's doing.

H M Hamlyn, a licensed interpreter, recollected that Paora Torotoro and Te Waka Kawatini signed at Maney's house and the rest signed at Tareha's place. The extra names on the conveyance were supposed to be outsiders agreeing to the sale.

The commission's chairman, C W Richmond, in his report on the five complaints concurred in by Commissioner F E Maning, stated that the deed of conveyance of 28 January 1870 was executed by Paora Torotoro and the other grantees, as well as by Tareha Te Moananui and several natives not named in the Crown grant: Wi Nganga, Utiku, Tareha, and Paraone. He expressed doubts about the adequacy of the price but reached no conclusions. As far as he could make out, all the complaints related to the distribution of the purchase money and to the mode of its payment. The grantees who said that they got nothing were not entitled to equity to repudiate their own acts. As to the mode of the payments, all the principal vendors' accounts with Maney that were mentioned appeared to be properly accredited to them. He believed that Paora Torotoro's allegation that Maney agreed to pay him £100 was 'pure fiction'.

Commissioner Hikairo expressed a different opinion. He believed that Paora Torotoro made frequent applications for the money without success and because of that went on getting credit. Maney was in the habit of holding back money so as to compel Maori to go to him in order to get goods on credit. Hikairo believed the four grantees who complained that they got no goods on account. 'This transaction,' he concluded, 'was not quite fair'.

Regarding Utiku's evidence, Hikairo said that according to Maori custom there were 20 persons with interests in the land who suffered injury through the insertion of only 10 names in the Crown grant. They had not received any of the proceeds. He believed that 'Maney had not got the whole of the land; There was a balance left and he applied that they should get the said balance'. It would be for Parliament to consider Utiku's statement (A5(i): report, p 56).

5.5.4

To whom was Roro o Kuri sold?

Mr Parsons expressed some doubt that Roro o Kuri was sold to Thomas Richardson. He cited a report in the *Hawke's Bay Herald* of 6 December 1870 that:

Te Roro o Kuri an island in Napier Harbour containing 70 acres, formerly the property of Mr A KOCH, was yesterday sold at auction by Mr E Lyndon for the sum of £142, the purchaser being Mr G E G RICHARDSON. (A12:120)

He pointed out that no such sale was recorded in the Native Land Court's minute books and Thomas Richardson's evidence to the 1873 commission made no mention of any of the islands in the block that he was farming. Rather, he had described a large part of the block as being 'sea beach and shingle bed', containing about '230 acres of good available land' (A5(i): evidence, p 6). Hikairo had referred to Maney as not having procured the whole of the land. Utiku's evidence seemed to suggest that the Petane people wanted to partition Te Ihu o te Rei out of the Crown grant.

In his *History of Hawke's Bay*, Wilson referred to a map of the province prepared by A Koch, a surveyor, and published by order of the provincial council in 1874, which listed Richardson and Hutton Troutbeck as the purchasers of Te Pahou (an area of approximately 694 acres) and to the 1872 sheep return, which listed 2521 sheep for Richardson and Troutbeck of Petane.¹⁶ This evidence suggests that the *Herald* was incorrect.

Troutbeck was also listed in the 1875–76 electoral district roll for Napier as the owner of the Roro o Kuri island freehold.¹⁷

5.5.5 **Te Pahou sale inconsistent with Treaty principles**

In ordering a Crown grant for Te Pahou to 10 'owners', the Native Land Court acted inconsistently with customary law and Treaty principles. By including the reserve of Roro o Kuri in Te Pahou, it acted inconsistently with the 1851 deed of sale. By failing to take appropriate action to remedy this situation and to reserve a fishing and access right for Maori, the Crown acted inconsistently with its Treaty and contractual obligations.

The continuing importance of fishing rights in Te Whanganui-a-Orotu for local Maori was demonstrated by a passage in Richmond's 1873 report:

In the course of our enquiry Mr Maney gave evidence, that it had been stipulated on the part of the native sellers that they retain the right to resort to the beaches of Pahou, as a fishing ground, and to erect whares on a particular part of the block for their residence whilst so employed. This was admitted on the part of Mr Richardson, the purchaser. But as the Deed of Conveyance is silent on the subject, we recommend that steps should be taken, without delay, to define the reserved right, and to put it upon a proper legal basis. (A5(i): report, p 11)

This recommendation was not implemented.

Te Pahou was a minor loss compared to the Heretaunga block, which was purchased by similar methods less than two months later. None the less, it eroded the customary, Treaty, and contractual rights of the local hapu at the northern end of Te Whanganui-a-Orotu and deprived them of one of the three native reserves provided for in the 1851 deed of sale.

5.6 **PORT DEVELOPMENT AND RECLAMATION**

5.6.1 **Admiralty survey**

In 1853 the first official survey of the harbour and lagoon was carried out by Captain B Drury and others in the Royal Navy ship HMS *Pandora*. An Admiralty chart of Ahuriri Road and the Port of Napier was published in 1854 (A21(f):1543).

5.6.2 **Provincial council improvements**

Harbour improvements and reclamation were initiated almost immediately after the first provincial council and superintendent (T H Fitzgerald) were elected, a clear indication of their crucial importance for the future development of Napier and its country districts. In 1861 the first harbour commission, a select committee of the provincial council, was appointed to inquire into and report on the capabilities of the harbour and means of improving it (A21(b):438).

A civil engineer, Edward C Wright,¹⁸ was instructed to survey the harbour and report on the best means of rendering it available to vessels of greater tonnage. In August 1859, he produced a scheme for substantial harbour works, a small part of which was carried out in the next three years (A21(b):414–419; E9:3–4).

5.6.3 **Opinion sought on ownership of reclaimed land**

The reclamation of very shallow mudflats in front of town sections and all round Gough Island was proposed, and, on 8 December 1859, Fitzgerald sought an opinion from a Wellington barrister, C D Ward, on possible objections to this work under section 2 of the Public Reserves Act 1854. This section stated:

It shall be lawful for the Governor . . . with the advice of his Executive Council to grant and dispose of any land reclaimed from the sea, and of any land below high water mark in any harbour, arm or creek, or any navigable river or on the sea coast . . . to the Superintendent of the Province . . . (cited in A12:107)

Ward's opinion was that 'The soil below high water mark is prima facie the Crown's property' and the Government had the power to vest the land in question in the superintendent and the owners of the town sections could not demand compensation (A21(b):421–422).

5.6.4 **The Crown vests Ahuriri Harbour in the superintendent**

On 29 December 1860, under the Public Reserves Act 1854, the Crown vested a small part of Te Whanganui-a-Orotu in the superintendent and his successors for the improvement of the harbour and the construction and maintenance of docks, piers, and other works deemed advisable for facilitating the trade and commerce of the town and port. This part of Te Whanganui-a-Orotu was later described by Judge Harvey as 'what could have been the then Native and official idea of the extent of the Ahuriri Harbour' (A5(m):48). As the claimants stated, the grant was made without reference to or consultation with their forebears (1.2(d):5).

5.6.5 **Provincial harbour works and reclamations**

In February 1861, the harbour commission took evidence from shipmasters and others and issued a detailed plan for dredging, constructing breastworks, and disposing of reclaimed lands. The select committee reported that work should continue for that year and the Government's attention should be directed to deepening the eastern harbour and providing wharf accommodation for vessels frequenting it (A21(b):455–470).

Under the Harbour Reserves Act 1861, the provincial government was able to acquire revenue for the improvement of the harbour as well as the facilitation of trade and commerce by the sale of land reclaimed from the sea. Between 1859 and

1862, harbour improvements and reclamation were a principal item of expenditure. Te Pakake and Te Koau were joined together, Watt's and Routledge's wharves were constructed on the north side of the Iron Pot, and a timber breastwork was constructed on the south side. Dredging commenced at the harbour entrance and at the Iron Pot (A21(b):414–419; D4:49; D9:98; E9:4; F3:16).

5.7 **THE LOSS OF TE PAKAKE**

The provincial government's actions and policies to improve the harbour led to the loss of Te Pakake, which McLean had obviously anticipated when he agreed that it should be reserved 'during such time as it remained unoccupied by Europeans'. When Domett surveyed Te Koau in 1854, he reported to the superintendent in Wellington that the small island nearby had not been surveyed for the present because there was an old pa fence and burial ground upon it, and he found that there was an understanding with McLean at the time of the purchase that it would not be used for some time (A21(b):403; E1:17). Clearly, the small island was Te Pakake, or Maori Island, then known as Tareha's reserve.

Te Pakake and Te Koau were included in the Ahuriri harbour area that was vested in the provincial superintendent on 29 December 1860, and they were connected to each other by Wright's harbour improvements and the accumulation of silt. On a plan numbered Hawke's Bay B1 14, Te Pakake was shown as a four-acre 'native reserve for fishing purposes. Also the perpetual right of fishing over all the mud flats in the inner harbour' (A12:116).

Between 1861 and 1874, Te Pakake and Te Koau were reclaimed and partially divided into lots for sale (D1:66, 125). Reclaimed sections 588 to 601, located on Te Pakake, were offered for sale by public auction in 1874 (A12:125).

According to the introductory notes to Stephanie McHugh's supporting papers (A21(b)), Te Pakake was taken for the construction of the Port Ahuriri to Napier section of the Napier to Manawatu railway in 1873, and compensation was paid to Tareha in 1874. According to claimant counsel, Tareha was granted a section on Te Pakake in 1877 (D9:108). Presumably, no legal change in its status was deemed necessary as it had been reserved only for such time as it was unoccupied by Europeans (A12:125).

5.8 **THE CROWN'S ANOMALOUS POSITION ON RESERVES AND ISLANDS**

5.8.1 **Sinclair's 1862 list of reserves**

In 1862 a Native Department official, Andrew Sinclair, compiled a return for McLean of general reserves that had been made for Maori in cessions of territory to the Crown in the province of Hawke's Bay. The return also listed the claim, the name of the block, the district, the area, the number on the map and the tribe, and the section number or name.

The names listed in the Ahuriri block were Roro Okuri, Whanganui Lake, Wharerangi, and Puketitiri. Each was listed on a separate line, and no lines were ruled between each entry (A5(c)), which led to speculation that 'Roro Okuri' and 'Whanganui Lake' were one entry and should have been printed as 'Roro Okuri,

Whanganui Lake'. Judge Harvey, for one, rejected the designation of Whanganui Lake as a reserve, because in his opinion most of it had not been sold.

5.8.2 **The claimants' submission**

As Mr Boast said:

Anyone who saw this report could certainly be forgiven for thinking that Whanganui Lake had a reserve status of some kind. (D1:32)

Mr Hirschfeld submitted that the Crown had never satisfactorily explained this 'anomaly', perhaps because it was:

at least partially consistent with the Maori version of events, and wholly inconsistent with its interpretation of the deed. If it were a mistake, it was not only a glaring one . . . but also one which was not corrected.

Mr Hirschfeld quoted Sinclair on the subject of the compilation of the list to the effect that he had examined all the records most thoroughly, which had been a work of considerable magnitude. In conclusion, Mr Hirschfeld said:

Whilst it was not submitted that Te Whanganui-a-Orotu was in fact a reserve, it is submitted that in the minds of colonial officials, there was no one clear title in the Crown. (D9:51)

Mr Hirschfeld also observed that the inclusion of Te Ihu o Te Rei and Parapara in the Te Pahou Crown grant was inconsistent with the Crown's position: 'If the lake had been purchased so had these two islands' (D9:49).

5.8.3 **The Crown's submission**

For a number of reasons, the Crown did not consider that much weight should be placed on Sinclair's list. Mr Brown pointed out that at least one other entry on the list was unclear. The word 'about' appeared by two entries in the column headed 'Area' and could refer to either. To Judge Harvey, it had appeared that the two entries 'Roro Okuri' and 'Whanganui Lake' were set up from want of space in two lines instead of one. Moreover, the map numbers and acreage were not given for 'Whanganui Lake', even though they were available. We note, however, that no acreage was given for 'Roro Okuri'.

Mr Brown also pointed out that 'Te Whanganui-a-Orotu was not named as a reserve in the Ahuriri Deed unlike Roro o Kuri'. Nor was it logical to have both Roro o Kuri, an island in Te Whanganui-a-Orotu, and Te Whanganui-a-Orotu listed as reserves. Furthermore, one could not lay too much store on the omission of a comma between 'Roro Okuri' and 'Whanganui Lake'. We could also add that there is a full stop after 'Roro Okuri' but not after 'Whanganui Lake'.

Finally, Mr Brown conceded that the word 'reserve' might well have had a number of meanings in the 19th century but that in this context it was quite clear that it meant 'not outside the transaction but embraced by the transaction with an entitlement nevertheless reserved to Maori'. In any event, the Crown did not understand the claimants to be arguing that Te Whanganui-a-Orotu was a reserve in the context of the sale (I15(a):28–29).

5.9 **PAORA TOROTORO'S APPLICATION FOR TITLE TO SIX ISLANDS**

Further evidence of early concern over settler encroachments into Te Whanganui-a-Orotu is provided by a survey plan that Paora Torotoro and others commissioned from William Ellison in November 1867. The plan was for the purpose of making an application to the Native Land Court for a title to six islands that were still regarded as Maori (customary) land. The islands shown on the plan were Urewiri (7.25 acres), Poroporo (1.75 acres), Tirowhangaho (1.5 acres), Tuteranuku (3.5 acres), Awa-a-waka (2 acres), and Matawhero (4 acres).

Mr Parsons could not find any reference to the application in the relevant Native Land Court minute books. Mr Hirschfeld submitted that the plan constituted both the application and the survey of the land, in accordance with section 25 of the Native Lands Act 1865. The plan has some faded pencil entries that appear to read 'not gazetted. The plan is incomplete . . . would require some portion of the beach to show some connection with the mainland.' Possibly for this reason, the plan, 'doubling as it were as the application and having been considered insufficient for surveying purposes . . . never reached the stage of being entertained by the court' (see fig 13).¹⁹

5.10 **TAREHA CLAIMS RECLAIMED LAND**

The first recorded Maori claim to the bed of Te Whanganui-a-Orotu following the Ahuriri purchase was prompted by reclamation work. On 20 June 1861, G S Cooper, the district commissioner, wrote in a report to McLean:

Tareha one day said to me that he had only sold the land as far as the high-water mark, and that all, that is being now reclaimed, is his property, as having been under the sea when he sold the Ahuriri Block.

He did not say much on the subject at the time, and has not reverted to it since, so that I am in hopes my arguments have convinced him. (A5(a):353)

Presumably Cooper explained to Tareha Ward's opinion that land reclaimed from the seabed belonged to the Crown.

5.11 **AN INNER HARBOUR VERSUS A BREAKWATER HARBOUR**

After C H Weber replaced Wright in 1863, little more was done for almost 10 years to improve the harbour other than repair work and some swamp draining and reclamation (E9:4). Relations with local Maori were unsettled, part of the Pakeha population left for the goldfields, and provincial revenue fell.

In 1864 the harbour commission made a contract with the surveyor O L W Bousfield for charts of the Ahuriri Lake, the Port of Napier and the harbour, and Hawke's Bay, showing the Ahuriri Plains. In laying these before the

Figure 13 (facing page): Ellison's 1867 survey plan of groups of islands near the Port of Napier

This is identical with plan
 111 in the Napier Survey Office
 in charge Native Land Br.
 24 Dec 25



Urua

(Group of Islands near Port Napier)

Shank's Bay

The Application of River Torotoro and 20 acres

Shank's Bay, 1867
 William Ellison
 1867

Presented to the (Chief) of the
 Review of Shank's Bay on the 6th day
 of March 1867
 William Ellison
 1867

Tirouhaka



Poroporo



Muteru



Ama



MATAWHERO

Scale 10 Chains to an Inch

chairman on 17 April 1865, Bousfield drew particular attention to the formation of mudflats and sandbanks on the southern side of 'the lake'. The cause, he ventured to suggest, was probably the combined action of the west and north-west winds and the earth washed down by the Tutaekuri River when in flood.

The entrance to the port was undergoing great and rapid change. In 15 years its width had increased to 13 chains (260 m), twice its previous width, and its depth had decreased from five to four fathoms, affecting its navigability. Bousfield concluded that the Iron Pot was formed and entertained by a tidal eddy and any interference must result in its filling up and being useless for shipping purposes. From soundings taken in 1862 and 1865, it was apparent that the Iron Pot was becoming more shallow and, since the commencement of what were called 'harbour improvements', a very great change for the worse had taken place. It could be maintained in a useful state only through an enormous initial and annual expenditure (A5(m):30–36; A12:105–106; A21(b):426–427; D4:48–49; D9:98; F3–16).

After the devastating 1867 flood, the services of the colony's civil engineer, J M Balfour, were procured to inspect the situation. He reported that for £10,000 the existing inner harbour could be improved to amply accommodate the present shipping (A21(b):493). But in 1873 the fear of floods and a strong demand for a deep-water harbour for ocean-going vessels led a select committee to invite John McGregor, a Scottish harbour engineer who had been forming a breakwater harbour for Oamaru, to report on the feasibility of one for Napier. In order to provide a completely sheltered harbour, McGregor proposed a protecting breakwater starting from the bluff, and he submitted two alternative estimates of the cost: £100,000 and £246,000 (A21(b):531–534, 568–569).

Several months later, the engineer-in-chief of the Public Works Department, John Carruthers, reported to his Minister that a harbour large enough to receive English ships would be a great boon and valuable as a port of refuge between Wellington and Auckland. According to Carruthers, the completion of the railway would enlarge the port's business and something must be done to improve it; if it were found that the shingle could be dealt with, the present port could be improved, but if the shingle moved rapidly, a bolder plan to make an artificial harbour would be cheaper in the end (A21(b):567–568).

5.12 **THE PROVINCIAL GOVERNMENT PROPOSES TE WHANGANUI-A-OROTU AS SECURITY FOR A HARBOUR LOAN**

In his opening speech to the provincial council in June 1874, Ormond recommended that a £250,000 Government loan to construct a breakwater harbour be sought and all reclaimed land within the Ahuriri Lagoon and the Marae o Maranui (Te Whare o Maraenui) block be set aside as security (A21(b):563). A select committee was appointed to prepare a memorial to the General Assembly setting forth the necessity for the construction of the harbour, urging the Assembly to authorise a £250,000 loan, and indicating what securities could be set aside (A21(b):541).

The memorial stated that the petitioners, acting on behalf of the province, were willing to have a rate on land imposed to provide for yearly interest and a sinking fund. It also stated that the petitioners had set aside valuable blocks of land as

security for the repayment of the principal. A portion of this land included about 70 acres in the immediate proximity of the proposed harbour (A21(b):566), described in a schedule to the select committee's report on the memorial as follows:

1. Port Ahuriri Lagoon, 74 acres in the vicinity of the proposed harbour.
2. Te Whare-o-Maraenui block, 1,748 acres 2 roods, in the Napier suburban district.
3. Ahuriri lagoon, 7,900 acres excluding the islands called Roro-o-Kuri, Para-para, Te Ihutekei, Uruwiri, Poro-Poro, Tirowhangahe, Tuteranuku, Awa-a-waka, and Matawhero. (A21(b):573)

There is no record of anyone considering Maori rights and interests; indeed, local hapu were probably unaware that the provincial council was proposing to set aside Te Whanganui-a-Orotu as security for a harbour loan. The exclusion of the six islands shown on William Ellison's 1867 survey plan was an official acknowledgement that they were still Maori land.

References

1. See M D N Campbell, *The Story of Napier, 1874–1974: Footprints along the Shore*, Napier, Napier City Council, 1975, pp 5–6.
2. J Belich 'The Governor and the Maori', in *The Oxford Illustrated History of New Zealand*, Keith Sinclair (ed), Auckland, 1990, pp 85–86
3. For a description of the sections, see A21(b), pp 401, 403.
4. Kay Mooney, *History of the County of Hawke's Bay*, Napier, Hawke's Bay County Council, 1973 pt 2, pp 108–109
5. Campbell, p 72; S D Waters, *Richardsons of Napier: A Century of Coastal Shipping 1859–1959*, Napier, 1959
6. Caroline Ralston, *Grass Huts and Warehouses: Pacific Beach Communities of the Nineteenth Century*, Canberra, 1977, p 187
7. Angela Ballara and Gary Scott, 'Claimants' Report to the Waitangi Tribunal on Crown Purchases of Maori Land in Early Provincial Hawke's Bay', January 1994 (I1), vol 1, pp 85–94
8. Campbell, pp 4–5
9. J G Wilson and others, *History of Hawke's Bay*, A H and A W Reed, Wellington, 1939 (reprinted Capper Press, Christchurch, 1976), p 210
10. Campbell, pp 11–18, 27–28
11. Mooney, pt 3, p 2
12. Ballara and Scott, Tutaekuri block file, pp 1–3
13. Mooney, pt 1, pp 5–7; Ballara and Scott, vol 1, pp 88, 98–103
14. Wilson, p 210
15. After Te Moananui died in 1861, Tareha took his name.
16. Wilson, p 213
17. A A Coates, 'The Galatea Story', *Whakatane District Historical Review*, 1980, p 30
18. For testimonials, see A21(b), p 470.
19. Hirschfeld to Waitangi Tribunal, 17 February 1995

CHAPTER 6

THE EXPROPRIATION OF TE WHANGANUI-A-OROTU BY STATUTE

6.1 TE WHANGANUI-A-OROTU IS VESTED IN THE NAPIER HARBOUR BOARD

6.1.1 The Napier Harbour Board Act 1874

In 1874 Ormond, who was the member of Parliament for Clive as well as the provincial superintendent, prompted the passage of a Bill through the General Assembly to reserve land for the future endowment of a board for the harbour of Napier (A4(a); A21(a):206–208). Under the Public Reserves Act 1854, the land would be vested in the superintendent. Under the Harbour Boards Act 1870, the provincial council would be authorised to constitute a harbour trust to raise money for works and improvements by mortgaging such land.

The Bill went to the Legislative Council for a second reading, in the course of which several speakers criticised the provincial council for its earlier reckless expenditure. According to the Honourable Mr Stokes, they had spent about £100,000 improving the Iron Pot, and ‘after they had done so they found that the last state of the Pot was worse than the first’.

The land reserved for the endowment, described in a schedule to the Bill, comprised the three blocks already set aside by the provincial council and 11 additional small parcels of Crown granted land in the Town of Napier. In respect of the inclusion of the Ahuriri Lagoon, Richard Boast remarked:

It is perhaps significant that even at this comparatively late stage the area is being referred to either as a lagoon or lake, not as a harbour or estuary. (D1:42)

6.1.2 Questions of title

Although questions of title to harbours and reclamations had constantly been cropping up in Parliament in respect of other harbours and reclamations, none were raised in respect of Ahuriri.

Mr Brown, in cross-examining claimant witnesses, drew the Tribunal’s attention to the lack of any opposition to or protest over the harbour board endowment and, more particularly, to the silence of the member for Eastern Maori, Karaitiana Takamoana. This, we consider, is hardly surprising, because the second reading debate was in the Legislative Council. Moreover, at this time, Karaitiana and other Heretaunga chiefs were deeply engaged in the politics of repudiation, not provincial and Parliamentary politics.

In the same parliamentary session, the following question directly pertinent to the statutory reservation of Te Whanganui-a-Orotu for a harbour board endowment

was put to the Native Minister, Donald McLean, by the member for Southern Maori, H K Taiaroa:

By what authority any land below high water mark has been reclaimed for public purposes in the North Island and whether such reclamations are not in contravention of the rights reserved as to fisheries to the Native Race by the Treaty of Waitangi; and if infringement of the Treaty has taken place, how the Maori people can obtain compensation?

McLean responded:

For the information of the House, that land below high water mark was granted to the Superintendents under the Public Reserves Act of 1854, and was also leased under the authority of the Act. In regard to all territories ceded by Maoris to the Crown, it had been held when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams, and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand had carefully preserved the rights of the Natives.¹

In a later debate on the Wanganui Foreshore Government Bill, when McLean sought an assurance from the local member that a canoe landing place would be provided, Karaitiana gave his approval and wanted similar provisions for Napier and Wairoa.²

From the claimants' perspective and in Treaty terms, the harbour endowment amounted to a statutory expropriation of a traditional resource that their tipuna used, occupied, and controlled and, in respect of the harbour proper, were knowingly and willingly shared with the settlers. The Tribunal concurs with this view.

6.1.3 **The Napier Harbour Board Act 1875**

In 1875, after the House had determined that the provincial councils should not sit again, Ormond prompted the passage of a second Bill through the General Assembly to constitute the Napier Harbour Board and name 12 members to sit on it. Those named were prominent businessmen and sheep farmers of the district and included Ormond himself and the mayor of Napier. None were Maori. Lands that were to have been vested in the superintendent for the endowment of a harbour trust were now vested in the Napier Harbour Board (A21(a):262; D1:61). Once again, there was no immediate opposition or protest.

6.1.4 **The Napier Harbour Board Act 1876**

Another 260 acres of partly water-covered land that lay between the western spit and the eastern spit on the western side of Te Pakake (Maori Island) and Te Koau (Gough Island), together with more small parcels comprising town sections and public reserves in the harbour area, were vested in the Napier Harbour Board by the Napier Harbour Board Act 1876 (A8(c)).

The Napier Harbour Board endowment was now about eight to nine times larger than the 1000 acre block that was reserved for the Town of Napier in 1855,

and in 1882 estimated to be worth £100,790. The main beneficiary was Napier, which greatly increased its area of flat land for port development and urban expansion through reclamations. Indeed, the 1874, 1875, and 1876 Acts were Napier's first 'gift from the sea', but, as the claimants have stated, these three Acts were passed 'without reference to or consultation with their forebears' (1.2(d):5–6).

6.2 THE LOSS OF PUKEMOKIMOKI

An early loss through port development was Pukemokimoki, described in the English translation of the Ahuriri deed as being the 'only portion of Mataruahou reserved for ourselves'. In Mr Boast's opinion, the English text was poorly drafted, leaving it unclear whether the somewhat 'mean-spirited proviso' that Te Pakake was reserved 'during such time as it remained unoccupied by Europeans' was intended to apply to Pukemokimoki as well (D1:66). Whatever may have been the Maori understanding, the provincial government treated them both as public reserves and appropriated them for harbour works and reclamations as required.

According to Taape Tareha, the island's name came from the mokimoki fern that grew there. The women used to wear the fern in a locket around their necks as perfume. The following lullaby, sung by women while nursing their children, has survived its association with the place name:

Taku hei Piripiri,
Taku hei Mokimoki,
Taku hei Tawhiri,
Taku Kate – taramaea.

The translation is:

My little neck satchel of sweet scented moss,
My little satchel of sweet scented fern,
My little neck satchel of odoriferous gum,
My little neck locket of sharp pointed taramaea. (D24:3–4)³

This island or hill (puke), washed on three sides by waters of the inner harbour, was reserved because the fern (*Doodia fragrans*) was very difficult to find in any part of Hawke's Bay, and for many generations people had come from near and far to gather it and the piripiri moss used by mothers for baby napkins (D24:6).

In Domett's 1854 town plan, Pukemokimoki became part of the town hall reserve between Thackeray and Emerson Streets. In 1855 Domett suggested that it 'might be laid out in ornamental walks as a place of recreation' (A12:130; A21(b):403, 412; E1:16).

According to the historian J G Wilson, Pukemokimoki Hill was removed during railway construction in 1872 and provided spoil to fill in the hollow in Dickens and Munroe Streets.⁴ Kay Mooney partly confirmed this. The hill near the junction of Carlyle Street and Chaucer Road, she wrote, was removed for the railway and the spoil used to reclaim Owen and Thackeray Streets.⁵

In 1947 the superintendent of parks and reserves, C W Corner, wrote that further fill from the hill was used for the recreation ground at Carlyle Street, which

became the sports centre of the district. There was ‘a great outcry when, in 1872, the hill was removed to make way for the railway’ (E12:4, 6).

The Napier Borough Endowments Act 1876 declared Pukemokimoki to be ‘an endowment for the borough of Napier’. Mr Boast regarded this as ‘roughly equivalent to a change in status from a government purpose to a local reserve’ (D1:66). When it reached its second hearing, the Napier Borough Endowments Amendment Bill 1993 would have empowered the Napier City Council to sell or lease land vested in it under the principal Act, but it was deferred (see para 9.12.5).

6.3 **THE DREDGING AND RECLAIMING OF TE WHANGANUI-A-OROTU BEFORE THE EARTHQUAKE**

6.3.1 **Harbour board politics**

At its first meeting, on 15 February 1876, the Napier Harbour Board elected Ormond as chairman. Except for the years 1877 to 1879, when he was a Minister, he filled this office until 1901.

The main issue before the board was whether to proceed with the inner harbour at the entrance or to construct an outer breakwater harbour at the Bluff.⁶ In the event, it remained the dominant issue in local body politics until it was finally settled by the 1931 earthquake.

Carruthers’ plan (see para 5.11) was adopted as a stopgap until 1884, when a board with a breakwater majority was elected. The Napier Harbour Board Empowering and Loan Act 1884 was passed, enabling work to begin on the breakwater scheme. After its completion in 1906, the wind changed and a board with an inner harbour majority was elected. The Napier Harbour Board Empowering and Loan Act 1914 was passed, enabling the board to carry out work on the inner harbour.

In 1924 the mayor of Napier and 1068 others petitioned Parliament for a commission of inquiry. Acrimonious debate between the parties peaked, and a royal commission chaired by J S Barton SM held an inquiry in 1927. It found that those responsible for 84 percent of the payment of any rates since 1911 were ‘steadfast in their adherence to the Inner Harbour proposal . . . in spite of any recommendations of engineers to the contrary’. Furthermore, the board’s energies were dissipated in ‘partisan warfare’. The Napier Harbour Board Empowering Loan and Constitution Amendment Act 1927 severely restricted the board’s borrowing powers, and there was ‘almost complete inactivity’ until the earthquake.⁷

6.3.2 **Harbour works**

Up to 1931, the harbour board continued dredging to maintain the harbour opening (F3:18). A training wall was constructed at the entrance in the 1870s (F3:16, 18). Between 1876 and 1879, spoil from Bluff Hill and the vicinity of Pandora Point was used for more harbour reclamation work around Te Koau, where the Ahuriri railway station was situated, and the Iron Pot, which was linked to Te Koau by a bridge.

According to expert witness Gary Williams, the combination of these works would have encouraged the development of deeper tidal flows and increased tidal flux in Te Whanganui-a-Orotu (F3:18).

6.3.3 **Impact on Maori fishing rights**

The effects of harbour works on traditional shellfish beds and fishing grounds were described in evidence given before the 1920 Native Land Claims Commission. Nepata Puhara said:

The new opening (Ahuriri outlet), was in existence in 1851. It has been made deeper by dredging. In 1874 I saw workmen digging it. Before the dredging the fish would have been eels, whitebait, pipis and crayfish – all freshwater fish. Since the deepening salt water fish is caught – flounders and other fish. The natives fished for these after the deepening. The reclamation works are covering some of the pipi beds and killing the pipi in other beds. (A7(a):37; D4:50–51; D9:97; E5:42–43, 51–52)

Mohi Te Atahikoia said:

The training wall made Ahuriri always keep open, and salt water fish now enter the lake. Fish in the lake were flounders, eels, inanga and fresh water fish. After the opening became permanent salt water fish would enter. (A7(a):41–42)

In evidence at the hearing of Hori Tupaea's 1932 petition, Te Roera Tareha said that the Iron Pot was the place where they gathered pipis, which grew there because of the salt water that came into the inner harbour. He named the fish that were caught before and after dredging deepened the entrance:

The pauas were outside. The fish were there at high tide when the salt water was there. The fish found in the harbour were upokororo, tuna, inanga, kokopu, patiki, mohao – these are all freshwater fish and were all that were caught there. At the present time patiki, mohao and inanga. The kokopu and tipohororo have disappeared. Taniwe, Kahawai and mango have come into this since the salt water began to come in. Kahawai and Kanae are not plentiful now but were plentiful in old days. When a net was spread enough were caught to last a week. (D4:51)

Several claimant witnesses' recollections of what the old people had told them supported this evidence (D25; D26:4; D29:3; D30; D39; D40:6; D43(c)).

The ultimate responsibility for the pre-earthquake operations by the harbour board and other local authorities in Te Whanganui-a-Orotu lay with the Crown. Despite its duty actively to protect the customary, Treaty, and contractual rights of local Maori in Te Whanganui-a-Orotu, the Crown had consented to empowering legislation that, the claimants submitted, completely abrogated their tino rangatiratanga over their taonga (D9:71). In particular, they said, all the legislation affecting Te Whanganui-a-Orotu after the passing of the Napier Harbour Board Act 1874 and the dredging of the Ahuriri entrance was carried out without reference to or consultation with their forebears (1.2.(d):6). We agree.

6.4 ROADS AND BRIDGES

6.4.1 The need for arterial roads

Work on roads and bridges around Napier progressed slowly in the provincial period, not only because of swamps, lagoons, and floods, but also because large runholders from country districts dominated the provincial council and wanted country access roads instead. To take advantage of Julius Vogel's Government-financed public works and immigration programme and promote closer settlement, however, Ormond, in the early 1870s, recognised the necessity of a network of arterial roads to the town and port.

6.4.2 The Napier to Taradale causeway blocks the tidal flow

The Napier to Taradale causeway across mudflats and lagoons and the bridging of Burton's tidal lagoon and the Tutaekuri River were begun in 1872 and completed in 1880. At once it became the main access route west. Even though bridged gaps were left to allow water to flow under the causeway, it blocked the free flow of the water and acted as a silt trap, filling up the Te Whare o Maraenui Lagoon area, behind which began to dry up (A21(b):586).⁸

6.4.3 The Westshore Bridge blocks access to the canoe reserve

The first Westshore Bridge linking the Ahuriri Heads was opened in August 1880. According to David Young, it had no physical effects on the estuary (E5:46), but it effectively blocked the access from the sea to the only landing place allocated for canoes after the 1851 purchase. A swinging section of the bridge was apparently opened only once. The bridge started to collapse in 1922 and was demolished in 1929 (E4:52), by which time it had been replaced by the Westshore Embankment Bridge. As Mr Parsons said:

The canoe reserve was reduced to a place name on a map. Before access had been cut off from below. Now access was cut off from above. (E4:53)

According to Heitia Hiha, the tribal canoe was unable to anchor at the reserve in 1990, not so much because the bridge itself inhibited their connection to the west but because of the size of the big waka. 'We have always wanted to park waka up on the reserve,' he said, 'and we have not been able to do that' (D21:9).

6.4.4 The western embankment and the bridge restrict the tidal flow

The need to replace the dilapidated old Westshore traffic bridge and provide a shorter route north across, rather than round, the inner harbour led the harbour board, the borough council, and the government to jointly fund and construct the 2-mile 61-chain long western embankment and a concrete bridge in 1915–22 (D4:53; E5:48).⁹ The *Waikawa* was bought to dredge the Ahuriri basin and build the embankment. Stones were used for the sides, beach gravel for the fill at the Westshore end, and sandy silt at the Napier end, which ran off as soon as it was placed. In the words of Mr Young, 'the estuary's subtle ecology was being "bombarded" sometimes to no constructive effect, with tonnes of fill' (E5:49).

Dredging let more tidal salt water into the inner harbour and introduced saltwater fish. Pipi, eels, and other freshwater fish were no longer to be found (D25: transcript of Pare Rakuraku tape, 5 May 1992). According to Mr Parsons, the Embankment Bridge restricted the tidal flow in and out of Te Whanganui-a-Orotu: ‘Two miles of tidal influence was lost by this action’ (E4:53).

6.5 THE RECLAMATION OF THE LAGOON

6.5.1 Beginnings

The reclamation of the lagoon by the action of the rivers and creeks flowing into it and by floods had been building up the plains for centuries (F3:7). Post-1840 Maori reclamations for crop cultivation were relatively small in scale, while early settlers drained some land on the outskirts of Napier for small farms and agriculture. To do away with ‘that pestiferous nuisance, the Napier Swamp’, and to force landowners to fill in their sections, the provincial council passed the Napier Swamp Act 1873. Some landowners, however, were unwilling to cooperate and others were absentees (A21(b):596).¹⁰ Fevers and dysentery were prevalent, and the prevailing belief was that they were caused by effluvia arising from stagnant water. The real health hazard, however, was the raw sewage that was being emptied into the swamp.¹¹ In 1874 the newly constituted Napier Borough Council inherited the problem.

6.5.2 Napier swamp reclamation

The Napier Swamp Nuisance Act 1875 (amended in 1877 and 1879) obliged owners of swamp sections ‘to raise the surface of the land’, and, if they failed to do so, empowered the council to reclaim the sections and recover the cost. Mounting attacks on owners of unfilled sections and demands for action in the *Daily Telegraph* produced results. A contract was completed in February 1878 for a swamp reclamation that provided the town with seven new streets. About 20 acres of swamp, 14 of which were held by private ownership, ‘became fit for occupation’.¹² In November 1878, the borough boundaries were enlarged to include the lagoon, thus bringing it under council control. It continued, however, to serve as a drainage outfall, a rubbish dump, a cesspool, and a general health hazard until swamp reclamation and drainage projects were completed after the turn of the century.¹³

6.5.3 The diversion of the Tutaekuri River is proposed

From 1877 the Napier Harbour Board started seeking engineers’ opinions on the best method of reclaiming the Te Whare o Maraenui Lagoon, which was situated at the southern end of Te Whanganui-a-Orotu.¹⁴ In 1886 the Napier Borough Council proposed diverting the Tutaekuri River into a new channel skirting the town boundary to deal with the problem of sewage (which was being discharged into the swamp) by providing a free-flowing sewer outlet. The harbour board, however, had other objectives; it wanted to save the £2500 a year it spent on dredging river silt out of the harbour, use the silt to reclaim the swamp, and profit from the sale of good grazing land.

6.5.4 The harbour board is empowered to reclaim Te Whare o Maraenui

The Napier Harbour Board Amendment and Endowment Improvement Act 1887 empowered the board to carry out certain works and improvements upon the reserve vested in it, and authorised it to fill up and reclaim Te Whare o Maraenui and part of the Ahuriri Lagoon. The Napier Harbour Board Amendment and Further Empowering Act 1889 increased the board's powers to provide for payment on any loans raised for improvements (A9:5).

6.5.5 The diversion of the Tutaekuri River and the 1897 flood

In 1889 J T Carr put forward an extensive scheme that met the objectives of the borough council (to divert the river) and the harbour board (to reclaim land). Agreement was reached, and in 1891 work began. A new channel was cut, and for a short time the river flowed through it. However, the great flood of 1897, which covered three-fifths of the Heretaunga Plains, left massive silt deposits and filled the inner harbour – and the new channel. The Tutaekuri River returned to its old bed (E5:47).¹⁵

6.5.6 The syndicate scheme and harbour board lease

In 1899 a private syndicate proposed to undertake an ambitious, costly, and risky scheme to reclaim all of Te Whare o Maraenui and the southern-most part of Te Whanganui-a-Orotu for the new suburb of Napier South.¹⁶ The Napier Harbour Board Amendment and Endowment Improvement Act 1899 empowered the board to sell and lease parts of the reclamation (A4(d); A9:6; D9:74).

The harbour board accepted a tender from Langlands and Company to reclaim a 300-acre block. The county engineer, C D Kennedy, became a partner in 1900 and a 21-year lease of 1780 acres from the board was negotiated. In return for reclaiming the land, Kennedy and Langlands were to receive part of the land in fee simple, with the rest divided between the harbour board and the Town of Napier (D1:63). In 1901 the lease was transferred to C D Kennedy and Company.

6.5.7 Reclamation of Napier South

Work on the scheme was carried out on contract by teams of mostly Maori workers using horses and scoops to throw up embankments around areas to be reclaimed, forming settling basins into which the silt-bearing Tutaekuri River was turned. Local employment boomed, and in nine years £170,000 was paid out in wages.

The syndicate scheme reclaimed most of the land it leased, much of which was subdivided off into about 700 allotments. In April 1908, the first Napier South sections were auctioned, averaging about £650 per acre. The borough council bought 20 acres for Nelson Park and Sir R D McLean donated 10 acres for McLean Park, in memory of his father, Sir Donald.¹⁷ The swampy third of Nelson Park was filled for development in 1918. This scheme dramatically reduced the wetlands and affected water circulation in the lagoon itself (E5:47–48). According to Nepata Puhara:

it was when Napier South was reclaimed that they finished getting freshwater fish out of the lake . . . It was then we ceased to fish for our eels and other fish. (A7(a):37)

Arrangements for the surrender of the lease were authorised by the Napier Harbour Board Amendment and Endowment Improvement Act 1912, it being agreed that the harbour board would pay the syndicate the very large sum of £17,000. The Act gave the board further borrowing powers for more reclamations and improvements (A4(f); A9:6; D1:63; D9:7). The Napier Harbour Board and Napier High School Empowering Act 1918 allowed the Napier High School Board to acquire, by lease, a part of the Te Whare o Maraenui reserve for the Napier Boys' High School (D9:74).

6.5.8 Small reclamations for urban expansion

In 1925 the harbour board decided on a 28-acre reclamation of the old bed of the Tutaekuri River alongside Hyderabad Road. The river had been diverted along a new channel in 1921 to allow the western embankment to be completed, and the old bed was described as 'a stinking eyesore' (E5:49).¹⁸ After the Napier Borough Council threatened to seek legislation to force the harbour board to hand over 500 acres for reclamation and suburban settlement, the harbour board took action. In 1929 the south pond at Ahuriri, known as Mosquito Pit, was reclaimed.

Small reclamations were also made in an unsightly and malodorous area adjoining the Napier to Taradale Road. The Napier Harbour Board and Napier Borough Enabling Act 1926 authorised the borough council to purchase, reclaim, subdivide, and sell about seven acres. In 1927 the harbour board obtained legislative approval for its own reclamation projects, which included 28 acres between George's Drive and Taradale Road. These small reclamations 'did not satisfy Napier's appetite for expansion'.¹⁹ In 1928, after the harbour board released the Awatoto, Richmond, and McDonald blocks for rural settlement, the borough council obtained further legislative authority to raise a loan for a 92-acre reclamation at Marewa.

6.5.9 Extent of pre-earthquake reclamations

Under enabling or empowering legislation, a total of 1000 acres of the harbour board's 9848-acre endowment had been reclaimed prior to the 1931 earthquake, providing a very profitable source of revenue for harbour development. Nevertheless the borough area of Napier in 1930 was only 1560 acres and the chronic problem of lack of land for urban expansion remained unsolved.²⁰ The borough council was still at the mercy of the harbour board.

Throughout all these physical alterations to Te Whanganui-a-Orotu, and amidst all the vigorous and sometimes acrimonious debate and planning that preceded them, there was 'No where . . . even a hint of consultation with the Maori' (E5:45). No regard whatever was paid to Maori rights and interests, either in Parliament or in local councils and newspapers. Maori were being slowly and gradually dispossessed of their lake and increasingly marginalised in the district. The wetlands ecology had been substantially changed, and the traditional resources of local hapu and their lagoon-based economy were being steadily diminished, damaged, or destroyed.

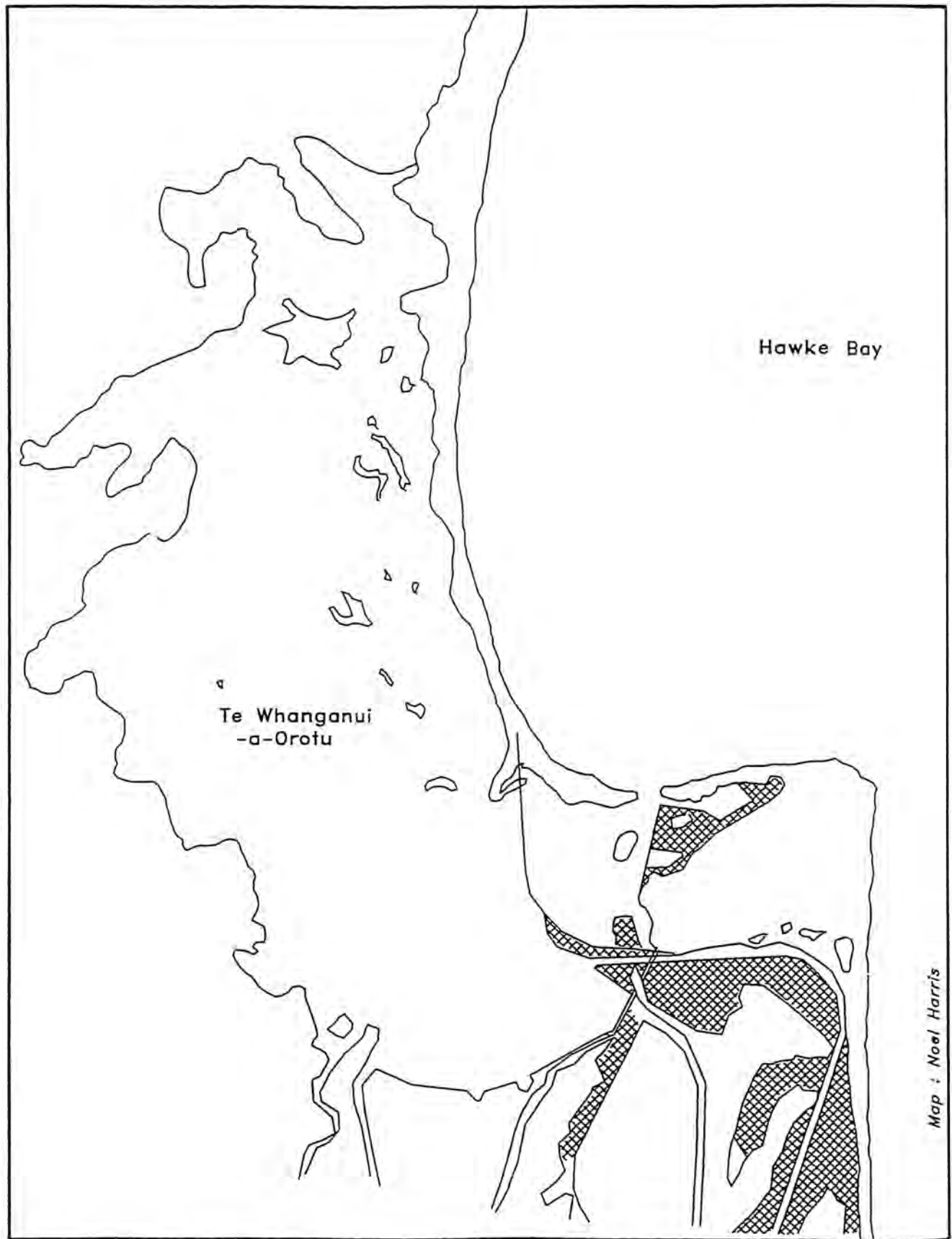


Figure 14: Reclamations in Te Whanganui-a-Orotu before the 1931 earthquake. Based on the sketch map in D4 following page 49.

6.6 THE POLLUTION OF THE AHURIRI ESTUARY

6.6.1 Two main causes

A growing threat to the ecology of the lagoon, and to the traditional resources that it provided for the tangata whenua, was pollution. As Mr Parsons observed, to ascertain its full extent and effect would require a specialist study of its own. The evidence that we were given indicated that before the earthquake the pollution of the Ahuriri Estuary, which affected traditional fishing grounds, shellfish beds, and water quality, was caused mainly by effluent discharged from the Hawke's Bay and North British Freezing Company's works on the western spit and the discharge of raw sewage at Perfume Point.

6.6.2 The Hawke's Bay and North British Freezing Company

The Hawke's Bay and North British Freezing Company, formed by a group of Hawke's Bay farmers and Scottish and English investors, established a freezing and boiling-down works and fellmongery on a five-acre site on the western spit in 1888. The site was leased from the Napier Harbour Board until 1930, when the lease expired and the company was wound up.²¹ Effluent was discharged at high tide on the theory that it would be carried out to sea when the tide turned. However, there were reports of sharks being seen inside the Ahuriri Heads, and heavy seas may well have driven effluent further up the harbour and lagoon (D4:53–54). The effect on Maori food resources outside and inside the heads 'may never have been properly assessed' (D4:54).

6.6.3 Perfume Point

The discharging of raw sewage and the dumping of rubbish into the swamps around Napier led to recurrent outbreaks of typhoid fever. According to Clive Squire, Napier city engineer designate in 1987, by the turn of the century septic tanks on Bluff Hill were causing enough problems for the residents to get together and lay pipes to the sea to discharge their sewage, but, in spite of this, problems continued. An outbreak of bubonic plague in Sydney in 1900 and the establishment of the Health Department focused more public attention on sewage disposal, and the *Hawke's Bay Herald* regularly criticised Napier's disposal methods. Ratepayer unwillingness to sanction the borough council's loans programme, however, slowed down additional works for sanitary purposes. Until an improved system was introduced over the years 1910 to 1915, sewage was discharged from several outlets at Ahuriri without any attempt being made to time discharges with outgoing tides.

The improved system concentrated sewage at one outlet, the end of the eastern pier on the inner harbour, through the operation of ejector pumps and air pressure generated at a central pumping station. The pipe discharged the sewage 50 feet off the Ahuriri Heads, again on the theory that it would be taken out to sea by the tide. The failure of this theory is evident from the renaming of the area from Te Karaka to Perfume Point (D26:3). According to Mr Squire, a scheme to discharge sewage only on the outgoing tide was not put into place until the 1930s. The discharge of raw sewage at Perfume Point continued until 1974, when a new submarine sewer outfall was opened at Awatoto (D4:54–55).

6.6.4 The decline of the water quality

The pollution of the waters of Te Whanganui-a-Orotu through the discharge of industrial effluent and sewage can only be deplored as abominable behaviour by Pakeha and in enormous contrast to the ritual and customary practices of the tangata whenua, as instanced in oral evidence given by claimant witnesses on fishing and healing (see para 2.2.4). The response of local authorities to harbour pollution at the time was to attempt to protect humans from the directly harmful effects, not to prevent them occurring or to consider their impact on fisheries and water purity.

As Professor James Ritchie stated in his evidence on Maori attitudes to ‘both fresh water and saltwater in both natural and contaminated state’, ‘rather than contaminate and then clean it up (the Western ethic) it should be as little polluted as possible in the first place’ (E2:10).

The Maori view that ‘water is the essential ingredient of life; a priceless treasure left by ancestors for the life-sustaining use of their descendants’ is acknowledged and described by the Hawkes Bay Regional Council in its 1994 policy statement, as is Maori’s ‘strict etiquette’ in the use of water to minimise both metaphysical and physical pollution (see para 9.11.3; app V).

References

1. *New Zealand Parliamentary Debates*, vol 16, 1874, p 58, cited in Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 167–168
2. *New Zealand Parliamentary Debates*, vol 16, 1874, p 853
3. Compare with D21, p 5 and J G Wilson and others, *History of Hawke's Bay*, A H and A W Reed, Wellington, 1939 (reprinted Christchurch, Capper Press, 1976), p 418, for slightly different versions.
4. Wilson, p 418. See also the illustration facing page 418, and note Mr Parsons’ doubts about the accuracy of the caption (A12:130).
5. Kay Mooney, *History of the County of Hawke's Bay*, Napier, Hawke's Bay County Council, 1973, pt 2, p 113
6. Gunter Warner, *The Napier Harbour Board: A Study in Local Body Administration and Politics*, MA thesis, Victoria University of Wellington, 1958, pp 12 ff
7. *Ibid*, pp 34–35
8. See also Mooney, pt 2, p 112; M D N Campbell, *The Story of Napier, 1874–1974: Footprints along the Shore*, Napier, Napier City Council, 1975, pp 11–12; Wilson, p 419
9. H K Stevenson, *Story of the Port of Napier, 1875–1975*, Napier, Hawke's Bay Harbour Board, 1977, p 98
10. See also Mooney, pt 2, p 112; Campbell, p 27
11. Campbell, p 43
12. *Ibid*, p 44
13. *Ibid*, pp 56–57
14. Mooney, pt 2, p 113
15. *Ibid*, pt 4, pp 18–23
16. *Ibid*, pt 2, pp 113–119; Campbell, pp 83–85
17. Mooney, pt 2, pp 113–119; Campbell, pp 83–85
18. Stevenson, p 102; Mooney, pt 2, p 119
19. Campbell, p 114
20. *Ibid*, p 115
21. M D N Campbell, *The Evolution of Hawke's Bay Landed Society, 1850–1914*, PhD thesis, Victoria University of Wellington, 1972, vol 1, pp 215–216

CHAPTER 7

THE LOSS OF ALL THAT REMAINED

7.1 THE IMPACT OF THE 1931 EARTHQUAKE

7.1.1 Introduction

For the seven claimant hapu, the 1931 earthquake was the beginning of the end to ‘the rights which they had formerly had and which they were always so anxious to preserve in Te Whanganui-a-Orotu’ (A6(j):2). During the next four decades, through actions, policies, and omissions of the Government and local authorities, they lost all that remained to them. As Gary Williams, the project engineer, then chief design engineer for the Hawke’s Bay Catchment and Regional Water Board from 1984 to 1987, explained in his evidence, the earthquake ‘radically altered’ the pattern of harbour development, reclamation, and flood control in the Napier area:

The uplift decided both the site of the Napier port and the method of flood control for the lower reaches of the Tutaekuri River. The headland site became the Port of Napier, and the Tutaekuri River was completely diverted to a common mouth with the Ngaruroro River. The Ahuriri Lagoon itself was nearly all reclaimed, with nothing more than a narrow channel, designed to dispose of hill runoff and drainage outflows, remaining. . . . the lagoon was destroyed by reclamation and drainage, not by the earthquake. (F3:19–20)

What the claimants lost, the Napier Harbour Board and Napier Borough Council gained. In the words of Geoff Conly, a newspaper editor and historian, the earthquake provided the board and council with an unexpected and welcome ‘gift from the sea’ (E8:190); that is, a large area of dry land for housing, industry, farm settlement, an airport, and a wildlife reserve. Undoubtedly, as Kay Mooney wrote in her *History of the County of Hawke’s Bay*:

The Harbour Board was the favoured daughter of disaster and reaped the benefit of the bounty although a claim is still pressed that part of this should have been deemed Maori land when the Treaty of Waitangi had granted to the tribes of Ahuriri possession of their fishing grounds.¹

This chapter examines ‘the benefit of the bounty’ to Napier and the loss by local Maori of all that remained of the lagoon.

7.1.2 The transformation of the lagoon

The tide at Port Ahuriri had begun to turn when the first two shocks, lasting 2½ minutes with about half a minute in between, struck at 10.46 am on 3 February

1931. They measured 7.9 on the Richter scale.² Conly summed up the after-effects on Te Whanganui-a-Orotu as follows:

The water began to run out of the lagoon through the narrow channel from the inner harbour to the sea, the islands were joined by new shingle banks and new beaches round the edges of the lagoon. Small or low beaches were gradually extended . . . the water crept gradually away from the Poraiti aspect and it was some days before a third or half of the lagoon bed reflected the sun. The earthquake of 13 February shook out a lot of what water was left. (E8:191–193)

Where there had previously been water between the two leading beacons at Petane was now dry land (D6(a):357). The total area of the lagoon within the Napier urban area that was raised above the high-water mark was approximately 1406 acres (D6(a):354).

Shortly after the main shake, Commander H W Morgan of HMS *Veronica*, which was berthed at the wharf, observed that water commenced to pour out of the harbour like a mill-race. At the channel entrance it rushed away ‘with a force that denied small ships entry’. Its peak flow of about 13 knots was caused by the outer margin of the lagoon being raised by two metres and the inner margin by one metre. This high rate of outflow continued past the next high tide (E8:193). Soundings taken later at Pania’s rock showed a rise of four to five feet (D6(a):199).

The Westshore Bridge collapsed and the causeway over the mudflats on either side spread. The roadway split and collapsed, the railway line buckled, and telegraph and fence posts were displaced. Communications northwards were cut off. The banks of the main tidal channel closed and the shingle beach slumped towards the sea (or enclosed lagoon), lessening the size of river channels. Fissures formed in the alluvium and recently filled ground, and large quantities of water, sand, and silt issued from fissures in the ground.³

Although the tides soon became regular again, high tide was slightly earlier, probably because of the reduced lagoon area (D6(a):193). Before the earthquake there was a discernible tide in Te Whanganui-a-Orotu; after the earthquake it was confined to the entrance, where the water was brackish. But the remaining water in the lagoon soon became fresh because the banking up of the tide was not sufficient to stem the inflow from rivers and streams. At the southern end the tilting up of the raised area caused some backing up of and overflow from the Tutaekuri River (D6(a):323). At the northern end the water that the Waiohinga (Esk) River discharged into the lagoon near Te Ihu o Te Rei was reduced to a trickle and went directly out to sea at Petane (D4:59–60).

At the beginning of 1932 the field superintendent of the Department of Agriculture reported that ‘from appearance one third to one half of the lagoon area was still more or less under water’ (E8:193). But apart from the main channel from the Westshore Bridge to Tapu Te Ranga, the remaining water was only one to two feet deep (D6(a):364, 470). As the claimants said, the earthquake ‘didn’t entirely drain Te Whanganui-a-Orotu but left it highly reclaimable’ (A12:165).

7.1.3

A serious public nuisance

The inner harbour opposite Port Ahuriri, having been emptied of its water within a few hours, remained elevated, and large quantities of fish were entrapped in the

shallow pools that dotted its surface. Claimant witness Selina Sullivan remembered collecting fish (flounder and kahawai) as the tide went out:

That was a luxury straight after the 1931 quake. We had two big trucks in Omaha . . . They were used to get logs from Taupo. They took a crowd to the port . . . at that time the sea went out a mile and a half I think and things were all in puddles, the fish, kina, everything. They couldn't get away. We all had a feast . . . Peter Nuku and Jim Wilson were the ones who had these trucks and distributed the catch right through the paa.

Not long after that the water started coming back slowly. We never got all those luxuries again. (D14:4)

Nevertheless, she added, it was possible to get kaimoana at Ahuriri for some time after the earthquake.

Rangiaho Brown said that when she came back to Napier the lagoon was dry and that there were 'a lot of dead fish and all sorts lying about . . . We went straight through town to Waimarama, we didn't spend much time sightseeing there' (D29: para 13).

As a precaution against disease, workers were engaged to rake the dead fish into large heaps for burning (D41: photo), but the horrible and persistent stench of dead fish and shellfish, stale water, and decomposing organic matter remained a serious public nuisance that taxed the harbour board's manpower resources.⁴

7.1.4

Whanganui-a-Orotu laid waste

From the claimants' perspective, 'one dramatic upheaval' laid waste a locality with special ancestral and life-sustaining qualities for the tangata whenua (A12:152). But to claim that the earthquake destroyed their 'exceptional and reliable food source' is only partly true and is evasive of responsibility (D4:57). Oral evidence given by witnesses for the claimants indicated that they continued to use the remaining shellfish beds and fishing grounds in Te Whanganui-a-Orotu, particularly in the Ahuriri Estuary, until as late as 1971–77, by which time they had become so polluted as to be a serious health risk (See para 2.5.8).

Emma Kaukau, who grew up at Omaha and was an eight-year-old at Puketapu School on the day of the earthquake, remembered her elders talking about Te Whanganui-a-Orotu drying up: 'They said, there will be a time when the water will return, to its resting place' (D17:3). Had it been left to natural forces this might well have happened. In Mr Williams's opinion, 'The lagoon would have reverted to a largely fresh water body' had no reclamation or drainage work been undertaken (F9:20). But with the raising of the inner harbour, a reclamation scheme on a scale not dreamt of in the 1900s entered the realm of practical politics, and was begun three years later. For the tangata whenua:

The loss of Te Whanganui-a-Orotu went well beyond its recreational pleasures. Apart from being the destruction of an exceptional and reliable food source there was a great sense of spiritual loss. Places of long ancestral association breed a security, a sense of belonging hard to define. This was the other loss experienced by the Maori. (A12:165)

7.2 RELIEF AND RECONSTRUCTION

7.2.1 Maori assist in rescue work

In Napier shore parties from the HMS *Veronica* took a leading part in early rescue work. In Hastings the *Auckland Weekly News* reported:

Maoris have been prominent in relief work. The earthquake was scarcely over when a large party of properly organised Maori formed into a working gang, appeared in the town and immediately set about sharing the work of clearing the debris, digging out the dead and tending the injured. Women joined with men in this splendid service. The Maori organisation was under the control of the Maori Welfare League and its members set an example which impressed everybody. They were imbued with the spirit of cheerfulness and self sacrifice and their help in this time of need is not likely to be forgotten readily. (D41; D44(15):7)

7.2.2 Relief provided for Maori

Special provisions for Maori relief were made by citizens' committees, which drew upon a central relief fund provided by a nationwide appeal. In Napier the central committee requisitioned Carl Pfeifer of the Department of Lands and Survey to control relief work in the northern Maori area, which comprised 12 pa from Moteo to Te Haroto. He immediately established communications with them and arranged for them to get regular supplies of food and other necessities. He found that emergency provisions had been made at every pa that he visited, and he was asked by young men if he could find work for them because they wanted to pay for their food if they could. He paid tribute to the magnificent practical, as well as spiritual, work that the Bishop of Aotearoa performed amongst his people at this time.⁵ In Hastings a special Maori relief fund was set up.

7.2.3 Government assistance

Despite general agreement that in disaster New Zealand was one community, and despite promises from Ministers that they would do everything in their power 'to reinstate Napier and the district surrounding it' (E8:27), Government assistance, in the context of the deepening depression, unemployment, and retrenchment, was utterly insufficient. The Hawke's Bay Earthquake Act, passed on 28 April 1931, established both the Hawke's Bay Adjustment Court to deal with applications for relief from obligations and encumbrances and a rehabilitation committee to deal with applications for relief from hardship. The Minister of Finance was authorised to make payments not exceeding £250,000 from the reserve fund to assist private persons and to transfer amounts not exceeding £250,000 from the State advances account for loans to local bodies (A4(m)). The total amount provided was about one-fifth of the estimated losses in Napier and Hastings alone.

There is no record of any special consideration being given as to how to recompense local hapu, who had sustained serious losses of traditional resources in the Ahuriri Lagoon, as well as a 'great sense of spiritual loss.'

7.2.4 Commission control

On 11 March, the Napier Borough Council's functions and duties were delegated to a Government commission of two men: J S Barton, a magistrate, and L B Campbell, an inspecting engineer for the Public Works Department. Its powers

were confirmed in section 24 of the Hawke's Bay Earthquake Act 1931. The local body elections were postponed until the first Wednesday in May 1933 (s 62). With supporting committees, the commissioners were responsible for the reconstruction in Napier until then.

At Port Ahuriri, reconstruction centred on factories, warehouses, wool stores, and wharves. For Westshore residents, a motor launch service from the Iron Pot to Meeanee Quay was provided until the collapsed footbridge was repaired in 1965.⁶

7.3 **RENEWED HARBOUR DEVELOPMENT**

7.3.1 **Breakwater party in the ascendancy**

The earthquake settled the fate of the inner harbour, but not the long-standing controversy between the inner harbour and breakwater parties. The Napier Harbour Board continued to function and, through Order in Council, was able to use its loan moneys for purposes other than those for which they had been raised.⁷

In 1932, following the retirement of the anti-breakwater chairman, A E Jull MP, after 20 years in office, T M Geddes was elected and immediately moved that:

The Chairman be asked to approach the Government at once with a view to obtaining a report from the Government Engineer-in-Chief, F W Furkert, and Drummond Holderness, chief engineer and general manager of the Auckland Harbour Board, on the altered condition following the earthquake and advice on the policy of development to be adopted to keep the Port of Napier operating and as to the Board's future policy of general harbour development. (E9:194)

7.3.2 **The Furkert and Holderness report**

The substance of the Furkert and Holderness report was a 'straight-out unequivocal recommendation for immediate development of the Breakwater harbour to be followed by the complete abandonment of the Inner Harbour as a commercial port'. A complete scheme, necessary for immediate prosecution, was outlined (E9:195).

The harbour board unanimously adopted this report. Even though it now had a clear mandate and up-to-date engineering advice, it moved that the commissioners control and execute the work. This, the Prime Minister refused. With Geddes in the chair, it then proceeded to implement the report with energy and decision.

7.3.3 **The loan for the breakwater extension is approved**

The requisite approval of the Local Government Loans Board and 60 percent of ratepayers was sought for a loan of £350,000 for the breakwater extension. In the run up to election day (19 July 1934), a battle raged between the breakwater party and Jull and his supporters. In an 80 percent poll, 67 percent in the borough of Napier and the townships were for the loan and 63 percent in Hastings and the country districts against it. The earthquake had 'finally convinced voters that harbour development depended on the breakwater alone'.⁸ The development of a breakwater port as an all-weather, deep-water harbour commenced.

7.4 THE RECLAMATION OF THE LAGOON

7.4.1 Title to the upraised land

As Conly said, the Napier Harbour Board coveted the sprawling, smelly mudflat that had been thrust up in the lagoon and claimed it 'with an alertness which anticipated any other claimant' (E8:190, 194). On 29 February 1931, W E Barnard, a lawyer and the member of Parliament for Napier, raised with the Minister of Marine, the Honourable J G Cobbe, the question of whether or not the large areas in the lagoon lifted above sea level were vested in the Napier Harbour Board. He pointed out that there was considerable dissatisfaction in Napier South with harbour board leases and that many would prefer a Crown tenure. A thorough investigation of the matter might show that the areas of new land being claimed by the harbour board were the property of the Crown (D6(a):373).

Prompt advice was provided by the Assistant Secretary of the Marine Department that there appeared to be no doubt that the land (the bed of the lagoon), excepting certain small islets, was vested in the board for its use, benefit, and endowment by section 2 of the Napier Harbour Board Act 1874 and described in the First Schedule. Doubts over boundaries had been met by the substitution of a new schedule in the Napier Harbour Board Amendment and Endowment Improvement Act 1887. Apparently, however, the title would not be for an estate in fee simple. As regards Barnard's question, he pointed out that:

A gradual and imperceptive accretion from the sea belongs to the owner of the edging terra firma, and where the increase is sudden or perceptible, the land gained belongs to the Crown.

According to Carlson and Forbes's *Law of Waters* (4th ed, p 39), he explained:

The reason for assigning lands gained suddenly from the sea, and islands, to the Crown is stated by most writers to be that the King is owner of the soil of the sea, and the universal occupant of what was unclaimed. (D6(a):375)

In the case in question, the board, having been granted the area in question by the King, 'is fully entitled to continue its right in any Title which has been issued to it in respect of that area', and 'their Title would be subject to reservations set out in Section 2 of the 1874 Act'.

As the question was deemed to be of some importance, an authoritative opinion was obtained from the Crown solicitor, C H Taylor. He agreed that the lagoon, excepting the small islands, was vested in the Napier Harbour Board for its use, benefit, and endowment. He did not think that the sudden raising of the land of the lagoon above the surface of the water by an earthquake gave the Crown any rights over the raised land or took away from the board any of the rights that it already held. The generally accepted view, to the effect that lands suddenly gained from the sea belong to the Crown, did not apply in this case because the Crown had already parted with its title.

On 15 March, 2½ weeks before Parliament began debating the Hawke's Bay Earthquake Bill, the Minister of Marine informed Barnard that the Crown Law Office confirmed the views of his department (D6(a):376–377). There is no

reference in the above correspondence of any past Maori claim for an investigation of title to Te Whanganui-a-Orotu or any hint that this was a continuing claim.

7.4.2 **Rochfort's scheme**

In October 1931, Guy Rochfort, a Napier surveyor and the harbour board's consulting engineer, proposed a reclamation scheme that involved the diversion to the sea at Waitangi of all the water that the Tutaekuri River discharged into the southern end of the lagoon, the construction of a gravity outfall channel to collect all other water running off the hills into the inner harbour, and the digging of a rectilinear network of subsidiary drains at right angles to the outfall channel (D6(a):359, 361). 'The Harbour Board decided the scheme was too big for it to tackle' and, in 1932–34, made arrangements with the Government to undertake the work.⁹

7.4.3 **The Napier Harbour Board Empowering Act 1932–33**

The Napier Harbour Board Empowering Act 1932–33 was passed to enable the board:

to sell certain Areas of Land and to adjust the Boundaries and Contours, both External and Internal of the Ahuriri Lagoon . . . in order to provide funds to improve and render saleable . . . and revenue producing land reclaimed from the lagoon. (A4(k))

Section 4 of the Act gave the board power to sell two parcels of land comprising portions of its Te Whare O Maraenui and Ahuriri Lagoon reserves and containing 28 acres and 92 acres respectively.

Section 5 of the Act gave the board power:

- (a) to purchase any areas of land adjacent to the Ahuriri Lagoon or within its outside boundaries, including the islands of the lagoon;
- (b) to sell any areas of land lying on or adjacent to the outside boundary lines that were its property;
- (c) to exchange any areas of land, being parts of the Ahuriri Lagoon endowment, for any other areas of land lying adjacent to the lagoon or being within the outside boundaries, including the islands; and
- (d) to take or purchase under the provisions of the Public Works Act 1928 any areas of land lying adjacent to the lagoon or being within the outside boundaries, including the islands.

Nine islands were named in the preamble to the Act: Roro o Kuri, Parapara, Te Ihutikei [Te Ihu o Te Rei], Uruwiri, Poroporo, Tirowhangahe, Tuteranuku, Awa a Waka, and Matawhero. All except for the European-owned Roro o Kuri and Te Ihutikei, a quarantine station under the joint administration of the Napier Borough Council, the Hastings Borough Council, and the Hawke's Bay County Council, were described as of little or no value, being mostly shingle beds and 'Native Land the title to which has never been investigated, ascertained or determined'. In fact, Parapara, too, was European-owned.

The Act empowered the Native Land Court to issue an order or orders vesting any island that was native land and for which the title had not been investigated in persons or trustees, who should have the power to sell, mortgage, lease, exchange, or otherwise deal with the land as fully as if they were beneficial owners (ss 61, 62).

7.4.4 **Reclamation and preliminary development**

On 8 November 1933, the Minister of Finance approved capital expenditure up to a maximum of £50,000 on the reclamation and preliminary development of the Ahuriri Lagoon (D6(a):439). On 3 May 1934, the Napier Harbour Board agreed to lease the lagoon area, consisting of 7595 acres (3074 ha), to the Crown for 21 years from 31 March 1934 for the peppercorn rent of one shilling per acre and with a right of renewal for a further 21 years if required (D6(a):445–447). The harbour board and the Crown, through the Ministry of Lands, reached an agreement that the Crown would carry out Rochfort's scheme of works, as amended by the Public Works Department, with all reasonable speed. Unemployed labourers in the board's rating area would be employed wherever practicable. The costs would constitute a debt payable (with interest) by the board to the Crown. All income would be applied to the reduction of the debt (A6(a):450–459).

In June 1934, the Public Works Department commenced drainage and reclamation work. Efforts were at once concentrated upon the construction of 11 miles of stopbanks needed to control the water draining from the hill country behind the lagoon. Two pumping stations were installed to drain the flat land enclosed by the stopbanks. To bring this land to a state of productivity, the first and most essential step was to rid it of excessive salt left by the sea. This was done by digging small drains three feet deep and 12 inches wide at the bottom in parallel lines two chains apart over the whole area.¹⁰

A progress report for the year ending 30 June 1937 stated that 207 miles of drains had been completed, a section of the block comprising 2000 acres had been completely drained, and the drainage of a further 2000 acres was well advanced (D6(a):270–273). Through draining, Te Whanganui-a-Orotu was eventually reduced to the tidal channels we see today (D24:58).

7.5 **THE DIVERSION OF THE TUTAEKURI RIVER**

A vital part of Rochfort's reclamation scheme was the diversion of the Tutaekuri River away from the lagoon and straight out to the sea at Waitangi. For many years prior to the earthquake, this had been a highly contentious issue in Hawke's Bay county council and rivers board politics. In 1929 Rochfort and Hay, another engineer, produced a scheme that not only provided for the complete diversion of the river to Waitangi but also would take surplus flood water from the Ngaruroro River (D6(a) 276–280).

When the 1929–30 empowering legislation went before the House, the opposition to this scheme from settlers at Clive, from the Whakatu freezing works, and from Maori landowners was sufficiently strong to have the scheme amended to allow for flood waters only to go down the overflow channel to Waitangi, leaving the main river to continue to the lagoon (D6(a):382).¹¹

Hay's investigation of the damage done to river protection works immediately after the earthquake revealed that the district was wide open to the menace of flooding. As the matter was urgent, the Government agreed to advance £10,000 to the Hawke's Bay Rivers Board to undertake urgent repairs before the summer drought broke. Two hundred horses and 300 men completed the work in four weeks (D6(a):382).

Following the upthrust of land by the earthquake, the Tutaekuri River became more sluggish and meandering in its lower reaches. These changes worsened the flood menace in the Meeanee area between Powdrell's Bend and Napier, which hitherto had escaped or suffered only lightly.

Initially, the board adhered to the 1930 policy of allowing only flood waters to go down the overflow channel to Waitangi, but post-earthquake changes in the lower reaches of the river and several floods made it increasingly obvious that complete diversion was the only way to provide adequate flood control. Despite continuing and very strong opposition from one section of the district, and several alternative proposals, in 1932 the Hawke's Bay Rivers Board finally accepted the complete diversion scheme, with a stopbank to be built at Moteo to prevent overflow.¹²

On 4 November 1932, Cabinet decided that the work should be carried out by the local bodies concerned, that the Unemployment Board should contribute to the labour costs, and that the Government should subsidise the remaining cost of 40 percent (D6(a):386–387). The Hawke's Bay Rivers Amendment Act 1932–33 allowed the diversion to go ahead as part of the Ngaruroro River flood control works (D6(a):401–402).

Under the control of the Hawke's Bay Rivers Board and the supervision of the Public Works Department, work started on 12 March 1934. The Tutaekuri River was quickly and completely diverted into the overflow channel to discharge into the sea about three miles south of Napier and to the north of the mouth of the Ngaruroro River. The overflow channel between the two was improved as an additional safeguard against the Tutaekuri in flood, and the old channel was stopbanked (D6(a):407). The diversion channel was finally enclosed in May and June 1936. The total expenditure on the diversion was well over £100,000 (D4:59).

The complete diversion of the Tutaekuri River allowed Napier South to be extended and developed 'without fear of inundation and destruction' (D4:59). It also benefited land reclamation in the Ahuriri Lagoon, particularly at the southern end (D6(a):638). The claimants, however, viewed the development differently. The sealing off of the Tutaekuri from Te Whanganui-a-Orotu severed the link between the two, which had been preserved since ancient times (D4:59). Through drainage and river diversion they had lost not only a traditional food resource but a taonga over which they still claimed tino rangatiratanga. Furthermore, the scheme had been carried out without any consultation or compensation.

7.6

LAND DEVELOPMENT FOR FARM SETTLEMENT

Under the 3 May 1934 agreement, the development of reclaimed lagoon land for farm settlement was supervised by the Commissioner of Crown Lands in Napier and carried out through the Small Farms Board under the Small Farms (Relief of Unemployment) Amendment Act 1932–33 (A8(f)). Section 2 of this act allowed the Napier Harbour Board to enter into an agreement with the Minister, whereby any of its endowment lands might be made available for small farms (A9:16; A8(f)).

In April 1934, the Small Farms Board of the Department of Lands and Survey commenced farming operations. By 30 June 1937, 13 miles of fencing had been erected at the south end of the block, approximately 400 acres had been sown in pasture, and 1000 breeding sheep had been drafted on to the block, with 100 head

of cattle to follow shortly. An average of 177 married men, all recruited from the unemployed of Napier and the surrounding district, had been employed the previous year (D6(a):473, 529–537). The whole block was farmed as one unit, pending a decision on its ultimate subdivision (A12:169).

7.7 THE COMPULSORY ACQUISITION OF THE ISLANDS

7.7.1 Empowering legislation drafted

One of the effects of the raising up of the bed of the Ahuriri Lagoon was the transformation of the islands into hills surrounded by dry land, which resulted in confusion over the external boundaries of the Napier Harbour Board's endowment. To enable it to reclaim, develop, subdivide, lease, or sell portions of upraised land, the board requested its solicitors, Sainsbury, Logan, and Williams, to draft the Napier Harbour Board Empowering Bill 1932, which would allow it to acquire the former islands.

Neither the board nor its solicitors seem to have been fully conversant with the number and status of the former islands, or with applications already made to the Native Land Court for investigation of title. The nine islands named in the proposed Bill were simply copied from the Napier Harbour Board Amendment and Endowment Improvement Act 1887. Except for 'Roro o Kuri (now owned by Europeans) and Te Ihuotikei (now a Quarantine station under the . . . joint administration of the Napier Borough Council, the Hastings Borough Council, and the Hawkes Bay County Council), all were described as 'of little or no value, being mostly shingle beds and . . . Native Land the title to which has never been investigated, ascertained or determined' (A7(a):110-18). Hence the provision in the Napier Harbour Board Empowering Act 1932–33 enabling the Native Land Court to issue orders vesting the islands in trustees, who should have the power to deal with the land as if they were beneficial owners (see para 7.4.3).

7.7.2 Native Department informed

On 10 October 1932, the solicitors referred a copy of the Bill and related plans to the Native Department. The under-secretary, Robert Jones, referred these to the Minister, Sir Apirana Ngata, who minuted them as follows:

By the proposed Bill the Napier Harbour Board proposes to assume control of what were formerly islands in the lagoon and allow compensation. (A7(a):148)

On 28 October, Jones advised Bob Tutaki, secretary of the Heretaunga Welfare Association in Fernhill, that the proposed Bill mentioned 'several little islets formerly in the lagoon' that were native land. The Bill, he explained, gave the board the power to buy the islands, but this was impracticable because no titles were issued. Alternatively, the islands could be taken under the Public Works Act 1928 and compensation could be assessed by the Native Land Court (A7(a):147).

About 10 days later Jones received a telegram from Hastings that was signed by Hakiwai informing him that a deputation on the Ahuriri Lagoon was on its way. Some three weeks later he received a copy of a petition seeking redress in respect of Te Whanganui-a-Orotu from the Native Affairs Committee. The petition

was addressed to Ngata and the House of Representatives and was signed by Hori Tupaea and four others, one of whom was N P Hakiwai (see para 10.10).

7.7.3 **Submissions on the islands**

The petitioners submitted, among other things, that:

The small islands which dotted the lagoon have always been considered as reserved for the Maoris, and nine such islands were named in the Napier Harbour Board Act 1874 and were specifically excluded by that Act from the provisions which vested the lagoon in the Harbour Board. (A6(j):2)

They were 'aware that any claim for compensation for loss to them through works and reclamations designed and made at the cost of the Harbour Board would have small chance of success'. They therefore submitted that they have:

- (a) a claim as of right to the territory represented by the islands, now lost or left undefined in the general emergence of land;
- (b) a claim according to equity and good conscience, with a large measure of right, to share in the benefits which may accrue from the added territory. (A6(j):3)

The petition appears to have had no effect whatever on the passage of the Bill through Parliament.

7.7.4 **An official inquiry into the status of the islands**

On receipt of the minuted copy of the draft Bill from Jones, Ngata promptly obtained an assurance by the chairman of the local Bills committee that it would be referred to the Native Affairs Committee. He also asked Jones for particulars relating to the small islands. Jones had already suggested that the preamble to the draft Bill should be amended both to exclude Parapara from the list of islands that were still native land and to correct the statement that they were mostly shingle banks of little or no value (A4(b); A7(a):140).

In response to Ngata's request for particulars, Jones and the chief surveyor in the Napier office of the Department of Lands and Survey procured the documents required to establish the current status of the nine islands, namely, the Crown grant for the Te Pahou block and the land transfer deeds for Te Ihu o Te Rei and Parapara, from the registrar of the Native Land Court and the Napier town clerk respectively. The chief surveyor also discovered that Roro o Kuri had apparently been sold by the grantees to David Milne, who then sold it to the North British Freezing Works (which was in liquidation), which resold it to Pat White, the son of Kinross White, the principal director. The land transfer deed was being handled by Sainsbury, Logan, and Williams, who had agreed to produce the deed if necessary (A13:142, 167).

As a result of these inquiries into the status of the islands, the Bill was amended, as Jones had suggested, to exclude Parapara and the reference to their being mostly shingle beds and of little or no value.

7.7.5 **Survey plans of the islands**

We do not know what plans the board's solicitors sent to the Native Department with the copy of the draft Bill, other than one of Tapu Te Ranga, which is not

mentioned in the Bill. We do know, however, that the six islands that were still customary land had been surveyed by William Ellison in November 1867 (see paras 5.5.8–9). We also know that Ellison's plan was transmitted to the provincial chief surveyor on 6 March 1868 and certified on 31 March 1925 as being identical to a plan in the Napier Survey Office, which was presumably destroyed in the fire after the earthquake. It is unlikely, therefore, that either the harbour board or its solicitors were aware of the existence of Ellison's plan in 1932 and 1933.

In January 1932, the board engaged Guy Rochfort to survey the native (customary) lands within the boundaries of the Ahuriri Lagoon reserve as well as part of the reserve and parts of the adjoining Te Pahou and Puketapu blocks. Rochfort's plan (DOSLI deposited plan 6227) comprised a total area of 124 acres 1 rood 27 perches. Included in it are Roro o Kuri (67 acres 1 rood 10 perches), Te Ihutikei (3 acres 3 roods 10 perches), and Parapara (1 acre 2 roods), incorrectly described as 'Native lands within the boundaries of the Ahuriri lagoon reserve', as well as plans of the six other islands in the reserve, correctly described as native (customary) lands (D6(a):509). The names and acreages are the same as those listed in the schedule to a proclamation that was issued on 6 October 1939 (see para 7.7.7).

Because Rochfort's plan was not declared before a justice of the peace until 16 October 1933 and was not received by the Department of Lands and Survey until 27 June 1934, it was presumably not among the 'related plans' referred to the Native Department on 10 October 1932 by the board's solicitors.

7.7.6 **Legal options**

The Napier Harbour Board's correspondence with its solicitors indicates that some six months after the whole lagoon area was leased to the Crown the 'procedural machinery' in section 6 of the Napier Harbour Board Empowering Act 1932–33 to acquire the islands was set in motion (A13:143–149). On 4 December 1935, the solicitors advised the board of its options. While acquisition under the Public Works Act 1928 might be quicker, they thought that where Maori claimants were concerned there was no way of knowing what kinds of claim or how many claims might be advanced. Moreover, the claimants 'might become more clamorous through political mouthpieces'. As title to the islands had never been investigated, ascertained, or determined, the board would readily grasp the advantage of an order being obtained that vested the land in trustees in the same manner as if the land had been granted to those persons by the Crown (A13:144).

An application under section 6 of the 1932–33 Act was accordingly lodged for the appointment of trustees and came before the Native Land Court in Hastings. W T Prentice, of Sainsbury, Logan, and Williams and a licensed interpreter, appeared in support of it. After being postponed three times it was heard on 20 March 1936, when an order was issued for the appointment of the following trustees: Te Roera Tareha (male adult, Taradale), Pukepuke Tangiora (female adult, Paki Paki), Mepera Makuiterangi Erihana (female adult, Opapa), Paora Kurupo (male adult, Puketapu), Hori Tupaea (male adult, Opapa).

According to Mr Prentice, 'a more stubborn set of Trustees could not have been found, and they were not likely to come to terms of sale that would be satisfactory to the Board' (A13:145). The matter, he explained to the board, had been complicated by the judge's view that there was no authority under which title could be given to land lying under channel waters. This had 'had the effect of

making the Natives very jubilant as to their claim for the raised Inner Harbour', which was to be duly heard some weeks later (A13:145–146). He was referring to Hori Tupaea's petition, the hearing of which commenced on 19 April 1934 (see para 10.11).

The court order was made on 8 June and matured six weeks later, with a sixth name being added to the list of trustees, that of Keita Pahi (female adult, Westshore) (A13:147).

As the board had been instrumental in having trustees appointed, the solicitors thought that it should now make the trustees an offer for the land or propose an exchange (A13:148). If the trustees stood out for terms in excess of what it was prepared to consider, resort could be had to the Public Works Act. The circumstances relating to the islands were of such an exceptional character that there could be considerable difficulty in fixing a basis of values if resort was had to that Act. The earthquake had the effect of raising the bed of the lagoon to such an extent that the islands, or some of them, probably merged, physically speaking, with the surrounding land. The Maori owners could fairly claim that their property had appreciated in value commensurably, at least, with that of the board's.

Although the 1874 and 1887 Acts did not reserve any right of access to the islands (possibly this was thought to be unnecessary), under the existing conditions it seemed unlikely that the Maori owners would be allowed to remain without access. The want of access as an argument in reduction of value might not carry much weight. The necessity of providing access to any land purchased from the Crown under section 124 of the Public Works Act 1924 would not apply. Nevertheless, it was significant of the view of the Legislature that landowners should have facilities for acquiring access. It was also possible, given the exceptional circumstances, that a court or the Legislature might apply the common law principle known as 'the right of way of necessity' (A13:149).

Without presuming to take upon themselves the functions of valuation, the solicitors thought that the per acre value should at least be equal to the per acre value to the board of land surrounding the islands. If any reference was made in any offer to want of access, this might give rise to agitation for some remedial legislation. The solicitors warned that:

Natives are able to pull many strings through Sir Apirana Ngata, and possibly, other members of Parliament. Legislation of that character might take such a form as to interfere seriously with the Board's operations with regard to its Lagoon Endowment area. (A13:149)

For themselves, the solicitors would be relieved if the board could arrange matters with the trustees by negotiation. Under the Act, the board had a free hand.

7.7.7

Taking the islands under the Public Works Act 1928

The board apparently considered it easier to take the islands under the Public Works Act 1928. A notice of intention to take land was published in the *Daily Telegraph* on 23 March 1939. Objections were to reach the board no later than 2 May 1939. In April, Hori Tupaea lodged an objection, and a hearing was fixed for 19 June 1939. No evidence of any such hearing was given to the Tribunal.

On 6 October 1939, a proclamation was issued, taking land described in the schedule 'for the purpose of adjusting boundaries both external and internal of the

Ahuriri Lagoon Endowment' and vesting it in the Napier Harbour Board as from 16 October 1939 (A8(g)). The approximate areas and pieces of land taken were described as follows:

A	R	P	Being Island or Land known as
6	0	0	Uruwiri
5	1	20	Tuteranuku
0	3	10	Poroporo
0	2	30	Tirawhangahe
5	0	20	Awa-a-Waka
3	3	20	Matawhero

Section 45 of the Public Works Act 1928 provided that no claim for compensation was to be made after a period of five years from the vesting.

On 24 October 1944, the harbour board was advised by its solicitors that this period had expired on 16 October. The solicitors said that, although they had written two or three times to the solicitors of the Maori trustees in the matter since the date of the proclamation, no claim, as far as they knew, had been made for compensation. They understood from Maori who were going to Wellington to discuss general matters with the Maori members of Parliament that the question of the ownership of the inner harbour would be raised again; Judge Harvey had not yet presented his report of the enquiry held by him just over eight years before (A13:151).

In all probability, the Maori trustees were awaiting the outcome of Judge Harvey's report on Hori Tupaea's petition to settle all their outstanding claims to Te Whanganui-a-Orotu, rather than seeking compensation for approximately 20 acres (see para 10.11.6).

7.7.8 **Tapu Te Ranga**

One former lagoon island well above the high-water mark, Tapu Te Ranga, was not amongst those taken under the Public Works Act 1928 and should therefore have been recognised by the Crown as Maori customary land (A12:18). Presumably the Crown mistakenly assumed it held the title in 1950, because at present it is part of the Ahuriri Landcorp farm (E3:16).

7.8 **CONCLUSION**

In summary, we find that after the 1931 earthquake:

- (a) the Crown approved and implemented a scheme of works to drain and develop up-raised land in the Ahuriri Lagoon and to divert the Tutaekiri River without any reference to or consultation with local Maori or any consideration of their customary, Treaty, and contractual rights;
- (b) the Crown empowered the Native Land Court to issue an order vesting the six former lagoon islands that were still customary land in trustees, who would have the power to dispose of them as if they were beneficial owners;

- (c) the Crown empowered the Napier Harbour Board to take the six former lagoon islands under the Public Works Act 1928; and
- (d) the omission of Tapu Te Ranga appears to have been an oversight as it was assumed to be Crown land in 1950.

The Crown's actions enabled the harbour board to exercise the legal option of resorting to the Public Works Act to acquire the islands compulsorily rather than negotiate with the trustees to purchase or exchange the islands.

This was a clearly a blatant misuse of the Public Works Act to avoid having to offer the trustees a fair market price or exchange. Moreover, the islands were compulsorily acquired without any compensation being paid, apparently because the owners expected that the matter would be dealt with after Judge Harvey presented his report.

The taking of the six islands, like the taking of Te Maunga railways land, 'raises issues that are significant in the consideration of public works generally'. We agree with the Te Maunga railways land Tribunal's recommendation that all persons exercising functions under the Public Works Act should act in a manner that is consistent with the Treaty of Waitangi.¹³

References

1. Kay Mooney, *History of the County of Hawke's Bay*, Napier, Hawke's Bay County Council, 1973, pt 2, p 119
2. Geoff Conly, *The Shock of '31: The Hawke's Bay Earthquake*, Wellington, A H and A W Reed, 1980, p 194
3. Ibid, pp 147–148. For later descriptions by scientists, see D6(a), pp 76–77.
4. Conly, p 190
5. *Hawke's Bay – 'Before' and 'After' The Great Earthquake of 1931: An Historical Record*, July 1931, p 161
6. M D N Campbell, *The Story of Napier, 1874–1974: Footprints along the Shore*, Napier, Napier City Council, 1975, pp 147–152
7. Gunter Warner, *The Napier Harbour Board: A Study in Local Body Administration and Politics*, MA thesis, Victoria University of Wellington, 1958, p 40
8. Campbell, p 122
9. D G Conly, 'The New Beginning: Napier', in *Hawke's Bay – 'Before' and 'After' The Great Earthquake of 1931: An Historical Record*, Napier, facsimile edition, 1981
10. D6(a), pp 85, 201, 317, 322, 333–334, 364–365, 418–419, 466–490
11. See also Mooney, pt 4, pp 18 ff
12. Ibid, pp 85–86
13. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wellington, Brookers Ltd, 1994, p 82

CHAPTER 8

THE DISPOSAL AND UTILISATION OF RECLAIMED LAND

8.1 THE EVIDENCE

The Tribunal was given brief evidence on the disposal and utilisation of land reclaimed from the inner harbour after the earthquake by Mr Parsons (A12:172–177).

As well, four volumes of ‘Supporting Papers to the Evidence of David Alexander’ on the physical changes to Te Whanganui-a-Orotu were filed by Crown counsel. These papers (D6(a)) and an index to them (D6(a): vol v) contained detailed, undigested material, taken mainly from official sources and newspapers, on the disposal and utilisation of lagoon lands under the Napier Harbour Board and Napier Borough Enabling Act 1945 and the Public Works Act 1928. No evidence from Mr Alexander was filed; nor was he called as a witness.

For the purposes of this report, we have briefly examined this evidence under four headings: suburban expansion, industrial development, the Hawke’s Bay Airport, and the Ahuriri farm settlement. The physical changes to Te Whanganui-a-Orotu that followed are clearly illustrated in the twin plans of the Ahuriri Lagoon and its surroundings that are reproduced here (see fig 15). Evidence on the environmental impact of the changes was presented by David Young (E5) and Gary Williams (F3). Transcripts of Mr Brown’s cross-examination of these two witnesses were prepared by the Crown Law Office (H3).

8.2 THE GREATER NAPIER SCHEME

8.2.1 The harbour board agreement with the borough council

We have seen how, before the earthquake, when the inner harbour party was dominant, the harbour board was reluctant to part with large areas of its endowment to meet Napier’s need for more land. Reclamation and leases, nevertheless, were a very profitable source of revenue for the financing of harbour development. After the earthquake, with the breakwater party in power, the board was more ready to come to terms with the Napier Borough Council over its land requirements.¹

A measure of this readiness was the 1936 lease to the borough council of the 475-acre Marewa block and a 40-acre plantation at the southern end of the lagoon adjoining Napier South (D6(a):1404–1406). None the less, the borough council still found itself in the position of being entirely dependent upon the harbour board for the land it needed for ‘natural growth and development’ (D6(a):1408–1409). Furthermore, harbour leases of land within the borough were unpopular with

tenants, and freehold land was increasingly sought for residential and business purposes. With the return to prosperity in the late 1930s, the pressure increased for more harbour board land adjacent to the borough boundaries. In 1943 the borough council started to give serious consideration to a Greater Napier scheme. In 1945 it petitioned Parliament in connection with lands needed for State housing and the rehabilitation of ex-servicemen, pointing out that the existing position was 'unfair and inequitable' (D6(a):1409).

On 29 May 1945, the *Daily Telegraph* reported that 'complete agreement had been reached between the Borough and the Napier Harbour Board on the development of a large area of land adjoining the present borough boundary'. This was a 'major step in the progress of the Greater Napier Scheme', which would assure the future expansion of Napier (D6(a):1410).

8.2.2 **Napier Harbour Board and Napier Borough Enabling Act 1945**

The Napier Harbour Board and Napier Borough Enabling Act 1945 provided for certain areas of land belonging to the harbour board to be sold and leased to the borough council for urban expansion. Special borrowing powers were conferred on the council for this purpose. The land included 278 acres that were required for immediate inclusion in the borough and 787 acres of the Ahuriri Lagoon reserve and the Te Whare o Maraenui block that were to be included as needed for development and subdivision (A7(a); A8(h)). The principal Act was extended in its application by the 1949 and 1958 amendment Acts (A8(i), (k)).

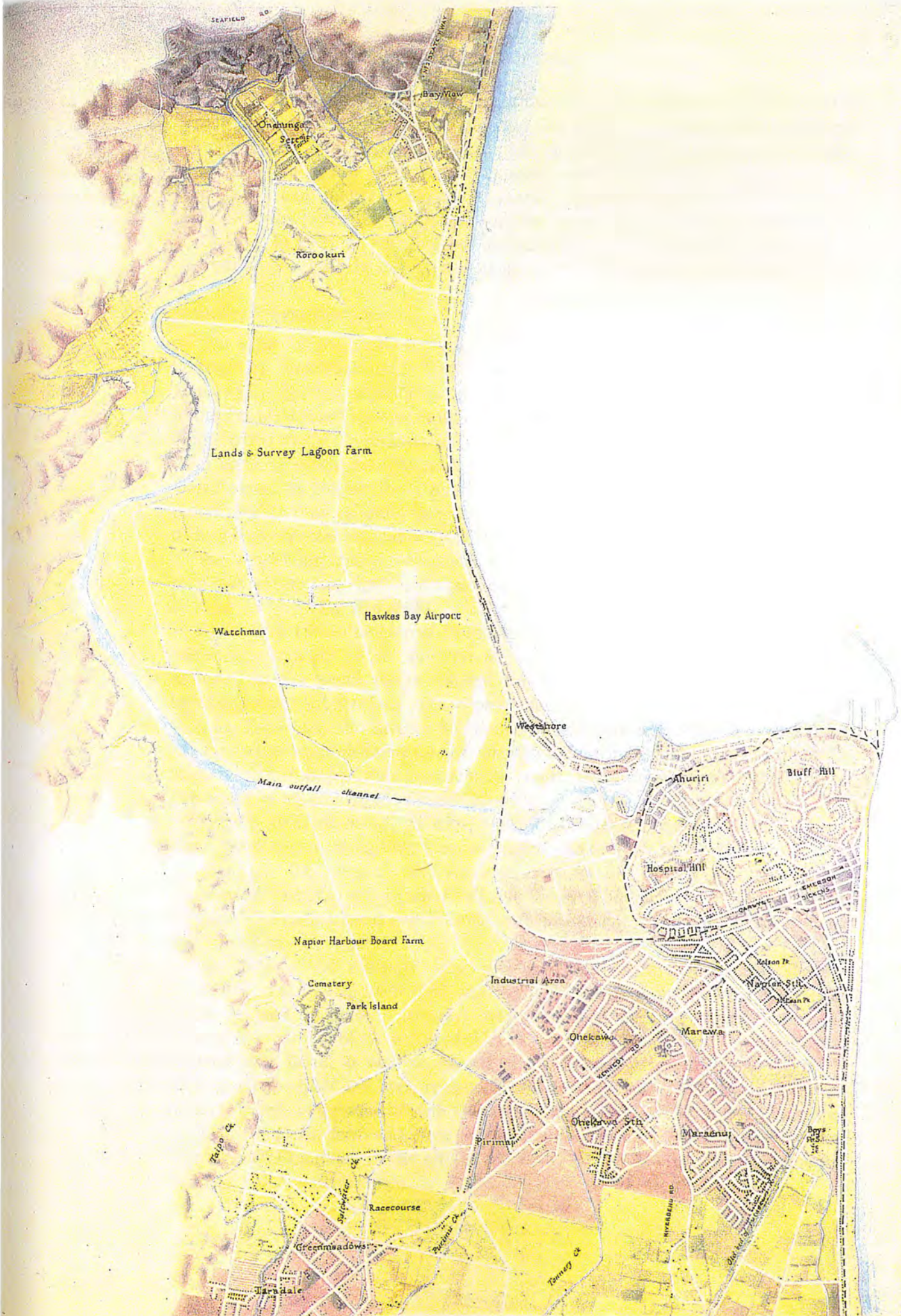
8.2.3 **Suburban expansion**

The post-earthquake expansion of Napier began with the development of the Marewa block. A bridge was built over the old bed of the Tutaekuri River and Kennedy and Taradale Roads. By May 1935 nearly 50 sections had been reserved for housing and 18 acres for a park, and three acres had been leased by the borough council for the Kennedy Park camping ground. In 1936, 456 acres were taken into the borough, and the new suburb of Marewa was developed as a pioneer State housing scheme. More land was taken under the Public Works Act 1945. The harbour board was paid £11,000 in compensation, which was £10,000 less than it claimed (A13:152; D6(a):1404–1406).²

To provide a recreation ground at Port Ahuriri, in 1935 the borough council entered into negotiations with the harbour board to preserve the south pond, which had been raised in the earthquake and was being used as a dump. In 1939 the board applied to hold over 10 of the 20 acres in consideration for a council undertaking to fill the whole pond and maintain it. On 30 July 1943, 3.8907 hectares were transferred to the council for the Ahuriri Park sportsground (D6(a):805–814).

After the Second World War, suburban Napier expanded southwards to Onekawa in 1947, Maraenui in 1957, and Pirimai in 1961. By May 1968, when the Pirimai subdivision was completed, planning by the harbour board, in association with the city council, was well underway for a 600-acre subdivision on lagoon land, mostly on the north side of Wharerangi Road. From 1969 to 1973 the suburb of Tamatea was developed in three stages.

Figure 15 (following pages): A century of change – 1865 and 1965 plans



100 years of progress - the same area after reclamations & earthquake action - 1965

The Napier Harbour Board Empowering Act 1974 enabled the board, under certain conditions, to sell endowment land that was leased for residential use and use the proceeds for purchases and development of other endowment lands (A13:155). But it did not bring the expected response. Harbour board leases, it seemed, were no longer as unpopular as they had been in the 1930s.

In 1976 the board leased 88 acres of land to the Hawke's Bay Hospital Board (A13:155). In 1978 the board agreed to the Napier City Council taking 40 hectares of farm land at Park Island for a recreational and sports centre (A12:177).

8.2.4 **Industrial development**

At the same time that Napier acquired new suburbs and parks it enlarged its acreage of industrial land. Urgent action was taken by the Public Works Department in 1946 to secure a 16-acre site in the Ahuriri Lagoon area adjacent to the Taradale Road railway crossing. It was owned by the harbour board and was being leased by the Commissioner of Crown Lands in conjunction with the Ahuriri farm settlement scheme. It was required by the Public Works and State Hydro Departments in Napier for a plant depot, store, and yard. But because it was practically the only suitable vacant land available, the harbour board could dispose of it only by special legislation. After the council had approved the estimated cost of the acquisition and development of the site (which included £800 for the purchase of the land itself), it was taken under the Public Works Act 1928 on 23 May 1949 (D6(a):594–598).

By the late 1940s the Napier Borough Council urgently required the Crown to surrender the lease of 35 acres on the west side of Taradale Road that were included in the small farms scheme for the purpose of establishing a light industrial area. All the land was in permanent pasture. An agreement was made with the Crown and the harbour board, and the area was referred to the council for the immediate establishment of the Onekawa light industrial area. A further 74 acres were included in the agreement for future development, with a total area of 116 acres being envisaged (D6(a):600–613).

By May 1957 almost all the sites, which had increased in area to a total of 284 acres, were occupied, and the area was taken into the city in 1958. To cope with the demand, the council subdivided an 80-acre block west of the disabled servicemen's centre on Taradale Road, and reserved 300 acres of a 664-acre block between Hyderabad Road and Westshore Embankment Road. This block became part of the city in 1960.³

The demand for industrial sites increased and the area expanded steadily (A12:177). On 15 February 1962, the *Daily Telegraph* requested that a 350-acre block of land be raised, serviced, and developed by the harbour board for industrial sites. The block included land between Meeanee Quay, Westshore, and Embankment Road, as well as the site of the embankment aerodrome (Napier's first airport), which had been reclaimed and developed in 1935–37. In 1969 the harbour board, in agreement with the city council, sliced off another 350 acres of its Ahuriri Lagoon farm and most of the embankment for industrial development. The area was included in the city in 1973 (A12:176–177) and later became the Pandora heavy-industry area.

8.3 THE HAWKE'S BAY AIRPORT

8.3.1 The choice of the site

On 13 December 1928, the harbour board granted the Napier Harbour Aero Club the use of an area of land east of Riverbend Road for an airfield. After the earthquake it was decided to make 100 acres available to the aero club for an aerodrome on the seaward side of the embankment between Taradale Road and the bridge. Then, in 1934, it offered to lease an area of 160 acres on the corner of Hyderabad Road and Embankment Road for a peppercorn rent as the first step towards the creation of a modern airport, on the understanding that an air board was to be set up in Napier. In 1935, at the request of the aero club, an Act of Parliament constituted the Napier Airport Board, and the East Coast Airways service to Gisborne began (A12:169–170).⁴

Prior to embarking on improvement work, the possibility of obtaining a large, more open site at Westshore (commonly known as the Beacons) that was free of obstructions and fogs and had a better natural surface, was investigated; but this was ruled out by the intensive draining scheme being undertaken by the Small Farms Board. Nevertheless, permission was given for the Beacons to be used and licensed as a public aerodrome for a limited period while the embankment aerodrome was developed.

From an operating viewpoint, the Beacons definitely came to be preferred by commercial aircraft. Its main disadvantages were that it was 2½ miles further out of town and understood to be part of the small farms scheme. Moreover, a considerable sum of money had been spent on the improvement of the embankment aerodrome (D6(a):703–743).

The levelling and fencing of the embankment site was completed in 1937, but the Beacons was still in use when war broke out in 1939 and East Coast Airways ceased to function. The Air Department retained the right to use the Beacons and the custodian continued to report on local weather conditions to the Meteorological Office and carry out maintenance and improvement work. On 23 September 1940, a piece of lagoon land totalling 9 acres 2 roods 16 perches was taken under the Public Works Act 1928 for a radio receiving station, which was maintained by the Government. A compensation payment of £192 was used by the harbour board to reduce its liability to the Small Farms Board (D6(a):768–770).

Following the compulsory acquisition of the six former islands in the lagoon, the way was open for the harbour board to lease the Beacons aerodrome to the borough council for the Airport Board (D6(a):754–761). The council, however, decided not to acquire the lease until the war ended. Meanwhile, the Government decided to set up a special committee to consider the future air transport requirements of the Napier-Hastings district. The Air Department favoured one central airport but the newly established Hastings Regional Planning Council sought a more central and convenient site at Karamu.

In February 1944, two Public Works engineers pronounced the Beacons site the best option (D6(a):779–784). The Napier Borough Council decided to proceed with the acquisition of the land under the Public Works Act 1928 and settle the amount of compensation by arbitration. By a proclamation issued on 11 June 1945, a total of 499 acres 2 roods 6 perches was taken for the aerodrome from the Ahuriri Lagoon reserve and the islands of Tuteranuku, Tirowhangahe, Awa a Waka, and

Matawhero and vested in the mayor, councillors, and burgesses of the borough of Napier (D6(a):793).

Controversy between Hastings and Napier over where the Hawke's Bay Airport should be developed re-erupted in 1961, when a sealed runway and better facilities were needed at the Beacons for new National Airways aircraft. Pressure from interested parties forced the Government to set up a commission of inquiry, which heard submissions locally and recommended the Beacons (D6(a):1128–1146).⁵

8.3.2 **The Hawke's Bay Airport Authority is constituted**

The Hawke's Bay Airport Authority was constituted to establish, maintain, operate, and manage the aerodrome. It consisted of nine members: three appointed by the Napier City Council, two by the Hastings City Council, two by the Hawke's Bay County Council, and one each by the borough councils of Taradale and Havelock North. On 30 July 1962, agreement was reached that the Corporation of Napier would transfer to itself and the four others as joint tenants the land vested in it for the airport in 1945, except for an area comprising 34 acres that was reserved at the south-east corner (D6(a):1167–1168).

In the deed that the five local authorities executed with the Crown on 30 January 1963, it was agreed that, while retaining ownership of the land, they should make it available for the aerodrome free of charge (D6(a):1150). On 8 April 1965, a certificate of title for 467 acres 3 roods 27.5 perches (189.3612 ha) in fee simple was issued to them (D6(a):1213).

8.3.3 **The proposed motorway**

The Hastings City Council had agreed to these arrangements on condition that a motorway linking the two cities be commenced in three years. This, however, became a major regional issue, and, after a delay of over four years, a short section bypassing Taradale was constructed.⁶ As we shall see, the motorway issue lived on to become part of the present claim (see para 9.12.4).

8.4 **THE AHURIRI FARM SETTLEMENT**

8.4.1 **The small farms scheme**

A small farms scheme for unemployed workers was established on harbour board leases after the earthquake, but the tenants generally complained that the rents were too high. A Government-planned project for 300 families on lagoon land leased from the harbour board was abandoned when it was realised that 10- to 15-acre allotments were uneconomic.

By the end of the Second World War, farmland was sorely needed for the rehabilitation of ex-servicemen.⁷ Local members of Parliament made public statements indicating that the time had come to subdivide lagoon land. The 'unique physical constraints of flooding, soil salinity, poor drainage and fresh water supply' (D6(a):1037, 1051–1059), and droughts, rabbits, and a lack of shelter for stock made it generally unsuitable for one-man units and rehabilitation purposes. Nevertheless, in 1946 and 1947, a 90-acre subdivision of 10 allotments, with a house on each, was made available to ex-servicemen for market gardens in the Onehunga farm settlement (D6(a):203–204).

8.4.2 **The partition of lagoon land**

In the late 1940s discussions began between the Commissioner of Crown Lands in Napier and the harbour board with a view to separating out the respective interests of the Crown and the board in the 7500-acre harbour endowment. One reason for this move was that under the existing arrangements the Crown could sub-lease only with the board's consent (D6(a):615–617).

A valuation report was procured, negotiations for separation were entered into, and agreement was eventually reached that 4790 acres were to become Crown land under the Land Act 1948. The harbour board retained 2200 acres south of the Ahuriri Estuary and paid £60,000 to the Minister of Lands to recompense the Crown in full for its net liability (D6(a):650–660). Detailed provisions for partition were made in section 31 of the Reserves and Other Lands Disposal Act 1950 (A8(j)).

The Napier Harbour Board now had a farm south of the estuary and the main outfall channel, and the Department of Lands and Survey had a farm north of the outfall channel, west of the Beacons aerodrome, and south of the Onehunga farm settlement. No evidence was given to us on the harbour board farm.

8.4.3 **The Lands and Survey farm**

Most of the Lands and Survey farm was utilised as a sheep and cattle fattening unit. A dairy unit was closed down in 1962 and a small deer farming enterprise was established in its place (D6(a):967, 1041; E5:66).

8.4.4 **Leases for other purposes**

The physical constraints already noted continued to place limitations on land use and subdivision. From 1952 to 1955 the Land Settlement Board leased a few small areas to individuals for 33 years, with rights of renewal, and a few small areas were subleased for five years (D6(a):1284–1311). From 1969 to 1978 a few licences to occupy for five years were issued by the Commissioner of Crown Lands (D6(a):1312–1324). We are unsure if the material that the Crown filed on leases from 1950 until restructuring in 1987 is complete. Twenty-five acres 10 perches were reserved for the Petane War Memorial Domain in 1952 (D6(a):921–923).

An application by the Napier City Council for 494 acres for a sewage farm and rubbish disposal on the State highway between Westshore and Bay View on the north side of the airport was approved by the Minister of Lands on 14 July 1960 at a price of £160,850 (approximately £34 an acre) (D6(a):924–926, 935–936). Because of the bird hazard to the airport, the sewage farm was not established. In 1967 the Crown resumed 86.5 acres for flood control purposes and leased back the remaining 403 acres 3 roods 20 perches for grazing. When the lease expired, the Napier City Council agreed to sell at the current market value of \$46,800. The Minister sanctioned the purchase after being informed that a leasehold tenure would not qualify for the two-to-one subsidy needed for the proposed flood control scheme, which had already been approved by the Soil Conservation and Rivers Control Council (D6(a):947–952).

Three areas totalling 54 acres on the Lands and Survey farm were gazetted on 25 July 1968 for extensions to the existing airport, thus increasing its total area to

524 acres. The Department of Lands and Survey further agreed that other areas required in future for such things as runway extensions would be 'earmarked' for aviation purposes. This would entail some 94 acres at the southern end of the main runway and would involve the progressive phasing out of departmental facilities in the area (D6(a):1017). In its 1982 Ahuriri farm settlement land utilisation study, the department noted that the airport crash tender used the farm 'frequently for access in emergencies and for familiarization purposes'. Should the farm settlement be disposed of, the report said, provision would have to be made for ensuring such access at all times (D6(a):1041).

8.4.5 **The failure to protect Te Ihu o Te Rei**

In 1978 and 1979 the Assistant Commissioner of Crown Lands approved the disposal of 582 square metres of the farm to the Napier City Council for \$220, subject to the land being incorporated into the adjoining Quarantine Island (Te Ihu o Te Rei), which the council owned as a reserve and had used for a quarry. He also approved the issue of a licence to the Hawke's Bay Pistol Club to use this piece of land as a car park for five years from 1 January 1980 at an annual rent of \$10. In August 1985, the licence was renewed for a further five years (D6(a):996–998).

The facts of the matter were that the piece of land was already within the boundary fences of the island and the city council had already given the pistol club permission to build a pistol range encroaching on it, subject to the approval of the Historic Places Trust and the Hawke's Bay County Council. The trust did not object, even though Te Ihu o Te Rei was a wahi tapu and had old midden sites. Indeed, Te Hata (Mick) Brown remembered when pipi shells and human bones were discovered amongst metal taken from Te Ihu o te Rei (D28: para 13). The county council, however, was unable to give planning approval until the city council either obtained the Crown's permission for the pistol club to occupy the piece of land or incorporated it into the reserve (D6(a):958–960). Apparently no one involved in these planning procedures took Maori traditional relationships with Te Ihu o Te Rei into account.

8.4.6 **The failure to protect Roro o Kuri**

The failure to protect Te Ihu o Te Rei was matched by the failure to protect Roro o Kuri, which had been purchased from A P White in 1940 and became part of the Lands and Survey farm (A12:180). In this instance, however, the Historic Places Trust did warn the Department of Lands and Survey that the area was part of a substantial archaeological site and that the trust would be unlikely to authorise its destruction. In 1978 a new quarry was opened to provide fill for a Housing Corporation development in Napier, clearly damaging archaeological remains. The director of the trust deplored the department's failure to have the area checked for archaeological sites before extending quarrying operations and pointed out that the incident could lead to action under section 9H of the Historic Places Act 1954. Instead, he asked the department to fund an archaeological survey of the area to obtain information for future farm management. The department agreed to make up to \$500 available (D6(a):977–989).

8.4.7 **The archaeological survey of the area**

The archaeological survey was carried out by M Jeal and A Walton in September 1979. They reported that, as much of the farm was uplifted lagoon bed, the area of archaeological interest was restricted to the former islands of Roro o Kuri and Tapu Te Ranga, which, together with Te Ihu o Te Rei, were the only survivors of the former lagoon islands. Seven recorded sites, including Otiere Pa, were protected by the Historic Places Act 1954 (as amended by the Historic Places Amendment Act 1975). There was no evidence of any archaeological features on Tapu Te Ranga, but Roro o Kuri 'had a great deal of interest archaeologically'. Given the record of damage to and destruction of archaeological sites at the former islands, the survey report concluded, it would be unfortunate if continuing demand for borrow material, in particular, resulted in further changes (D6(a):982–983).

8.4.8 **The 1982 land utilisation study**

The Department of Lands and Survey's *Ahuriri Farm Settlement Utilisation Study* of September 1982 indicated that there were other non-agricultural uses on the farm settlement that were 'so well entrenched that the public concerned have expectations of continued free use'. It described them under the broad headings of 'services', 'community', 'recreation', 'education', 'archaeological research', 'conservation', and 'outfall channel', pointing out that many relied on the farm settlement being under Crown control.

Committed uses that could not be relocated and that must remain were:

- (a) airport crash tender access and crash gates;
- (b) airport extensions;
- (c) the catchment ponding area;
- (d) the outfall channel;
- (e) marine and airport navigation lights;
- (f) the United States' satellite monitoring station;
- (g) various users' water supply;
- (h) access for duck shooters and fishermen; and
- (i) the fuel pipeline and telephone cable along the western side of State Highway 2.

The departmental study listed and examined convenience uses, which could be relocated but preferably should remain, and easily relocated uses (D6(a):1057–1058). 'The extensive use of the Farm Settlement for such activities,' the department concluded, 'justifies its existence as public land' (D6(a):1059).

8.4.9 **Maori interest**

The only use by the local Maori community mentioned in the study was the gathering of puha (watercress) from the banks of drains (D6(a):1044). The only regular fishing noted in the outfall channel since 1971 was that of a commercial eeler who had a departmental permit. It was understood that good catches were still being obtained (D6(a):1042).

The question of 'the unresolved claim by Maoris to the Bed of the Old Inner Harbour' was seen as an additional constraint on privatisation, which 'should be the subject of a separate study' (D6(a):1058). To the best of our knowledge, this was not undertaken before the passing of the State-Owned Enterprises Act 1986.

8.5 THE DIVISION OF CROWN LAND

The State-Owned Enterprises Act 1986 led to major reforms of Government departments that combined trading and administrative functions. The commercial activities of the Department of Lands and Survey were corporatised. In 1987 the Lands and Survey farm settlement was divided up between Landcorp Farming Ltd and the Department of Conservation (Te Papa Atawhai). The Landcorp farm in 1993 consisted of 1421 hectares and was being used largely for finishing cattle, sheep, and deer raised on other corporation properties.

Crown leases in the marginal strips of the upper estuary were divided. Where leases allocated to the Department of Conservation were a mix of productive land and marine wetland, the lessees were offered the right to freehold farming land. The remainder were to revert to the department's control. In respect of the pending Wai 55 claim, the district conservator was reported in the *Daily Telegraph* of 17 May 1988 to have said that the department did not see itself as 'an active objector . . . as it would be holding the land as guardian of the people of New Zealand'. It was a 'neutral participant in the whole exercise' (D6(a):1395).

Through restructuring, the department acquired 488.7099 hectares of land in the Te Whanganui-a-Orotu area in three ways.

Firstly, it was allocated 408.8620 hectares of land (based on conservation or public access values) that had been formerly managed by the Department of Lands and Survey.

Secondly, on 16 July 1991, it was gifted 12.3519 hectares of land adjacent to the southern side of the area known as 'Pandora Pond' by the Port of Napier.

Thirdly, under the Harbour Boards Dry Land Endowment Revesting Act 1991, 67.6960 hectares of land held by the Napier City Council were revested in the Crown to be managed for conservation purposes under the Conservation Act 1987 (H12:2–3).

In 1987 the Department of Conservation inherited a wildlife refuge over parts of the lower estuary from the Wildlife Service of the Department of Internal Affairs, which became part of the Department of Conservation. This refuge was and is managed subject to the Wildlife Act 1953.⁸

In 1987 the administrative responsibility for the Whakamahatanga walkway, which consisted of a circular three-kilometre track and a 2.5-kilometre summit track on Roro o Kuri, was transferred from the Department of Lands and Survey. The land is now owned, controlled, and grazed by Landcorp Farming Ltd.⁹

8.6 THE DEMISE OF THE HARBOUR BOARD AND THE DIVISION OF THE REMAINING ENDOWMENT

The major reformation of the State sector was followed by a complete and comprehensive review of local government and the amendment of the Local Government Act 1974 to require the Local Government Commission to give priority to the preparation of reorganisation schemes.

Draft organisation schemes for the Hawke's Bay region were published in December 1988. Local government authorities in the area were constituted as follows:

- (a) Napier city: the former authorities were the Napier City Council, the Hawke's Bay County Council, and the Petane Domain Board.
- (b) Hastings district: the former authorities were the Hastings City Council, the Hawke's Bay County Council, and the Havelock North Borough Council.
- (c) The Hawke's Bay Regional Council: the former authorities were the Hawke's Bay Catchment Board and the Hawke's Bay Harbour Board.¹⁰

On 1 October 1988, the Hawke's Bay Harbour Board went out of existence. It was replaced by the Port of Napier Company Ltd and the Hawke's Bay Regional Council, which held most of the shares in the company.¹¹

The regional council was originally named as the body that would inherit the harbour board leases in the city. But four Napier city councillors formed themselves into a land action group 'to stop the ownership of a substantial chunk of Napier' (ie, harbour board leases) being transferred to the regional council. 'At stake' was 'the control of 2670 sections most of them residential, industrial or commercial' (D40(b)). Petitions were circulated around the city to support the councillors' claim. As one councillor saw it, 'the issue boiled down to the fact that the land was Napier's rightful inheritance and the money from the leasehold sections should be used for the city's benefit'. The Napier Progressive Association pledged its full support 'to stop \$50 million worth of leasehold land in the city' being put in regional control. An editorial in the *Daily Telegraph* of 6 February 1989 alleged that the Local Government Commission had 'deprived Napier of a large part of its only compensation for the disastrous earthquake'. The income from the disputed territory was about \$1.7 million annually. Napier had been given the harbour board's foreshore reserves, and the rent from the leasehold lands was needed to develop and maintain them. The chairman of the United Hawke's Bay Council believed that this was 'the worst case of parochial politics seen in Hawke's Bay'. The rights of the other 91,000 citizens were deliberately ignored. Also ignored was the filing of the Wai 55 claim of 16 March 1988, which asked the Tribunal to recommend that the title and rights of Te Whanganui-a-Orotu be restored to the hapu represented by Te Otane Reti and four others (1.2(a)).

According to Mr Parsons:

The Local Government Commission stepped in to decide a carve up of the Harbour Board assets. The Harbour Board farm went to the Napier City Council, the Port of Napier retained the Ahuriri Industrial area, the Onekawa Industrial area, and certain lease hold sections in Tamatea. (A12:178)

This, he added, was 'not a comprehensive breakdown of the dispersal of the Harbour Board's assets, only some of the major ones in areas under claim to the Waitangi Tribunal'. Neither the Crown nor the Napier City Council filed any detailed evidence on this subject (2.85).

Mr Parsons presumed that the Hawke's Bay Harbour Board Empowering Act 1989 (A4(i)) made reference to the board's assets under its new owners as the board went out of existence before the Act was passed. The stated purpose of this Act was to empower the board to sell land vested in it to lessees and their families, to apply the proceeds to the purchasing of land as an endowment, and the improving and developing of that land for the financing of harbour works. About the time of the second reading of the Bill, the board circularised lessees telling

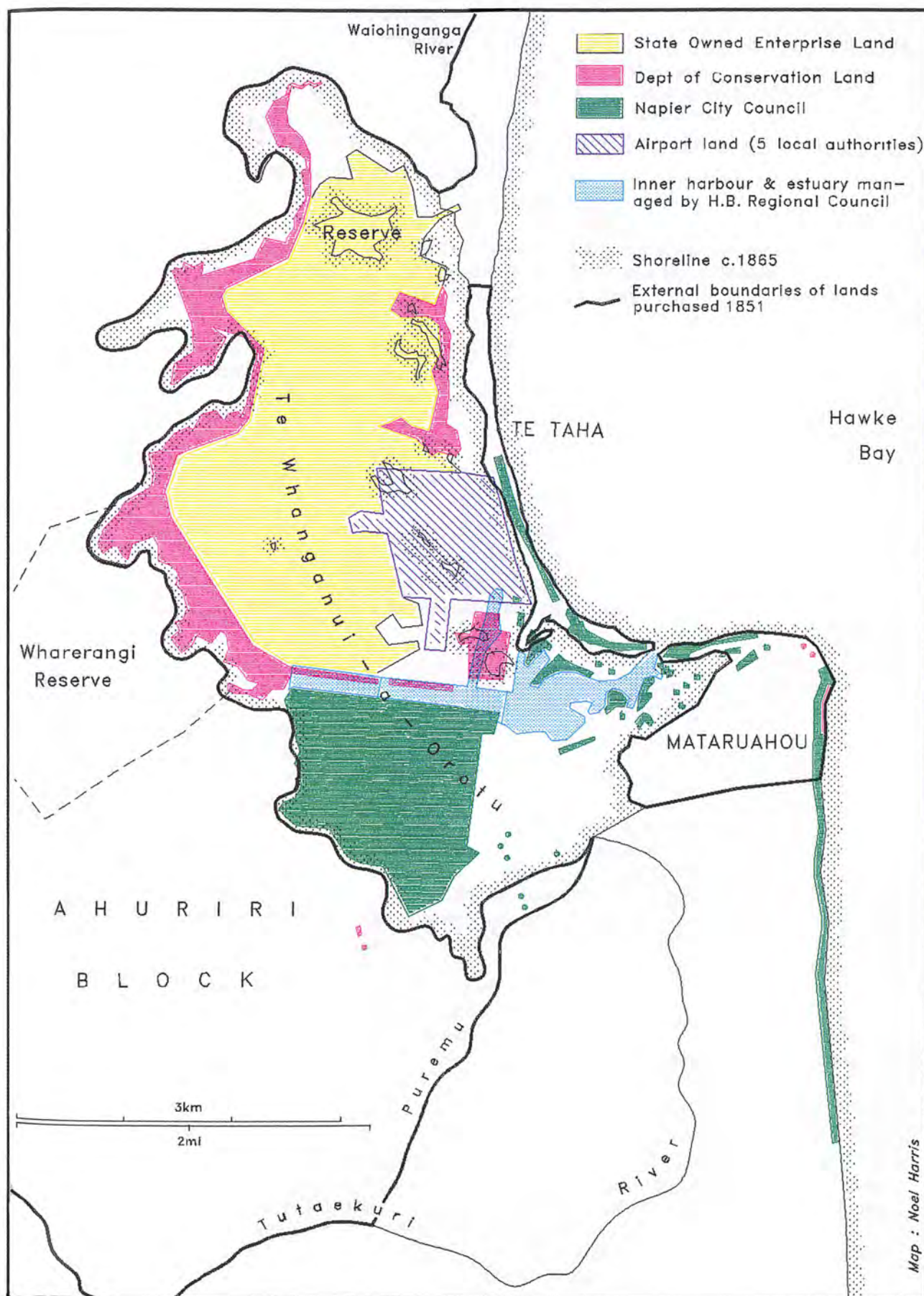


Figure 16: Ownership of lagoon land circa 1990. Based on the Department of Survey and Land information map of June 1990.

them that this was the time to freehold. Despite an assurance from the Prime Minister that the pending claim to the Waitangi Tribunal would not affect anyone's tenancy, there was no rush to do so (A12:178).

Viewing the 'carve up' of the southern section of Te Whanganui-a-Orotu (retained until 1988 by the Hawke's Bay Harbour Board) in the context of the environmental changes and the decline of their rights to traditional fisheries, the claimants stated:

Every one has profited from Te Whanganui-a-Orotu, it seems, except the traditional owners, the Maori, systematically deprived of rights and benefits. Where possible both Crown and Napier Harbour Board have chosen to ignore Maori rights. (D4:61)

We agree. Clearly, reclamation, land development, and urban expansion had dispossessed Maori 'owners' of everything except an inaccessible canoe reserve. Indeed, Maori had been denied any right to share in Napier's 'gift from the sea'.

8.7 ENVIRONMENTAL DAMAGE SINCE THE EARTHQUAKE

On behalf of the claimants, Gary Williams, a consulting engineer specialising in the field of hydrology, water, and soil movement who worked for the Hawke's Bay Catchment and Regional Water Board from 1984 to 1987, gave evidence to show that the lagoon had been destroyed not by the earthquake but by reclamation and drainage:

if the Ahuriri Harbour had been simply abandoned as a port – but with a permanent opening being maintained for the outflow of flood waters – and no reclamation or drainage work had been undertaken.

The lagoon would have reverted to a largely fresh water body . . .

The mudflats raised above the high tide level would have been quickly colonised by swamp land vegetation, giving rise to a very fecund wetland . . .

the lagoon, left to itself, would have had more marsh and swamp lands, but still a large body of open water. The water would have been much more fresh water, as it had been prior to the Ahuriri harbour developments . . .

The flood control, drainage and reclamation works certainly benefitted urban development, but this development was not contingent on drainage of virtually the whole lagoon. Given the difficulties of pastoral farming of the Harbour Board (now Napier City) and Crown farms due to the salinity of the soil and poor drainage, one would have to question the wisdom of reclaiming those areas . . .

On the debit side is the loss of a lagoon that was not only highly productive, but had many intrinsic and recreational benefits. On an area for area basis, the direct loss of human food alone was probably greater than the food produced off the two farms. (F3:20–21)

In Mr Williams's opinion:

By simply turning off the pumps draining the Napier City and Crown farms, these areas would quickly return to a lagoon status . . . Incidentally parts of Napier would get a little wet and the airport would be inoperable!

A reversion of the farm areas could, though, be done in a purposeful manner, by the relocation of stopbanks and pump stations. (F3:23)

The present conditions, Mr Williams concluded, could be maintained only by continual drainage and river management (F3:24). This evidence lends credibility to Mr Young's statement that Te Whanganui-a-Orotu, despite nearly 150 years of environmental mismanagement, still represented:

a vital source for traditional food gathering to Ngati Kahungunu – a place where the bounty of mauri and the watchful presence of taniwha persist, miraculously. (E5:5)

First and foremost among the deleterious impacts that Mr Young identified were water loss and water quality levels. The water quality problems were such that instead of kaimoana there were signs posted warning would-be gatherers that the waters were unsafe for the taking of shellfish (E5:26). The pollution that affected low-lying land in the early Napier settlement, and what Mr Parsons had described as the failure to consider kaitiaki in the location of outfall and drainage pipes, persisted well into this century. The underlying problems still existed.

From the rainfall and farm catchment area it was estimated that 29.5 million cubic metres of fresh water were discharged annually through the estuary. Essentially the waters were affected in their quality by direct usage practices and by run-off, mainly from pastoral and agricultural practices, whose residues ultimately leached into the estuary, and also by the direct discharge of storm water, which carries pollutants, if not toxins. In times of heavy rain, the stormwater system could and did carry raw sewage into Te Whanganui-a-Orotu. Moreover, a number of pumping stations forced storm water into the estuary.

A number of water quality aspects that caused 'undue stress to the estuarine environment' had been identified; for example, quarrying in the upper reaches of the estuary. At least three reports had been produced on this subject over the past six or seven years and some improvements had been made, but it was difficult to change the industrial habits of 50 years and 'progress appeared modest. Indeed reporting might at times be considered a substitute for action' (E5:71). There was a clear need for the suitable planting of riparian strips on all streams and wetlands entering the estuary and, more importantly, there was a need for a change to land use practices within the catchment (E5:74).

The lower estuary had been adversely affected by run-off from the urban industrial area and apparently there had been little change in the amount of contaminants entering the estuary since 1976–78, despite adjustments to stormwater systems by the Napier City Council.

All the discharges ran 'totally counter to the interests of both the estuary environment and its kaitiaki whose remaining shellfish gathering sites have been highly vulnerable and patently affected by such pollution'. Because of what it saw as a difficulty in testing by any other authority, the Community Health Board's health protection unit had started monitoring shellfish. It found that kaimoana should not be taken from the lagoon and, in a number of places within the harbour, even swimming was hazardous to health. What was not possible to manage was the extent of the loss of plant and fish life between the 1850s and the 1970s. Better data collection was needed so that information on trends was available.

The claimants, Mr Young suggested, had produced the evidence necessary to prove damage to their taonga. It was now up to the Crown to do whatever was

necessary to fully and openly acknowledge its responsibilities and cooperate with those who, their pleas for so long ignored, knew what was best for its management (E5:69–82). How well the Crown has undertaken such responsibilities is examined in our next chapter.

References

1. Gunter Warner, *The Napier Harbour Board: A Study in Local Body Administration and Politics*, MA thesis, Victoria University of Wellington, 1958, pp 130–131
2. See also M D N Campbell, *The Story of Napier, 1874–1974: Footprints along the Shore*, Napier, Napier City Council, 1975, pp 158–161
3. Ibid, p 203
4. Ibid, pp 162–164; H K Stevenson, *Story of the Port of Napier, 1875–1975*, Napier, Hawke's Bay Harbour Board, pp 152, 190, 296
5. Campbell, pp 205–206
6. M B Boyd, *City of the Plains: A History of Hastings*, Wellington, Victoria University Press, 1984, pp 373–374
7. Ibid, pp 319–322
8. For maps identifying this and other areas managed by the Department of Conservation, and inventory sheets describing each separate unit, see the Department of Conservation, *Hawke's Bay Conservancy Conservation Management Strategy*, Napier, October 1994, vol 2.
9. Ibid
10. Local Government Commission, *Draft Reorganization Schemes for the Hawke's Bay Region*, Wellington, December 1988
11. Under the Port Companies Act 1988, the Napier Port Company Ltd was established to take over the management and operation of the commercial aspects of the port and certain properties from the Hawke's Bay Harbour Board. The Hawke's Bay Regional Council held eleven-twelfths of the shares, the Manawatu–Wanganui Regional Council one-twelfth.

CHAPTER 9

THE AHURIRI ESTUARY: ENVIRONMENTAL AND MANAGEMENT ISSUES

9.1 THE ISSUES

The claimants state that environmental damage had been caused to Te Whanganui-a-Orotu and that environmental management, prior to the passing of the Resource Management Act 1991, was carried out without consultation with themselves or their forebears. Furthermore, since that Act came into force, there has been inadequate acknowledgement of the principles of the Treaty in dealing with environmental matters (1.2(d):7; D9:18; I9(a):1–3). In this chapter we examine these claims, with particular reference to the Ahuriri Estuary.

9.2 THE ESTUARY AND ITS ECOLOGICAL IMPORTANCE

Of the original 3840-hectare lagoon, the Ahuriri Estuary was the only remaining water area by 1992 and had been ‘extensively modified by natural and human activities’ (I9(e):13).

The remaining estuarine water area covers 275 hectares at high tide. Nearest to the sea lies the inner harbour, the entrance to which still requires dredging to maintain a sufficient depth for small boats to berth at the Iron Pot. Between Pandora Bridge and the Embankment Bridge lies the lower estuary, consisting of tidal flats, shallow channels, and several islands. West of the Embankment Bridge is the narrow, stopbanked middle estuary, which becomes increasingly shallow as it approaches the Poraiti Hills. Where it swings round their base, it is known as the upper estuary. North of the lower reaches of the middle estuary is the Westshore Lagoon and a 38-hectare recreation reserve. Opposite the lagoon, to the south of the outfall channel, is the southern marsh. Most of the catchment area is farmland, with a few patches of remaining vegetation (I9(e):13–14).

John Ombler, the regional conservator of the Hawke’s Bay conservancy, gave evidence on the ecological importance of the Ahuriri Estuary. ‘Estuaries generally,’ he said, ‘are the most productive ecosystems on the earth.’ The Ahuriri Estuary has ‘one of the greatest concentrations of water birds relative to its size of estuarine areas in New Zealand, and has been described as one of the finest refuges for wading birds in the country’ (H12:3–4). The estuary margins, the upper outfall channel and its surrounds, and the southern marsh are regarded as a very valuable wildlife habitat. The wetlands adjacent to the main road north are relatively freshwater, as is the southern marsh, and are used by large numbers of water birds, which are attracted to a habitat rich in rushes. The greatest biological diversity is found at the margins of the tidal channels, where the water is shallow.

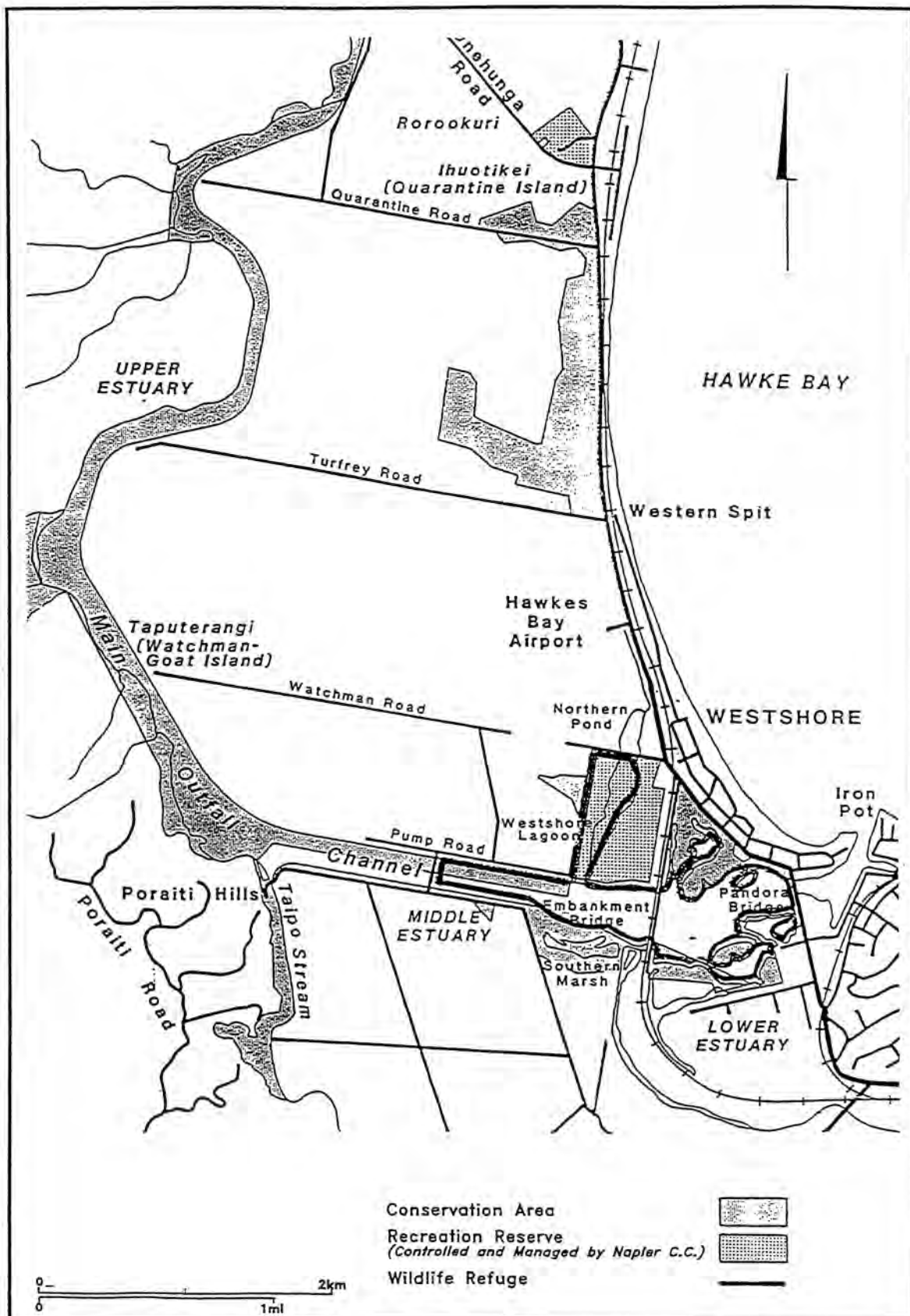


Figure 17: Ahuriri Estuary areas managed by the Department of Conservation. Copied from map 3 in volume 1 of the Department of Conservation's *Hawke's Bay Conservancy Conservation Management Strategy* (Napier, October 1994).

9.3 **CONFLICT OVER USE AND MANAGEMENT**

9.3.1 **Wildlife values versus human development**

Since the 1950s:

the use of the Ahuriri Estuary has been a source of conflict between wildlife values and human activities and developments such as recreation, reclamations, channel dredging, marina proposals and motorway developments. (I9(e):15)

The tangata whenua were only marginally involved in the conflict, notwithstanding their old, unresolved claim to Te Whanganui-a-Orotu. Customary and traditional conservation values played little or no part in the system of environmental control that operated during the years of conflict.

9.3.2 **The system of control and management**

When this conflict began, the tidal estuary and part of the outfall channel were controlled by the Napier Harbour Board as part of its harbour endowment, and the Westshore Domain was controlled by the Napier City Council. The rest of the outfall channel and the middle and upper estuary were Crown land and were administered by the Department of Lands and Survey. Other authorities involved in planning and management were the Hawke's Bay County Council and the Hawke's Bay Catchment Board; other Government agencies involved were the Departments of Internal Affairs (Wildlife Service), Marine, Transport, Scientific and Industrial Research, and Civil Aviation. Under the legislation that empowered these authorities to control and manage the Ahuriri Estuary,¹ neither the Crown nor the administering authorities were obliged to act in accordance with the Treaty principles of rangatiratanga and partnership; rather the principle of kawanatanga was absolute. While the tangata whenua could elect representatives or stand for local authorities, they do not appear to have actively exercised these democratic rights.

9.3.3 **Wildlife refuge gazetted**

Early in 1956, on the recommendation of a prominent member of the Ornithological Society, the estuary area was inspected by a field officer of the Wildlife Service and representatives of the Hawke's Bay Acclimatization Society, and a discussion was held with the Napier City Council and the Napier Harbour Board. Arising from this, a proclamation was prepared to have part of the 124-acre Westshore Domain, the outfall channel, and 61 acres of tidal estuary, excluding the 'islands', declared a wildlife refuge. The harbour board consented on condition it could reclaim, drain, and improve the area under its control, which it had the authority to do under section 14(2) of the Wildlife Act 1953.

On 8 May 1958, the Ahuriri Wildlife Refuge was gazetted under the Wildlife Act (D6(a):1325, 1481). Although the reserve was under the control of the city council and the harbour board, the council delegated its authority over the portion within the Westshore Domain to a committee representing the Royal Forest and Bird Protection Society, the Hawke's Bay Naturalists Club, and the Hawke's Bay Acclimatization Society. The whole area was shown as a wildlife refuge in the Hawke's Bay County Council's 1963 district scheme.

An unofficial extension of the wildlife refuge was the adjoining 14.5218-hectare Watchman Road reserve, which had been part of the 485 acres that were taken by proclamation from the harbour board and vested in the borough council for airport purposes in 1945. It was populated by a large number and variety of wading and wetland birds and zoned for community purposes. On 8 June 1967, the city council resolved to protect the wildlife in the reserve (D6(a):1204).

9.3.4 **The Hawke's Bay Wildlife Trust proposes a wildlife park**

On 1 March 1967, the Hawke's Bay Wildlife Trust was incorporated with the object of preserving and protecting all native and introduced wildlife in the province and elsewhere for the benefit of the public. The nine foundation corporate members were the Napier City Council, the Dannevirke Borough Council, the Hawke's Bay Holiday and Travel Association, the Deerstalkers Association, Federated Farmers, the Hawke's Bay Acclimatization Society, the Education Board, the Royal Forest and Bird Protection Society, and the New Zealand Ornithological Society.

In 1968 the trust proposed to lease and develop the lagoon area of the 124-acre Westshore Domain as a wildlife sanctuary (D6(a):1238–1240). After clearing the proposal with the Department of Civil Aviation, the Minister of Lands approved it (D6(a):1241–1242). On 28 February 1972, the 124 acres were leased for 38 years to the trust to develop as a wildlife park (D6(a):1247–1253).

9.3.5 **The residential marina proposal**

By 1966 the Napier City Council, having used up the land that was acquired for housing and industry from the harbour board under the 1945 Act, proposed to reclaim and develop 55 acres of the tidal estuary. The Napier Harbour Board and Napier City (Inner Harbour) Subdivision Act 1966 was passed, authorising the board to transfer the 61 acres 3 roods to the city council for reclamation, development, subdivision, and sale (D6(a):1436).

While the Bill was being considered by the local Bills committee, the town clerk intimated that the council might wish to develop the area partly as a marina subdivision (D6(a):1450). About 190 sections and a large boating area were envisaged, and the Marine Department approved the scheme (D6(a):1438).

The plan put the Wildlife Service in the position of having to condone a development that would disturb bird life and contravene the Wildlife Act 1953. In 1969 the Hawke's Bay Acclimatization Society mooted the exclusion of 61 acres from the wildlife refuge. A departmental refuge committee agreed (D6(a):1481–1482). Under section 14 of the Wildlife Act, the revocation required the consent of the occupiers and the Ministers of the Crown who were charged with the administration of the Crown land affected.

Consent was obtained from the harbour board and the Hawke's Bay Wildlife Trust, but the Napier City Council considered that the 61 acres were already severed from the refuge under the 1966 Act. Anticipating that a small group would object to the marina development, it asked that the usual procedure of advertising exclusions be restricted to the balance of the area originally gazetted. Two successive Ministers of Lands said the council should advertise, and, on 16 and 21 May 1973, notices appeared in local newspapers. Seven letters of objection were received from 12 people (D6(a):1455–1458, 1482).

In 1970 and 1971, a suggestion from the city planner that the outfall channel be developed for rowing and boating had also received some publicity and the local acclimatisation society and the Department of Lands and Survey had objected (D6(a):1353, 1358).

9.3.6 **Ecology Action (Hawke's Bay) opposes marina development**

In April 1973, Ecology Action (Hawke's Bay) produced a report highlighting three threats to the Ahuriri Lagoon wildlife refuge: (a) the city council's proposed marina suburb and reclamation for industrial sites and a grassed reserve; (b) the planned extension of the motorway from Taradale and Kennedy Road; and (c) the Wildlife Trust's development of the Westshore Pond to include a car park, a track, a curator's house, a mini zoo, a kiwi display house, and a deer park (D6(a):1256–1262). The report was well publicised, and a campaign against the marina conducted by Ecology Action and other interested parties got under way. After the Local Authorities Board had approved the raising of a \$500,000 loan by the council to develop the residential marina, Ecology Action organised a petition for a poll of ratepayers, which was signed by 1056 people, and the council agreed to proceed with a poll (D6(a):1477).

9.3.7 **Marina development shelved**

At a meeting of the Nature Conservation Council on 12 and 13 June 1973, there was a general consensus that the lower estuary, while useful for migratory birds, was not nearly as valuable as the outfall channel and the Westshore Pond. Weighing up all the circumstances, the council considered that the abandonment of the planned marina would not be justified (D6(a):1439–1442). Talks with the Minister of Internal Affairs, Henry May, however, revealed that the Government would press for an environmental impact study. Accordingly, the city council decided to defer both the poll and the marina project, and a council subcommittee was instructed to prepare alternative schemes for the area (D6(a):1479).

9.4 **REPORTS AND DISCUSSIONS ON FUTURE MANAGEMENT**

9.4.1 **Dr Hunnable's report**

To enable the council and the harbour board to give consideration to an 'acceptable development', a report was commissioned from the Auckland firm of Dr T J Sprott and Associates and prepared by Dr Hunnable.

Dr Hunnable concluded that conservation could not be achieved by leaving the area alone. The lagoons were slowly filling in and, unless something positive was done to conserve them, they would progressively become swamps and, eventually, dry land, and existing feeding grounds for birds would inevitably disappear. If the area were to become a recreation and wildlife area, a fairly complete system of control would be needed to maintain it in as natural a state as possible and prevent the water and mudflats becoming fouled and badly polluted (D6(a):1487, 1490).

9.4.2 **The Kilner and Cooper report**

A Kilner and R Cooper, in their Ministry of Agriculture and Fisheries report of 7 April 1975 on *Development and Protection of the Ahuriri Estuary*, pointed out

that estuaries were the most productive of any ecosystems. It was important that man was conservative in his interference with the estuarine ecosystem. The extent of the contribution of the Ahuriri Estuary to fish production was unknown. When it was formed after the earthquake, the extensive wetlands associated with it had been destroyed by drainage or by being cut off from the main channel. A fairly complete system of control would be needed to maintain it in as natural a state as possible and prevent the water and mudflat body from becoming fouled and badly polluted. One authority or a board representing the various interests was needed (D6(a):1493–1503).

9.4.3 Development for recreation and other purposes

After studying Dr Hunnab's report, the council and the board decided on the development of a larger area of water for recreational and other purposes. Certain works for which approval from the Transport Department would be sought could be done without affecting the ecology. These works included excavation by the harbour board, for which an environmental report would be procured before the work was started. The board had been excavating on the south side of the estuary for fill to be used in the harbour and planned to reclaim the south side and build trawler or lighter piers.

The council and the board suggested that the control of the area and the work should be in the hands of an authority comprising themselves, the Department of Lands and Survey, and the Department of Internal Affairs (D6(a):1506–1507). The Royal Forest and Bird Protection Society had already asked the Government to create an Ahuriri wetlands reserve, with a board to take responsibility for the whole area (D6(a):1491). Environmental interests were generally opposed to joint local authority and departmental management.

9.4.4 Environmental groups favour national protected area

A public meeting to discuss the future of the Ahuriri reserve was called by the Royal Forest and Bird Protection Society, Ecology Action, and Wai-Ora Action, a Maori conservation group associated with Ecology Action (a waiora area of water, Heitia Hiha explained, donates health and vitality). The meeting was held at the Hawke's Bay Community College and was chaired by the principal, Dr John Harre. About 200 people attended and among the guest speakers was Mr Tareha of Wai-Ora Action, who spoke on cultural aspects and early Maori history. A motion that the Ahuriri Estuary and Lagoon should become a national protected area in the form of a park or reserve was supported by 148 of those present (D6(a):1510–1512).

Early in 1976, the three groups met Professor G Knox of Canterbury University, a specialist in marine biology. He offered his services in establishing a link between his department and the community college to form the basis of a study and valuation of the estuary in total and to set out proposals for an integrated research programme (D6(a):1521–1526).

9.4.5 Steering and technical committees established

In response to public interest in the future of the estuary, in June 1973 the Napier City Council convened a meeting of representatives of involved local bodies and Government departments. Steering and technical committees were set up and

charged with the investigation and assessment of existing and future land use and resources, and the impact of known and likely proposals (D6(a):1428).

9.5 THE KNOX REPORT

9.5.1 Release and recommendations

In August 1979, the technical committee published the long awaited 'Knox report': *Ahuriri Estuary: An Environmental Study*. On 23 October, this was released to the public. It favoured 'preserving the whole area as much as possible as a wildlife refuge and tidal wetland area with strict control over any future developments' (D6(a):1533).

The study recommended that a management plan should be developed for the estuary (with appropriate changes in the Napier and Hawke's Bay County district schemes), future public access to the estuary's borders should be thoroughly examined, and no further permits should be issued to the harbour board to extract gravel from the area. Other recommendations included:

- (a) No further dredging, reclamation, and quarrying should be allowed.
- (b) Industrial pollutants should not be discharged.
- (c) Recreational development should be compatible with wildlife values.
- (d) Proposals to develop a deer park and nocturama for introduced mammals and native birds should be reconsidered.
- (e) The canoe reserve, a site wanted by the Ahuriri Maori committee for a marae, should be kept as an open public space.
- (f) Fish farming should not be permitted.
- (g) Management plans should be developed for the Westshore Lagoon and Estuary, and further studies into such matters as the feeding patterns of birds and the water quality and flow should be carried out (D6(a):1534).

9.5.2 Planning responsibilities handed over

Future planning responsibilities were handed over to the city council and the harbour board by the steering committee on 6 May 1980, and the committee was disbanded. Members of the technical committee were retained in an advisory capacity (D6(a):1535–1537).

9.6 ECOLOGY ACTION AND WAI-ORA ACTION: COMPLAINTS AND PROPOSALS

In April 1977, Wai-Ora Action complained that the city council had not pulled down a stopbank built eight years earlier. The stopbank had drained several areas of lagoon, leaving it 'smelling like an unflushed toilet', upsetting the marine life, and preventing the ebb and flow of the tide in the nearby canoe reserve. The boundaries of the canoe reserve should be clearly defined so that it could be developed by the Ahuriri Tribal Executive for the use of the people, possibly for a marae (A6(a):1470). The mayor explained that the council had adopted an attitude of status quo since it had set up committees to inquire into all aspects of the estuary (D6(a):1471–1473).

In light of the Knox report, Ecology Action and Wai-Ora Action formulated joint proposals regarding the future of the estuary and its environs. Some people, they admitted, had felt that they had been obstructionist, but 'their very real concern for the area led them to present the proposals as a constructive approach to the best way of preserving the natural character of the area'. They proposed:

- (a) the preservation of the entire wetland area from Pandora Bridge to the Maraetara–Petane area as a reserve;
- (b) a joint city and county council district scheme;
- (c) a board to represent local bodies, wildlife services, conservationist societies, industry, and tourism;
- (d) the protection of the western marsh verges under the Poraiti Hills by QEII preservation covenants; and
- (e) the removal of deer to enable the re-establishment of trees and cover for more indigenous wildlife.

These proposals would simplify management, protect both wildlife habitats and more than 30 surveyed archaeological sites on the western verges, and permit the regeneration and replanting of the western verges and the expansion of bird areas into the present deer reserve. The reserve could be made part of a wider walkway concept. Access to and enjoyment of the area could be permitted under controlled conditions. A unique educational reserve within walking distance of the city could be established (D6(a):1540–1542).

9.7

HARBOUR BOARD PROPOSALS AND DISTRICT SCHEME REVIEWS

Other interested parties were more critical of the Knox report. The harbour board proposed to carry out further excavation and reclamation work in the Humber Street pond to satisfy the growing demand for improved sailing conditions, provide a bird roost, and extend a car parking and boat launching area (D6(a):1531). A water recreation lobbying committee was elected at a meeting of about 60 people in Napier to back the harbour board in any move to dredge more of the lower estuary (D6(a):1545).

The Napier district scheme review retained the estuary as a natural wilderness area with limited public access. Only drainage and excavation works were to be allowed. A total of 12 objections and submissions was heard by the planning committee.

The Ahuriri Tribal Committee objected to the limitations that were placed on the floor size and height of the planned traditional meeting house for the canoe reserve, and Charles Mohi said that the meeting house was vital to Napier to bring people together.

During the course of the hearing, the Hawke's Bay Harbour Board presented its own harbour management plan, which advocated further dredging (D6(a):1546–1547, 1553). Its district scheme review, on the other hand, recognised the need to preserve the natural characteristics of the Ahuriri Estuary as a whole (D6(a):1546–1553).

In 1981 the harbour board obtained approval both from the Ministry of Transport to remove a shingle bank and form a single body of water that could be used by small boats and from the Planning Tribunal to resume dredging in the

estuary area (D6(a):1562–1563). No objections were raised to the Planning Tribunal's approval of a reclamation of 4600 square metres of land adjacent to Humber Street for a car park and beach for the estuary ponds (D6(a):1564). A few months before the harbour board ceased to exist, it planned to remove the spit in Pandora Pond, renewing another public controversy (D6(a):1566–1567).

9.8 **DRAFT MANAGEMENT PLAN MOOTED**

Despite a steering committee recommendation that a management plan for the estuary should be prepared, little happened until 1984, when a meeting of representatives of the administering authorities set up a working party to prepare a draft (D6(a):1569–1572). Concern over lack of progress led to new initiatives in 1989, by which time the Department of Conservation had been established and local government reorganised (see paras 8.5, 8.6).

9.9 **MONOCULTURAL LEGISLATION AND PROCESSES**

Weighing up the evidence on the ecosystem management that operated over the Ahuriri Estuary prior to the late 1980s, we found that it was essentially monocultural. As yet, the general thrust of the Treaty of Waitangi Act 1975 ('to provide for the observance and the confirmation of the principles of the Treaty') has had no real effect. No other legislation applying to the management of the estuary contained any specific provisions obliging administering authorities to acknowledge Treaty principles or Maori interests, except section 3(1)(g) of the Town and Country Planning Act 1977, which required Maori values with respect to 'ancestral land' to be taken into account. This could conceivably have applied to the island of Tapu Te Ranga, but did not.

Relevant departments and local authorities made few, if any, attempts to consult local Maori or actively involve them in planning and management processes. Indeed, they were deemed to have no greater interest in the estuary than the Pakeha environmental lobby, which was primarily concerned with wildlife. All planning and management went on without reference to the tangata whenua, yet in the end it was the tangata whenua, in alliance with the environmentalists, who defeated the marina project.

As the Tribunal found in its report on the Manukau claim, attitudinal and legislative changes were needed for Maori interests to be acknowledged and given 'the priority guaranteed in the Treaty'.²

9.10 **THE NEW LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK**

9.10.1 **Introduction**

A new legislative framework for conservation and resource management was established by the Environment Act 1986, the Conservation Act 1987, the Conservation Law Reform Act 1990, and the Resource Management Act 1991.

9.10.2 The Environment Act 1986

Under the Environment Act 1986, the Parliamentary Commissioner for the Environment was obliged to take full and balanced account of the principles of the Treaty of Waitangi when monitoring the environment and advising public authorities on environmental management.

9.10.3 The Conservation Act 1987 and the Conservation Law Reform Act 1990

The Conservation Act 1987 defined conservation as the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations. Section 4 of the Act stated, 'This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.'

The principal Act established the Department of Conservation, and the Conservation Law Reform Act 1990 established the New Zealand Conservation Authority and advisory conservation boards to bridge the interface between the Minister and the Department on the one hand and the public on the other. The main purpose of the authority was to advise the Minister on statements of general policy under the Act and associated legislation. The Rangitikei–Hawke's Bay Conservation Board had jurisdiction over Hawke's Bay and, consequently, over the Ahuriri Estuary.

9.10.4 Conservation management strategies

Under section 17(2)(d) of the Conservation Act 1987, which was inserted by the Conservation Law Reform Act 1990, the Department of Conservation was required to prepare conservation management strategies for all the areas that it managed and all national and historic resources within its care.

The purpose of a conservation management strategy was 'to implement general policies and establish objectives for integrated management of natural and historic resources, including any species managed by the Department' under the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Wild Animal Control Act 1977, the Marine Mammals Protection Act 1978, the National Parks Act 1980, the New Zealand Walkways Act 1990, and the Conservation Act 1987.³

9.10.5 The Resource Management Act 1991

The Resource Management Act 1991, which came into force on 10 October 1991, 'restated and reformed the law relating to the use of land, air, and water'.⁴ The purpose of the Act was 'To promote the sustainable management of national and physical resources' (s 5(1)). In contrast to the Water and Soil Conservation Act 1967, special provisions for the protection of Maori values and interests were made.

The Act required 'all persons exercising powers and functions under it, in relation to managing the use, development, and protection of natural and physical resources' to 'take into account the principles of the Treaty of Waitangi' (s 5). The relationship of Maori, their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' was recognised and provided for as a matter of 'national importance' (s 6(e)). Other specified matters of national importance were the protection of major environmental features (coasts, lakes, mines,

landscapes, indigenous vegetation, and habitats of indigenous fauna) and the enhancement of public access to such areas. All persons exercising powers and functions under the Act were to have particular regard to 'kaitiakitanga' (s 7(a)), meaning 'the exercise of guardianship' and, in relation to a resource, including 'the ethic of stewardship based on the nature of the resource itself' (s 2).

Issues in this claim concerning the claimants' tino rangatiratanga over their taonga, Te Whanganui-a-Orotu, clearly fall within the scope of the special provisions in the 1991 Act. So do issues concerning environmental damage to Te Whanganui-a-Orotu and lack of consultation and inadequate acknowledgement of Treaty principles in environmental management. Before examining these issues, we need briefly to review the evidence we were given on management plans and processes affecting the Te Whanganui-a-Orotu area under the new legislation.

9.11 **MANAGEMENT PLANS COVERING THE TE WHANGANUI-A-OROTU AREA**

9.11.1 **The Ahuriri Estuary management plan**

In 1989 the Department of Conservation and the Napier City Council agreed to initiate the development of a management plan for the Ahuriri Estuary (see fig 17). A steering committee 'comprising representatives of central and local government agencies (officials), local Maori people, and environmental interest groups' collected available information and research findings and prepared an issues document for public consultation. Thirty-eight submissions were received. On 17 July 1990, a joint committee comprising three members of the Napier City Council, three members of the Hawke's Bay Regional Council, and two members of the Hastings District Council was formed to oversee a 'consultation and submission phase' and the preparation of a draft plan and to recommend its adoption by the constituent authorities.

In preparing the draft, the joint committee recognised that it might need to be amended to reflect the changes that the Resource Management Act 1991 and the *New Zealand Coastal Policy Statement*, due to be released for public comment by 1 October 1992, would bring.

A draft management plan, dated December 1991, was made available for public comment and submissions, and, 'after many months of careful deliberation and public consultation', a revised and expanded plan dated September 1992 was completed in a way that generally recognised the Resource Management Act. It was intended to provide strategic guidance to management agencies when carrying out their respective functions, powers, and duties under that Act (I9(e):17).

The plan was presented in a series of issues and policies relevant to the management of the estuary and its catchment (I9(e):3). The third of the series was headed 'Maori Traditional Features/Values/Uses'. Its objective was:

To identify and provide as appropriate for the protection and enhancement of Maori traditional features, values, and resource use in the Ahuriri Estuary and its catchment.
(I9(e):25)

Four issues affecting Ngati Kahungunu needed to be taken into account by management agencies: opportunities for Maori to access and use their traditional

resources; the identification of and protection for traditional Maori resources and values; the mitigation and, where possible, elimination of water pollution; and the protection of ancestral lands, water, wahi tapu, and other taonga.

Management policies were to ensure that such traditional sites and kaimoana and other resources were identified and protected in full consultation with the tangata whenua. Management authorities were to take into account the principles of the Treaty of Waitangi. Iwi were to consider the preparation of their own management plan for the estuary, having regard to the objects of the *Ahuriri Estuary Management Plan*. The Napier City Council was to ensure that the use of the canoe landing reserve was to remain compatible with the natural values of the northern side of the estuary; development of the site would not be permitted (19(e):26–27).

9.11.2 **The conservation management strategy**

The conservation management strategy was prepared by the Department of Conservation during 1992 and 1993, in consultation with the Rangitikei–Hawke’s Bay Conservation Board, and referred to the New Zealand Conservation Authority in 1994. It defined management objectives for the Ahuriri conservation areas to include the protection of important natural and historical values and, subject to this, the facilitation of public access to and use of them. Continuation of opposition to uses and developments, it noted, would have a negative impact on these values. The importance of the area for the tangata whenua and consultation with and inclusion of them in management planning and interpretation should be recognised (H12: attachment 1).

9.11.3 **Hawke’s Bay Regional Policy Statement 1994**

Te Whanganui-a-Orotu lay within the area administered by the Hawke’s Bay Regional Council, the Napier City Council, and the Hastings District Council, all of which had authority delegated by the Crown (in the exercise of its Treaty rights of kawanatanga) to manage natural and physical resources under the Resource Management Act 1991.

The Hawke’s Bay Regional Council had the responsibility for those matters of regional significance that were relevant to resources and the environment. This responsibility included the preparation of a regional policy statement to provide an overview to which plans and actions of the city and district councils and the Department of Conservation must conform.

The policy statement that was proposed in March 1994 included a chapter on ‘The Maori Dimension’, which defined and clearly acknowledged the regional council’s statutory obligation to identify Maori values and interests and ensure that they were treated in accordance with the requirements set out in the 1991 Act. ‘Within the terms of the Treaty principle of Te Tino Rangatiratanga O Te Hapu/Iwi Maori, each hapu/iwi in Hawke’s Bay,’ it said, ‘has the right to determine what these values and interests are’ (19(c):29). The challenge was to identify the resource management issues that concerned Maori, and, in consultation with them, work out ways in which they could best be resolved within the framework provided by the Act.

To obtain suggestions on ways in which matters of significance to hapu and iwi could be addressed within the framework of the Resource Management Act, the

regional council sought support, cooperation and guidance from Te Runanganui O Ngati Kahungunu Incorporated, the Takitimu District Maori Council, the Kahungunu Maori Executive, the regional council's Maori committee, and others. Hui were held during the early consultation period, and the chapter on 'The Maori Dimension' was prepared and included in the proposed policy statement. The chapter itself did not represent the completion of the process of consultation. Rather, it established a framework and starting point for the development of a new relationship under the 1991 Act, based upon cooperation and understanding (I9(c):30). (Because the 'Maori Dimension' chapter contains valuable background material on matters relating to resource management pertinent to the present claim, we have included some extracts from it, with comment, in appendix V.)

9.11.4 **The 1994 regional coastal plan**

The water of the Ahuriri Estuary up to one kilometre above the Taipo Stream confluence is owned by the Crown and administered by the Hawke's Bay Regional Council under the Resource Management Act 1991, the *New Zealand Coastal Policy Statement*, and its own regional policy statement.

Under the Resource Management Act, the Hawke's Bay Regional Council produced a proposed regional coastal plan in September 1994, which focused on promoting the sustainable management of the natural and physical resources within the coastal marine area. The plan was prepared in full consultation with the community of Hawke's Bay. Included among the five major groups consulted were iwi authorities and hapu/iwi.

In the pursuit of the establishment of a practical framework for sustainable resource management that incorporated Maori ethics for coastal environmental protection, the regional council was required to take into account the relevant provisions of the Resource Management Act.

For the regional coastal plan to comply with the spirit of the Act, the partnership principle of the Treaty, which recognised 'rangatiratanga' and other principles, had to be taken into account, 'to allow proper participation by Ngati Kahungunu and its constituent Hapu in the management/decision making process'.⁵ (To indicate how it proposed to comply with the requirements of the Act and Treaty principles, a summary of the relevant parts of the plan is included in appendix V).

9.12 **NEW CONSULTATIVE PROCESSES**

9.12.1 **Maori committees**

In accordance with the duty to consult the tangata whenua under the new legislative framework, the local authorities that were jointly responsible for environmental management and planning in the Te Whanganui-a-Orotu area established Maori committees to advise their respective councils.

The first was the Maori standing committee of the Hawke's Bay Regional Council, mooted in 1988 and set up in August 1990. It was based on the existing iwi structure, which consisted of four taiwhenua (tribal areas) of Te Runanganui O Ngati Kahungunu, namely, Wairoa, Te Whanganui-a-Orotu, Heretaunga, and Tamatea. The committee consisted of 15 members, 12 Maori representatives, and

three elected councillors. Iwi representation was equal for the four taiwhenua (19(d):10–11).

We understand that the Hastings District Council also has a Maori advisory standing committee, which was established on 24 June 1991. It consists of 12 Maori members drawn from 24 marae in the area and chosen by representative committees. Minutes of the Maori advisory committee are presented at council meetings and its resolutions have the status of standing committee recommendations.

The idea of having a Maori advisory committee to the Napier City Council was mooted in 1991, and the committee met for the first time in February 1992. We understand that the committee consisted of six members (four Maori and two city councillors). The Maori members were nominated by four main groups, namely, the Ahuriri Tribal Executive, Maori wardens, the Maori Women's Welfare League, and taiwhenua of Te Whanganui-a-Orotu, and by any other Maori group operating in the city. Originally, taiwhenua of Te Whanganui-a-Orotu organised a hui, at which the four members were elected from about 12. The city council provided support for the Maori advisory committee, and council subcommittees provided agendas on subjects that they were debating. Maori advisory committee recommendations were made to council subcommittees. The Maori advisory committee members had no direct voice in the council.

9.12.2 **The findings of the Parliamentary Commissioner for the Environment**

In June 1992, the Parliamentary Commissioner for the Environment, Helen Hughes, summarised her case study findings on Hawke's Bay Regional Council initiatives on iwi consultation in her report *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*. Her findings on these initiatives in respect of Te Whanganui-a-Orotu taiwhenua were:

- 1 Insufficient resources . . . resources need to be provided (by council).
- 2 Tangata Whenua need more information on legislation and planning processes.
- 3 Maori values and views of environmental management are not accepted as valid in the planning system.
- 4 Maori decision-making structures and values need to be combined with the Pakeha system.
- 5 Maori Standing Committee seen as only viable alternative given resources of Iwi and Council, but Maori have no voting rights and Iwi representatives cannot act as advocates when issues of concern to Maori are taken to full Council.
- 6 Council should not assume that the committee has the sole right to articulate Iwi and hapu opinion; the Council should still consult directly with those concerned.
- 7 The consultation process needs to be outcomes oriented and monitored for effectiveness. Central government should also ensure the system they have set in place is effective.⁶

9.12.3 **Relationships with local authorities**

According to Heitia Hiha, there has been 'a great change in natural resource management' to fulfil the requirements of the Resource Management Act 1991 (D21:12). The regional council's standing committee was the first, and had been used by the Parliamentary Commissioner for the Environment as 'a kind of standard towards what Standing Committees should be like'. The Hastings district standing committee had 'even gone further' (D44(9):21). He and Marjorie Joe

were on the Napier committee and were concerned that one of the councillors used the committee 'as his media launching pad'. The two city council members were councillors, not employees, who were required to work under the Act.

Te Whanganui-a-Orotu was within the City of Napier boundary, but all their marae were inside the Hastings district boundary. The Hastings committee was 'a very active group' and had put in 'some very good submissions'. It had appointed a Maori liaison officer, who worked right next to the planning department. Consequently, Maori people had quick contact with anything that was going on in that area (D44(9):21).

Since his work on the Maori advisory committee began, Heitia Hiha continued, it had not addressed many issues as far as Ahuriri was concerned. It should have been consulted about the production of the video *Ahuriri Looking Ahead*, in which Maori people were recognised only because of their historical association with the area, not, as they should have been, as owners of the lagoon, or pipi gatherers, or partakers of other benefits (D21:12). The video showed how they had been marginalised.

Such marginalisation, he added, still continued (D44(9):10). The Crown transferred its alleged interests to local body type organisations, which disregarded their Treaty rights and the principle of partnership. Local authorities refused to recognise them, except when it was historically or culturally appropriate, and that prejudicially disadvantaged them. Local authorities were managing the resource without consulting them. For example, they were denied access to Te Whanganui-a-Orotu by locked gates in the pump house area, which was a bountiful site for herrings, and by 'No parking' signs where they went fishing, though parking days were arranged for duckshooters (D44(9):2-3).

Marjorie Joe instanced the failure of the city council to consult them before beginning works that uncovered a midden of pure white pipi shells on Te Ihu o Te Rei. A hui told the council to stop and close up the midden (D26:3; cf H9).

9.12.4 **The proposed motorway extension**

One of the important issues that local Maori had addressed was Transit New Zealand's proposed motorway extension from Taradale to the Hawke's Bay Airport across the Ahuriri channel. By 1993, Transit New Zealand was planning an extension, not only to provide a better link from the south but also to relieve the noise and congestion in the Pandora Bridge area. It wanted to build a new bridge on the western side of the estuary because the Pandora Bridge could not cope with the traffic. Under the Resource Management Act 1991, it was obliged to consult with local iwi (D15).

According to Heitia Hiha, Transit New Zealand went to a meeting at Waiohiki Marae to discuss where the motorway should go, and gave them four proposals. The one they considered ran through the industrial area and endowment land presently being farmed and alongside the old Embankment Bridge and the road skirting the western side of the Westshore motor camp. Approval for this route was sought from the Napier City Council. If the people had their way, they would not have had a bridge going across that area because it was so important. Transit New Zealand had surveyed the shellfish beds, and Malcolm Hart of the Health Department had given them figures that showed that the beds were 160,000 times more polluted than shellfish beds that had been shut down up north. Yet they hoped that when the pollution was cleared, and that part of the estuary received

its mauri back, they would be able to gather kaimoana. They wanted a bridge spanning the whole area so that the natural flow of water would continue, not a culvert type of bridge which would constrict the flow (D44(9):22–23).

In the first instance, they wanted to discuss the kind of construction and whether a bridge could be built across the Ahuriri channel without affecting any of the shellfish beds. They wanted to get a reasonable sized waka up the channel. The drainage of the area concerned them; the area would have to be properly drained so that there would be no run-off from the bridge or crossway into the estuary to further contaminate the shellfish. They wanted to partake in the planning and decision-making at all stages, but preferred that the construction did not go ahead (D44(9):4–6); see also E5:61–62).

9.12.5 **Legislation to enable the council to sell or lease lands vested in it**

A second important issue that the Maori advisory committee had addressed was the introduction of the Napier Borough Endowments Amendment Bill 1993 (D33) into Parliament, which would have empowered the Napier City Council to sell or lease certain lands that were vested in it pursuant to the Napier Borough Endowments Act 1876 for industrial and residential development. The Bill was deferred when it reached its second reading (D44(9):9). The land involved included Pukemokimoki (see para 6.2).

According to Heitia Hiha, the claimants attended a full council meeting to show their concern about this legislation, and ‘managed to persuade them to refrain from taking any further action . . . until such time as the claim was determined by the Waitangi Tribunal’. They were lucky that one of the councillors advised his colleagues that, just the night before, he had read a 1947 report (presumably E12), produced by the then town clerk, mentioning that Pukemokimoki had never been sold.

Underlying the claimants’ concern over this issue was the feeling that they should have some input not only into the disposal of land vested in the Napier City Council, which had been reserved for them or reclaimed from Te Whanganui-a-Orotu, but also over the development of the whole area. The wool stores on the old Te Pakake Pa site, for example, were going to be changed into residences. The Port Railway Station nearby was changed into a kind of museum. It was all right for them to take part in the spiritual and environmental side of resource management, but when it came to the business development side, they were not part of it (D44(9):10). None the less, their rangatiratanga, mana, and kaitiakitanga over Te Whanganui-a-Orotu extended to these matters, as did the Treaty principles, particularly the principle of partnership (D44(9):30–32).

Neither the Napier City Council nor the Hawke’s Bay Regional Council gave evidence on the lands vested in them by virtue of the Local Government (Hawke’s Bay Region) Reorganisation Order 1989 under the Local Government Act 1974. Through their solicitors they notified the Tribunal of their interest and formal participation in the hearing of the claim and of their intention not to appear or take an active part in the proceedings unless requested. Due representation by the Crown was deemed sufficient. The Napier City Council further advised through its solicitors that it had no intention of affecting any Tribunal hearing by conducting land sales (2.85).

9.12.6 The claimants' view of the consultative system and process

Claimant evidence on the relationship of the Maori advisory committee and the Hawke's Bay Regional Council suggested to Mr Young that Maori were not being given the standing or the finance or an effective voice in the council's management of resources. He cited the opinion of Mana Cracknell that:

The Maori Standing Committee as a consultative system and process operates on the premise that the Pakeha members of the Committee, when advocating for Maori within the structure of regional government, will perform their dual role with objectivity.

He noted that a similar opinion was espoused by Shaun Kerrins, a research student in anthropology, who detailed 'examples of cultural blindness and dominance by regional councillors based on interviews, media statements, [and] by discussion during the local body election campaign' (E5:67).

Heitia Hiha thought that the unfortunate thing about the Maori advisory committee in Napier was that council officers were required to take account of Treaty principles when working under the Resource Management Act 1991 but councillors, who were elected by the people, said, 'Well who are these, this Advisory committee to tell us what to do?' (D44(9):21).

Summing up, it could be said that the claimants viewed the new consultative system and processes under the Resource Management Act with scepticism and a lack of confidence. Their two prime concerns were the failure of the consultative process to carry the Maori view through to action, and the narrow range of topics that the councils considered appropriate for tangata whenua input.

9.12.7 Relationships with the Department of Conservation

Evidence on working relationships between the Department of Conservation and the tangata whenua was given by several witnesses and through supporting papers (D40(6)). 'We seem to be in partnership with the Department of Conservation, that's the area we seem to fulfil,' said Heitia Hiha. It was not just the estuary and that side of it that concerned them, but the development of the whole area (D44(9):22).

Another witness for the claimants, Kurupo III Te Pakitu Tareha, described the project to restore Otatara Pa for local hapu. The project was being sponsored by the conservation corps of the Ministry of Youth Affairs and administered by the Department of Conservation in cooperation with Waiohiki Marae (see para 1.7.3). 'In a nutshell,' he said, 'we were alarmed at the degradation of the environment within our traditional boundaries, so we decided to do something about it' (E17:1; D40(b):45–48, 58). He and his corps members had worked on a beautification programme of the lower estuary that was initiated by Toro Waaka, cleaning up rubbish, planting native trees, and completing a walkway round it; they had also worked in the Te Pakake area. 'Through projects of this type and through this claim,' he concluded, 'we are trying to restore the land, the waters and the mauri of these places to what they once were' (E17:3).

Mr Ombler gave evidence that, in preparing the non-statutory Ahuriri Estuary management plan, the Department of Conservation and the three local authorities had 'involved other groups from the community in a steering committee'. In his view, both the Conservation Authority and conservation boards, which approved conservation management plans and strategies, were 'citizen bodies appointed by

the Minister of Conservation'. He noted that both had tangata whenua nominees (H12:6–7) (see para 9.11.1).

On the other hand, Nigel Hadfield, who was involved in the planning of the Ahuriri management plan, said:

There were about 10 pakehas, academic sort of people. . . . It was quite intimidating because these people were representing their big organizations and they were challenging each other half of the time . . . to come in with a Maori view was not easy. Basically they were looking for a rubber stamp . . . that's how I saw it. (D40:4)

Pamela Bain, a conservancy archaeologist, gave evidence of the partnership between the Department of Conservation and hapu of Te Whanganui-a-Orotu in the Otatara project and of the association of Te Runanga O Ngati Kahungunu with Mark Allen, a University of California archaeologist, in the locating, mapping, and gathering of historical material on pa sites and the training of young people on research (see para 2.2.6). Excavation, she said, could be conducted only with the permission of the tangata whenua and the Historic Places Trust (H9).

It seems to us that shared concerns of the Department of Conservation and the claimants have provided solid ground for practical cooperation. Concerns listed by the department in 1990 were: the proposed motorway development through the ecologically important southern marsh area; the dredging both of channels and of the area between the Pandora and Embankment Bridges; the possible future expansion of the airport; future industrial development; land use practices within the catchment area; water quality and discharges into the estuary; the protection of archaeological and historical sites; and restoration work.⁷

9.12.8 **Closing submissions on consultation issues**

In closing, Ms Wickliffe addressed the issues concerning environmental management and planning prior to, and after, the Resource Management Act 1991 was passed. The legislation, she said, once used to allocate management rights to natural resources, was:

a breach of the letter and spirit of the Treaty of Waitangi. [It] conferred on central government exclusive control to manage and or delegate the management of Te Whanganui-a-Orotu without regard to the Crown's duty to actively protect Maori interests and without regard to the wishes of the Claimants.

It was also a direct breach of the letter and spirit of the Treaty in that it failed to recognise or give effect to the claimants' rights to rangatiratanga and full authority over Te Whanganui-a-Orotu (I9(a):2).

The Ahuriri Estuary management plan, she said, made provision for tangata whenua matters but made no attempt to address seriously any transfer of management responsibility to the claimants, notwithstanding section 33 of the Resource Management Act allowing them to do so. The relevant authorities had deemed it their prerogative to effect a policy whereby no development on the canoe reserve of the claimants was to be permitted. Evidence given to the Tribunal illustrated that tangata whenua needs in relation to Te Whanganui-a-Orotu were being broadly balanced against other interests in the lagoon. This had occurred

because of the inadequacy of the statutory regime, for which the Crown was responsible (I9(a):5).

The duty of the Crown to actively protect:

requires that where they delegate the responsibility of managing natural resources to other agencies then the Crown must ensure that there is adequate protection for tangata whenua interests provided for in the relevant legislation.

Legislation of this type should ensure the protection of Maori rangatiratanga over, and protection for, taonga. Failure to provide statutory definition is therefore an omission of the Crown in terms of section 6(1) of the Treaty of Waitangi Act 1975 (I9(a):5).

Since the passing of the Resource Management Act, Ms Wickliffe continued, there was no clear evidence that the policy of the Crown had been to ensure that those acting pursuant to the Act did give these matters the weight required by Treaty provisions (I9(a):5).

She quoted section 20 of the New Zealand Bill of Rights Act 1990, which provided that:

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture . . . of that minority.

Clearly, the Bill of Rights Act established 'in the form of statute a clear recognition of minority rights which protect, inter alia, their tino rangatiratanga and taonga' (I9(b):6).

She submitted that:

the continued failure to adequately provide for recognition of Maori rangatiratanga over taonga through the general inadequacy of section 8 of the Resource Management Act and the continued failure to address the measures necessary to ensure the protection of taonga so that Maori may enjoy their culture is in breach of the Bill of Rights Act and New Zealand's obligations at international law under the International Covenant on Civil and Political Rights. (I9(a):6)

She commented that Te Whanganui-a-Orotu was 'in a particularly vulnerable state', which was directly attributable to past breaches by the Crown of its obligation to Maori, such breaches being at least in part due to legislative action. She then quoted from a Privy Council decision on this point:

While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. Again, if as in the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations and may extend to the situation where those breaches are due to legislated action. (I9(a):7-8)⁸

Section 8 of the Resource Management Act 1991 needed amending in order to give effect to the principles of the Treaty (I9(a):7):

The Act must be broadened to permit the development of a regime that will involve the tangata whenua in a real and significant way in the management of this resource [Te Whanganui-a-Orotu]. (I9(a):8)

There were successful examples of joint management regimes in other jurisdictions with comparable indigenous populations. Basically, these regimes envisaged joint management, with significant indigenous representation on the relevant management boards. It would be an indictment on the Crown if a similar standard of participation in management could not be met in New Zealand (I9(a):8).

On the issue of title to the estuary, now under the management of the Department of Conservation, she submitted that the current policy of the Government permitted the vesting of title in resources of significant size. A recommendation from the Tribunal in this respect would be entirely consistent with that policy (I9(a):8).

9.13 **DOES THE NEW STRUCTURE FOR ENVIRONMENTAL MANAGEMENT ADEQUATELY PROTECT THE TANGATA WHENUA'S TREATY RIGHTS?**

9.13.1 **The principle of consultation**

Clearly, the requirements of the Resource Management Act 1991 and the Conservation Act 1987, as regards Maori issues, cannot be met without consultation with the tangata whenua. In reflecting upon the appropriateness of the consultations that have taken place with the claimants in respect of the Te Whanganui-a-Orotu area, we have been mindful of the duty of the Crown to consult its Treaty partners in accordance with the principle of consultation formulated in various Tribunal reports and in the courts, notably by Justice Richardson in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at page 683:

In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.

As the Tribunal observed in the *Ngai Tahu Report 1991*:

in some areas more than others consultation by the Crown will be highly desirable . . . In the contemporary context, resource, and other forms of planning, insofar as they may impinge on Maori interests will often give rise to the need for consultation.⁹

In the *Te Ika Whenua – Energy Assets Report 1993*, the Tribunal expressed the view that:

the test as to what consultation is necessary depends upon the effect of the legislation. . . . The lack of consultation with the claimants means that we cannot say that the Crown has put itself in a position to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard of the impact of the principles of the Treaty.¹⁰

9.13.2 **Local authority consultation: Te Whanganui-a-Orotu**

Claimant evidence on the new committee structure and process operating in the Hawke's Bay region and in Napier city in the 1990s clearly indicated to us that the Treaty rights of the claimants were not being adequately protected in the Ahuriri Estuary Te Whanganui-a-Orotu area. While the 1992 Ahuriri Estuary management plan and the 1994 Hawke's Bay regional policy and coastal policy statements represent a significant change in attitude to tangata whenua values, interests, and inputs, we have yet to see how far these words will be matched by action.

Certainly, the consultation process adopted by the Hawke's Bay Regional Council in the preparation of its proposed policy statements and the establishment of Maori advisory standing committees by the local authorities were encouraging developments. In both instances, the tangata whenua demonstrated a continued willingness to work through the existing system to achieve Treaty objectives. On the other hand, there was disquieting evidence that the Maori advisory committee structure and process were not achieving the objectives set out in these proposed policy statements.

In practice, the local authorities did not appear to be adequately fulfilling their statutory obligation to protect the Treaty rights of the tangata whenua in environmental management and planning issues. The present system for local authority consultation with tangata whenua did not seem to measure up to the Treaty principle or to the proposed guidelines published in June 1992 by the Parliamentary Commissioner for the Environment (I9(d)). Yet the Resource Management Act 1991 was 'a strong signal to decision-makers that tangata whenua have a special status and are not considered just another interest group' (I9(d):4).

As the parliamentary commissioner has indicated, the structure and the process must evolve, and require continuous monitoring to maintain and increase their effectiveness. Utmost good faith must be the guiding rule for the consultative process, from the setting up of a committee to the seeking and, hopefully, achieving of a final consensus. Clearly this has not been demonstrated during consultation with the tangata whenua regarding their taonga Te Whanganui-a-Orotu.

9.13.3 **Department of Conservation consultation: Ahuriri Estuary**

Despite the opposition of environmental interests generally to joint local authority and departmental management (see para 9.4.3), it was largely continued by the Napier City Council and the Department of Conservation in the development of a management plan for the Ahuriri Estuary. Although local Maori and environmental groups were represented on the steering committee that was set up

in the early stages, this fell well short of an appropriate mechanism for tangata whenua input. The ratio of local Maori to others on the committee certainly did not demonstrate partnership. The tangata whenua were not given any special consideration, but were merely considered as another environmental group. The process did not take place in a forum conducive to tangata whenua participation where they felt at ease, for example, at a hui held on a marae. The joint committee subsequently set up to oversee the preparation of the management plan represented the three local authorities concerned, in recognition of the need for 'political input'. No provision was made for tangata whenua input, even though the Ahuriri Estuary was, and is, their taonga.

9.13.4 **Lack of tangata whenua representation on the Conservation Authority and conservation boards**

The present system of ministerial appointment of members of the Conservation Authority and conservation boards, which approve management plans, does not conform to the spirit of partnership.¹¹ The likely result is a ratio of two tangata whenua out of 12 members on the authority and three out of up to 12, or possibly 15, members on the board. We consider this inappropriate on any basis. The structure of these vitally important bodies clearly contravenes the Treaty principle of partnership. The Conservation Law Reform Act 1990 needs to be amended to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987.

9.13.5 **Inadequate recognition of Treaty principles in resource management**

In our view, claimant evidence of what has been and is occurring in the claim area in respect of environmental management and planning processes clearly indicates that the structure established under the Resource Management Act 1991 itself is inappropriate.

The Maori committees set up by the local authorities are advisory only. Some powers relative to tino rangatiratanga over taonga should be delegated to them. If consensus cannot be reached between the committee and the council, limited council powers of veto may be appropriate as a last resort. The Maori membership of the Napier Maori advisory committee does not seem to represent the tangata whenua adequately, even though a large part of their taonga, Te Whanganui-a-Orotu, is now within the city boundaries.

The range of issues delegated to the Maori committee must not be restricted to cultural considerations alone. Maori interests clearly include hapu/iwi sustainable resource development.

We endorse the findings in the *Ngawha Geothermal Resource Report 1993* that (para 8.4.6):

the Crown has not, in delegating extensive powers to local and regional authorities under the Act, ensured that its Treaty duty of protection of Maori interests will be implemented. On the contrary, it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed.¹²

Paragraph 8.4.7:

We repeat here our finding that the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.¹³

As in the Ngawha claim,¹⁴ we have found in the present claim that the claimants have been or are likely to be prejudicially affected by the foregoing omission and, in particular, by the absence of any provision in the Act giving priority to the protection of their taonga (Te Whanganui-a-Orotu) and confirming their Treaty rights in the exercise of their rangatiratanga and kaitiakitanga to manage and control it as they wish.

In the present climate, we think that the resource management and conservation management structures are themselves impediments to Treaty principles and utmost good faith. The way in which they operate in the claim area reflects what Sir Kenneth Keith, president of the New Zealand Law Commission, described to the New Zealand Institute of Advanced Legal Studies Conference in February 1995 as ‘a top down view of law and administration’, rather than ‘a bottom up view’.¹⁵ He went on to suggest that:

We should draw on the extensive experience of individuals, families, tribes, and many of other groups organising themselves within a State or indeed across several States.¹⁶

The Tribunal commends this suggestion to the local authorities and the Department of Conservation, which are managing the resources of Te Whanganui-a-Orotu and conserving the Ahuriri Estuary essentially from ‘a top down view’. They should seek to act as a catalyst for ‘a bottom up view’.

References

1. This included the Napier Harbour Board Act 1874 and amendments, the Hawke’s Bay Rivers Act 1920 and amendments, the Reserves and Other Lands Disposal Act 1950, the Town and Country Planning Act 1953, the Wildlife Act 1953, and the Soil and Conservation Act 1967 (D6:73–77; I9(a):2).
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, pp 84–85
3. Department of Conservation, *Hawke’s Bay Conservancy Conservation Management Strategy*, Napier, October 1994, vol 1, p 1
4. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 67
5. Hawke’s Bay Regional Council, *Proposed Regional Coastal Plan*, September 1994, pp 9–11
6. Helen Hughes, *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*, June 1992, p 16, table 2.2
7. Pamphlet jointly produced by Te Papa Atawhai, the Hawke’s Bay Regional Council, and the city of Napier, 1990
8. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517
9. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, p 245

10. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 31
11. Under the Conservation Act 1987, the 12 members of the Conservation Authority are appointed by the Minister: two each after consultation with the Ministers of Maori Affairs and Tourism; one after consultation with the Minister of Local Government; one each on the recommendation of the Royal Society, the Royal Forest and Bird Protection Society, and the Federation of Mountain Clubs (NZ); and four appointed following public notice calling for nominations. The membership of conservation boards may not exceed 12 members, with three exceptions (where special tangata whenua representatives are appointed). The Minister appoints every member of a board after giving public notice and seeking public nominations. The tangata whenua are mainly taken into account along with other interest groups and as one specific section of the local community by the Minister when he appoints the members.
12. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 154
13. Ibid
14. Ibid, para 8.4.8
15. K J Keith, 'Treaty Claims: Unfinished Business – The Roles of the Tribunal, the Courts, and the Legislature', paper presented to the New Zealand Institute of Advanced Legal Studies Conference, February 1995, p 2
16. Ibid, p 8

CHAPTER 10

PETITIONING FOR TITLE TO TE WHANGANUI-A-OROTU

10.1 THE PRINCIPLE OF REDRESS

In the second amended statement of claim, dated 14 July 1993, the claimants said that the Crown has breached its duty to provide effective redress for past claims in respect of Te Whanganui-a-Orotu (1.2(d):4). They also said that no compensation of any kind for the loss of any rights had ever been paid in respect of Te Whanganui-a-Orotu to them or to their forebears (1.2(d):6).

The history of petitions to Parliament for redress and the investigation of title to Te Whanganui-a-Orotu bears out these claims.

10.2 THE BEGINNINGS OF PROTEST AND PETITIONS

Maori concern over the Crown's gradual encroachment on Te Whanganui-a-Orotu can be traced back to Tareha's 1861 assertion that he had sold land only as far as the high-water mark. Whereas Mr Brown was inclined to the view that the apparent lack of protest after the Ahuriri purchase was an indication that the sellers accepted that Te Whanganui-a-Orotu had been included, Mr Hirschfeld pointed out that:

Maori believed they had retained ownership of the lagoon, and despite the growth of settlement at Napier, were undisturbed in their use of the area.

European use of the lagoon (but not ownership) was offered by Maori as one of the terms of the transaction. At the first indication that Europeans were acting inappropriately . . . by reclaiming some land off for Napier township, there is also record of Maori protest. (I8(a):29)

After the establishment of the Native Land Court and the four main seats in Parliament, Maori signatories to the deed of sale and their descendants tried to adapt to British law and to 'work the system' in order to gain redress.¹ This was a continuation of the kupapa tactics that they had adopted in setting up a runanga system rather than joining the King movement or the Hauhau and then having their complaints investigated by the Hawke's Bay Native Lands Alienation Commission, rather than repudiating all fraudulent or unfair land sales. Hence the 1866 and 1867 applications by Paora Totoro and others to the Native Land Court to investigate the title to islands at the northern end of the lagoon and the 1875 petition to Parliament concerning islands in Te Whanganui-a-Orotu (see paras 5.9, 5.10). As Keith Sinclair observed in *Kinds of Peace*:

In the years 1872-8 Hawke's Bay Maori began bombarding Parliament with petitions . . . generally about land rights. Most received unfavourable recommendations or no recommendations from the Select Committee, but they were a great nuisance to politicians.²

'Our tipuna,' Heitia Hiha observed, 'have put in claims ever since in 1907, 1916, 1920, 1932, and since then much correspondence has been sent and hui called to consider ways of presenting the claim' (D21:10). Simultaneously, they continued to use and occupy all that remained to them at Te Whanganui-a-Orotu and to exercise their tino rangatiratanga, mana, and kaitiakitanga over it, until it was 'usurped' by others (D21:11).

None of the petitions concerning Te Whanganui-a-Orotu can be fully understood in isolation. Each represented the continuation of a take (cause) that goes back to Tareha, Paora Torotoro, Karaitiana Takamoana, Henare Tomoana, and others and that has passed down from generation to generation to the present claimants.

10.3 THE 1875 PETITION

In 1875, following a petition signed by Henare Tomoana and 37 others, a meeting of the Native Affairs Committee was held in Wellington on 17 August 1875 to hear sworn testimony from Henare, Karaitiana Takamoana, Donald McLean, and Wi Tako Ngatata.

Henare Tomoana told the committee that Maori were not aware that Te Pakake was not theirs until development was already well underway:

We saw that houses were erected on it, and that vessels were lying alongside. That is why we have sent in our petition. We want to ascertain whether the Govt have really taken it; if they have we want it returned to us. (F9: app II, p 888)

Karaitiana Takamoana added that 'All the chiefs urged that Whanganui O Roto should be reserved', and they asked 'for the islands on that sea, because they were Pa which were occupied' (F9: app II, pp 899-900).

Wi Tako Ngatata confirmed that the Ahuriri chiefs did ask for Te Pakake and the other islands to be reserved, but he could not recall if McLean agreed or not (F9: app II, p 903). McLean defended his handling of the purchase negotiations but, when questioned, said that he had not reserved Te Whanganui-a-Orotu, nor was he requested to do so (F9: app II, p 920). His influence prevailed, and the petition went no further.

10.4 THE 1894 PETITION

Settlement on the Meeanee Spit led to another petition in 1894. This time the petitioners were Marara Nukai, a sister of Paora Torotoro,³ and six others, who claimed that when their parents sold the Ahuriri block to McLean a piece of land was reserved to them, and they and their parents had resided on it for years. The boundaries were delineated by place names: Purekenai, Te Taha, Okahu, Awamauku, Ruatangahanga, Matahorea, and Te Karaka.⁴ They asked the House

to confirm that a reserve was made by the purchasers and the vendors (A6(d)). The Native Affairs Committee referred the petition for departmental reports and the chief surveyor in Napier responded as follows:

I have at last got one of the principal Natives concerned in the petition & from him I learn that the land they claim is the Western Spit Township including Freezing works, Hotels, churches dwelling houses &c. However he was not desirous of embarrassing the Government & said that notwithstanding the promise of the whole they would be satisfied with an acre or two of the unalienated crown land.

I pointed out that three sections (one with a water frontage at the former village) had been set apart as native Reserves and am inclined to think that they would be content with them . . . (A6(d))

We note that this description of the location of the claimed reserve completely overlooks its proximity to traditional shellfish beds, fishing places, and the only freshwater spring on the spit, Ruatangahangaha, which was discovered by Mahu.⁵

On 5 January 1895, the Land Purchase Department informed the committee that no reserve was stipulated in the deed of purchase, although Maori did perhaps occupy the land for a time after the purchase. 'Reasonable reserves' appeared 'to have been set aside for them' (A6(d)). This ended the investigation.

10.5 THE 1907 PETITION

One of the signatories to the 1894 petition was Raihania Kahui, who married the daughter of Marara Nukai.⁶ According to evidence given by Hiha Ngarangioue at a Native Land Court hearing in Hastings on 15 February 1916, Raihania Kahui petitioned Parliament to have an investigation held into the title of Te Whanganui-a-Orotu, but did not follow the matter up. Neither this petition nor any official correspondence relating to it has been located.

According to Mr Parsons, the damaging encroachment of the Napier South reclamation led to Raihania's petition 'as early as 1907'. Raihania Kahui died on 16 March 1909 and the petition lapsed (A12:135).

10.6 APPLICATIONS TO THE NATIVE LAND COURT 1916–19

10.6.1 The 1916 hearing

On 15 February 1916, an application from Hiha Ngarangioue and Oriwia Porou for an investigation into Te Whanganui-a-Orotu was heard by Judge M Gilfedder in the Native Land Court.

Hiha Ngarangioue's whakapapa shows that he was Ngati Hinepare (A12:135).

Evidence was given by Oriwia Porou that the descendants of Tawhao lived on the shores around Te Whanganui-a-Orotu. A prima facie case was established, and the case was adjourned until the applicants had an opportunity to get the advice of a leading solicitor. They chose Alfred Levavasour Durrell Fraser, a prominent Hastings land agent, and, from 1899 to 1908, the local member of Parliament. Fraser had helped Maori with flood relief in 1897 and was considered 'an authority on Maori law'.⁷

The case resumed on 13 April 1916 with Fraser appearing for the claimants and W T Prentice for the harbour board. Any hopes that the claimants may have had were soon dashed. Fraser told the court that he would not lead any evidence for them because he had made careful inquiry and come to the conclusion that they had no title.

Prentice said that land below the high-water mark was vested in the Napier Harbour Board by statute. It was not native (customary) land and the Court had no jurisdiction (A5(m):26). As Mr Boast said:

Confronted with this unanimity of approach . . . the Court unhesitatingly agreed that it had no jurisdiction to deal with the matter. (D1:69)

As Judge Harvey later noted, both Judge Gilfedder and Fraser ‘assumed that the Whanganui-o-Roto had been sold to the Crown’ (A5(m):27).

10.6.2 **Application to the Native Appellate Court**

An appeal was lodged on 9 May 1916 by Hiha Ngarangioue, Te Wahapango, Aporo Te Huiki, and others. A literal translation of the grounds of appeal, as Judge Harvey later observed, showed ‘the bewilderment caused by Judge Gilfedder’s dictum that the Whanganui-o-Roto has been purchased by the Crown in 1851’. According to the record:

Mr Fraser stood up and told the Court that this lake was sold by the elders to the Crown in the year 1851. Mr Fraser asked Judge Gilfedder to dismiss their application. Judge Gilfedder dismissed it. The Maoris told him that the lake was not sold and that the deed of sale of Ahuriri was here, and the lake was not set out in the deed. Here is the deed - we have it. Mr Fraser said that the whole of the lake was included in the said sale and that the Court was not to listen to the Maoris. We said that the Chief Surveyor at Napier had made a map, and that he said that the land under the water had not yet been before the Court. The Judge then decided that the lake was included in the sale. (A5(m):27)

Dispensing with Fraser’s services, the claimants approached C B Morison KC to represent them in the Native Appellate Court. He contacted the Department of Lands and Survey, asking to be shown the Ahuriri deed and plan. The under-secretary raised the matter with the Solicitor General, John Salmond, and Morison was allowed to see the deed, but was not allowed to take a copy (A8(d):164). No documentation of any advice that he may have given the claimants has been found.

The case was not heard until 11 April 1919, whereupon Te Wahapango and Aporo Te Huki, on behalf of the claimants, withdrew the appeal (A5(m):27). They had been advised that the Ahuriri purchase would be investigated only through a commission appointed by Parliament (A12:136).

10.6.3 **The Solicitor General’s opinion**

In a memorandum to the Solicitor General dated 25 August 1916, the Under-Secretary of Lands and Survey stated that the plan attached to the deed showed:

the Inner Harbour as being included in the purchase, but from the description in the deed, it would appear that the Inner Harbour is not so included. (A8(d):165)

This was the first official acknowledgement that the boundary description in the 1851 Ahuriri deed excluded Te Whanganui-a-Orotu. It was qualified, however, by the under-secretary's conclusion that, because 'the waters of the inner harbour are unquestionably tidal, the inconsistency does not seem to be of much importance' (A8(d):165).

On 28 August 1916, the Solicitor General replied:

On examining the Deed of Purchase . . . it would seem clear that the purchase does not include the inner harbour. The description in the body of the deed shows the boundary as following the interior of the harbour. It is true that the plan attached to the deed would, by its colouring, indicate the inclusion of the inner harbour. This, however, I take to be an error and the exterior red line on the plan must be taken to refer merely to the spit of land lying between the inner harbour and the sea. I agree however that the question is of no practical importance. The inner harbour . . . is tidal water and the limits of Native customary title are high water mark. (A8(d):164)

The Solicitor General assumed that Te Whanganui-a-Orotu was and had always been tidal. He did not consider whether Maori had been informed in 1851 that their customary title ended at the high-water mark; nor did he consider whether this common law assumption was a breach of the Treaty.

10.6.4 **The 1918 hearing on the islands of Te Whanganui-a-Orotu**

Pera Hohepa, of Puketapu, applied to the Native Land Court in 1917 to investigate the title to Te Whanganui-a-Orotu and 12 lagoon islands bounded by it (Taputeranga, Whare o Hineuru, Kouriuri, Poroporo, Tirowhangahe, Tuteranuku, Tewa a Waka, Kotauwanui, Matawhero, Te Mara, Ngamuku, and Awamauku) (A8(d):158). Correspondence from the Under-Secretary of Lands and Survey in Wellington shows that the Commissioner of Crown Lands in Napier was informed that six of the islands, namely Urewiri, Poroporo, Tirowhangahe, Tuteranuku, Awa a Waka, and Matawhero were able to be investigated (A8(d):157). These were the islands that were excluded from the Napier Harbour Board's endowment in the Napier Harbour Act 1874 and its amendments and that had not been Crown granted, and were therefore still considered to be native (customary) land. They were also the same islands that appeared on the 1867 survey plan that was procured by Paora Torotoro for an application to the Native Land Court, but was deemed incomplete for the purpose (see para 5.9).

At the hearing, on 12 February 1918, Judge Jones ruled that 'at present' his hands were tied when it came to dealing with Te Whanganui-a-Orotu, but that he was prepared to investigate the title to the islands as soon as plans were obtained from and certified by the chief surveyor in Napier.

Six days later, Pera Hohepa called in to see the Native Minister, W H Herries, and complained to his private secretary, H R H Balneavis, that he was unable to get the chief surveyor to certify such a plan or plans (A8(d):158). He also said that he was anxious to proceed with his application concerning the islands as soon as possible, although he was prepared to leave the question of title to the harbour in abeyance.

On being advised of this, the Under-Secretary of Lands and Survey said that the Commissioner of Crown Lands in Napier had been informed some months earlier that there was no objection to a plan of six islands being supplied to the court, but

he was unable to make any statement about the others listed until further information was obtained. A copy of the under-secretary's memo was sent to Pera Hohepa (A7(a):180).

Because no hearing took place, we can only conclude that the 1867 survey plan was still considered 'incomplete' for court purposes. Indeed, this may well have been the reason why the chief surveyor had been unable to provide a certified plan to Judge Jones in the first place.

10.7 THE 1919 PETITION AND 1920 NATIVE LAND CLAIMS COMMISSION

10.7.1 The 1919 petition of Mohi Te Atahikoia

In 1919 Mohi Te Atahikoia, a senior chief of Ngati Kahungunu living at Pakipaki, took over the leadership of the campaign for title to Te Whanganui-a-Orotu. His principal hapu was Ngati Whakaiti of Waimarama and, although he did not descend from the seven hapu of Te Whanganui-a-Orotu, his wife had Ngati Matepu connections. Born in the early 1840s, Mohi Te Atahikoia had fought against Te Kooti and had been actively involved in Native Land Court proceedings and the Kotahitanga Maori parliaments.⁸ With Tareha and Te Wahapango, he gave evidence before the Native Affairs Committee in 1918 and carried out its suggestion to confer with the Napier Harbour Board and, if they got no satisfaction, to go back to Parliament (A7(a):41).

As Mohi Te Atahikoia explained to the Native Land Claims Commission in 1920:

An answer from the Harbour Board, did not come for sometime, and it was then in the shape of a copy of the deed. The Board's representatives [a clerk and Mr Prentice] did not object to or question our claim . . . I wrote for a more definite reply but I got no answer, and I then placed another petition before Parliament. (A7(a):41)

A 1919 petition signed by Mohi Te Atahikoia and 47 others claimed 'a portion of the sea called Te Whanganui-a-Orotu and land known as the Puketitiri Reserve' (A6(f)). The petitioners' main grievance was the 'taking' of Te Whanganui-a-Orotu by the harbour board, even though Maori owning the Ahuriri block had arranged with McLean on 17 November 1851 that it should not be taken. The reason for this arrangement was that:

the foods in the sea were . . . the main foods of our ancestors and our forefathers, and are today with us, and will be handed down to our children after us. (A6(f))

As the petitioners recounted, the Native Land Court had refused to hear their case until the Government instructed it to do so. Therefore, the petitioners had made an application to the Government to issue that instruction, and had been told by the Native Minister's private secretary to meet with the Napier Harbour Board. The reply that they had received from the harbour board, which they attached to the petition, apparently stated that the board did 'not disagree with that deed of arrangement [made] with Mr McLean' (A6(f)).

Although we have not seen the harbour board's reply, the evidence in Mohi Te Atahikoia's petition seems plausible to us, considering that both the Department

of Lands and the Solicitor General in 1916 had expressed the opinion that Te Whanganui-a-Orotu was, according to the description of boundaries in the deed, excluded (see para 10.6.3). Subsequently, according to the 1924 petition, the chairman of the Napier Harbour Board ‘admitted that the Lake belonged to the Maories’ (see para 10.9).

10.7.2 **The 1920 Native Land Claims Commission**

The Native Affairs Department felt that the petition warranted consideration by the Government, despite the objection of the Department of Lands and Survey (A8(d):153). Accordingly, it was referred to a commission of inquiry that was constituted on 8 June 1920 to report upon a number of petitions concerning Maori land. Judge Robert Noble Jones was appointed chairman and John Strauchon and John Ormsby members (A5(l)). Evidence from witnesses with interests in Te Whanganui-a-Orotu and submissions on their behalf and on behalf of the Crown and the harbour board were heard in Napier on 13 and 14 August 1920.

Evidence given by Maori residing in the area suggested that Te Whanganui-a-Orotu was essentially a freshwater lake that was opened from time to time to allow it to flow into the sea to prevent flooding cultivations along the shore. Once dredging and harbour works commenced and the Ahuriri opening became permanent, saltwater fish were increasingly caught. When Napier South was reclaimed, freshwater fish were no longer caught. Nepata Puhara said that the reclamation work was destroying some of the pipi beds (A7(a):37). Henry Hill, a school inspector, on the other hand, put forward his theory that geologically the area was once part of the sea (A7(a):44).

Mr Myers, for the Maori, said that they were originally entitled to the bed of the harbour but, since statutory title had been issued to the harbour board, they were entitled to compensation. They also had fishing rights under the Treaty, irrespective of the deed, and the harbour board might be liable to compensate them for any injury to these.

Mr R J Knight (a native lands draughtsman), for the Crown, said that at the date of purchase the inside waters were tidal. Therefore, the Maori must fail in this claim. Mr Grant, for the harbour board, said that the board had had statutory title since 1874 and 1877 and there were no reservations of fishing rights. Maori anyway were only granted equal rights with Europeans in 1851.

The commission found that the boundaries of the land sold to the Government by deed on 17 November 1851 skirted ‘along the interior line of the harbour’, but did not include it. Park’s 7 June 1851 report stated that at the mouth of the lagoon there was a harbour proper, which was tidal. It was ‘undeniable’ that Ahuriri Maori had customary inshore fishing rights in the harbour, which they sought to retain for themselves. But the deed clause, as the commissioners understood it, merely reiterated:

the ordinary common law that all the King’s subjects, whether European or Maori, have a right of passage over the sea, a common right of fishing and a common (though perhaps restricted) right of landing on the foreshore; . . . (A5(l):13)

It was scarcely to be expected, the commissioners continued, that Maori ‘would fully realize, or anticipate, how even this right would be affected in the future by harbour, drainage, and other public works’ (A5(l):13). But whether they

appreciated the full effect of the dealing (of which there is some doubt) or not, it was made clear to them:

that the Crown was buying the land and their 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, although perhaps in doing so they were not fully conscious of the effect it would have on those fishing-rights that they were so anxious to retain. (A5(l):14)

10.8 **THE APPLICATION FOR SEVEN ISLANDS**

On 20 February 1922, application was made to the Native Land Court to investigate the title to seven islands of Te Whanganui-a-Orotu, namely Matawhero, Tuteranuku, Te Awawaka, Te Roro o Kuri, Poroporo, Tirohangahe, and Urewiri (A9:11). The application came before Judge Gilfedder on 5 August 1924 and was recorded in the Napier minute book as follows:

Investigation of title to some islands or rather sandbanks in the Whanganui o Roto lagoon. One of these Te Roro o Kiru is owned by David Milne under CT 38/550 (on Deeds title). The other islands are useless and there is no plan of any of them. It will be necessary to have surveys made if it is decided to go on with the investigations. (D1:74)

10.9 **THE 1925 PETITION OF TE WAHAPANGO**

Unperturbed by the ruling of the 1920 commission, Te Wahapango and 18 others petitioned Parliament in 1924. Te Wahapango was a Ngai Te Ruruku chief who had fought against Te Kooti with Mohi Te Atahikoia and could remember the signing of the Ahuriri deed in 1851.⁹

The petitioners claimed that Te Whanganui-a-Orotu was 'inaccurately included' in the sale of the Ahuriri block. Application was made to McLean for its return and he agreed. At the conference that was held with the Napier Harbour Board, they said the chairman had 'admitted that the Lake belonged to the Maories' (A6(i):2). They also referred to the protection of Maori rights afforded by the Treaty of Waitangi and the Crown's obligation to honour those rights:

We are aware that on the 30th March 1922 King George V commanded the Government of New Zealand to pronounce the validity of the Treaty of Waitangi. Insomuch as the Treaty of Waitangi reserves to the Maori the fishing rights in Lakes, we hereby admit for your consideration our petition in connection with Lake Whanganui-o-Rotu . . . (A6(i):2-3)

The petition was forwarded by the Native Affairs Committee to the Native Department. The under-secretary, Judge Jones, on 6 July 1925 merely reiterated what the 1920 commission that he had chaired said: 'according to the deed, "the sea (moana) and the rivers and the waters and the trees and everything else pertaining to the said land" were included in the sale'. This, the commission had

thought, was intended to include the natives' interests in the harbour (A7(a):166). Although the Native Affairs Committee requested that the petition be investigated by Parliament, this was not carried through. Clearly, the petitioners' appeal to the Treaty of Waitangi had not helped their quest to have Te Whanganui-a-Orotu returned to their control or even to have the extent of their fishing rights investigated.

10.10 THE 1932 PETITION

Mohi Te Atahikoia died in 1928, Te Wahapango in 1932. That same year, the proposed Napier Harbour Board Empowering Bill, giving the board the power to buy the former islands (see para 7.7.2), served as a catalyst for the 1932 petition that was signed by Hori Tupaea and four others, one being N P Hakiwai. Hori Tupaea traced his descent from Ngati Parau and Ngati Hinepare.¹⁰

The 1932 petitioners seemed more aware of the documented history of the lagoon and the Ahuriri purchase than their forebears:

It was considered at the time [of the Ahuriri purchase] by Government officials that this harbour was the most valuable part of the block then under negotiation, and Mr McLean, who conducted the negotiations for the Government, admitted that he was most desirous to secure the harbour for the Crown. (A6(j):1)

Those who signed the deed, the petitioners wrote, 'never intended to include the lagoon'. It was taken 'by the wrongful exercise of the general rights of the Crown over tidal waters'. The small islands that dotted the lagoon 'had always been considered as reserved' and the nine named in the Napier Harbour Board Act 1874 were specifically excluded from the 7900 acres vested in the board as an endowment (A6(j):1).

The 'disastrous earthquake of February 1931', they continued:

has wholly changed the conditions: the lagoon has now become mostly dry land; the Harbour Board, on the one hand has its big prize, the Inner Harbour, and as to the rest of the lagoon the Board must benefit largely by the exchange of a waste of water, which was worth nothing to them, for an extensive piece of territory, which has a great prospective value; the Maoris, on the other hand, have lost all that remained to them, and have nothing to represent the rights which they formerly had and which they were always so anxious to preserve. (A6(j):2)

The petitioners appealed to a sense of partnership between the Government, the local authority, and Maori. To make up for the losses of the past, they wanted to share in the benefits of the future:

Your petitioners are aware that any claim for compensation for loss to them through works and reclamations designed and made at the cost of the Harbour Board would have small chance of success, but it is clear that a vast upheaval by the operation of the forces of nature is in a different category; your petitioners, like the rest of the community, suffered from the ill-effects of the earthquakes, and they submit that they are justified in asserting a right to share in any benefits which may have arisen, so far as relates to this lagoon, in which, while it remained water, they had rights still subsisting. (A6(j):3)

In light of the earthquake, they were prepared to move forward with the local authorities and share in what remained, and they asked that their claims be considered ‘according to equity and good conscience’ (A6(j):3).

10.11 **JUDGE HARVEY’S 1934 INQUIRY**

Following the Native-Affairs Committee’s referral of Hori Tupaea’s petition to the Government for inquiry and report, the chief judge of the Native Land Court was authorised to refer the matter to a judge of the court under section 27 of the Native Purposes Act 1933 (A7(a):99). The hearing opened before Judge Harvey in Hastings on 3 March 1934. The petitioners advised the court that ‘this claim was against the Crown and not the Napier Harbour Board’ (D1:91–94). The hearing resumed on 19 April, with Raniera Ellison of Te Aute appearing for the petitioners, W T Prentice appearing for the harbour board, and H B Lusk, the Crown solicitor at Napier, appearing for the Crown (A5(m):1). As Mr Boast observed:

This case was remarkable for the general paucity of oral evidence called. The matter was seen principally as a matter of legal argument, and three reasonably comprehensive written ‘cases’ for the claimants, the Crown and the Harbour Board were filed, as well as a written reply by the claimants to the Crown and Harbour Board cases. (D1:94)

After an adjournment to 1 May, oral evidence was given by Te Roera Tareha of Waiohiki to support the petitioners’ claim that the water in Te Whanganui-a-Orotu was previously predominantly fresh water, the fish found in the harbour were freshwater fish, and that it was the influx of salt water into the inner harbour that caused the appearance of saltwater fish (A7(a):136–138).

10.11.1 **The case for the claimants**

In summary, the case for the claimants was as follows. From time immemorial, Te Whanganui-a-Orotu was ‘truly a food supply area ... the most valuable part of the Ahuriri patrimony’. From before 1840 to at least 1874, ‘the Te Whanga was for all practical purposes a fresh water area’. Only ‘in recent years’ and by ‘intervention of man’ had it become ‘wholly salt and tidal’. But ‘it was still the source of food’ for Maori and ‘man’s interference with natural conditions’ could not be invoked to displace their ‘ancient vested rights’ (A5(m):82–84).

The 1851 sale was made under three arrangements, first, with the main block; second, in connection with the gravel spit; and third, for the harbour proper. In 1874 the whole of Te Whanganui-a-Orotu, which Maori claimed still belonged to them, was vested in the Napier Harbour Board. Indisputably under article 2 of the Treaty, Te Whanganui-a-Orotu was theirs when the Treaty was signed (A5(m):83). Whether originally salt and fresh water; the general clause in the deed including the sea and so on, inserted after the completion of the negotiations for the harbour proper, ‘was never intended to add to what was conveyed in the operative part of the deed’ and must be read in the light of the particular words’ that preceded it. ‘To treat it in any other way’ was to ‘create an inconsistency and an ambiguity in the Deed’ (A5(m):84).

In conclusion, the claimants appealed to the court that:

If British Law is to supercede the conditions of a Treaty which is the foundation of Imperial Sovereignty in New Zealand then the Treaty is of no value as it would fail in those conditions guaranteed to the Natives. (A6(m):89)

10.11.2 The case for the Crown

The Crown's case was consistent and predictable. The claim that Te Whanganui-a-Orotu was reserved for Maori in 1851 was 'entirely without foundation'. Te Whanganui-a-Orotu was 'intended by all parties to pass to the Crown (if indeed it was not already Crown property by virtue of the Common Law)'. It was 'true that the description of boundaries as set out in the Deed' did not 'embrace the lagoon, but the plan apparently did'. If, irrespective of the question of its reservation, Te Whanganui-a-Orotu was in fact not an inland non-tidal water, but a lagoon or an arm of the sea, and subject to the rise and fall of the tide, it was, 'by common law, the property of the Crown' (A6(m):5–7).

10.11.3 The case for the harbour board

The Napier Harbour Board claimed to hold Te Whanganui-a-Orotu under the statutory title conferred by the Napier Harbour Board Act 1874 and the Napier Harbour Board Amendment and Endowment Improvement Act 1887. The petitioners' contention that the lagoon was a freshwater lake was not borne out by Maori history. At the very beginning of Maori occupation, the waters of the lagoon were tidal, with a natural outlet at Keteketerau. It was only since 1929, when Nga Puhi received a favourable ruling from Judge Acheson concerning Lake Omapere, that the petitioners 'suddenly discovered' that Te Whanganui-a-Orotu was a freshwater lake (A6(m):7–10; A7(a):71–77). The fishing rights of Maori and Pakeha had always been recognised and had never been interfered with by the harbour board. The board did not challenge the petitioners' claim to the land represented by the islands, but the recently raised land that had previously been below the water remained the property of the Napier Harbour Board (A6(m): 10).

10.11.4 Treaty rights

In their replies to the Crown and harbour board cases concerning their common law and British law rights, the petitioners emphasised the overriding importance of the rights that were guaranteed to them by the Treaty of Waitangi:

As the Treaty of Waitangi constitutes in fact the only conditions on which the English sovereignty in New Zealand is founded, therefore no law whether common or otherwise can by virtue of that Treaty override any of the privileges solemnly guaranteed to the Natives by that Treaty. (A6(m):86)

Possibly these statements reflected the Waitangi celebrations of February 1934, which attracted 6000 representatives of the tribes, including 250 Ngati Kahungunu, for as Sir Apirana Ngata wrote to Te Rangi Hiroa on 17 March 1934:

recent happenings in Parliament in regard to the Native land development schemes and the feeling of resentment then engendered drove many to the meeting to show as it were a united front to the enemy.¹¹

The ‘greater service’ of the gathering to New Zealand, Sir Apirana continued:

was the stock-taking of ideas of relationships between Maori people and the Pakeha, the partners in the agreement of 1840.¹²

Possibly, too, the petitioners’ emphasis on Treaty rights reflected the growing support of the Ratana church in the district at this time. A petition calling for statutory recognition of the Treaty signed by T W Ratana and 30,128 others was taken to Parliament by Eruera Tirakatene, the member for Southern Maori, on 25 November 1932.¹³

10.11.5 **Waiting for the Harvey report**

Judge Harvey’s report was not presented to Chief Judge Morison until November 1947, and then only after considerable prodding. Meanwhile, Maori grew tired of waiting. On 19 February 1940, Tuiri Tareha, a descendant of Tareha Te Moananui, wrote to the Native Minister, asking after the report. In response to a ministerial inquiry, the judge replied that it involved a great deal more research than he had originally anticipated, and Tuiri Tareha was told that it would be submitted at a ‘fairly early date’ (A7(a):92–94; D1:100). Nevertheless, five years on, no report had been submitted.

10.11.6 **The 1945 petition**

In 1945 Paneta Maniapoto Otene and 13 others again petitioned Parliament in pursuance of their claim to the area of the lagoon. Paneta (Barnett) Otene’s hapu affiliations were Ngati Hawea and Ngati Hinepare.¹⁴ The petitioners were the descendants of the Maori who owned the Ahuriri block in 1851. In substance, the petition was the same as the 1932 petition. The petitioners felt that any report would have to be revised in light of the recent Lake Waikaremoana and Whanganui River decisions (A6(k)). Judge Harvey was sent a copy of this petition and he said that he hoped that the report would be completed by Christmas, but it was not (A7(a):78).

After further inquiries about the report, the Maori Affairs Committee and the Prime Minister and Minister of Maori Affairs, Peter Fraser, in August and September 1946 asked the chief judge to take the matter up with Judge Harvey. He explained that the matter had been left in rather an unsatisfactory state by the death of Raniera Ellison, who at the last hearing had proposed to adduce further evidence on Maori usage of the waters (A7(a):61). Mr Parsons, however, was later told by James Waitaringa Mapu, a signatory to the 1932 petition, that this evidence was gathered, deposited in Wellington, and misplaced (A12:155). The evidence related to the existence of shellfish beds and freshwater eel traps within the area claimed by the Crown to be tidal lands. On 15 July 1947, Fraser asked the under-secretary to tell the judge to complete the report on the evidence before the court. The judge agreed that this ‘seemed to provide the only way out’ (A7(a):56).

Eventually, after two more letters and a telegram, the report was received and publicly released in April 1948 (A7(a):53; F1:2). Before the 1932 petitioners were informed, however, a further petition was submitted by Ahere Hohepa and others.

10.11.7 **The 1948 petition**

The 1948 petition was supported by over 257 people, with lists of whole families included. Its principal signatory, Ahere Hohepa, belonged to Ngati Hinepare, Ngati Mahu, and Ngai Tawhao (D35: para 2).

The petition reiterated the main points of Hori Tupaea's petition, hoping that Parliament would see fit to vest the 'now dry land' of Te Whanganui-a-Orotu in the petitioners (A6(1)). The Government did not respond specifically because it felt that the Harvey report would cover the issues raised.

10.11.8 **Judge Harvey's report**

As Judge Harvey saw it, the hearing that had commenced in Hastings in 1934 was 'still uncompleted' and the court report was a 'progress report' (A5(m):3). It meticulously examined all the available evidence on the two main issues: firstly, whether Te Whanganui-a-Orotu was included in the purchase and, secondly, whether it was a lagoon or, as the Crown contended, an arm of the sea.

In the judge's opinion, the greater part of Te Whanganui-a-Orotu was not included, but all the parties understood that the Ahuriri Harbour was. The harbour consisted of the Ahuriri opening and the land immediately adjoining it. All the rest of the water area was 'Whanganui-o-Rotu' (A6(m):11–26) (cf 'the harbour proper' in para 10.11.1). As to the six islands, which were Maori (customary) land since their title had never been investigated, ascertained, or determined, it seemed:

most difficult to conceive of a construction being put upon the Ahuriri Deed of cession of 1851 that would include the Whanganui-o-Rotu as a whole without including these islands scattered over the surface of that part of the Whanga which is outside the recited boundary line of the first parcel to the deed. (A6(m):32)

On whether Te Whanganui-a-Orotu was an arm of the sea and salt water or inland non-tidal fresh water, Judge Harvey thought that there was:

some fairly strong evidence and material in support of the claim of the petitioners that . . . at the time of the Treaty [Te Whanganui-a-Orotu was] a fresh or brackish water lagoon and as such was 'land' within the meaning of the various Native Ordinances and Acts. But the evidence upon this crucial point had not been strengthened by showing various 'fresh water mussle beds in situ' and the remains of eel weirs. Thus the report was 'made upon an incompleted case and possibly in the absence of telling evidence'. (A5(m):90)

Finally, it should be noted that Judge Harvey was critical of the case for the harbour board presented by Prentice:

I can allow no value whatever to be placed on this personal discourse by Mr Prentice. He has not given the whole story; he was not in a position where he could have been prompted to give it all, and he was not subject to cross-examination . . . I think the dignity of the Harbour Board suffers when its case becomes an attack upon the bonafides of the Native petitioners. As has been seen, the Natives have been claiming this lagoon for a great number of years before the 1st August, 1929 – the date of Judge Acheson's Omapere Lake judgement. (A5(m):53)

10.11.9 **The chief judge makes no recommendation**

On 23 June 1948, Chief Judge Morison transmitted Judge Harvey's report to Peter Fraser. In a covering memorandum, he pointed out that the petitioners had asked for 'satisfaction of such just and equitable rights' as they might be found to possess. It seemed to him that to establish such rights the petitioners had to show that they possessed them when the area was vested in the harbour board in 1874 and when whatever rights they had, if any, appeared to have been extinguished.

'Owing to lack of evidence,' the court had been unable to decide this matter. It did appear, however, that if the greater part of the area was not included in the sale, the Maori at the time of the vesting:

must either have owned the area under the customs and usages, or must have had some fishing and, possibly other rights in it, and such rights of ownership as other rights must have been extinguished by the vesting, without payment or compensation.

At that time, the results of the earthquake could not have been foreseen. Therefore, any redress to which the petitioners might be entitled 'should be assessed on the value of those rights at the time when they were extinguished'. Because the petitioners had 'failed to establish just what those rights were', he was 'not in a position to make a recommendation as to the manner in which they should be recompensed for their loss'. This 'should be a matter for further consideration by the Government' (A5(m): 1-3).

10.12 **THE AFTERMATH OF THE HARVEY REPORT**

10.12.1 **Peter Fraser's 1949 offer**

Claimant evidence indicated that Fraser took the report seriously enough to make the Ngati Kahungunu people an offer in 1949. In a sworn affidavit dated 16 June 1977, Anthony Davis stated that he was present in 1949 when the Honourable Eruera T Tirakatene, the Minister representing Maori on the Executive Council, brought Fraser to a private meeting with elders at the Masonic Hotel in Napier to discuss Te Whanganui-a-Orotu. Tirakatene had discussed the matter thoroughly with Fraser, and he came specifically to make the offer. Tipi Ropiha, the Under-Secretary of Maori Affairs, and John Te H Grace from the Prime Minister's office were present. Fraser offered a piece of land totalling 4500 acres as compensation for the land raised up during the earthquake. He said that he could give it back because it was farmed by the Government. As to the other 4000 acres, they would have to deal with the Napier City Council and the harbour board, and it would cost them a great deal of money.

Their spokesmen, Paneta Otene and Ahera Hohepa, declined Fraser's offer. 'If we own the northern end,' they said, 'then we must own the southern end too.' Since then, there had never been another offer (A13:130).

This evidence seems plausible, given that Fraser must have been well aware that discussions between the Commissioner of Crown Lands and the Napier Harbour Board were underway with a view to separating out the respective interests of the Crown and the board in the 7500-acre harbour board endowment (see para 8.4.2).

Mr Parsons presumed that the meeting occurred on 21 June 1949, when Fraser was visiting the district and was reported in the *Daily Telegraph* to have said that ‘it was the intention of the Government to get all long-standing Maori land claims settled in the near future’ (A12:147). Several other claimant witnesses recalled hearing about Fraser’s offer and its being refused because they wanted all, not half, the land. Eruti Pene, a Waiohiki elder, said:

In 1948 a gathering of the Executive of the sub-tribes was held at Ahuriri, to petition the Crown to return our land. While I did not hear the Premier Peter Fraser announce his argument to return 50% of the land his report of that hui arrived back at the Ahuriri Executive. I was there at that meeting. (D18:5; D43(d))

Wini Te Reo Spooner heard about it from her grand-uncle, Ahera Hohepa, who had said no because he wanted all Te Whanganui-a-Orotu back (D35:1).

Heitia Hiha said that when Fraser was having a meeting to deal with Omaranui’s compensation Tongia Davis again put the claim concerning Te Whanganui-a-Orotu to him. There was more than one take (cause) in relation to Fraser’s visit, he added (D21:11; D44(a):17, 19).

Claimant witnesses and associate counsel pointed out that the matter was dealt with simply by word of mouth. In response to a request from the Tribunal, the Crown searched for documentary evidence of the meeting in relevant Maori Affairs and Lands and Survey department files, but to no avail. It did, however, discover that a search in 1972 had failed to find any reference to the matter (E13:1–2).

Entries in Fraser’s official engagements book and his smaller appointment book established that he did visit the district and that he stayed overnight in Hastings and Napier on five occasions between June and November 1949. Tirakatene was with him on 20 July and he stayed at the Masonic Hotel on 24 August. The Crown researcher suggested a more thorough investigation but this was not carried out.

To the Tribunal, it seems likely that Fraser did discuss Te Whanganui-a-Orotu privately with tribal elders in 1949 and did offer to return that half of the lagoon land that the Crown acquired the following year. The Fraser Government was defeated in the 1949 general election and Fraser died in December 1950. The new National Government did not consider the Harvey report or offer land or monetary compensation in settlement (F1:3).

10.12.2 **Tuiri Tareha’s letter**

The hapu of Ngati Kahungunu continued raising questions about the Harvey report and the ownership of Te Whanganui-a-Orotu. In April 1951, Tuiri Tareha asked the Minister of Maori Affairs, Mr E B Corbett, what the Government intended to do about Te Whanganui-a-Orotu. On 12 September 1951, Corbett replied that:

Failing specific and convincing evidence on this point [the arm of the sea], the claim of the people is not made out, and there is no ground for any action on the matter by the Government. (F1:4)

In short, the Crown continued to adhere to the common law presumption, which, as Judge Harvey had pointed out, had not been tested in court. The claimants’ Treaty rights were ignored.

10.12.3 **Riddiford's 1955 inquiry**

On 13 December 1955, a Wellington solicitor, D J Riddiford, wrote to Chief Judge Morison on behalf of clients in Hawke's Bay to inquire whether Parliament had reached a final decision on Hori Tupaea's 1932 petition and whether the court was still willing to receive further evidence (A13:131). Noting that Judge Harvey's report was incomplete, the chief judge replied:

Another seven years has now elapsed with nothing done by the Maoris to produce this further evidence. . . . the Petitioners were under an obligation to prosecute their claim with due diligence. I consider that owing to the length of time which has now elapsed, this enquiry must be regarded as closed. (A13:132)

10.13 **FURTHER ATTEMPTS TO SEEK REDRESS FROM THE GOVERNMENT**

10.13.1 **The petition of Ihakara Rapana**

On 30 September 1965, another petition praying for an investigation into the ownership of Te Whanganui-a-Orotu was presented to Parliament by Ihakara Rapana MBE of Kohupatiki, a prominent Ngati Raukawa elder, James Waitaringa Mapu, and 120 others. They listed four points: Te Whanganui-a-Orotu was Maori land, reserved from the sale of Ahuriri; the Crown and the Napier Harbour Board had taken possession of land that was not theirs; their ground for protest was the Treaty of Waitangi, which gave them a guarantee of rights and the undisturbed possession of their land; and further grounds for protest were Judge Harvey's report and the decision and recommendation of the late Peter Fraser (A6(m)).

Nine of the petitioners were invited to sit in on the meeting of the Maori Affairs Committee, which discussed the petition on 20 October 1965. Ihakara Rapana presented supporting written material. He stated that Te Whanganui-a-Orotu had been reserved from sale in 1851 and the Treaty guarantee to Maori of rights to their lands, fisheries, and so on should not be overridden by the common law. Te Whanganui-a-Orotu was a rich and valuable gift, with its abundance of freshwater food, kakahi shellfish, and many other fishes. Owing to Pakeha river diversion and dredging, the Ahuriri Harbour fishing had been falsely taken by the Crown without payment and vested in the Napier Harbour Board. Peter Fraser had made a recommendation to Maori, who disagreed with the terms (A6(m)).

The Maori Affairs Committee, relying on Judge Harvey's uncompleted report, made no recommendation regarding the petition, but the member for Southern Maori, Sir Eruera Tirakatene, did not support the decision (A6(m)). The petitioners continued to chafe at the unfairness of the Crown's continual reliance on a report that had stopped only just short of answering most of their grievances favourably and its denial to them of the right to submit (or re-submit) the further evidence that Judge Harvey had required to complete it.

10.13.2 **The letter of Anthony Davis**

In January 1972, Anthony Davis wrote to the Minister of Maori Affairs, Duncan MacIntyre, expressing dissatisfaction with the Maori Affairs Committee's 1965 decision and complaining that 'It is useless petitioning parliament on anything to do with our Maori people' (A12:150).

In a further letter, Davis detailed his recollection of the offer made by Peter Fraser in 1949, and pointed to the effect of continued injustice on Maori in the area:

It is twenty years ago when our elders turned down the offer made by Mr Fraser. If the younger men were at the helm then, we would have accepted the offer. We find that we, the Maoris of Heretaunga are the poorest Maoris in New Zealand. Because of the fertility of our land the Pakeha bought or took nearly every acre he could lay hands on, leaving us almost landless and there is nothing worse than a landless Maori. (A12:150)

Predictably, MacIntyre was unaware of Fraser's offer. Once again, the Government shelved this unresolved claim, confirming Anthony Davis's cynicism about the worth of further protest.

10.13.3 **The 1973 inquiry**

After Labour became the Government in 1973, the member for Southern Maori, Mrs T W M Tirakatene, asked the Minister of Maori Affairs, Matiu Rata, to instigate a search of the Maori Land Court records for any reference to Te Whanganui-a-Orotu. Mr Rata replied that all the relevant records had been appended to the Harvey report (A12:151). On 26 June 1973, the Secretary of Maori Affairs, J M McEwan, reported that 'Successive Governments have taken the view when representations were subsequently made to them that the report was too vague to support any decision'.

This report sums up the Crown's consistent response to the grievances that have been raised by the hapu of Te Whanganui-a-Orotu for over a century. As long as some doubt remained over the complete validity of the claimants' case, the Crown continued to deny the need for any redress whatsoever.

In 1974 the late James Waitaringa Mapu, Bob Cottrell, and others met Mr Rata to initiate new proceedings, but Mr Rata resigned his portfolio, and Labour was defeated at the next election. The case lay in abeyance until the present claim was lodged with the Waitangi Tribunal (A12:151).

10.14 **CONCLUSION**

As we have seen, the timing and content of the petitions usually related to what was happening on the foreshore of Te Whanganui-a-Orotu and particularly to reclamations and development undertaken by the Napier Harbour Board and the Napier Borough Council (later the Napier City Council), or undertaken on their behalf by various Government agencies, such as the Departments of Railways, Public Works, and Lands and Survey. The whole process was facilitated and speeded up by the 1931 earthquake, the river diversion, and the urbanisation of greater Napier. The ultimate responsibility lay with the Crown and with Parliament, which passed the empowering legislation. The Crown, therefore, had a Treaty duty and obligation to redress the grievances of the petitioners.

In the final analysis, the Crown's consistent response has always been that Te Whanganui-a-Orotu was included in the purchase or, alternatively, that it was an arm of the sea, and therefore owned by the Crown. The customary and Treaty

rights of the petitioners received little, if any, attention from those who rejected the claims made by the chiefs and people of Ngati Kahungunu-ki-Heretaunga for over a century. From time to time, a limited right to some compensation was conceded but none was ever paid. Clearly, the Treaty principles of active protection and redress were breached.

References

1. Compare with Keith Sinclair, *Kinds of Peace*, Auckland, 1991, p 86
2. Ibid, p 119
3. Hirschfeld to Waitangi Tribunal, 16 November 1994
4. Most of these place names were located on the following maps: Ahuriri Lagoon Maori place names (D20(a)), the Admiralty chart (A21(f):1543), and Robert Park's plan of the Town of Napier (A21(f):1548)
5. J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, Wellington, A H and A W Reed, 1973, pp 50–51
6. Information on the marriage in Hirschfeld to Waitangi Tribunal, 16 November 1994
7. *Cyclopedia of New Zealand*, Christchurch, 1908, vol 6, p 300
8. *The Dictionary of New Zealand Biography*, 2 vols, Wellington, Department of Internal Affairs, 1990–93, vol 2, pp 514–515; Hirschfeld to Waitangi Tribunal, 16 November 1994
9. Hirschfeld to Waitangi Tribunal, 16 November 1994
10. Ibid
11. M P K Sorrenson (ed), *Na To Hoa Aroha: From Your Dear Friend*, Auckland, 1988, vol 3, p 134
12. Ibid, p 136
13. J M Henderson, *Ratana: The Origins and Story of the Movement*, Wellington, 1963, pp 87–89
14. Hirschfeld to Waitangi Tribunal, 16 November 1994

CHAPTER 11

NGATI PAHAUWERA'S CLAIM

11.1 INTRODUCTION

We have found the assessment of Ngati Pahauwera's claim a difficult task. In reviewing the evidence and submissions presented by Ngati Pahauwera and the response of the Wai 55 claimants, the Tribunal has identified seven main issues relevant to the claim: whakapapa; whanaungatanga; rangatira rights; ahi kaa (continuing occupation); rohe (boundaries); ringakaha (defending the land in battle); and petitioning. While they will be dealt with separately in this chapter, they overlap considerably.

11.2 THE LODGING OF THE CLAIM

On 16 July 1993, three days prior to the first hearing of the Te Whanganui-a-Orotu claim, the Tribunal received a letter from George Hawkins, representing Ngati Pahauwera. In it, Mr Hawkins wrote:

I understand that there are seven hapu claimant groups already involved in this claim, but that Ngati Pahauwera has not been included at this stage.

I therefore hereby lodge a claim on behalf of Ngati Pahauwera to be included as one of the claimant groups regarding Te Whanganui a Orotu. (D42)

The letter also stated that Ngati Pahauwera would welcome the opportunity to give evidence in support of their claim to Te Whanganui-a-Orotu.

11.2.1 The first hearing for Ngati Pahauwera

On 31 January 1994, Ngati Pahauwera commenced giving evidence of their claim to Te Whanganui-a-Orotu at the fourth hearing in Wellington. Wiki Hapeta was heard. Following his presentation, however, Crown counsel sought clarification on the status of his evidence, and the hearing was adjourned to enable Ngati Pahauwera to discuss the matter with their counsel (see para 1.7.4).

11.2.2 Negotiations between Ngati Pahauwera and the Wai 55 claimants

A hui was held between the seven claimant hapu and the representatives of Ngati Pahauwera at Tangoio Marae on 19 February 1994. As a result of this hui, and a further hui-a-iwi of the seven hapu, Mr Hirschfeld submitted a memorandum to be read alongside the amended statement of claim. The memo's fifth point stated that:

it is now accepted by the seven hapu of Te Whanganui-a-Orotu that the position of Ngati Pahauwera is to support and encourage the seven hapu of Te Whanganui-a-Orotu in their Wai 55 claim without their need to participate within it . . . (2.101)

The memo further stated that the position of Ngati Pahauwera in relation to the seven claimant hapu was through whanaungatanga; that the seven hapu 'gratefully acknowledge the support of Ngati Pahauwera in pursuing their Wai 55 claim'; and that the seven hapu 'intend to implement, in accordance with the appropriate tikanga Maori, that whanaungatanga [with Ngati Pahauwera] at the completion of the Wai 55 claim' (2.101).

This memorandum was the subject of further discussions between the seven claimant hapu and Ngati Pahauwera. The parties tried to reach an accommodation but were not able to. From then on, Ngati Pahauwera proceeded with their own claim.

11.2.3 **Further evidence**

In all, five witnesses gave evidence in support of Ngati Pahauwera's interest in Te Whanganui-a-Orotu at the fifth hearing in Napier, held from 2 to 5 May 1994. These witnesses included Toro Waaka and Te Aranui Boyce Puna (Spooners), who had already given evidence for the seven claimant hapu. Later, Te Aranui Boyce Puna's evidence for Ngati Pahauwera was withdrawn from the record.

The issues arising from the evidence of Ngati Pahauwera witnesses were examined by Heitia Hiha, on behalf of the Wai 55 claimants,¹ and Toro Waaka responded.

At the sixth hearing, held in Napier from 18 to 21 July, further evidence in response to Heitia Hiha and the Wai 55 claimants was supplied by Toro Waaka and Charles Hirini.

11.2.4 **Ngati Pahauwera's statement of claim**

Throughout these hearings, the Ngati Pahauwera evidence was presented within the Wai 55 claim. A statement of claim dated 25 May 1994 was later entered on the Wai 55/201 record of proceeding as 1.28 and given the reference Wai 432 (see app 1).

The statement of claim asked the Tribunal to find that Ngati Pahauwera have 'rangatira' and 'tangata whenua' rights to a portion of Te Whanganui-a-Orotu, and that Te Whanganui-a-Orotu was a 'taonga' of Ngati Pahauwera's. The claim stated that their 'rangatira status' over portions of Te Whanganui-a-Orotu arose from their occupation and use of Te Whanganui-a-Orotu prior to and subsequent to 1840 (1.28:1-2).

Most importantly, the claim asked the Tribunal to acknowledge that Ngati Pahauwera 'are rightfully included or joined as claimants' to the seven hapu already having their claims to Te Whanganui-a-Orotu heard. The claim asked for findings similar to those sought by the Wai 55 claimants.

In closing, Ms Ertel asked the Tribunal to find that the 'Native Land Court acted inconsistently with the Treaty by not recognising and giving effect to the estate of Ngati Pahauwera of Mohaka' and that the Crown 'acted inconsistently with the Treaty by not rectifying the operation of the Native Land Court'. (I11:27)

As has been demonstrated above, we have afforded the Ngati Pahauwera claimants every opportunity to be heard. The Wai 55 claimants were obliging in

this, despite it lengthening the hearing and delaying the reporting of their own claim.

11.2.5 The scope of the claim

It was claimed for Ngati Pahauwera that there were two groups with substantial interests in Te Whanganui-a-Orotu.

Ngati Pahauwera resident at Te Whanganui-a-Orotu claimed 'occupation' rights through whakapapa, the location of Ngati Pahauwera pa and kainga at the northern end, and the presence of the graves of Ngati Pahauwera ancestors on islands in Te Whanganui-a-Orotu.

In addition, a 'use' right for Ngati Pahauwera at Mohaka was claimed on the basis of regular hapu movement down to Te Whanganui-a-Orotu and the exercise of kaitiakitanga over it.

Both sets of rights were said to be supported by Ngati Pahauwera's defence of Te Whanganui-a-Orotu in past battles, by their objections to Crown ownership and control, and by reference to their standing in the area in tribal whakatauki, karanga, and waiata. The boundary of their tipuna Te Kahu o Te Rangi was said to be significant in support of their claim that they had tangata whenua status in Te Whanganui-a-Orotu.

11.3 WHAKAPAPA

11.3.1 Ngati Pahauwera evidence

Whakapapa charts provided by Ngati Pahauwera outline the Ngati Pahauwera descent from the different lineages (I2(a)). A brief summary follows, showing that Ngati Pahauwera and the Wai 55 hapu have common ancestors.

Kahutapere, one of Taraia I's generals, married Hine Te Rangi (of the Te Koaupari line). Their child Hinekimihaanga married Tureia. Hinekimihaanga and Tureia had a son, Te Huki, who married Rangitohumare. One of their children was Purua Aute, whose son Te Kahu o Te Rangi is identified by Ngati Pahauwera as their founding tipuna.

Wiki Hapeta stated that, as well as being of Ngati Hinepare, Ngai Te Ruruku, Ngai Tawhao, and Ngati Tu (four of the seven hapu groups), he was of Ngati Pahauwera. It was 'not right', he said, 'that Ngati Pahauwera is left out. They are from the same tipuna' (G1:1).

Toro Waaka presented detailed whakapapa evidence to back up Wiki Hapeta's claim that Ngati Pahauwera were of the same tipuna as some of the seven hapu, although he admitted that the 'relationship between Ngati Pahauwera and the other hapu who are the tangata whenua of the Ahuriri lagoon is complex' (H4:7).

Toro Waaka stated that Kahutapere was associated with the pa Otiere, that Kahutapere's wife, Hine Te Rangi, came from and lived at Te Ihu o Te Rei, and that Rangitohumare was associated with the pa Otatara and Oueroa. He claimed that the descendants of Kahutapere and Hine Te Rangi lived in these pa until invading musket-bearing tribes forced them into evacuating to Nukutaurua, situated near the Mahia Peninsula (H4:4).

Toro Waaka also submitted that Te Kahu o Te Rangi, the great-grandson of Kahutapere and Hine Te Rangi, was the uncle of Te Ruruku o Te Rangi, from

whom one of the claimant hapu, Ngai Te Ruruku, take their name. Both Thomas Wainohu and Charles Hirini supported Toro Waaka's explanation of Ngati Pahauwera's whakapapa links with some of the Wai 55 hapu (H5; H6).

11.3.2 Wai 55 claimant evidence

In a submission prepared by a number of the Wai 55 witnesses, the authors (B Taylor, F Reti, H Hiha, M Puna, N Taylor, and P Parsons) agreed that some of the seven hapu (Ngati Tu, Ngati Matepu, and Ngai Te Ruruku) have ancestral links with Ngati Pahauwera, especially through Hine Te Rangi, Hinekimianga, and Rangitohumare. However, they claimed that when Hinekimianga and Rangitohumare married Taraia's generals Tureia and Te Hiku, respectively, they moved away from Te Whanganui-a-Orotu and never returned to occupy it (H14:28, 35).

11.3.3 Toro Waaka's response

Toro Waaka disagreed, arguing that Hinekimianga and Rangitohumare did not stay away permanently, and that they retained their rights to Te Whanganui-a-Orotu. Indeed, he argued that Te Hiku, who married Rangitohumare, did not take his wives away but visited them at their pa (H16).

11.3.4 The Tribunal's comment

We note the conflict in the evidence concerning the continued occupation by Hinekimianga and Rangitohumare but draw no conclusion from it, as it does not appear to impact on the claim by Ngati Pahauwera to have whakapapa links and tipuna in common with the Wai 55 claimant hapu. The evidence clearly shows that they do.

11.4 WHANAUNGATANGA

11.4.1 Introduction

In rejecting Ngati Pahauwera's claim to tangata whenua status on the basis of occupation and use rights, the Wai 55 claimants argued instead that Ngati Pahauwera have whanaungatanga rights in Te Whanganui-a-Orotu.

11.4.2 The evidence of the Wai 55 claimants

The Wai 55 claimants argued that Ngati Pahauwera's base is Mohaka, which lies 70 kilometres north of Te Whanganui-a-Orotu, and that other hapu have rights to the coastal land between the two places (H14:35). They contended that Ngati Tu are the principal hapu of Tangoio, that Ngati Moe have occupational rights at Waikare, and that Ngai Tatara (or Ngati Kurumokihi) have mana rangatira over lands between Tangoio and Mohaka (H14:35–42).

Evidence already given to the Tribunal indicated that the tangata whenua of Te Whanganui-a-Orotu had a well-established practice of whanaungatanga. Frederick Reti related how many hapu, such as Ngati Hineuru, Ngati Whatuiapiti, and Ngati

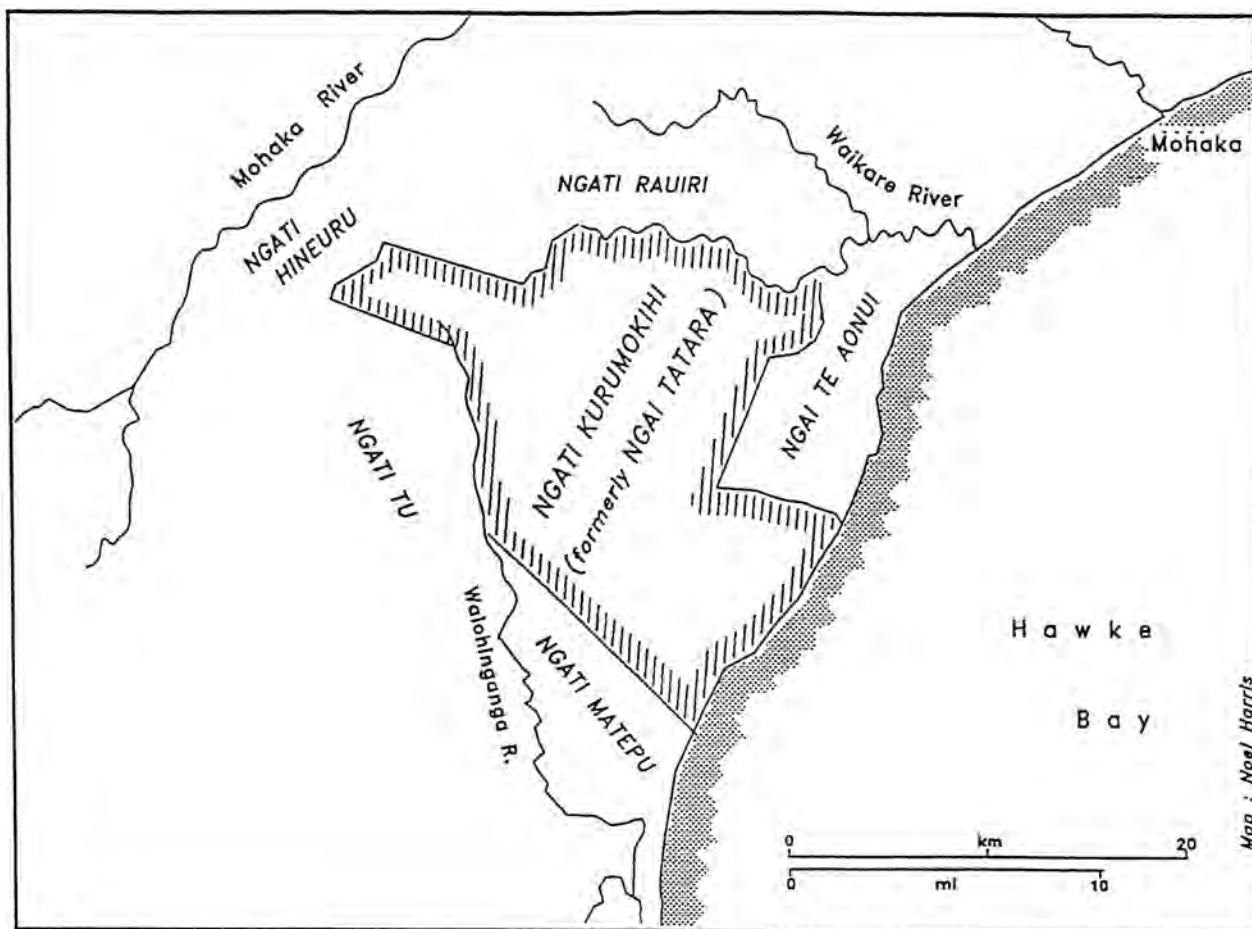


Figure 18: Lands of the Ngai Tataru, and subtribes by whom they were surrounded. Based on the map facing page 66 of H Guthrie-Smith's *Tutira: The Story of a New Zealand Sheep Station* (3rd ed, Edinburgh, 1953).

Hawea, used the resources of Te Whanganui-a-Orotu (D27:10). Selina Sullivan and Monty Murton both provided evidence to emphasise the practice of whanaungatanga (D14; A12:185) (see para 2.5.6).

They further argued that evidence from the Native Land Court hearings into the Petane and Te Pahou blocks showed that the 10 owners awarded title were of Ngati Matepu, Ngati Tu, and Ngai Te Ruruku (see para 5.5.3). This, they submitted, confirmed these three hapu 'as having Maori customary title to the northern end of Te Whanganui-a-Orotu'. No Ngati Pahauwera names appeared in the memorial of ownership at all, thus negating Ngati Pahauwera's claim to occupation rights (H14:32–34).

11.4.3 Ngati Pahauwera's response

Ms Ertel responded to the Wai 55 claimants' argument that Ngati Tu, Ngati Moe, and Ngai Tataru (or Ngati Kurumokihi) were the tangata whenua of the land between northern Te Whanganui-a-Orotu and Mohaka by stating that 'Pahauwera do not seek to oust the rights of others, it is the exclusion of their interest that is at issue' (I11:12–7). Exclusion would be inconsistent with the use right asserted by Ngati Pahauwera, their capacity to move over a large area, and the boundary of Te Kahu Te Rangi.

In response to the Native Land Court evidence led by the Wai 55 claimants, Ms Ertel argued that the limitations of the court structure and processes resulted in the ‘inadequate or in fact total abrogation of the rights and interests of Ngati Pahauwera’ in Te Whanganui-a-Orotu, the Maori Land Court being incapable of giving effect to Maori customary title (I11:12–17).

11.4.4 **The Tribunal’s comments**

It seems clear to us that Mohaka Ngati Pahauwera had rights of use such as those that Charles Hirini spoke of when he said that he was born in Mohaka but travelled to Te Whanganui-a-Orotu to get kaimoana and remembered camping at Westshore and staying at Tangoio and Petane (H6). Similarly, on a different matter, Wiki Hapeta spoke of Ngati Pahauwera joining the local people ‘to assist their whanaunga’ when Te Whatanui of Ngati Raukawa was ousted from the area (G1:2). Both these examples would tend to support the Wai 55 claimants’ view that the rights enjoyed by Ngati Pahauwera were whanaungatanga rights, rather than tangata whenua rights, as argued by Ms Ertel.

On the issue of Native Land Court titles, we accept that the listed owners of the Te Pahou and Petane blocks may give some indication of the rights of Ngati Matepu, Ngati Tu, and Ngai Te Ruruku. But we also accept the argument that these awards may not have recognised the rights of all Maori to these areas.

11.5 **RANGATIRA RIGHTS**

11.5.1 **Ngati Pahauwera evidence**

The Ngati Pahauwera evidence made much of Paora Rerepu, the ‘paramount’ chief of Ngati Pahauwera, signing the Ahuriri deed. As Ms Ertel told the Tribunal in her opening submissions, ‘[his] authority to sign the deed was unchallenged and is recognition that Ngati Pahauwera had rangatira rights as tangata whenua along with the current claimant hapu’ (H11:5). Close whakapapa links with Paora Rerepu and other Wai 55 claimant hapu were referred to by the Ngati Pahauwera witnesses.

As well as being of Ngati Hinepare, Ngai Te Ruruku, Ngai Tawhao, and Ngati Tu, Wiki Hapeta claimed descent from Paora Rerepu (see para 11.3.1). He said that Paora Rerepu signed the Ahuriri deed of sale as ‘Rangatira of Ngati Pahauwera’ (G1:1).

Toro Waaka emphasised that Paora Rerepu signed the deed as paramount chief of Ngati Pahauwera and that he received a blanket and some tobacco from McLean as payment for the Ahuriri block (H4:3). He submitted a short whakapapa chart of Paora Rerepu to emphasise the closeness of the ‘blood relationship’ between him and the chiefs of the current claimants (H4:5).

11.5.2 **Wai 55 claimant evidence**

Heitia Hiha’s submission took exception to the assertion made by Wiki Hapeta that Paora Rerepu’s signing of the Ahuriri deed gave Ngati Pahauwera rights to Te Whanganui-a-Orotu. Instead, he described Paora Rerepu’s action as lending his support (tautoko) to the sale (H13:2). Paora Rerepu, he explained, was there because he was waiting to escort McLean to Mohaka as soon as the Ahuriri deed

negotiations had ended (H13:1). As to Toro Waaka's claim that McLean paid Paora Rerepu for the Ahuriri block, Heitia Hiha pointed out that an entry in McLean's journal showed that Paora Rerepu was given these items on 22 April 1851, months before the deed was signed (H13:2).

11.5.3 The Tribunal's comment

It appears that there may have been several reasons why Paora Rerepu signed the Ahuriri deed. The eastern boundary of the block lay in the catchment of the Mohaka and Waiohinganga Rivers. As we stated in our *Mohaka River Report 1992* (Wai 119), above the Te Hoe confluence, the Mohaka River involves the complex rights of many hapu (2.10). Ngati Pahauwera claimed that the boundary of their rohe ran from Te Haroto into Puketitiri bush and down through the Waiohinganga River to the sea (2.4). Paora Rerepu, therefore, could have been representing Ngati Pahauwera's interests in other parts of the Ahuriri block.

Many of the signatories to the Ahuriri deed included Ngati Kahungunu-ki-Heretaunga hapu other than the hapu of the principal sellers and, in addition, Ngati Hawea, Ngati Kurukuru, and Ngati Whatuiapiti, and others, yet these hapu are not included in the claim. It therefore seems likely that it was becoming a common practice for many leading figures to participate in such signings, whether or not they were tangata whenua (see para 3.6). Such participation may have been as much an assertion of personal mana to lend support and strength to the transaction as an assertion of mana over the land itself.

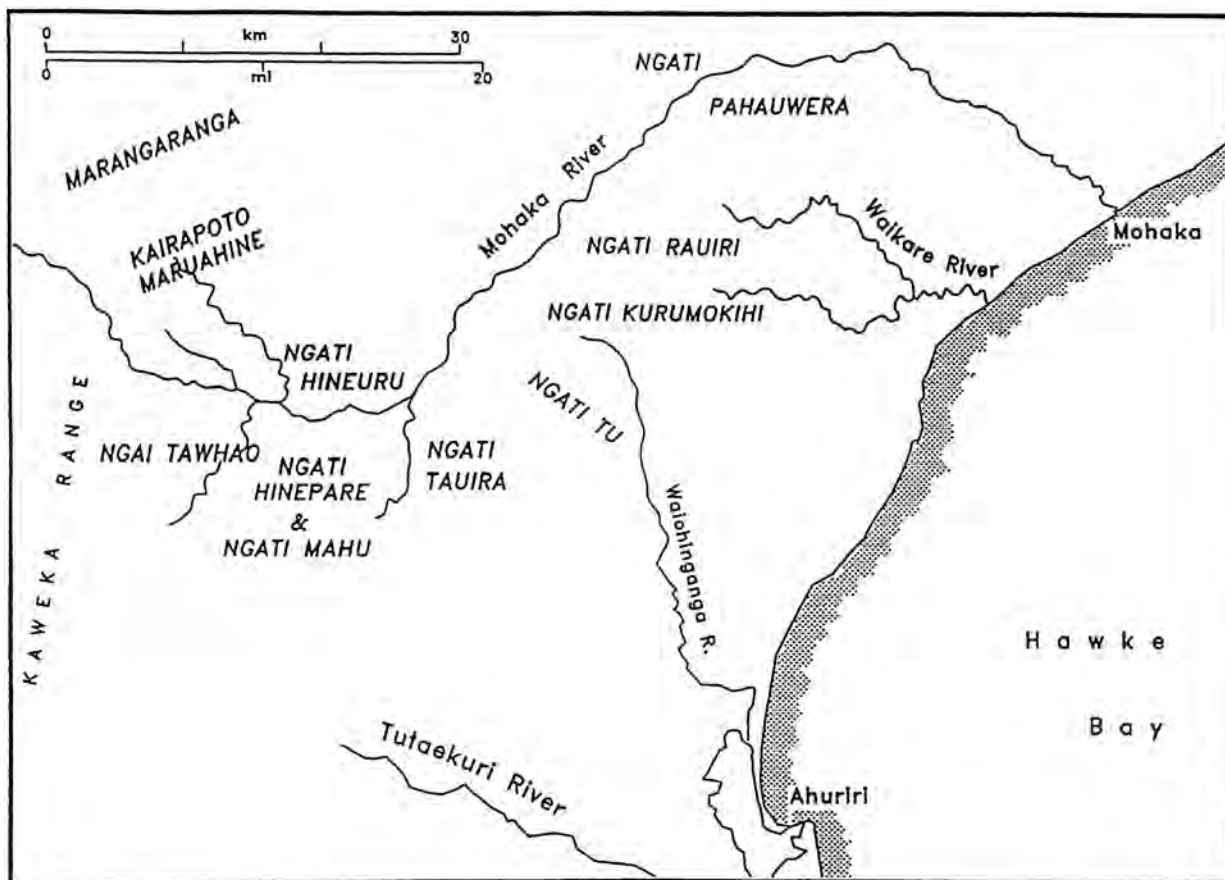


Figure 19: Iwi and hapu of the Mohaka River area. Based on map 2.1 on page 16 of the *Mohaka River Report 1992* (Wellington, Brooker and Friend Ltd, 1992).

11.6 **AHI KAA AND ROHE**

11.6.1 **Introduction**

The Wai 55 claimants say that they were guided by Maori custom when they assessed what hapu had tangata whenua status at Te Whanganui-a-Orotu. Ancestry and permanent occupation were deemed the necessary criteria (H14:1). Ngati Pahauwera cited these criteria, but in addition stressed the importance of the boundary of their rohe, as marked out by Te Kahu o Te Rangi, arguing that it extended to Te Whanganui-a-Orotu.

11.6.2 **Te Kahu o Te Rangi's rohe**

James Wainohu provided the Tribunal with a transcript and translation of Te Kahu o Te Rangi's rohe, as told to the Native Land Court by Wepiha Te Wainohu in 1879:

Te rohe o Te Kahu-o-te-Rangi, takutaai moana ki Pukekaraka ka rere ki uta Puketitoti, ka taka ki te Waiau. I konei ka tutaki raua ko Te Kapua . . . ? rito, he Rangatira no te Urewera kaati koe ki konei. Katahi a Te kahu-o-te-rangi ka moki tona toki ka ripiripi i nga papakiri o te tawai ka rere ano ki Te Haroto, taka atu ki Puketitiri ka haere atu i roto o te awa (Te Wai-a-Hingaanga) puta noa ki te takutai moana. Kei konei te toka, ne taniwha ko Moremore no nga rangatira o roto Heretaunga ara no Tareha ma, Karaitiana, Tomoana me etahi atu . . . (H5:41)²

The boundaries of Te Kahu o te Rangi extend from the sea at Pukekaraka to Puketitoti down to the Waiau river. It is here that he met Te Kapua a chief from the Urewera who said, 'This is as far as you go' (This is your boundary).

Te Kahu o te Rangi took up his axe and began to make his mark on the bark of the tawai trees and up onto Te Haroto and down into Puketitiri and down through the Te wai o Hingaanga stream to the sea. There is a rock here, a taniwha, its name is Moremore and it belongs to chiefs of Heretaunga, Tareha, Karaitiana, Tomoana and others . . . (H5:(4))

James Wainohu told the Tribunal that, at the time when the Waiohinga River entered Te Whanganui-a-Orotu near Kaiarero, the southern extremity of Te Kahu o Te Rangi's rohe was the island Urewiri. A pou, Mataitai, was placed there to mark the rohe. The rohe, however, was not exclusive and that other hapu also used the resources within it (H5:1). As James Wainohu described it:

Kahu o te Rangi walked his boundaries and bespoke the land. With the aid of his brothers and their families he imposed his will on all hapu in that rohe. (H5:2)

Charles Hirini described the rohe as going into Te Whanganui-a-Orotu (H6:4).

The issue of Ngati Pahauwera's boundary in relation to the northern end of Te Whanganui-a-Orotu was examined in a joint statement read by Heitia Hiha on behalf of the Wai 55 claimants. At a meeting with Ngati Pahauwera representatives on 6 March 1991, the late Te Otane Reti, a kaumatua of Tangoio Marae and a Wai 55 claimant, had rejected the claim that the boundary came down as far as the Esk River mouth, stating that to his knowledge the southern boundary of Ngati Pahauwera's rohe was the Waikare River (H14:24).

The Wai 55 authors countered the importance placed on Te Kahu o Te Rangi's rohe by presenting further background evidence of the Napier minute book references from which they were recorded. Their research suggested that it was 'after Ngati Tu, Ngai Tatara and Ngati Moe invited Te Ruruku down to be their warlord that it was considered advantageous to place the people under Te Kahu o Te Rangi's mana as a "stabilising measure"'. These boundaries, however, 'only affected people, not land' (H14:26). Te Kahu o Te Rangi's mana, the Wai 55 claimants continued, 'dissolved' after his death and after attacks and reprisals in the Tarawera area. These incidents resulted in the Tuwharetoa chief, Te Heuheu, assuming the mana of the territory west of the Maungaharuru summit and erecting new boundary posts 'on the Titiokura saddle' between the Hawke's Bay tribes and those of the interior. After a further attack, Te Heuheu extended this boundary. His actions 'affected the whole Waitara block which had previously been under the mana of Te Kahu o Te Rangi'. By the time Te Kahu o Te Rangi's grandson Takirau inherited his mana, his influence was mainly confined to the hapu occupying the lands bordering the Waikare River. Subsequently, an incident of treachery caused Ngati Moe to abandon Takirau's protection. Soon after, Ngati Tauhere also abandoned Takirau. These instances demonstrated that 'the sub-tribes of the Waikare area were not permanently bound by the mana of Te Kahu o Te Rangi and could change leadership if dissatisfied' (H14:17–21) (see figs 18, 19).

Toro Waaka attempted to rectify what he saw as errors and omissions in the Wai 55 joint statement. In support of the claim that Tangoio was a Ngati Pahauwera community, he pointed to an entry dated 12 December 1851 in Colenso's journal showing that the Tangoio people had received payment for the sale of the Mohaka block (H16:1). He produced whakapapa evidence to show that Te Kahu o Te Rangi 'would have been very comfortable moving in and out of the [Te Whanganui-a-Orotu] area'. Although Ngati Pahauwera referred strictly to his descendants, it became, he said, 'an umbrella name associated with hapu within the rohe . . . as [Te Kahu o Te Rangi] marked it out' (H16:3). 'Why would it be necessary to walk over the boundaries and mark trees,' as Te Kahu o Te Rangi did, 'if mana was only over people' (H16:4).

It was a known fact, Toro Waaka continued, that Takirau fell out not only with other hapu but with the people of Mohaka as well. The mana transferred to another son of Te Kahu o Te Rangi and to his cousin Te Ruruku. There had been a lot of intermarriage within hapu of the area, he concluded, and most of them now were descendants of the ancestor hapu in the claim, and Ngati Pahauwera asked that Te Kahu o Te Rangi be rightfully included (H16:4).

Charles Hirini refuted the statement that Te Kahu o Te Rangi's mana had dissolved. Takirau may have lost mana, he argued, but his grandfather's mana continued through the lines of his numerous children. He also said that any boundary Te Heuheu set up lost its mana after a later incident (I2:1).

We note that neither Mr Prentice nor Dr Ballara provide any information that would support the claim that Te Kahu o Te Rangi's rohe extended into the northern end of Te Whanganui-a-Orotu. Mr Prentice referred to Te Kahu o Te Rangi as 'the Mohaka chief'.³ Dr Ballara listed Ngati Matepu, Ngati Hinepare, Ngai Tamawahine, and others under the Ngati Kahungunu-ki-Heretaunga major hapu umbrella as dominating the Ahuriri area.⁴

11.6.3 **Further evidence of a ‘seasonal use right’**

We have earlier discussed a seasonal use right claimed for Ngati Pahauwera at Mohaka. Further evidence of such a right given by both Wiki Hapeta and Toro Waaka was a mihi, whakatauki, or karanga that they said was used to greet Ngati Pahauwera at Tangoio Marae. Toro Waaka submitted that:

To this day when people from Mohaka go to Tangoio Marae they are greeted with the mihi ‘Haere mai Ngati Pahauwera ki runga. Ki Ngati Pahauwera ki raro’. This translates as ‘Ngati Pahauwera from up the way, welcome from Ngati Pahauwera down here’. This illustrates that we are one people living in different places. (H4:4)

Wiki Hapeta said that this karanga was used at Tangoio Marae and at Petane Marae (G1:4).

Heitia Hiha disputed the use of the karanga to greet Ngati Pahauwera at Tangoio Marae. He told the Tribunal that his great aunt Keera Koko had lived there all her life and had never heard it, and it was not used at his marae at Petane (H13:2).

11.7 **RINGAKAHA**

11.7.1 **Introduction**

This section concerns the defence of Te Whanganui-a-Orotu against invaders, and its significance in the assessment of Ngati Pahauwera’s claim. The evidence shows that there was extensive fighting in the Ahuriri/Te Whanganui-a-Orotu area in the 1820s, as taua armed with muskets invaded Ngati Kahungunu territory (see fig 5). Particular reference was made by Ngati Pahauwera to the invasion by Te Whatanui of Ngati Raukawa. Accounts of these battles can be found elsewhere; their importance to this section is whether they help establish Ngati Pahauwera as tangata whenua (see para 3.2.2)(H1:1–12).

11.7.2 **Ngati Pahauwera evidence**

Wiki Hapeta stated that Ngati Pahauwera ‘always defended’ Te Whanganui-a-Orotu, ‘even when the other hapu had fled to other areas, or when no one else would help’ (G1:2). The example Wiki Hapeta provided was that of Te Whatanui, who invaded Heretaunga and reformed Te Puketapu, leaving the ‘local people’ in refuge on Te Pakake. He continued:

That summer, Te Hau-Waho chief of Te Pa-kake called on the people of Te Heretaunga to fight Whatanui. Ngati Whatuiapiti and Ngai Te Upoko-Iri declined to join battle.

Ngati Pahauwera of Mohaka and Ngati Kurukuru of Waimarama joined together to fight Te Whatanui. The mother of Tiakitai, the Chief of Waimarama was Ngati Pahauwera. Hauwaho was a descendent of Purua Aute. Our hapu joined to assist their whanaunga.

... Ngati Raukawa were defeated. Te Whatanui escaped and Whanganui A Orotu was again Ngati Kahungunu territory. (G1:2–3)

Wiki Hapeta, it would appear, considered that Ngati Pahauwera were helping the 'local people' to defend their land.

Toro Waaka claimed that the descendants of Kahutapere and his wife Hine Te Rangi occupied Otiere (on Roro o Kuri) and Te Ihu o Te Rei until the defeats suffered there forced a withdrawal to Nukutaurua. As recorded above, Toro Waaka believed that some Ngati Pahauwera, through the descendants of Kahutapere and Hine Te Rangi, lived at the northern end of Te Whanganui-a-Orotu and helped to defend it. He said:

Assistance in battle brought with it obligations. The blood shed by Ngati Pahauwera in the various battles was a paanga in itself to the land. It is said to be as strong as ahi pitau (bunging your navel) . . . (H4:2)

He also said that some Ngati Pahauwera stayed at Te Pakake Pa 'with their whanaunga, Hauwaho in times of trouble' (H4:5).

11.7.3 **The Wai 55 claimants' response**

The Wai 55 claimants submitted that the battles of Parapara and Te Ihu o Te Rei, when Ngati Raukawa, Tuwharetoa, and Waikato attacked armed with muskets, resulted in the naming of Ngati Matepu (people killed by guns). They therefore concluded that it was Ngati Matepu, and the closely related Ngati Tu and Ngai Te Ruruku, who were in occupation of these island pa and whose blood was spilt there (H14:29–32).

Heitia Hiha agreed that Ngati Pahauwera were asked to help drive Ngati Raukawa from Puketapu. However, as he explained it:

Ringakaha is your strength in defending your land . . . The tangata whenua (Ngati Hinepare, Ngati Tuku O Te Rangi, Ngati Matepu, and Ngati Parau) called on Ngati Whatuiapiti, Ngai Te Upokoiri, Ngati Kurukuru and Ngati Pahauwera for the purpose of driving him out. (H13:3)

11.7.4 **Other research**

Mr Prentice records the raids by outsiders and the defence of Heretaunga in the 1820s in some detail. He does not list Ngati Pahauwera among the defenders of Parapara and Te Ihu o Te Rei or among the 'doomed refugees' without guns on Te Pakake. He writes that the killing of Te Ohomaori of Ngati Raukawa by Te Kahu o Te Rangi was one of the incidents that led to the 1820 taua in the first place.

When the call went out to all Heretaunga people to expel Ngati Raukawa from the pa that they had built at Puketapu, messengers went as far as Ruahine, Roto a Tara, Waimarama, and Mohaka. After Puketapu was captured, the respective hapu who formed the war alliance left for their own homes.⁵

Dr Ballara writes that it was chiefs such as Tareha, Oneone, Te Waka Kawatini, Tareahi, and Kaiwhata (who described themselves as Ngati Kahungunu-ki-Heretaunga) who fought at Puketapu. They also defended the island pa of Te Ihu o Te Rei and Parapara. It was, she notes, Ngati Matepu who, with Ngati Kurukuru and other Ngati Kahungunu-ki-Heretaunga, opposed Ngati Raukawa.⁶

11.7.5 The Tribunal's comments

We accept that Ngati Pahauwera assisted in driving Ngati Raukawa from Heretaunga and that some of their tipuna lie buried on the islands of Te Whanganui-a-Orotu as a result of earlier battles. We understand, however, that there are a number of reasons why ancestors might be buried in places other than their own. While warfare was a significant factor, marriage to cement alliances was also important. The result was that many Maori have been buried far from their tribal rohe, but as we understand it this is not necessarily an indication of tangata whenua status to the land on which they rest.

Raids and counter-raids were made throughout the Heretaunga area. All the hapu of this area were threatened and were required to evacuate or defend themselves. We therefore see the wars of the 1820s as involving an alliance of invaders being met by an alliance of Ngati Kahungunu-ki-Heretaunga (consisting of different hapu at different times) and others. Once peace was established, the alliances were no longer necessary. After the return from Nukutaurua, the seven claimant hapu resettled around Te Whanganui-a-Orotu, and Ngati Pahauwera resettled at Mohaka (see para 3.2.5).

11.8 PETITIONING

11.8.1 Introduction

As chapter 10 detailed, from 1875 there was a succession of petitions to Parliament seeking an investigation of title to the lagoon islands and Te Whanganui-a-Orotu, culminating in the present claim. Ngati Pahauwera did not present evidence on their involvement in this petitioning and, consequently, the Wai 55 claimants did not give any evidence to identify the specific hapu affiliations of the petitioners. None the less, we consider such evidence significant in respect of the present claim. Indeed, we see these petitions and the applications to the Native Land Court to investigate title to the islands and Te Whanganui-a-Orotu as essentially a continuation of the tangata whenua role as kaitiaki of their taonga. For the purposes of the Ngati Pahauwera claim, we now summarise the information on the hapu affiliations of the petitioners.

11.8.2 The nineteenth century petitioners

Many of the chiefs who had signed the Ahuriri deed were later involved in discussions with, and forwarding petitions to, the Crown concerning Te Whanganui-a-Orotu. Tareha (later Tareha Te Moananui) is the first person known to have questioned the authority by which reclamations of Te Whanganui-a-Orotu were being carried out by provincial officials (see para 5.6.5). His principal hapu was Ngati Parau, but he was also Ngai Te Ruruku and Ngati Matepu.⁷

Te Waka Kawatini and Paora Torotoro gave evidence concerning Te Whanganui-a-Orotu to the Hawke's Bay Native Land Alienation Commission in 1873 (see para 3.5.5). They were uncle and nephew and both were Ngati Matepu. Paora Torotoro, who was Te Waka Kawatini's successor, was also Ngati Hinepare and Ngai Te Ruruku.⁸

In 1875 Karaitiana Takamoana gave evidence to the Native Affairs Committee that examined a petition sent by Henare Tomoana and others (see para 3.5.5). The

two men were half-brothers and chiefs of Ngati Whatuiapiti, their principal hapu being Ngati Hawea.⁹ As they were influential Ngati Kahungunu-ki-Heretaunga leaders and successive members of the House of Representatives for Eastern Maori, it appears that they were exercising political leadership in giving evidence regarding Te Whanganui-a-Orotu.

Marara Nukai, who headed the 1894 petition, was Paora Torotoro's sister (see para 10.4).

11.8.3 **The early twentieth century petitioners**

Rahania Kahui, who signed the 1894 petition and sent in his own petition to Parliament in 1907, was Marara Nukai's son-in-law.¹⁰

Hiha Ngarangioue, who requested a hearing into the title to Te Whanganui-a-Orotu by the Native Land Court in 1916, belonged to Ngati Hinepare (see para 10.6.1).

Mohi Te Atahikoia, who headed the 1919 petition, was a well-known and experienced leader of Ngati Kahungunu-ki-Heretaunga. His hapu affiliations were Ngati Whakaiti and Ngati Kautere of Waimarama (see para 10.7.1).

One of the signatories to the 1919 petition was Te Wahapango, a Ngai Te Ruruku chief who headed a further petition in 1925 (see para 10.9).

11.8.4 **Post-earthquake petitioners**

Hori Tupaea, who headed the 1932 petition, was Ngati Parau, Ngati Hinepare, and Ngati Whatuiapiti.¹¹

Before Judge Harvey's report on this petition was released, two further petitions were presented to Parliament: one in 1945 from Paneta Maniapoto Otene (Ngati Hawea with Ngati Hinepare affiliations) and one in 1948 from Ahere Hohepa (Ngati Hinepare, Ngati Mahu, and Ngai Tawhao).¹² As well, Tuira Tareha, a descendant of Tareha Te Moananui, sent a letter to the Government in 1940 and another in 1951.

The 1965 petition was signed by whole families of the Ahuriri tangata whenua and was headed by a prominent Ngati Raukawa elder, Ihakara Rapana.

11.8.5 **The Tribunal's comment**

The continuity and consistency of the efforts of petitioners to have the Government and courts investigate the title to Te Whanganui-a-Orotu is obvious. Many of the petitioners belonged to the Wai 55 claimant hapu, whose tipuna had negotiated the sale of the Ahuriri block to McLean. Political leadership and support came from Ngati Kahungunu-ki-Heretaunga – most notably from Ngati Whatuiapiti. We have had no evidence that any of the principal signatories to the petitions had Ngati Pahauwera affiliations.

11.9 **CONCLUSIONS**

Having inquired into the evidence, we conclude that the Ngati Pahauwera claim to tangata whenua status to Te Whanganui-a-Orotu cannot be substantiated and we record our conclusions as follows.

We accept that the whakapapa evidence led by Ngati Pahauwera to establish occupation and use rights clearly shows that they share common ancestors with the principal claimants to Te Whanganui-a-Orotu. It appears to us, however, that the issue around which contention arises is the continuing occupation of those tipuna who were involved in marriage alliances, alliances which, as might be expected, subsequently gave rise to descent from more than one hapu.

In later years, when interests are claimed through such ancestors as is the case here, the question is whether the interests arise from the Ngati Pahauwera connection or from one of the other hapu connections. While such whakapapa links would almost certainly give Ngati Pahauwera the ability to claim interests or rights in Te Whanganui-a-Orotu, the evidence presented to us is not sufficiently persuasive for us to say that those links enable them to claim tangata whenua status.

Given that those linkages exist, it would not be unexpected that Ngati Pahauwera today would trace interests back to certain pa and kainga at the northern end of Te Whanganui-a-Orotu where marriage alliances clearly occurred and where it was said that some of these tipuna lived. In addition, it would not be unexpected that Ngati Pahauwera tipuna might be buried in those places as well (see para 11.7.5).

In our view, it might also be expected that such links would give rise to the regular movement of Ngati Pahauwera from Mohaka down to Te Whanganui-a-Orotu to participate in the harvesting of the bounty of that area. We think that such interests might also have applied to other Ngati Kahungunu hapu, but this would not necessarily give them the right to claim as tangata whenua. Indeed, we understand this to be the position for a number of other hapu in the area.

While it could be argued that this kind of movement might indicate a 'use' right, as in fact has been argued here, we think that it could also be argued that the right to move in and out of the area and participate in the harvest could arise equally from the links between 'whanaunga' who share common ancestry. This is the position put by the Wai 55 claimants and we tend to share that view. It would at least help to explain the karanga submitted by Toro Waaka for Ngati Pahauwera:

... 'Haere mai Ngati Pahauwera ki runga. Ki Ngati Pahauwera ki raro'. This translates as 'Ngati Pahauwera from up the way, welcome from Ngati Pahauwera down here'.
(H4:4)

We understand that in some tribal areas it would be regarded as unusual for those on the paepae to welcome their own in that way if they were in fact tangata whenua of the particular locality.

As for the issue of ringakaha, we think that the kinds of linkages described above would impose on related hapu a responsibility to help defend land in times of war, particularly in the case of a valued taonga like Te Whanganui-a-Orotu. This responsibility to come to its defence against invading tribes from outside the Ngati Kahungunu rohe would, we believe, extend to those hapu not residing there but linked through whakapapa. Indeed, this is what appears to have happened.

If in former times, tangata whenua status alone gave rise to the responsibility to become involved in the defence of land and water during wars, then in recent times the equivalent of that responsibility would, we think, be the defending of the

title and rights against the Crown or its delegated agents. As we have already seen, there is no evidence that any of the principal signatories to the many petitions and court cases involving Te Whanganui-a-Orotu were first and foremost of Ngati Pahauwera descent (see paras 11.8.1–5).

We acknowledge that some assessment of the Maori Land Court determinations might well throw light on the rights and interests that Ngati Pahauwera claim as being more than those arising from whanaungatanga, through common ancestors. On the evidence as presented to us, we are unable to conclude that they have the rights contended for. In view of our comments in paragraph 11.4.4, we make no findings relative to the Native Land Court.

Ngati Pahauwera asked that they be rightfully included or joined as principal claimants to Te Whanganui-a-Orotu. We cannot accede to that request. Indeed, it may well be that only those with tangata whenua status could have done that. In the event they chose not to. We do not doubt, however, that the Wai 55 claimants will honour their clearly stated intention to recognise, in accordance with tikanga Maori, the rights and interests of their whanaunga, Ngati Pahauwera.

References

1. Ms Ertel applied to have various sections of this evidence (H14) struck out as not being relevant to the issues before the Tribunal. The sections in question concerned evidence from Napier Native Land Court minute books. This application was refused (see 2.107).
2. James Wainohu cited his reference as Cordry Huata (the Mohaka River claim), with the translation by Ramon Joe.
3. W T Prentice, 'The Maori History of Hawke's Bay', in J G Wilson and others, *History of Hawke's Bay*, A H and A W Reed, Wellington, 1939 (reprinted Christchurch, Capper Press, 1976), p 93
4. H A Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, pp 183–184, 188–194
5. Prentice, pp 94–97, 107–108
6. Ballara, pp 189–191; see also H1, p 12
7. Information supplied by Wai 55 claimants, in a letter from Mr Hirschfeld to the Waitangi Tribunal on 22 November 1994.
8. Ibid. According to Dr Ballara, Paora Torotoro was Ngai Tamawahine (people of Petane) and Ngai Tuku a Te Rangi; see Napier Native Land Court minute book 1, pp 147, 181, 206, minute book 2, pp 89, 206.
9. *The Dictionary of New Zealand Biography*, 2 vols, Wellington, Department of Internal Affairs, 1990–93, vol 1, pp 418–420, vol 2, pp 544–546
10. Hirschfeld to Waitangi Tribunal, 22 November 1994
11. Ibid
12. Ibid

CHAPTER 12

FINDINGS ON TREATY BREACHES AND RECOMMENDATIONS

12.1 THE ROLE OF THE TRIBUNAL

Before setting out our findings and recommendations, we remind ourselves that our role is to determine whether or not the principles of the Treaty have been breached and, if they have, what, if any, recommendations we should make.

Our jurisdiction is clearly set out in section 6 of the Treaty of Waitangi Act 1975. Under subsection (1), Maori may submit a claim to the Tribunal if they are prejudicially affected by legislation or a policy, practice, act, or omission of the Crown that is inconsistent with the principles of the Treaty. The Tribunal then inquires into the claim (subs (2)) and, if it finds that the claim is well founded, may recommend remedial action to be taken by the Crown (subs (3)). That recommendation may be in either general or specific terms (subs (4)). Accordingly, before we make any recommendations, we must be satisfied that the present claim is well founded.

12.2 THE PRINCIPLES OF THE TREATY

12.2.1 A general overarching principle

In its earlier reports, the Tribunal formulated particular principles of the Treaty of Waitangi that are applicable to particular claims. In recent reports, it has enunciated the view that ‘some matters earlier characterised as principles might more appropriately be seen as inherent in or encompassed by a wider and more general principle’, that is:

The cession by Maori of sovereignty to the Crown . . . in exchange for the protection by the Crown of Maori rangatiratanga. [Emphasis in original.]¹

In the *Ngai Tahu Sea Fisheries Report 1992*, the Tribunal saw this principle as ‘fundamental to the compact or accord embodied in the Treaty’ and as ‘of paramount importance’.² Derived as it was directly from the provisions of articles 1 and 2 of the Treaty, this principle was ‘overarching and far-reaching’. Intrinsic to it were several concepts, elsewhere characterised as principles. Specifically, these were ‘the Crown obligation actively to protect Maori Treaty rights; the tribal right of self-regulation, the right of redress of past breaches, and the duty to consult’.³

Implicit in the overarching general principle was:

the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori is conditional. It was qualified by the retention of tino rangatiratanga . . . that . . . embraced protection not only of Maori land but much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga – mana Maori – in terms of article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. The right to govern it acquired was a qualified right.⁴

In the *Ngawha Geothermal Resource Report 1993*, the Tribunal again enunciated the overarching principle of the Treaty. It then went on to discuss the nature of the Crown duties inherent in that principle, namely, the duty of active protection, the duty to redress past breaches, and the duty to consult. It referred to the need to ensure that:

the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies . . . of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses so to delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.⁵

12.2.2 **The principle of partnership**

The principle of partnership, long acknowledged as having been authoritatively established by the Court of Appeal, states that ‘the Treaty signifies a partnership, requiring the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith’.

As stated in the *Muriwhenua Fishing Report 1988*, and cited in the *Ngawha Geothermal Resource Report 1993*:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty’s terms. The Treaty . . . [was indeed] a charter, or a covenant in Maori eyes, for a continuing relationship between Crown and Maori, based upon their pledges to one another. It is this that lays the foundation of the concept of partnership.⁶

We have restated the two foregoing principles as a reminder of the simple but basic promises of the Treaty and of the broad intentions that underlie the mutual obligations of the parties to it. In our view, these provide the general backdrop against which all claims stand to be measured.

12.2.3 **The principle of active protection**

We turn now to consider the nature of the principles of the Treaty recently discussed by the Privy Council in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, the Te Reo Maori (Maori language) case, which is of

particular relevance to this report. The Privy Council, which in this case included our chief justice, Sir Thomas Eichelbaum, had this to say at page 517:

In Their Lordships' opinion the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty . . . With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.

Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

It appears to us that the Privy Council's statement that the Crown's undertaking to protect and to preserve Maori taonga (property) is foremost among the Treaty principles and is entirely consistent with the observations of the judges of our Court of Appeal in the landmark 1987 *New Zealand Maori Council (Lands)* decision.⁷

We think, therefore, that there can be no doubt that an important Treaty principle is the Crown's duty actively to protect Maori tino rangatiratanga over their taonga (Maori text), that is, the full, exclusive control and undisturbed possession of their properties so long as they wished to retain them (English text). But other important concepts or principles have been enunciated by the Tribunal and the courts as well. Among these are reciprocity and partnership, consultation and tribal self-regulation, and redress for past Treaty breaches. A further principle of tribal resource development has been referred to by claimant counsel in the present claim and by the Hawke's Bay Regional Council in its proposed policy statement. All these Treaty principles are apposite to the present claim. Indeed, they are, as it were, the whariki (mat) on which the claim is laid.

12.3 THE APPLICATION OF TREATY PRINCIPLES TO THE PRESENT CLAIM

12.3.1 Introduction

Before we apply the principles of the Treaty to the present claim, we should recall that on three previous occasions Treaty claims to Te Whanganui-a-Orotu have been raised and discussed.

In 1874 H K Taiaroa asked in Parliament whether reclamations were not in contravention of Treaty rights. In response, McLean denied that there had been any

breach of the Treaty and declared that every government had carefully preserved Maori rights (see paras 6.1.1–4).

At the 1934 hearing of Hori Tupaea's petition, Raniera Ellison argued on behalf of the claimants that no law, whether common or other, can override any of the privileges that the Treaty solemnly granted to Maori (see para 10.11.1). If British law were to supersede the conditions of the Treaty, he claimed, it would follow that the Treaty was of no value. Te Whanganui-a-Orotu came within the scope of article 2 of the Treaty, which guaranteed the claimants their fisheries and other properties. Therefore, what remained since the earthquake was theirs by right under the Treaty. The claimants, he submitted, should at least participate in the area that they had always maintained was theirs (A6(m):89). Judge Harvey did not respond to this Treaty claim.

Again, in 1965 the claim of Ihakara Rapana and others that the Treaty guaranteed rights to Maori and had the power to override common law was ignored.

In the present claim, the claimants contend that they never knowingly or willingly relinquished their tino rangatiratanga over their taonga (Te Whanganui-a-Orotu) and that the Crown was in breach of Treaty principles in asserting ownership over Te Whanganui-a-Orotu by vesting it in the Napier Harbour Board by statute (see paras 6.1.1, 6.1.3–4).

The Crown contends that Te Whanganui-a-Orotu was included in the 1851 purchase or, alternatively, that it vested in the Crown through the 'arm of the sea' legal rule, whereby areas of water that form part of the sea are the property of the Crown.

If the Crown is unsuccessful in both of these alternative arguments, it must follow that Te Whanganui-a-Orotu was never acquired by the Crown. In this case it would seem to us to be self-evident that the subsequent vesting of Te Whanganui-a-Orotu in the Napier Harbour Board as a harbour endowment and the reclamation and disposal of and serious environmental damage to Te Whanganui-a-Orotu was in breach of the Treaty principle that the Crown must actively protect Maori taonga.

12.3.2 **Was Te Whanganui-a-Orotu included in the sale?**

In considering whether or not Te Whanganui-a-Orotu was included in the sale, it is helpful to recall the conclusions that we reached in chapter 3.

- (a) The principal Ahuriri chiefs agreed to sell McLean the inland Ahuriri block lying to the north and west of Te Whanganui-a-Orotu. As Tareha said on 20 December 1850, 'The water is ours. The land you see before you is yours.'
- (b) On 2 May 1851, the sellers, under pressure from McLean and with considerable reluctance, agreed to sell Mataruahou and Te Taha. The May agreement secured for the Crown the control of the entrance to the harbour, which McLean considered 'essentially necessary' for the growth of European settlement.
- (c) There is no evidence that the purchase of Te Whanganui-a-Orotu was negotiated or that the chiefs agreed to sell it. We can only conclude, therefore, that McLean thought that the harbour was an arm of the sea and belonged to the Queen under English common law, but he did not explain this to Maori.

It is also helpful to recall our conclusion in chapter 4 that there is no firm evidence that the sellers ever saw, let alone understood, the red line on the deed plan that McLean exhibited before they signed. Nor is it critical whether they did or did not. The red line on the deed plan is an incorrect delineation of the external boundary of the Ahuriri purchase in that it includes the strip of land north of Ruahoro and continues on from where the Puremu and Tutaekuri Rivers discharged into Te Whanganui-a-Orotu to Mataruahou (see para 4.7.1). Furthermore, it excluded that portion of Te Whanganui-a-Orotu that was embraced in the later Tutaekuri and Te Whare o Maraenui block purchases (see paras 5.3.3, 5.5.2).

Having regard to these conclusions and the other matters discussed in chapters 2, 3, and 4, we think that the correct analysis must be that the sellers had no reason to believe that Te Whanganui-a-Orotu was included in the purchase.

In contrast, the Crown, through its agents, regarded Te Whanganui-a-Orotu as being included in the sale. This was illustrated by the reference to ‘moana’ in the all appertaining (tangi) clause, the reservation of a fishing right and canoe access, and the red line on the plan attached to the deed.

The case for the Crown, cogently argued by Mr Brown, cannot overcome the key point that there was no ‘meeting of minds’ between Maori and the Crown over the position of Te Whanganui-a-Orotu; at best the Crown’s arguments, even on a strict legal analysis, can do no more than establish that there were two different understandings of the all appertaining clause and the reservation of fishing and access rights. We cannot accept the Crown’s view that the red line on the deed plan accurately represents the external boundary of the 1851 purchase.

12.3.3 **Was Te Whanganui-a-Orotu an ‘arm of the sea’?**

But what of the Crown’s alternative contention that Te Whanganui-a-Orotu was an ‘arm of the sea’ and thus the bed had vested in the Crown (presumably upon the signing of the Treaty in 1840) even if the lake had not been included in the purchase?

In this instance, it is, we think, helpful to bring together the relevant historical evidence, which is scattered through a number of chapters.

- (a) McLean always spoke of the harbour, not of fresh water or salt water or of the harbour proper, as distinct from the lagoon. Moreover, he was convinced that the harbour was required for successful settlement (see paras 3.4.5, 3.4.9). There is no evidence that he negotiated its purchase; he must have assumed that the Crown acquired it after the signing of the Treaty in 1840.
- (b) In 1859 (before reclamation commenced), the provincial government of Hawke’s Bay obtained an opinion from C D Ward to the effect that the bed of the harbour below the high-water mark was *prima facie* the Crown’s property (see para 5.6.3).
- (c) In Parliament in 1874, McLean himself said in reply to a question from Tairaroa that authority for reclamation below the high-water mark was not a breach of the Treaty and that native rights had been preserved. All rivers and streams, both on and below the surface, were ceded to the Crown in the all appertaining clause in most deeds of sale (see para 6.1.2).

- (d) Ormond and the provincial government's solicitors, in promoting a local Bill to authorise reclamation by the Napier Harbour Board in 1874–76, were presumably relying on Ward's legal opinion that the Crown owned the bed of the harbour below the high-water mark (see paras 6.1.1, 6.1.3, 6.1.4).
- (e) There is no evidence that until Tareha made his claim to Cooper in 1861 Maori were ever told that the Crown 'owned' harbours from 1840. And at that time Tareha had no idea that harbour works and reclamations would ever extend very far beyond Te Pakake and Te Koau, and that large areas would be reclaimed and drained for urban and industrial land (see paras 5.7, 5.10).
- (f) In 1916 John Salmond, the Solicitor General and one of this country's greatest jurists, opined that the inner harbour was tidal water and the high-water mark was the limit of native customary title (see para 10.6.3).
- (g) In 1920 the Native Land Claims Commission interpreted the reservation of a fishing and access right in the deed of sale as merely reiterating 'the ordinary common law that all the King's subjects . . . have a right of passage over the sea, a common right of fishing and a common (though perhaps restricted) right of landing on the foreshore' (see para 10.7.2).
- (h) In 1948 Judge Harvey thought that there was 'some fairly strong evidence and material' to support the claim that in 1840 Te Whanganui-a-Orotu was 'a fresh or brackish water lagoon and as such was "land" within the meaning of the various Native Ordinances and Acts' (see para 10.11.8).
- (i) Claimant witnesses gave evidence of the presence of freshwater fish in various parts of the lagoon at least until after the reclamation of Napier South. An expert witness gave us evidence on the presence of large and varying quantities of fresh water in the lagoon (see paras 1.2.1, 2.5.7, 6.6.3, 8.7). This suggests that Te Whanganui-a-Orotu was more a part of the river system than an arm of the sea.

We conclude that, as at 1851, and indeed at all material times, Te Whanganui-a-Orotu included elements of fresh water and elements of sea water, with the relative amounts of each varying from one part to another and from one time to another, in accordance with freshwater inflows that were far more substantial than tidal saltwater inflows. The presence within Te Whanganui-a-Orotu of large quantities of fresh water and a very restricted link to the sea distinguished it from harbours like Manukau. We therefore cannot accept the Crown's presumption that Te Whanganui-a-Orotu was a part of the sea. It follows that the bed of Te Whanganui-a-Orotu did not as a matter of common law (traditional English judge-made law) vest in the Crown.

Even if we are wrong in this conclusion, we think that for the Crown to rely on a principle of English common law to deprive Maori of their taonga, Te Whanganui-a-Orotu, would be a breach of the Treaty principle to actively protect the property of Maori.

As the petitioners said at the 1934 hearing, common law rights cannot override Treaty rights (see para 10.11.4), and in this case the exercise of British sovereignty is qualified by the article 2 guarantee of tino rangatiratanga.

12.3.4 **Parallels with the *Lake Omapere* decision**

It is interesting to note, as Mr Hirschfeld did very effectively in his closing submissions (I18(e):103–116), the parallels between the present claim and the *Lake Omapere* decision.⁸ That 1929 decision of Judge F O V Acheson of the Native Land Court was in our view one of the most perceptive judgments in the legal history of our country. We think that the following passages demonstrate this quality and show parallels with the present claim. Page 7:

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

. . . Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream. [Emphasis in original.]

Page 8:

. . . To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a ‘mauri’ or ‘indwelling life principle’ which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.

Page 9:

. . . To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

. . . Finally, to all these things there was added the value of a lake as a permanent source of food supply.

. . . Lake Omapere . . . has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shell-fish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

Pages 10 and 11:

. . . Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

. . . Yes! The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake-occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores. . . Great numbers of the Ngapuhi, must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all. [Emphasis in original.]

Pages 13 and 14:

. . . It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.

Page 19:

. . . *Are the words 'Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess', contained in Article Two of the Treaty of Waitangi, ample in their scope to include Lake Omapere?*

. . . Yes!

According to both English Common Law and ancient Maori Custom, the term 'Lands and Estates' would be ample to include by description a lake or a lake-bed. But even if that were not so, the further term 'other properties collectively possessed' would be more than ample to include a lake occupied and possessed as was Omapere. [Emphasis in original.]

Page 20:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?

... The parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed. [Emphasis in original.]

Page 21:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Crown would claim the bed of Lake Omapere?

... No!

There was no Common Law Right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right. [Emphasis in original.]

Page 24:

... In these later days, 1929, it is not sufficiently realised how dependent the early settlers were on the Treaty of Waitangi, and what great benefits the white people derived from it for several decades.

... In view of the considerations set out above, the Native Land Court holds that it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives.

We think that the words of Judge Acheson could be applied to Te Whanganui-a-Orotu with only minor modifications. More particularly, we do not see why the presence of substantial quantities of salt water within Te Whanganui-a-Orotu and the influence of the tide should alter the position in Treaty terms. Indeed, the word 'moana' denotes a lake as well as the sea. To the claimants and other petitioners, it was (like Lake Omapere) Maori customary land. The sale of land adjacent to it did not include rights to its bed and drainage operations were unauthorised (cf I18(e):113–115).

We therefore conclude that, if the Crown did not purchase Te Whanganui-a-Orotu, its appropriation by the Crown and the consequent affront to the rangatiratanga of the claimants was a clear breach of the principles of the Treaty. If, however, the Crown did acquire Te Whanganui-a-Orotu, either by contract or by the common law, it did so on a basis that was also clearly in breach of the Crown's Treaty guarantee of rangatiratanga and its obligation to actively protect taonga.

12.3.5 **Legislation**

Beginning with the statutory vesting of Te Whanganui-a-Orotu in the Napier Harbour Board, it appears to us that over the years there were a series of breaches of the principles of the Treaty. On each occasion that the reclamation and sale or lease of lagoon lands was authorised by legislation or took place, it was done without consultation with or the approval of Maori and was therefore in breach of the principles of the Treaty. Similarly, acts, policies, and omissions that resulted in the pollution of Te Whanganui-a-Orotu (see paras 2.5.8, 6.6.1–5, 8.7, 9.6) were further breaches of the Principles of the Treaty as was the loss of shellfish beds and fishing grounds and the access to them. Further breaches occurred through the loss of the island reserves of Te Pakake and Pukemokimoki (see paras 5.7, 6.3) and through losses at the southern and northern ends of the lagoon and more particularly of Roro o Kuri, Te Ihu o Te Rei, and Parapara (see paras 5.3.1–3, 5.5.1–5).

The Crown's compulsory taking of the six islands that clearly did not form part of the sale (see paras 7.7.1–7) was a further and blatant breach, as was the inclusion of Tapu Te Ranga in the Lands and Survey farm (see para 7.8).

Even if Te Whanganui-a-Orotu was acquired by the Crown in 1851 as a matter of general law, it is, we think, beyond argument that it was implicit in the acquisition that Maori would continue to have access to Te Whanganui-a-Orotu for what were to them the vitally important activities of fishing, shellfish gathering, and transportation, as well as for the protection of and access to wahi tapu. Following the earthquake, Te Whanganui-a-Orotu in its natural state would have continued to be a source of fish, shellfish, and other traditional resources, and, at least to some extent, a means of transport. By extensively draining and then developing land uplifted by the earthquake without any regard whatever for Maori rights and interests (see paras 7.4–6), the Crown committed further breaches of the principles of the Treaty, more particularly those of active protection and partnership, depriving local Maori of their traditional hapu/iwi resource and prospects for resource development.

The final and most recent group of breaches was the depriving of the claimants, by legislation or otherwise, of an effective role in the management of the Ahuriri Estuary, which forms part of the conservation estate (see paras 9.12.1–8).

12.3.6 **Summary of breaches of Treaty principles**

In summary, we find that there have been a series of breaches by the Crown of the principles of the Treaty in respect of Te Whanganui-a-Orotu. These breaches may be grouped as follows.

The Crown has been in breach by:

- (a) not making it clear that it believed that Te Whanganui-a-Orotu was included in the original purchase and then relying on what were, at most, legally ambiguous provisions in documents prepared by the Crown as a basis for claiming Te Whanganui-a-Orotu;
- (b) purporting to rely on the common law principle of 'arm of the sea' to acquire Te Whanganui-a-Orotu without the consent of Maori;
- (c) enacting legislation to vest Te Whanganui-a-Orotu in the Napier Harbour Board and to authorise a series of reclamations and sales and leases of it,

more particularly to the Napier Borough (City) Council for urban development;

- (d) compulsorily acquiring islands, without paying any compensation, that were clearly outside the purchase and recognised by statute as customary Maori land;
- (e) depriving Maori of access to Te Whanganui-a-Orotu for fishing, shellfish gathering, transport, and other uses, including kaitiakitanga of wahi tapu.
- (f) permitting serious environmental damage and destruction to occur to Te Whanganui-a-Orotu; and
- (g) failing to ensure, by legislation or otherwise, that Maori had an effective role in the conservation and resource management of Te Whanganui-a-Orotu in accordance with their status as tangata whenua and Treaty partners.

We note that in some of these matters, in addition to breaching the general overarching principle of active protection of rangatiratanga over a taonga, were breaches of other principles of the Treaty that were formulated by the Tribunal and the courts and relied on by the claimants. These were the principles of partnership, involving the duty of the Crown to act responsibly and in good faith and to consult, and the duty to provide effective redress for past breaches of the Treaty, which the Crown failed to do (see ch 10).

12.4 RECOMMENDATIONS

12.4.1 Two legal issues

Having found that the Wai 55 claim is well founded and that there have been a number of breaches of the principles of the Treaty that have prejudiced the claimants, the Tribunal has jurisdiction to recommend to the Crown that action be taken to compensate for or remove that prejudice. Before considering what, if any, recommendations we should make, we refer to two legal issues.

The first of these issues is the effect of the Treaty of Waitangi Amendment Act 1993, which amended section 6 of the Treaty of Waitangi Act 1975 by providing that the Tribunal:

shall not recommend—

- (a) The return to Maori ownership of any private land; or
- (b) The acquisition by the Crown of any private land.

‘Private land’ is defined as:

any land, or interest in land, held by a person other than—

- (a) The Crown; or
- (b) A Crown entity within the meaning of the Public Finance Act 1989.

Mr Hirschfeld presented an elaborate argument to the effect that the 1993 amendment had no application to the present claim because it was enacted on 20 August 1993 – after the hearings had commenced – or, alternatively, that the amendment was itself in breach of the principles of the Treaty (I18(e):117–124). Mr Brown, supported by counsel for the Port of Napier Ltd (I16), responded by

submissions to the effect that the plain words of the amendment reflected the intention of Parliament as disclosed by *Hansard* and left no doubt that it did apply to the present claim. We agree. As Mr Brown submitted, the amendment is not retrospective in its nature because it prohibits the Tribunal from making recommendations in respect of private land only from the date of its enactment. By its words, the amendment also squarely applies to local authorities such as the Port of Napier Ltd and the other local authorities to which parts of Te Whanganui-a-Orotu have passed. None of these local authorities are agencies of the Crown as defined in the Public Finance Act 1989.

We cannot accept Mr Hirschfeld's submission that the amendment is in breach of the principles of the Treaty. Again as Mr Brown submitted, it is open to the Government to consider the possible effect of a Tribunal recommendation on a private landowner who has acquired rights to that land in good faith, and Parliament does have the ultimate right to change the law. It is not as if the Tribunal is being deprived of the power to make recommendations in respect of Crown land, whether within the area of the claim or not, or to recommend to the Crown that it should make monetary compensation consequent upon the disposition by the Crown of land that could otherwise have been the subject of a recommendation. If the Crown elected to transfer to local bodies for no or inadequate consideration land that to its knowledge was the subject of a claim, it must accept the consequence of a potential liability for monetary compensation to the claimants.

The second legal issue that arises is the possible significance of the inclusion within the area of the claim of a substantial area of land that is owned by Landcorp, a State-owned enterprise. We are mindful that any recommendation for the return of that land could potentially be subject to sections 8A and 8B of the Treaty of Waitangi Act 1975, with the consequence that, if the procedures specified in those sections were followed, the Crown could be required to give effect to the recommendation. We are, however, conscious that the scope and the application of these sections have not as yet been the subject of detailed consideration by the Tribunal or the courts.

12.4.2 **Final recommendations not appropriate at this stage**

We must now decide what, if any, recommendations to make in respect of our finding that a series of breaches by the Crown of the principles of the Treaty have occurred.

At this stage, we consider that it is not appropriate to make any final recommendations for three main reasons:

- (a) The question of remedies was not extensively argued at the hearing.
- (b) The Tribunal is considering a recommendation that the Landcorp farm be returned to the claimants and is conscious that such a recommendation is potentially binding.
- (c) The claimants should have the opportunity of reformulating the recommendations that they seek in the light of the contents of this report.

We do not, however, want to see the question of relief delayed unnecessarily, and, to avoid that happening, we propose to fix the week starting 30 October as the date for a further hearing in Napier. Should the claimants or the Crown so wish, they may apply to us for an adjournment to a later date, provided they give six weeks' notice.

12.4.3 **Interim steps to be taken**

In the interim, the following steps should be taken:

- (a) The Crown should identify and advise the Tribunal and the claimants of the boundaries and precise ownership details of all Crown and State-owned enterprise land within the pre-European settlement boundaries of Te Whanganui-a-Orotu, when it comprised 9500 acres (3840 hectares).
- (b) The Crown should also identify and advise the Tribunal and the claimants of the present day land utilisation of the Landcorp farm. What we seek is an up-dating of the Ahuriri farm settlement utilisation study of September 1982, which was prepared by staff of the Napier district office of the Department of Lands and Survey (see para 8.4.8) (D6(a):1023–1110).
- (c) There should be no further alienation of any Crown land or State-owned enterprise land lying within the pre-1851 boundaries of Te Whanganui-a-Orotu.
- (d) The claimants should file with the Tribunal a schedule of the recommendations that they seek and they should serve it on the Crown at least one month prior to the further hearing.
- (e) If the claimants lack sufficient resources to prepare the recommendations that they seek, they should approach the Crown for financial and/or expert assistance. In that event, we would expect a sympathetic and helpful response.

12.4.4 **Suggestions on possible recommendations**

To assist the parties in preparing for the further hearing, we make the following suggestions on possible recommendations (we emphasise that we make these on a tentative basis and on the information at present available to the Tribunal):

- (a) The area of Crown land to be considered for possible return should include the Landcorp farm, Roro o Kuri, and the Ahuriri Estuary.
- (b) A substantial fund should be set up as compensation for the past loss of Te Whanganui-a-Orotu as a taonga, of both tangible and intangible value, and as a hapu/iwi economic base, to which the claimants and their tipuna had Treaty rights of resource development.
- (c) More particularly, compensation should be paid for the taking of island reserves and wahi tapu, Te Pakake and Pukemokimoki, for the six former lagoon islands (Maori customary land) that were compulsorily acquired under the Public Works Act 1928 without any compensation being paid, and for the Crown's failure to compensate tangata whenua for the losses that they incurred, including a fishing and access right, by the drainage and development that followed the 1931 earthquake, even though half of this partially developed land was revested in Crown ownership in 1950.
- (d) A new regime should be developed for the management of conservation land within Te Whanganui-a-Orotu that will ensure that the claimants have effective representation. In developing a proposed model, the claimants should not feel bound by the conditions that the Resource Management Act 1991 at present requires to be imposed upon the handing over of any part of the conservation estate.

- (e) The local authorities responsible for the sustained resource management of natural and physical resources in the claim area should be required, by legislation if necessary, to match their words with action and develop the present Maori advisory standing committee structure and process to give the seven claimant hapu a more effective representative and responsible role, in accordance with their status as tangata whenua.
- (f) Appropriate amendments should be made to the Conservation Law Reform Act 1990 to give effect to Treaty principles as provided for in section 4 of the Conservation Act 1987 (see para 9.13.4).
- (g) Appropriate amendments should be made to the Resource Management Act 1991, as recommended by the *Ngawha Geothermal Resource Report 1993*⁹ (see para 9.13.5).
- (h) Appropriate amendments should be made to the Public Works Act 1981, as outlined in recommendations 3(a), 3(b), 3(c), and 3(d) of the *Te Maunga Railways Land Report 1994*.¹⁰
- (i) The Crown should pay to the claimants reasonable costs and disbursements.

References

1. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 269; see also Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 236–237; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 99; and Waitangi Tribunal, *Maori Development Corporation Report*, Wellington, Brookers Ltd, 1993, p 33
2. *The Ngai Tahu Sea Fisheries Report 1992*, p 269
3. Ibid
4. Ibid
5. *Ngawha Geothermal Resource Report 1993*, pp 100–101, para 5.1.3
6. Ibid
7. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641
8. We copied our extracts from the typed and paginated version found in the Bay of Islands Native Land Court minute book (vol 2, pp 253–278).
9. *Ngawha Geothermal Resource Report 1993*, p 155, para 8.5.2
10. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wellington, Brookers Ltd, 1994, p 82

DATED at Wellington this 13th day of June 1995

W M Wilson

W M Wilson, presiding officer

M A Bennett

M A Bennett, member

J H Ingram

J H Ingram, member

M B Boyd

M B Boyd, member

G M Te Heuheu

G M Te Heuheu, member



APPENDIX I

STATEMENTS OF CLAIM

BEFORE THE WAITANGI TRIBUNAL

WAI 55

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Whanganui-a-Orotu

AND

IN THE MATTER of a Claim by Te Otane Reti and others

SECOND AMENDED STATEMENT OF CLAIM

Dated this 14th day of July 1993

1.0 Preamble

This amended statement of claim amends the statement of claim (1990) and the first amended statement of claim (1991).

In essence, this claim, Wai 55, is about Te Whanganui-a-Orotu as a taonga, the rangatiratanga over it, and also its ownership prior to 1874.

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.

This claim deals with the Ahuriri purchase of 1851 only insofar as it concerns Te Whanganui-a-Orotu.

2.0 The Claimants

The claimants are:

The hapu of Te Whanganui-a-Orotu.

Their names are listed in the first amended statement of claim.

3.0 Te Whanganui-a-Orotu

In this amended statement of claim, Te Whanganui-a-Orotu means Te Whanganui-a-Orotu the lake and its boundaries in 1840. When referring to these boundaries, reference is made to all that was or still is contained within those boundaries, namely, the:

Water, fresh, or otherwise;

Bed;

Islands;

Fisheries;

Vegetation;

Animal life (such as birds);

All organic or 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;

Everything left by Tipuna, inclusive of their own remains, and all which they handled and possessed.

4.0 The Claim

The claimants say:

4.1

That their claim falls within one or more of the matters referred to in s 5(1) of the Treaty of Waitangi Act 1975, namely:

they are Maori, and

they have been and continue to be prejudicially affected by the various ordinances, acts, regulations, orders, proclamations, notices and other laws and by the various policies, practices and omissions adopted by or on behalf of the Crown their agents or their successors;

and

4.2

That they have been, and are likely to be prejudicially affected by the aforesaid, namely:

their rangatiratanga over and rights of ownership to Te Whanganui-a-Orotu have been unilaterally abrogated;

and

4.3 That the aforesaid prejudice is inconsistent with the principles of the Treaty, namely:

by the Crown failing to guarantee their rangatira tanga over and rights of ownership to Te Whanganui-a-Orotu, and,

by the Crown breaching its duty to actively protect their rangatiratanga over and rights of ownership to Te Whanganui-a-Orotu, and,

by the Crown breaching its fiduciary obligation to them in respect of Whanganui-a-Orotu, and,

by the Crown breaching its duty to act reasonably and in good faith towards them in respect of Te Whanganui-a-Orotu, and,

by the Crown breaching its duty to consult with them in respect of Te Whanganui-a-Orotu, and,

by the Crown breaching its duty to provide effective redress for their past claims in respect of Te Whanganui-a-Orotu.

5.0 Wherefore the Claimants Seek the Following Findings

5.1

Te Whanganui-a-Orotu is a taonga over which rangatiratanga was exercised prior to and after 1840 and remains so today.

5.2

Ngati Kahungunu signed the Treaty.

5.3

Te Whanganui-a-Orotu belonged, at the time the Treaty was signed in 1840, to the forebears of the claimants in accordance with their customs and usages.

5.4

Te Whanganui-a-Orotu was particularly revered and treasured for the kaimoana it provided.

5.5

When the Treaty was signed in 1840, the Treaty did entitle the forebears of the claimants to retain their rangatiratanga over, not only the water, but also the bed and the islands.

5.6

When the Treaty was signed in 1840, the Treaty did not entitle the Crown to claim Te Whanganui-a-Orotu.

5.7

Te Whanganui-a-Orotu was not included within the boundaries of the 1851 deed.

5.8

Te Whanganui-a-Orotu was excluded from the 1851 sale.

5.9

The map attached to the deed was not shaded red at the time the deed was signed.

5.10

Until 1874 Te Whanganui-a-Orotu was native land in the sense of the definition provided in the Native Lands Act 1865.

5.11

The islands immediately after the signing of the 1851 deed – but excluding Roro-o-kuri, Pukemokimoki and Pakake – were still native land in the sense of the definition provided in the Native Lands Act 1865.

5.12

The grant to the Superintendent of the Hawkes Bay Province in 1860 under the Public Reserves Act 1854 was made without reference to or consultation with the forebears of the claimants.

5.13

The Napier Harbour Board Act 1874 was passed by parliament without reference to or consultation with the forebears of the claimants.

5.14

All legislation, affecting Te Whanganui-a-Orotu, after the passing of the Napier Harbour Board Act 1974 was passed by parliament without reference to or consultation with the forebears of the claimants or the claimants.

5.15

The diversion of rivers away from Te Whanganui-a-Orotu was done without reference to or consultation with the forebears of the claimants.

5.16

The dredging of the Ahuriri entrance to Te Whanganui-a-Orotu in the 19th century and later was done without reference to or consultation with the forebears of the claimants.

5.17

After the 1931 earthquake the decision to drain the remnant waters was done without reference to or consultation with the forebears of the claimants or the claimants.

5.18

The airport was conceived of and constructed without reference to or consultation with the forebears of the claimants or the claimants.

5.19

Alienation of parts of Te Whanganui-a-Orotu has occurred without reference to or consultation with the forebears of the claimants or the claimants.

5.20

No compensation of any kind for the loss of any right has ever been offered or paid in respect of Te Whanganui-a-Orotu to the forebears of the claimants or the claimants.

5.21

Environmental damage has been caused to Te Whanganui-a-Orotu.

5.22

Environmental management of Te Whanganui-a-Orotu, prior to the passing of the Resource Management Act 1991, was carried out without reference to or consultation with the forebears of the claimants or the claimants.

5.23

Since the passing of the Resource Management Act 1991 there has been inadequate acknowledgement of the principles of the Treaty in dealing with environmental matters over Te Whanganui-a-Orotu.

5.24

Any other findings the Tribunal considers appropriate.

6.0 Wherefore The Claimants Seek the Following Recommendations

6.1

A recommendation that legislation, vesting title in Te Whanganui-a-Orotu in others, be repealed or amended, together with others acts, or parts thereof, which alienate or could further alienate Te Whanganui-a-Orotu from the claimants.

6.2

A recommendation for the return of all Crown lands in Te Whanganui-a-Orotu to the hapu of Te Whanganui-a-Orotu.

6.3

A recommendation for the return of all other public lands in Te Whanganui-a-Orotu to the hapu of Te Whanganui-a-Orotu.

6.4

A recommendation for payment of compensation for those parts of Te Whanganui-a-Orotu which have passed from the Crown into private ownership.

6.5

A recommendation for payment of compensation for the destruction of former islands, environmental destruction (inclusive of water and fisheries), and spiritual degradation.

6.6

A recommendation for the costs to implement these recommendations.

6.7

A recommendation that the Crown enter into immediate negotiations with the claimants over the amounts of compensation payable as herein sought.

6.8

A recommendation that section 8 of the Resource Management Act 1991 is inadequate in providing for the rangatiratanga of the claimants over Te Whanganui-a-Orotu.

6.9

A recommendation for the immediate implementation of the recommendations sought.

7.0 Amendment of Claim

The claimants reserve the right to further particularise their claim and to seek further findings and recommendations as the claim progresses, provided however, that the basis of any such amendment sought is in respect of Te Whanganui-a-Orotu as outlined herewith.

Charl Hirschfeld
Counsel for the Claimants

To the Registrar of the Waitangi Tribunal, and
Counsel for the Crown

BEFORE THE WAITANGI TRIBUNAL

WAI 55

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Whanganui-a-Orotu

AND

IN THE MATTER of a Claim by Te Otane Reti and others

**AMENDMENT TO THE SECOND
AMENDED STATEMENT OF CLAIM (14 JULY 1993)**

Dated this 6th day of December 1993

1.0 Introduction

This amendment to the amended statement of claim of 14 July 1993 is in respect of two matters, namely, clarification of the names of the hapu claimants, and concerning the (August) 1993 amendment to The Treaty of Waitangi Act 1975.

The amendment is made pursuant to paragraph 7 of the amended statement of claim of 14 July 1993.

2.0 Amendment to Paragraph 2

Paragraph 2 of the amended statement of claim is amended by deleting the last sentence

‘Their names are listed in the first amended statement of claim.’

and substituting it with the following sentence:

‘The names of those hapu are as follows:

1. Ngati Parau
2. Ngati Hinepare
3. Ngati Tu
4. Ngati Mahu
5. Ngai Tawhao
6. Ngai Te Ruruku
7. Ngati Matepu’

3.0 Amendment to Paragraph 5

Paragraph five of the amended statement of claim is ended by including after paragraph 5.24 the following paragraph:

‘5.25

That despite the passage into law of the August 1993 amendment to the Waitangi Tribunal Act 1975, concerning the recommendation for the return of private land (defined in the amendment), any recommendation made by the Tribunal for the return of land is not affected by that amendment.’

Carl Hirschfeld
Counsel for the Claimants

To the Registrar of the Waitangi Tribunal, and
Counsel for the Crown

BEFORE THE WAITANGI TRIBUNAL

WAI 55

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of Te Whanganui-a-Orotu

AND

IN THE MATTER of a Claim by Te Otane Reti (Deceased) and others

**SECOND AMENDMENT TO THE SECOND AMENDED
STATEMENT OF CLAIM (14 JULY 1993)**

Dated this 1st day of August 1994

1.0 Introduction

This amendment to the amended statement of claim 14 July 1993 is in respect of an extra recommendation sought by the claimants.

The amendment is made pursuant to paragraph 7 of the amended statement of claim of 14 July 1993.

2.0 Amendment to paragraph 6

Paragraph 6 of the amended statement of claim is amended by including after paragraph 6.8 the following paragraph:

- ‘6.8(a) A recommendation that the Crown be required to identify the owners in fee simple of all parcels of land contained within Te Whanganui-a-Orotu as it was in 1840.’

Charl Hirschfeld
Counsel for the Claimants

TO: the Registrar of the Waitangi Tribunal

AND TO: Counsel for the Crown

BEFORE THE WAITANGI TRIBUNAL

WAI 55

CONCERNING the Treaty of Waitangi Act 1975

AND a claim by TE ONE RETI AND OTHERS TO TE
WHANGANUI-A-OROTU (NAPIER INNER HARBOUR)

STATEMENT OF CLAIM

Whereas

A. Prior to, at 1840 and subsequent the Ngati Pahauwera claimants held rangatira and tangata whenua rights to a portion of Te Whanganui-a-Orotu.

B. Te Whanganui-a-Orotu was a taonga of the Ngati Pahauwera claimants.

C. In November 1851 the Crown purported to purchase the Ahuriri Block.

D. The Crown has subsequently claimed that it has 'ownership' of Te Whanganui-a-Orotu by virtue of a common law doctrine or that Te Whanganui-a-Orotu was included in the purported sale of the Ahuriri Block and was thus purchased by the Crown at 1851.

The Claim

1. The Ngati Pahauwera claimants claim rangatira status in respect of parts of the land bordering on Te Whanganui-a-Orotu and rights in the lake arising from their occupation and use of Te Whanganui-a-Orotu prior and subsequent to 1840.

2. If the Tribunal finds that the Crown did not purchase Te Whanganui-a-Orotu, the claimants claim that they are prejudicially affected by that purchase which was contrary to the Treaty, as it represented a breach of the Crown's fiduciary duties to the hapu of Te Whanganui-a-Orotu, including Ngati Pahauwera.

3. If the Tribunal finds that Te Whanganui-a-Orotu was not purchased, but became vested in the Crown by the operation of the common law, the Ngati Pahauwera claimants say that the operation of the common law has resulted in prejudice and loss to them and is inconsistent with the principles of the Treaty of Waitangi.

4. If the Tribunal finds that Te Whanganui-a-Orotu was not purchased by the Crown, but was subsequently appropriated by them by statute, then the claimants claim that this was inconsistent with the Treaty and has resulted in prejudice and loss to Ngati Pahauwera.

Findings Sought

5. What the Ngati Pahauwera claimants seek is:

- (a) an acknowledgement by the Tribunal that they are rightfully included or joined as claimants; and
- (b) findings that:
 - (i) Te Whanganui-a-Orotu was at 1840 a taonga of inter alia, Ngati Pahauwera. Specifically, Te Whanganui-a-Orotu was a natural resource providing physical sustenance for the hapu of Te Whanganui-a-Orotu and was thus integral to the survival of those hapu.
 - (ii) Te Whanganui-a-Orotu was never relinquished by, inter alia, Ngati Pahauwera; and
 - (iii) All omissions or acts of the Crown (including the operation of the common law) by which the Crown appropriated to itself the ownership and/or management of Te Whanganui-a-Orotu were contrary to the Treaty of Waitangi; and
 - (iv) The vesting of management and/or ownership rights in Crown constructs was contrary to the Treaty; and
 - (v) The failure of the Crown to act consistently with the Treaty has resulted in prejudice and loss to, inter alia, Ngati Pahauwera.

6. If, alternatively, the Tribunal finds that the Crown did purchase Te Whanganui-a-Orotu, then the claimants seek the following findings:

- (a) Te Whanganui-a-Orotu was at 1840 a taonga of inter alia, Ngati Pahauwera. Specifically, Te Whanganui-a-Orotu was a natural resource providing physical sustenance for the hapu of Te Whanganui-a-Orotu and was thus integral to the survival of those hapu.
- (b) The Crown, by purchasing this resource breached its fiduciary obligations to the hapu of Te Whanganui-a-Orotu, including Ngati Pahauwera.
- (c) This breach of the Crown's fiduciary duties to the hapu of Te Whanganui-a-Orotu including Ngati Pahauwera has resulted in prejudice and loss to them.

7. If, alternatively, the Tribunal finds that the Crown did not purchase Te Whanganui-a-Orotu, but that the Crown has either already or subsequently acquired it through the operation of the common law, then the claimants seek the following findings:

- (a) Te Whanganui-a-Orotu was at 1840 a taonga of inter alia, Ngati Pahauwera. Specifically, Te Whanganui-a-Orotu was a natural resource providing physical sustenance for the hapu of Te Whanganui-a-Orotu and was thus integral to the survival of those hapu.
- (b) The importation and operation of the common law was in breach of the Treaty.
- (c) All omissions or acts of the Crown (including the operation of the common law) by which the Crown appropriated to itself the ownership and/or management of Te Whanganui-a-Orotu were contrary to the Treaty of Waitangi.

Recommendations

8. The claimants seek the following recommendations on the basis that all or any of the findings sought are granted by the Tribunal. Recommendations that:

- (a) the claimants should be financially compensated:
 - (i) for loss of their traditional fishery; and
 - (ii) their economic resources; and
 - (iii) diminution of their control and authority over their resources before and after the earthquake; and
 - (iv) trespass and/or nuisance
- (b) all Crown land within the land that was Te Whanganui-a-Orotu be vested in the claimants, including Ngati Pahauwera
- (c) all future management and control over the resources within Te Whanganui-a-Orotu be vested in the claimants, including Ngati Pahauwera.

Dated at Wellington this 25th day of May 1994

Kathy L Ertel
Counsel for the Ngati Pahauwera Claimants

APPENDIX II

RECORD OF HEARINGS

D FIRST HEARING, OMAHU MARAE, OMAHU, 19–23 JULY 1993

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe
Peter Nee Harland

Appearing for the Crown:

Brendan Brown
Ellen France

Also appearing:

M J Wenley for the Hawke's Bay Airport Authority
Max Courtney for the Port of Napier Ltd

Submissions and evidence were received from:

Bevan Taylor (oral in Maori and English, D11, D43(a))
Rameka (Joe) Pohatu (oral in Maori, supporting papers, D10, D12, D13, D39, D43(e))
John Hohepa (D10, D13, also oral in Maori)
Te Awhina Whaitiri (oral in Maori)*
Emma Te Ruawhare Kaukau (D17, D43(b))
Erueti Pene (Jock) (D18, also oral in Maori)
David Erueti Pene (D19, D19(a), D43(d))
Hineiaia Pene (oral in Maori)
Wiremu Karena Hakiwai (oral in Maori)*
Hirini Moko Mead (D22)
Kurupai Nelson (oral)*
Kahu Reremoana Hungahunga (D23, also oral in Maori)
Heitia Hiha (D21, D23); as part of Heitia's evidence, he also presented (D21(b))
Te Maari (Marjorie) Joe (D26)
Rangiaho Brown (D29)
Apirana Mahuika (D30)
Bevan Taylor (D25; Mr Taylor also read D25(a), (b), (c))
Frederick R M Reti (D27)
Hine Reti (oral)*
Wiari Anaru (D32)

* No paper submitted

Mana Powhiro Cracknell (D37, D37(a), also oral in Maori)
Labour Hawaikirangi (oral in Maori and English)
Joe Pohatu (D39)
Kerry Nigel Hadfield (D40(a), (b))

Evidence admitted to the record but not read out at this hearing:

Selina Sullivan (evidence was tabled, D14)
Peter Kaukau (D16, D43(c))
Taape O'Reilly (D24)
Te Haata Brown (D28)
Rangiaho Brown (D29)
Apirana Mahuika (D30)
Violet (Kera) Koko (D31)
Te Aranui Boyce Puna (Spooner) (D34)
Te Rima o Hurae Whenuaroa (D36)
Hine I Nukua I Terangi Reti (D38)

Site visit:

Key to site visit of 20 July 1993 (D20)

**E SECOND HEARING, NAPIER CITY COUNCIL CHAMBERS, NAPIER,
4–8 OCTOBER 1993**

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Brendan Brown
Ellen France

Also appearing:

J Hippolite for the Department of Conservation

Submissions and evidence were received from:

Toro Waaka (E14)
Arapata Tamati Hakiwai (E15, E15(a))
Haana Maiora Cotter (E16)
Kurupo III Te Pakitu Tareha (E17)
Patrick Parsons (E3(a)–(f), also referred to A12, D4)
James Ritchie (E2)
Bryan D Gilling (E1(a)–(b))
Richard Boast (E4)

Evidence admitted to the record but not read out at this hearing:

Gordon Hart (E18)
Hineiapitia (Beattie) Nikera (E19)
Polly Rakuraku (E20)
Monty Murton (E21)

**F THIRD HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER, 6–8
DECEMBER 1993**

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Brendan Brown
Ellen France

Also appearing:

J Hippolite for the Department of Conservation

Submissions and evidence were received from:

Gary Williams (F3)
David Young (E5)
Richard Boast (D1, E4) (continuation of Boast's evidence from October 1993 hearing; read
by Charl Hirschfeld)
Tony Walzl (F9)
John Hohepa (F10)

G FOURTH HEARING, NGATI PAHAUWERA HEARING IN RELATION TO TE WHANGANUI-A-OROTU, WAITANGI TRIBUNAL DIVISION HEARING ROOM, SEABRIDGE HOUSE, WELLINGTON, 31 JANUARY 1994

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Brendan Brown
Ellen France

Appearing for Ngati Pahauwera:

Shaan Stevens

Submissions and evidence were received from:

Document G1 was admitted to the record
Counsel for Ngati Pahauwera sought an adjournment of the hearing

**H FIFTH HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER,
2-4 MAY 1994**

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Brendan Brown
Ellen France

Appearing for Ngati Pahauwera:

Shaan Stevens

Also appearing:

Max Courtney for the Port of Napier Ltd

Submissions and evidence were received from:

Tony Walzl (F9)
Kath Ertel (H11, H11(a), H16)
Charles Ropitini Tio Te Kahika Hirini (H6) (read by Ray Paku)
Thomas Spooner (H8, H8(a)) (evidence withdrawn)
Te Aranui Boyce (Puna) Spooner (H7) (evidence withdrawn)
Thomas James Winohu (H5)
John Stewart Ombler (H12, H12(a))
Toro Waaka (H4)
Heitia Hiha (H13, H13(a), (b), (c))
Heitia Hiha (H14)
Brendan Brown (H15)
Pamela Bain (H9)

**MAP AND DEED VISIT, DEPARTMENT OF SURVEY AND LAND INFORMATION,
HEAPHY HOUSE, WELLINGTON, 1 JULY 1994**

Appearing for the Tribunal:

Georgina Te Heuheu
Bill Wilson

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Ellen France

Appearing for Ngati Pahauwera

Shaan Stevens

**I SIXTH HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER
18–22 JULY 1994**

Appearing for the claimants:

Charl Hirschfeld
Caren Wickliffe

Appearing for the Crown:

Brendan Brown
Ellen France

Appearing for Ngati Pahauwera:

Shaan Stevens
Kath Ertel

Also appearing:

Max Courtney for the Port of Napier Ltd

Submissions and evidence were received from:

John Stewart Ombler (H12)
Charles Hirini (I2, I2(a))
Charl Hirschfeld and Caren Wickliffe (I8–10)
Kath Ertel (I11–14)
Brendan Brown (I15, I15(a)–(d))
Max Courtney (I16, I16(a))
Charlie Mohi (oral)

APPENDIX III

RECORD OF PROCEEDINGS

1 CLAIMS

1.2 (a) Claim No 1

Wai: 55

Date: 16 March 1988

Claimants: Te Otane Reti and others

Affecting: Te Whanganui-a-Orotu, Napier (Ahuriri)

(b) Further statement of claim

Date: 17 May 1990

(c) Amended statement of claim

Date: 15 April 1991

(d) Second amended statement of claim

Date: 14 July 1993

(e) Amendment to the second amended statement of claim

Date: 14 July 1993

(f) Second amendment to the second amended statement of claim

Date: 1 August 1994

1.28 Claim No 2

Wai: 432

Date: 25 May 1994

Claimant: Ngati Pahauwera

Concerning: Te Whanganui-a-Orotu

2 PAPERS IN PROCEEDINGS

2.1 Tribunal directions to receive Orotu claim, 6 March 1989 (Wai 55)

2.8 Tribunal directions on Orotu claim to distribute document bank, 30 March 1990 (Wai 55)

2.13 Tribunal directions on Orotu claim re proposals for conference (Wai 55)

- 2.14 Tribunal directions on Orotu claim re Parsons report, 29 May 1990 (Wai 55)
- 2.16 Notice of Orotu claim, 5 June 1990 (Wai 55)
- 2.18 Tribunal directions on Orotu claim to appoint presiding officer, 27 June 1990 (Wai 55)
- 2.21 Tribunal directions on Orotu amended claim, 3 August 1990 (Wai 55)
- 2.24 Tribunal directions on Orotu claim re timetabling, 2 October 1990 (Wai 55)
- 2.28 Tribunal directions on Orotu claim re abandoning timetabling, 11 December 1990 (Wai 55)
- 2.32 Tribunal directions on Orotu re distribution of Parsons report, 19 April 1991 (Wai 55)
- 2.35 Tribunal directions on Orotu claim re calling conference, 17 May 1991 (Wai 55 and other claims)
- 2.37 Claimants' memorandum on Orotu claim, 15 May 1991 (Wai 55)
- 2.47 Tribunal direction re: appointment of counsel, 4 July 1991 (Wai 55)
- 2.79 Tribunal direction to release report concerning customary Maori usage of Te Whanganui-a-Orotu, 4 August 1992 (Wai 55)
- 2.81 Tribunal direction appointing members for Te Whanganui-a-Orotu claim, 26 March 1993 (Wai 55)
- 2.82 Tribunal direction regarding urgent hearing, 29 March 1993 (Wai 55)
- 2.83 Tribunal direction regarding issues, 2 June 1993 (Wai 55)
- 2.84 Letter from Charl B Hirschfeld regarding representation, 23 June 1993 (Wai 55)
- 2.85 Letter from counsel for Napier City Council and counsel for Hawke's Bay Regional Council, 16 June 1993 (Wai 55)
- 2.86 Notification of Te Whanganui-a-Orotu first hearing, 19–23 July 1993
- 2.87 Memorandum of counsel for claimants re issues and other matters, 12 July 1993 (Wai 55)
- 2.88 Notification of Te Whanganui-a-Orotu second hearing, 4–8 October 1993
- 2.89 Letter from Ngati Pahauwera negotiating committee, 23 August 1993
- 2.90 Tribunal Direction re witness summons, Bryan Gilling, 30 September 1993

- 2.91 Statement by presiding officer re Bryan Gilling, 8 October 1993
- 2.92 Letter from Crown in response to letter reference number 2.89, 1 October 1993
- 2.93 Notification of Te Whanganui-a-Orotu third hearing, 6–10 December 1993
- 2.97 Notification of fourth hearing in respect of Ngati Pahauwera for 31 January 1994, 20 December 1993
- 2.99 Director's minute 21 February 1994 following the meeting with the representatives of the Wai 55 claim and Ngati Pahauwera
- 2.100 Notification of fifth hearing commencing 11 April 1994 (postponed)
- 2.101 Claimant memorandum re Ngati Pahauwera, 18 March 1994
- 2.102 Crown memorandum re hearings, 31 March 1994
- 2.103 Letter from counsel for Ngati Pahauwera, 6 April 1994
- 2.104 Minutes of Wai 55 judicial conference held on 7 April 1994
- 2.105 Notification of fifth hearing commencing 2 May 1994 and postponement of hearing 11 April 1994
- 2.107 Tribunal direction re applications for sections of evidence to be struck out, 17 June 1994 (Wai 55)
- 2.108 Claimant memorandum re opposition to Ngati Pahauwera's application concerning parts of Mr Hiha's evidence, 29 June 1994
- 2.109 Clarification re claimant memorandum of 29 June 1994, Wai 55, 29 June 1994
- 2.111 Notification of hearing, 15 July 1994
- 2.115 Tribunal direction regarding completion of report date, 2 December 1994

3 COMMISSIONS AND AGREEMENTS

- 3.1 Research commission, Parsons re Te Whanganui-a-Orotu claim (Wai 55)
- 3.11 Research commission, Gary Scott, Angela Ballara, 20 August 1993 (Wai 201)

APPENDIX IV

RECORD OF DOCUMENTS

* Document confidential and unavailable to the public without a Tribunal order

† Document held at the Waitangi Tribunal library, Waitangi Tribunal Division offices, second floor, Seabridge House, 110 Featherston Street, Wellington

The reference in brackets after each document or set of documents refers to the person or party producing the document in evidence

A FIRST HEARING AT WAITANGI TRIBUNAL DIVISION BOARDROOM, SEABRIDGE HOUSE, WELLINGTON, 15 APRIL 1992

- A1 Wai 55 statement of claim: Te Otane Reti and others, Te Whanganui-a-Orotu (Napier Inner Harbour) (registrar)
- A2 H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1878, vol II, pp 483–496
Copies of original deeds
— Waipukurau block, 4 November 1851
— Ahuriri block, 17 November 1851
— Mohaka block, 5 December 1851
(registrar)
- A3 (a) Copy of purchases plan for Waipukurau block, H H Turton, *Plans of Land Purchases in the North Island of New Zealand*, 1878, vol II
(b) Copy of purchase plan for Ahuriri block, NA, Wellington, AAMK 869/202B
(registrar)
- A4 Legislation related to Te Whanganui-a-Orotu, (registrar)
(a) The Napier Harbour Board Act 1874
(b) The Napier Harbour Board Amendment and Endowment Improvement Act 1887
(c) The Napier Harbour Board Amendment and Further Empowering Act 1889
(d) The Napier Harbour Board Amendment and Endowment Improvement Act 1899
(e) The Napier Harbour Board Exchange of Lands Empowering Act 1906
(f) The Napier Harbour Board Amendment and Endowment Improvement Act 1912
(g) The Napier Harbour Board Empowering and Loan Act 1914
(h) The Napier Harbour Board and Napier High School Empowering Act 1918
(i) The Reserves and Other Lands Disposal and Public Bodies Act 1921
(j) The Native Land Act 1931
(k) The Napier Harbour Board Empowering Act 1932–33

- (l) The Hawkes Bay Harbour Board Emowering Act 1989
 - (m) The Hawkes Bay Earthquake Act 1931
- (registrar)

A5 Official Publications related to Te Whanganui-a-Orotu

- (a) 'Report of the Land Purchase Department Relative to the Extinguishment of Native Title in the Ahuriri District', AJHR, 1862, C-1
- (b) 'Further Papers relative to Governor Sir George Grey's plan of Native Government: Reports of Officers', AJHR, 1862, E-9, sec 6
- (c) 'Return of Native Reserves Made in the Cession of Native Territory to the Crown', AJHR, 1862, E-10, pp 1-3, 9
- (d) G S Cooper, 'Report on the Subject of Native Lands in the Province of Hawke's Bay', AJHR, 1867, A-15
- (e) G S Cooper, 'Report on the Subject of Reserves, Native Lands, etc, in the Province of Hawke's Bay', AJHR, 1867, A-15A
- (f) Karaitiana Takamoana, 'Memorial to the General Assembly', AJHR, 1869, D-22
- (g) 'Return of all Runs Leased by Maoris to Europeans in the Northern Island', AJHR, 1869, D-27
- (h) 'Report on the Native Reserves in the Province of Hawke's Bay', AJHR, 1871, F-4, pp 60-63
- (i) 'Report of the Hawkes Bay Native Lands Alienation Commission', AJHR, 1873, G-7
- (j) 'Notes of Native Meetings (East Coast and Bay of Plenty)', AJHR, 1874, G-1
- (k) 'Reports from Officers in Native Districts', AJHR, 1874, G-2, pp 18-19
- (l) 'Reports of Native Land Claims Commission', AJHR, 1921-22, G-5
- (m) 'Report and Recommendation on Petition No 240 of 1932, of Hori Tupaea and Four Others, Praying for Relief in Connection with Whanganui-o-Rotu (Napier Inner Harbour) and their Right of Property or Therein', AJHR, 1948, G-6A
- (n) 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants Concerning the Mohaka Block', AJHR, 1951, G-4

(registrar)

A6 Petitions

- (a) 'Petition of Renata Kawepo and 553 Others', AJHR, 1872, I-2
- (b) 'Petition of 300 Maoris of Hawke's Bay, Wairoa, Turanga and Taupo', AJHR, 1873, J-6
- (c) 'Petition of 371 Maoris of Hawke's Bay, Wairarapa, Wairoa and Turanganui', AJHR, 1873, J-7
- (d) 'Petition of Marara Nukai and Six Others', MA/MLP 6/3 no 641/1894
- (e) 'Reports of the Native Affairs Committee', AJHR, 1904, I-3, petition no 823, 1903, p 17
- (f) 'Petition of Mohi Te Atahikoia and 47 Others', AJHR, 1920, G-6A, petition no 365, 1919, p 28
- (g) 'Petition of Paora Kurupo and 51 Others in Relation to the Puketitiri Reserve', LS1, 22/2590, NA, Wellington
- (h) 'Report on Petition No 70/24 of Te Whatuiapiti Renata for Inclusion in List of Owners in Puketiritiri Block', MA 1/1924/218, NA, Wellington

- (i) 'Petition No 419/1924 of Waka Pango and 18 Others in Relation to Te Whanganui-a-Orotu', AAMK 869/202B, NA, Wellington
 - (j) 'Petition No 240/32 of Hori Tupaea and Others in Relation to Te Whanganui-a-Orotu', LE 1/1948/301, NA, Wellington
 - (k) 'Petition No 82/1945 of Paneta Maniapoto Otene and 13 Others in Relation to the Ahuriri Lagoon', LE 1/1945/12, NA, Wellington
 - (l) 'Petition No 26/1948 of Ahere Hohepa and Others in Relation to Ahuriri Lagoon', LE 1/1948/18, NA, Wellington
 - (m) 'Petition No 1965/48 of I Rapana and 121 Others in Relation to the Whanganui-a-Orotu', LE 1/1965/13, NA, Wellington
 - (n) 'Schedule of Petitions Presented to the House of Representatives and the Legislative Council 1870–1872', app 5, S M Cole, 'The Repudiation Movement: A Study of the Maori Land Protest Movement in Hawkes Bay in the 1870s', MA thesis, Massey University, 1977
- (registrar)
- A7 Maori Affairs files related to Te Whanganui-a-Orotu
- (a) Napier Harbour Board Empowering Act 1932. Power to take Native land in Ahuriri Lagoon and Te Whare-o-Maraenui Lagoon, AAMK 869/202B, NA, Wellington
 - (b) MA 101 Commission on Mohaka Block 1950 (copied from vol 53, Waitangi Tribunal Raupatu document bank) MA 101/1 proceedings
 - (c) MA 101/2 exhibits
 - (d) MA 101/3 correspondence
 - (e) J 1905/1232 re Wharerangi block
 - (f) Petition no 156/12 Hohaia Hoata, MA 1 1912/2853
- (registrar)
- A8 Documents related to Te Whanganui-a-Orotu
- (a) H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1878, vol 2, p 509
 - (b) Ibid, p 580
 - (c) The Napier Harbour Board Act 1876
 - (d) Napier Harbour Board 1887–1936, Lands and Survey 29057, NA, Wellington
 - (e) *Hawkes Bay Herald*, 24 May 1918, p 6
 - (f) The Small Farms (Relief of Unemployment) Amendment Act 1945
 - (g) *New Zealand Gazette*, 1939, p 2673
 - (h) The Napier Harbour Board and Napier Borough Enabling Act 1945
 - (i) The Napier Harbour Board and Napier Borough Enabling Amendment Act 1949
 - (j) The Reserves and Other Lands Disposal Act 1950
 - (k) The Napier Harbour Board and Napier City Enabling Amendment Act 1958
- (registrar)
- A9 J Hippolite, 'A Preliminary Historical Report', Te Whanganui-a-Orotu claim, 25 July 1990 (registrar)
- A12 Evidence of Patrick Parsons, claimants report on Te Whanganui-a-Orotu, March 1991 (counsel for claimants)

- A13 Supporting documents to A12 (counsel for claimants)
- A21 ‘Supporting Papers to the Evidence of Stephanie McHugh re: Te Whanganui-a-Orotu’, October 1991 (no evidence from S McHugh was filed)
- (a) Volume 1: official publications (*British Parliamentary Papers*, Acts, Bills, ordinances, *New Zealand Parliamentary Debates*, *Journals of the House of Representatives*, *Journals of the Legislative Council*)
 - (b) Volume 2: official publications (*Appendices to the Journals of the House of Representatives*, *New Zealand Gazette*, *Hawke’s Bay Provincial Council Votes and Proceedings*)
 - (c) Volume 3: Department of Survey and Land Information records (newspapers, Turton’s deeds, pamphlets, deed receipts, Crown grants) and other published material
 - (d) Volume 4: National Archives files and correspondence (CS, G, LE, MA, NM, NZC, and W series)
 - (e) Volume 5: library manuscript material (Alexander Turnbull Library: Colenso, Tiffen, and McLean papers; Auckland Public Library: Grey’s letters)
 - (f) Volume 6: maps
- (counsel for Crown)
- A33 J Hippolite, report on the Hawkes Bay land purchases, 12 February 1992 (registrar)

D FIRST HEARING, OMAHU MARAE, OMAHU, 19–23 JULY 1993 AND SITE VISIT, 20 JULY 1993

- D1 Evidence of Richard Boast on Te Whanganui-a-Orotu 1851–1991, a legal history, June 1991 (counsel for claimants)
- D2 Evidence of Peter H E Bloomer, 2 July 1992 (counsel for claimants)
- D3[†] Cadastral map: Te Whanganui-a-Orotu (registrar)
- D4 Evidence of Patrick Parson, report on Te Whanganui-a-Orotu: traditional use and environmental change, May 1992 (counsel for claimants)
- D5[†] Cadastral map: Crown purchases in the Hawke’s Bay area (registrar)
- D6 (a) ‘Supporting Papers to the Evidence of David Alexander: Physical Changes to Te Whanganui-a-Orotu’ (no evidence from D Alexander was filed)
- volumes 1–4 include records of Departments of Lands and Survey (later Survey and Land Information), head office and Napier office, Marine, Works (later Works and Development), head office and Napier office, the Napier (later Hawke’s Bay) Harbour Board and the Port of Napier Ltd.
 - volume 5 index
- (counsel for Crown)

- D8 Steven Chrisp, 'The Maori Occupation of Wairarapa: Orthodox and Nonorthodox Versions', *Journal of the Polynesian Society*, vol 1, no 1 (March 1993), pp 39–70 (registrar)
- D9 Opening Submissions of counsel for the claimants, 19 July 1993
 - (a) Map and key
- D10 Supporting documents to John Hohepa's oral submission (counsel for claimants)
- D11 Evidence of Bevan Taylor (counsel for claimants)
- D12 Whakapapa of Rameka (Joe) Pohatu (counsel for claimants)
- D13 Waiata in support of John Hohepa and Rameka Pohatu's submission (counsel for claimants)
- D14 Evidence of Selina Sullivan (tabled) (counsel for claimants)
- D15 Letter from Sainsbury, Logan, and Williams registering Transit New Zealand's interest in claim Wai 55, 13 July 1993
- D16 Evidence of Peter Kaukau (counsel for claimants)
- D17 Evidence of Emma Te Ruawhare Kaukau (counsel for claimants)
- D18 Evidence of Erueti Pene (counsel for claimants)
- D19 Evidence of David Erueti Pene
 - (a) Supporting documents (counsel for claimants)
- D20 Place names re: site visit of 20 July 1993
 - (a) Supporting maps (counsel for claimants)
- D21 Evidence of Heitia Hiha
 - (a) Scheme plan of Napier-Hastings motorway*
 - (b) Background information of William Hamutana; submitted by T R Hamutana
 - (a) Maps (counsel for claimants)
- D22 Evidence of Hirini Moko Mead (counsel for claimants)
- D23 Evidence of Kahu Reremoana Hungahunga (counsel for claimants)
- D24 Evidence of Taape Tareha-O'Reilly (counsel for claimants)

- 25 Evidence of Bevan Taylor
 - (a) Testimony of Pare (Polly) Rakuraku
 - (b) Evidence of Harata Taurima
 - (c) Pat Parsons on customary usage(counsel for claimants)
- D26 Evidence of Marjorie Joe (counsel for claimants)
- D27 Evidence of Frederick R M Reti (counsel for claimants)
- D28 Evidence of Te Hata Brown (counsel for claimants)
- D29 Evidence of Rangiaho Brown (counsel for claimants)
- D30 Evidence of Apirana Mahuika (counsel for claimants)
- D31 Evidence of Violet (Kera) Koko (counsel for claimants)
- D32 Evidence of Wiari Anaru (counsel for claimants)
- D33 The Napier Borough Endowments Amendment Act 1993; schedule of certificate of title, 25 February 1993; certificates of title and plans for town section 368 (Pukemokimoki)
(counsel for claimants)
- D34 Evidence of Te Aranui Boyce Puna (Spooner) (counsel for claimants)
- D35 Evidence of Wini Te Reo Spooner (counsel for claimants)
- D36 Evidence of Te Rima o Hurae Whenuaroa (counsel for claimants)
- D37 Evidence of Mana Powhiro Cracknell
 - (a) Supporting documents(counsel for claimants)
- D38 Evidence of Hine-I-Nukua-I-Terangi Reti (counsel for claimants)
- D39 Evidence of Joe Pohatu (counsel for claimants)
- D40 Evidence of Kerry Nigel Roderick Hadfield
 - (a) Video
 - (b) Newspaper articles(counsel for claimants)
- D41 Photographs and extract from *Auckland Weekly News* following the Hawke's Bay earthquake (counsel for claimants)
- D42 Claim from Ngati Pahauwera (iwi), 16 July 1993

D43 Translation of kaumatua evidence

- (a) Bevan Taylor (D11)
- (b) Emma Te Ruawhare Kaukau (D17)
- (c) Peter Kaukau (D16)
- (d) Erueti Pene (D18)
- (e) Joe Pohatu (D39)

D44 Transcript of cross-examination of claimant evidence, Te Whanganui-a-Orotu claim, first hearing, 19–23 July 1993

- (1) Hoani John Hohepa
- (2) Te Awhina Whaitiri
- (3) Emma Te Ruawhare Kaukau
- (4) Erueti Jock Pene
- (5) David Erueti Pene
- (6) Hineaia Pene
- (7) Kurupai Nelson
- (8) Kahu Reremoana Hungahunga
- (9) Heitia Hiha
- (10) Rangiaho Brown
- (11) Apirana Mahuika
- (12) Wiari Anaru
- (13) Mana Cracknall
- (14) Joe Pohatu
- (15) Kerry Nigel Roderick Hadfield
- (16) Bevan Taylor
- (17) Frederick Reti
- (18) Hirini Mead

**E SECOND HEARING, NAPIER CITY COUNCIL CHAMBERS, NAPIER,
4–8 OCTOBER 1993**

E1 Evidence of Bryan D Gilling

- (a) Document bank
 - (b) Footnoted copy of E1
- (counsel for claimants)

E2 Evidence of James Ernest Ritchie (counsel for claimants)

E3 Evidence of Patrick Parsons (counsel for claimants)

- (a) Amended brief to E3
 - (b) Extracts from Dominion Museum materials
 - (c) Amendment to Ngati Tu Whakapapa, as contained in Parsons' report
 - (d) Tape: Ngati Raukawa Kaioaraora, James Mapu
 - (e) Map of inner harbour showing Te Pakake
 - (f) Slides
- (counsel for claimants)

E4 Evidence of Richard Boast (counsel for claimants)

- E5 Evidence of David Young (counsel for claimants)
- E6 M D N Campbell, *Story of Napier 1874–1974: Footprints Along the Shore*, Napier, Napier City Council, 1975, pp 1–13, 160–163 (registrar)
- E7 M B Boyd, *City of the Plains: A History of Hastings*, Wellington, Victoria University Press, 1984, pp 3–15 (registrar)
- E8 Geoff Conly, *The Shock of '31: The Hawke's Bay Earthquake*, Wellington, AH and AW Reed, 1980, pp 136, 176, 190–199 (registrar)
- E9 H K Stevenson, *Story of the Port of Napier 1875–1975*, Napier, Hawke's Bay Harbour Board, 1977, pp 1–5, 15–20, 23, 24, 44, 45, 52–54, 67, 69, 98–103, 194, 195, 205, 206, 244–249, 282, 283, 299–301, 303 (registrar)
- E10 J D H Buchanan, *The Maori History and Place Names of Hawke's Bay*, Wellington, AH and AW Reed, 1973, pp 49–52 (registrar)
- E11 J G Wilson and others, *History of Hawke's Bay*, Christchurch, Caper Press, 1976, pp 21–43, 46–48, 59, 79–82, 93–96, 100–108, 192–199, 204–221, 351–355 (registrar)
- E12 C W Corner, 'The History and Development of the Parks, Gardens and Recreation Grounds of Napier', 1947 (registrar)
- E13 Information provided by the Crown in respect of Peter Fraser's visit to Napier in June 1949 (counsel for Crown)
- E14 Evidence of Toro Waaka (counsel for claimants)
- E15 Evidence of Arapata Tamati Hakiwai (counsel for claimants)
- E15 (a) Slides
 - slide presentation no 1: *Maori Taonga*
 - slide presentation no 2: *Maori Taonga*
 - slide presentation no 3: *Past, Present, Future*
- E16 Evidence of Haana Maiora Cotter (counsel for claimants)
- E17 Evidence of Kurupo III Te Pakitu Tareha (counsel for claimants)
- E18 Evidence of Gordon Hart (counsel for claimants)
- E19 Evidence of Hineiapitia (Beattie) Nikera (counsel for claimants)
- E20 Evidence of Polly Rakuraku (counsel for claimants)
- E21 Evidence of Monty Murton (counsel for claimants)

- E22⁺ 1852 Bousfield map. Inscribed ‘Copy of tracing lent by J G Wilson Esq Hatauma [sic] G R May 23rd 1931’ (laminated colour photocopy of the original held by the Department of Survey and Land Information Office in Napier) (registrar)
- E23⁺ Sketch map of the Ahuriri District, R W Skeet C1854 (laminated coloured photocopy of the original held by Department of Survey and Land Information Office in Napier) (counsel for claimants)
- E24⁺ Deed plan of Ahuriri block (photocopied in colour from the original plan held at the head office of the Department of Survey and Land Information in Wellington) (HB37) (counsel for claimants)
- E25 Ahuriri deed 1851 (photocopied in two parts from the original E26 (in Maori), held at the head office of the Department of Survey and Land Information in Wellington) (HB37) (counsel for claimants)
- E27 Transcript of cross-examination prepared by the Crown Law Office and the Waitangi Tribunal at hearing on 4–8 October 1993
- (a) Bryan Gilling
 - (b) Pat Parsons
 - (c) James Ritchie
 - (d) Corrections to transcript of cross-examination of Patrick Parsons

**F THIRD HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER
6–8 DECEMBER 1993**

- F1 Memorandum on the Crown’s response to Judge Harvey’s 1948 report with appended documents (counsel for Crown)
- F2 Beverley Dunlop and Kay Mooney, *Profile of a Province: Hawke’s Bay*, Auckland, Hodder and Stoughton, 1986, pp 3–19 (registrar)
- F3 Evidence of Gary Williams (counsel for claimants)
- F4 Index of supporting maps to the evidence of David Young (E5)
- (a) Ngaruroro River scheme, 1875
 - (b) Ngaruroro River scheme, 1910
 - (c) Ngaruroro River scheme, 1958
 - (d) Ngaruroro River scheme, 1983
- (counsel for claimants)
- F5 Copy of map of the Ahuriri Lagoon showing locality names from Department of Lands and Survey records. Referred to in Gary William’s evidence (F3) (counsel for claimants)
- F6 Copy of the map of Ahuriri Road and Port Napier, Surveyed by Commissioner B Drury et al, 1855, referred to in Gary William’s evidence (F3) (counsel for claimants)

- F7 Copy of Ahuriri deed translation certified by Hari Wi Katene and J H Grace, published in Judge Harvey's 1948 report, A5(m) (counsel for claimants)
- F8 Plans showing:
 (a) Ahuriri Lagoon, Scinde Island, and the surroundings up to and at 1865
 (b) the same area after reclamations and earthquake action, 1965 (reprinted by the Department of Survey and Land Information Office, Wellington, October 1989) (registrar)
- F9 Evidence of Tony Walzl (counsel for claimants)
- F10[†] Evidence of John Hohepa (video, *His First Movie*, by Horace Cottrel, Napier, 1922) (counsel for claimants)
- G FOURTH HEARING, TO HEAR NGATI PAHAUWERA IN RESPECT OF WAI 55 CLAIM TE WHANGANUI-A-OROTU, WAITANGI TRIBUNAL OFFICES, WELLINGTON, 31 JANUARY 1994**
- G1 Evidence of Wiki Hapeta (counsel for Ngati Pahauwera claimants)
- H FIFTH HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER, 2-4 MAY 1994**
- H1 Angela Ballara and Gary Scott, 'Claimants' Report to the Waitangi Tribunal: Crown Purchases of Maori Land in Early Provincial Hawke's Bay', January 1994, block file 1, Ahuriri (claimant counsel)
- H2 Gunter Warner, 'The Napier Harbour Board – A study in Local Body Administration and Politics', MA thesis, Victoria University of Wellington, 1958, chs 2, 4 (registrar)
- H3 Transcripts of cross-examination prepared by Crown Law Office from the third hearing, 6-8 December 1993
 (a) Richard Boast
 (b) Gary Williams
 (c) David Young
- H4 Evidence of Toro Edward Waaka (counsel for Ngati Pahauwera claimants)
- H5 Evidence of Thomas James Wainohu (counsel for Ngati Pahauwera claimants)
- H6 Evidence of Charles Ropitini Tio Te Kahika Hirini (counsel for Ngati Pahauwera claimants)
- H7 Evidence of Te Aranui Boyce Puna (Spooner) (counsel for Ngati Pahauwera claimants) (evidence withdrawn from the record)

- H8 Evidence of Tom Spooner
 - (a) Whakapapa supporting evidence of Tom Spooner (counsel for Ngati Pahauwera claimants)
- H9 Evidence of Pamela Bain (counsel for Crown)
- H10 Materials to be produced through Mr Walzl by Crown counsel (Crown Law Office)
- H11 Opening submissions of counsel for the Ngati Pahauwera
 - (a) Supporting documents (counsel for Ngati Pahauwera claimants)
- H12 Evidence of John Stewart Ombler
 - (a) Map of land managed by the Department of Conservation (counsel for crown)
- H13 Evidence of Heitia Hiha in response to Ngati Pahauwera
 - (a) Supporting documents
 - (b) Supporting documents
 - (c) Supporting documents (counsel for claimants)
- H14 Joint statement read by Heitia Hiha (counsel for claimants)
- H15 Synopsis of opening submissions for the Crown
- H16 Ngati Pahauwera response to Wai 55 claimants' examination of Ngati Pahauwera evidence
- H17 Translation of waiata of Heitia Hiha (counsel for the claimants)

SIXTH HEARING, THE GREAT WALL CONFERENCE CENTRE, NAPIER, 18–22 JULY 1994

- I1 Angela Ballara and Gary Scott, 'Claimants' Report to the Waitangi Tribunal: Crown Purchases of Maori Land in Early Provincial Hawke's Bay', January 1994 (counsel for claimants)
- I2 Evidence in reply of Charlie Hirini
 - (a) Petition with supporting whakapapa (counsel for Ngati Pahauwera claimants)
- I3 Files of the Civil Secretary's office and the Colonial Secretary's office (New Munster), 1851
 - (a) Colonial Secretary Alfred Domett to Donald McLean, 26 March 1851 (counsel for crown)

- I4 Transcripts of cross-examination of witnesses, fifth hearing, 2–5 May 1994, prepared by Crown Law Office
- (a) Tony Walzl
 - (b) John Ombler
 - (c) Toro Waaka
 - (d) Pamela Bain
- (counsel for crown)
- I5 Transcripts of visit to the Department of Survey and Land Information on 1 July 1994 to view Ahuriri deeds and maps, prepared by Crown Law Office (counsel for crown)
- I6 Press statement by Minister of Conservation, 24 June 1994 (counsel for crown)
- I7 Extract from James Cowan, *Sir Donald MacLean: The Story of a New Zealand Statesman*, Wellington, 1940 (counsel for Ngati Pahauwera claimants)
- I8
- (a) Closing submissions of counsel for the claimants (C Hirschfeld), pt 1 (formerly recorded as I8)
 - (b) Closing submissions of counsel for the claimants (C Hirschfeld), pt 2 (formerly recorded as I8(a))
 - (c) Closing submissions of counsel for the claimants (C Hirschfeld), pt 3 (formerly recorded as I8(c))
 - (d) Memorandum of counsel for the claimants (C Hirschfeld) on the Treaty of Waitangi Amendment Act 1993 (counsel for claimants) (formerly recorded as I8(d))
 - (e) Opinion of D W McMorland (counsel for claimants) (formerly recorded as I8(b))
 - (f) Closing submissions of counsel for the claimants (C Hirschfeld), amended version
- I9 Closing submissions of counsel for the claimants (C Wickliffe), the traditional, spiritual, cultural, customary use, and environmental change evidence of the claimants
- (a) Closing submissions of counsel for the claimants continued (C Wickliffe)
 - (b) Transcript of cross-examination of Patrick Parsons in relation to maps (counsel for claimants)
 - (c) Hawke's Bay Regional Council Regional Policy Statement, Proposed, March 1994 (counsel for claimants)
 - (d) Local authority consultation with tangata whenua 1992 (counsel for claimants)
 - (e) Ahuriri Estuary Management Plan September 1992 (counsel for claimants)
 - (f) [1994] *Canadian Native Law Reporter* (counsel for claimants)
- I10 Submissions of counsel for the claimants in reply (C Hirschfeld)
- I11 Closing submissions of counsel for Ngati Pahauwera (K Ertel) (formerly recorded as J1)
- (a) Transcription, Te Whanganui a Orotu closing submissions, 18–22 July 1994 (formerly recorded as J1(a)) (counsel for Ngati Pahauwera claimants)
- I12 Supporting documents (formerly recorded as J2) (counsel for Ngati Pahauwera claimants)

- I13 Native Lands Act 1865 (formerly recorded as J3) (counsel for Ngati Pahauwera claimants)
- I14 Map (Tangitu Ki te Moana Maungaharuru Ki Uta) (formerly recorded as J4) (counsel for Ngati Pahauwera claimants)
- I15 Synopsis of closing submission of the Crown (Brendan Brown) (formerly recorded as K2) (counsel for crown)
 - (a) Synopsis of closing submissions of the Crown continued, pt 2: the 1851 transaction (formerly recorded as K3) (counsel for crown)
 - (b) Bundle of supporting documents to closing submissions of the Crown (blue cover) (formerly recorded as K1) (counsel for crown)
 - (c) Other supporting documents of closing submissions of the Crown (formerly recorded as K4) (counsel for crown)
 - (d) Transcriptions of interpolations (formerly recorded as K2(a)) (counsel for crown)
- I16 Memorandum from M Courtney (Port of Napier Ltd) (formerly recorded as L1)
 - (a)[†] Map of Napier city (Port of Napier Ltd) (formerly recorded as L2)

APPENDIX V

REGIONAL POLICY STATEMENT EXTRACTS

The following extracts are taken from the Hawke's Bay Regional Council's *Regional Policy Statement*, proposed March 1994.

Pages 30 and 31:

Matters of Resource Management Significance to Tangata Whenua

The resource management issues which are of significance to the Tangata Whenua may be summarised as follows:

- The need to preserve and protect the mauri of natural and physical resources.
- Recognition of the guarantees of tino rangatiratanga and its relationship with the kawanatanga in resource management planning and decision-making.
- The need to reaffirm the Maori social fabric of whanau/hapu/Iwi.
- Recognition of marae as the physical manifestation of tino rangatiratanga and a place for consultation as appropriate with Treaty partners including Councils.
- Recognition of kaitiakitanga.
- Protection of waahi tapu from desecration.
- The need for resource managers to take account of Maori spiritual values such as concepts of mauri, tapu, mana, wehi, and karakia.
- Respect for rahui and taiapure.
- The need to prepare hapu/Iwi resource development plans.
- The need to be in a position to implement hapu/Iwi plans without unreasonable and unjustified restrictions.
- All aspects of water management in Hawke's Bay. In particular, the importance of maintaining adequate water levels and quality to ensure that the mauri (life force) of waterways are undamaged, particularly by pollution and human sewage discharges to water.

- Input into enforcement and compliance procedures.
- The need to protect those characteristics of the coastal environment of special value to Maori, including waahi tapu, tauranga waka, mahinga kai, mahinga mataitai and taonga raranga.
- Adequate resourcing of the Iwi and constituent hapu to enable participation in all aspects of resource management in the Region.
- Active participation and recognition of tikanga Maori in policy and decision-making processes of the Councils.
- Maintaining and enhancing the consultative processes among the Councils, Tangata Whenua, and constituent hapu.
- Recognition and facilitation of resource development initiatives by Tangata Whenua and constituent hapu to the fullest extent practicable and permissible under the Act.
- Recognition and provision for the holistic relationship that Maori have with the environment extending from nga maunga (mountains) to te moana (the sea).
- Recognition of and provision for traditional Maori knowledge in the sustainable management of the Region's resources.
- Provisions enabling Maori to maintain and enhance their traditional relationship to the whenua (the land), wai (waters) and taonga (treasured possessions).

Pages 36 and 37:

What do the Principles of the Treaty of Waitangi (Te Tiriti O Waitangi) mean for Tangata Whenua?

To Tangata Whenua those principles, based on interpretations by the Courts and the Waitangi Tribunal and as applied in the context of sustainable management of natural and physical resources under the Act, mean as follows:

—**The Principle of Te Tino Rangatiratanga**

Te tino rangatiratanga (fully chiefly authority) over resources including lands, forests, fisheries and other taonga were guaranteed to Maori under Article II of the Treaty. Tino rangatiratanga includes tribal self-regulation of resources in accordance with their own customary preferences. Tino Rangatiratanga was not, nor was it ever intended to be, relinquished or given away by Maori to the Crown.

—**The Principle of Partnership**

The Treaty signified a partnership between Maori tribes and the Crown. The exchange of promises under Articles I and II of the Treaty is seen as an exchange of gifts. The gift of the right to make laws and the promise to do so as to accord the Maori interest

in appropriate priority. Utmost good faith, reasonable co-operation and compromise are fundamental to this concept of a partnership.

—**The Principle of Kawanatanga**

Kawanatanga, as ceded by Maori under Article I of the Treaty, gave the Crown the right to govern and to make laws applying to everyone. The delegation of resource management powers by the Crown to local authorities under the Act means that those authorities can make policies, set objectives and make rules affecting the management of natural and physical resources, subject to the guarantee of *tino rangatiratanga* to Maori and recognition of the partnership between Maori and the Crown.

—**The Principle of Active Participation and Consultation**

The spirit of the Treaty calls for Maori to have a much greater say in the management of the environment. Effective, early and meaningful consultation is an integral and necessary component and forerunner to greater participation by Maori in resource management decision-making.

—**The Principle of Active Protection**

The guarantee of *Te Tino Rangatiratanga* given in Article II is consistent with an obligation to actively protect Maori people in the use of their lands, water and other protected taonga, to the fullest extent practicable. In the context of resource management, the various elements which underlie and are fundamental to a spiritual association with the environment (including *mauri*, *tapu*, *mana*, *tikanga* and *wairua*) may all fairly be described as taonga that have been retained by Maori in accordance with Article II of the Treaty. The principle of active protection therefore extends to the spiritual values and beliefs of Maori.

—**The Principle of Hapu/Iwi Resource Development**

Article III of the Treaty gave to Maori the same rights and duties as other New Zealand citizens. The Treaty guaranteed to Maori retention of their property rights under Article II, and the choice of developing those rights under Article III. To Maori, the efficient use and development of what are in many ways currently under-utilised hapu/iwi resources is a very important principle of the Treaty in the context of resource management under the Act. Ngati Kahungunu seek restoration of their tribal resources. The Treaty recognises the right of Maori to develop those resources in accordance with their own needs and aspirations. In pursuing development, Maori may choose to pursue non-traditional uses of their resources instead of or as complementary to, their traditional practices. Recognition of the ability and needs for hapu/iwi to develop their resources in a manner which achieves the purposes of the Act is a fundamental principle embodied in the Treaty.

Tribunal's comment

We note that the Crown's obligation 'to actively protect Maori people in the use of their lands, water, and other protected taonga' is qualified by the words 'to the fullest extent practicable'. We consider this qualification is inconsistent with the preceding discussion of the principle of *kawanatanga* and the delegation of resource management powers to local authorities to exercise, '*subject to the guarantee of tino rangatiratanga to Maori and recognition of the partnership between Maori and the Crown*'.

Clearly the regional council still has to resolve the inconsistency between the Crown's duty to actively protect te tino rangatiratanga and national and physical resources long regarded as taonga and its right and duty to control and manage natural and physical resources in the national interest.

The Tribunal has already considered this issue in its *Mohaka River Report 1992* (p 68), where it pointed out in the words of the *Ngai Tahu Sea Fisheries Report 1992* that 'the right to govern' that the Crown acquired under the Treaty 'was a qualified right'.

Comments on the Hawke's Bay Regional Council's *Proposed Regional Coastal Plan* of September 1994

Chapter 2 of the Hawke's Bay Regional Council's Proposed Regional Coastal Plan of September 1994 ('Coastal Resources') included a section entitled 'Cultural Heritage and Tangata Whenua', which acknowledged and described 'the kaitiaki role of the Ngati Kahungunu as "tangata whenua" in terms of Tikanga Maori based on the traditional sovereignty over god-given taonga relating to the land and sea'. It noted that, for Maori, 'the coast and contributing waters can be likened to the bloodlines of their forefathers, life sustaining and sacred. They provide the main requisites for everyday life . . .' Knowledge and understanding of the past ensure that 'Maori would continue to support, respect and conserve the environment'. Maori see themselves 'as part of the total created reality'. 'They belong to the environment. Their role within the natural environment is as Kaitiaki. It is the obligation of the Kaitiaki to ensure that there is as little disruption to the environment as possible. To defile the environment would be contemptuous and show a lack of respect to the appropriate Atua.'

'The principle of environmental Kaitiakitanga should be construed as the sustainable use of the resources, the education of future generations as to the sustainable use and the appeasement of the Atua.

'The workings of Tapu played a dominant role in environmental protection and resource management.'

The Ahuriri Estuary was recognised in the proposed regional coastal plan as a wildlife area of 'national significance' and, together with the larger area of Te Whanganui-a-Orotu, as of major significance to the tangata whenua. In making decisions on permit applications to use the estuary, the regional council was to have particular regard to the need to protect sites of spiritual, historical, or cultural significance to Maori, including wahi tapu, tauranga waka, mahinga maataitai, and taonga raranga, as well as the need to manage the estuarine habitat and physical estuarine processes in a way that averted, remedied, or mitigated adverse effects on the biological integrity of the estuarine system.

Prohibited activities included the erection of whitebait jetties, maimai, or any structure that would impound the coastal marine area, allowing stock to enter. The taking and use of water from the mauri area, and the use of powered vessels, except for rescue operations, were also prohibited. Rules on water quality standards and the discharge of contaminants were specified. Desired environmental outcomes derived from the Knox report included:

- '(a) Management of the estuary as a whole system, with respect for the relatedness of its parts.
- '(b) Maintenance of the estuarine ecosystem at optimum function through protection of the sources and pathways of energy flow that drive it.'

APPENDIX VI

RELATED LEGISLATION

LEGISLATION RELATING TO THE EXPROPRIATION OF TE WHANGANUI-A-OROTU

Statute	Year	No
Harbour Boards Act	1870	51
Napier Harbour Board Act	1874	36
Napier Harbour Board Act	1875	65
Napier Swamp Nuisance Act	1875	4
Napier Harbour Board Act	1876	92
Napier Swamp Nuisance Amendment Act	1877	70
Public Reserves Act	1881	15
Napier Harbour Act	1878	34
Napier Swamp Nuisance Amendment Act	1879	3
Napier Harbour Board Empowering and Loan Act (Local)	1884	5
Napier Harbour Board Empowering Act (Local)	1885	7
Napier Harbour Board Amendment and Endowment Improvement Act (Local)	1887	7
Napier Harbour Board Amendment and Further Empowering Act (Local)	1889	11
Napier Harbour Board Loan Act (Local)	1892	5
Napier Harbour Board Further Empowering Act (Local)	1892	6
Napier Municipal Corporation and Napier Harbour Board Exchange of Lands Empowering Act (Local)	1897	7
Napier Harbour Board Amendment and Endowment Improvement Act (Local)	1899	3
Napier Harbour Board Exchange of Lands Empowering Act (Local)	1906	27
Napier Harbour Board Loan Act (Local)	1906	37
Napier Harbour Board Loan Act (Local)	1909	41
Napier Harbour Board Amendment and Endowment Improvement Act (Local)	1912	31
Napier Harbour Board Empowering and Loan Act (Local)	1914	14
Napier Harbour Board Empowering and Vesting Act (Local)	1917	9
Napier Harbour Board Loans and Enabling Act (Local)	1918	3
Napier Harbour Board and Napier High School Empowering Act (Local)	1918	8
Napier Harbour Board Empowering and Loan Amendment Act (Local)	1920	4
Reserves and other Lands Disposal and Public Bodies Empowering Act	1921	59

Statute	Year	No
Napier Harbour Board Rating Regulation Act (Local)	1925	6
Napier Harbour Board and Napier Borough Enabling Act (Local)	1926	14
Napier Harbour Board Loans Enabling Act 1918 Extension Act (Local)	1927	8
Napier Harbour Board Empowering Loan And Constitution Amendment Act (Local)	1927	23
Public Works Act	1928	21
Napier Borough and Napier Harbour Board Enabling Act (Local)	1928	20
Napier Harbour Board Loans Enabling Act (Local)	1930	12
Hawkes Bay Rivers Amendment Act	1932–33	9
Napier Harbour Board Empowering Act (Local)	1933	7
Napier Harbour Board and Napier Borough Enabling Act (Local)	1933	8
Napier Harbour Board Empowering Act (Local)	1933	16
Napier Harbour Board Loan Act (Local)	1933	18
Napier Harbour Board and Napier Borough Enabling Act (Local)	1936	4
Napier Harbour Board Loan Amendment Act (Local)	1937	14
Napier Harbour Board Loan Amendment Act (Local)	1939	8
Napier Harbour Board and Napier Borough Enabling Act (Local)	1945	9
Napier Harbour Board and Napier Borough Amendment Act (Local)	1949	10
Napier Harbour Board Loan Amendment Act (Local)	1951	11
Napier Harbour Board Loan Act (Local)	1954	1
Napier Harbour Board and Napier City Enabling Amendment Act (Local)	1958	1
Napier Harbour Board Loan and Empowering Act (Local)	1962	12
Napier Harbour Board and Napier City Enabling Amendment Act (Local)	1965	3
Napier Harbour Board and Napier City Enabling Amendment Act (Local)	1966	11
Napier Harbour Board and Napier City (Inner Harbour) Subdivision Act (Local)	1966	12
Napier Harbour Board Loan and Empowering Act (Local)	1968	11
Napier Harbour Loan and Empowering Act (No 2) (Local)	1968	19
Napier Harbour Board Empowering Act (Local)	1974	12
Harbour Boards Dry Land Endowment Revesting Act	1991	109

LEGISLATION RELATING TO THE CONSERVATION AND RESOURCE MANAGEMENT OF TE WHANGANUI-A-OROTU

Statute	Year	No
Wildlife Act	1953	31
Water and Soil Conservation Act	1967	135
Marine Reserves Act	1971	15
Historic Places Amendment Act	1975	40
Reserves Act	1977	66
Wild Animal Control Act	1977	111

Related Legislation

Statute	Year	No
Town and Country Planning Act	1977	121
Marine Mammals Protection Act	1978	80
Native Parks Act	1980	66
Environment Act	1986	127
Conservation Act	1987	65
New Zealand Walkways Act	1990	32
Conservation Law Reform Act	1990	31
Resource Management Act	1991	69

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