

**THE
NGATI RANGITEAORERE
CLAIM REPORT
1990**



WAITANGI TRIBUNAL REPORT 1990

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(WAI 32)**

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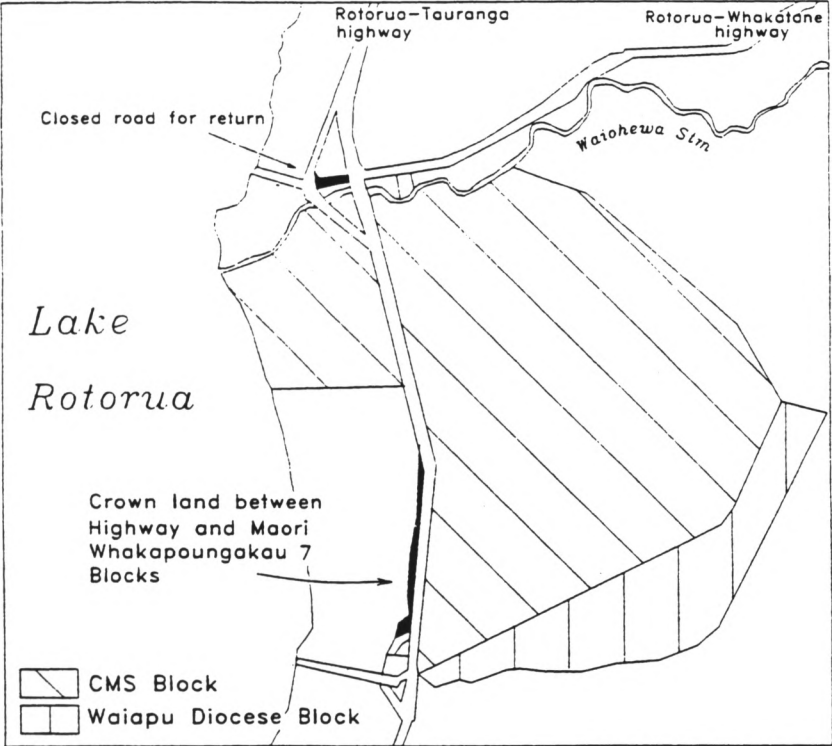


Figure 1

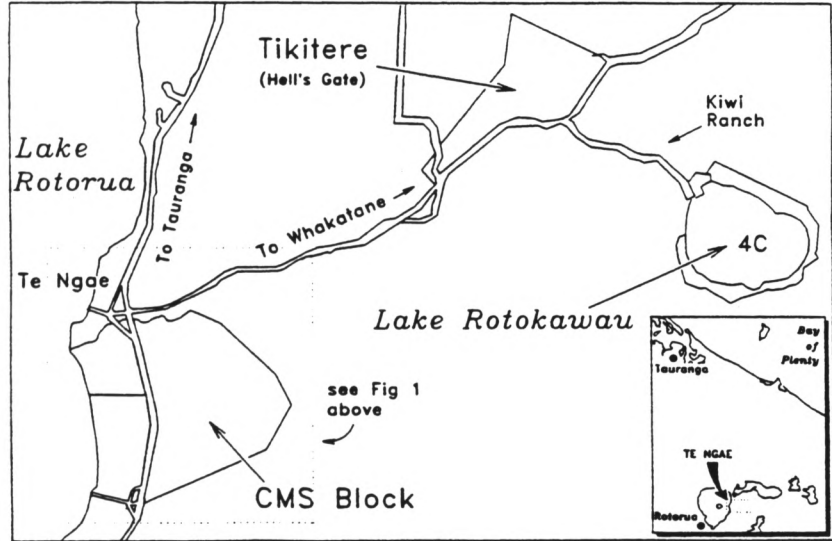


Figure 2

Chapter 1

Summary and Recommendations

Te Minita Maori Te Rangatira

Tena koe, Nga mihi nui kia koe me to tatou Kawana kua tu nei. Tenei ka mihi atu hoki ki o-tatou aitua maha kua huri atu ki tua te arai. Tu mokemoke ana te Kawana me te Roopu Whakamana i te Tiriti te hinganga o te totara-hae-mata a Turirangi Te Kani. Aue! Tatou katoa kua riro! Haere ra! Haere ra!

“Te tangata e mahi ana i tona oneone ka makona i te taro. Tena ko te tangata e whai ana i te hunga tekateka noa kahore ona ngakau.”

Ngati Rangiteaorere's claim concerns events which began in the year before the signing of the Treaty. In the late 1830s the Anglican Church Mission Society was seeking a secure base to continue its missionary work with the iwi of Te Arawa. These were turbulent times and the mission had already lost its first home during inter-tribal warfare.

In September 1839 the missionaries entered into an agreement with Te Arawa over a piece of land at Te Ngae. The missionaries believed that they were buying the land but the Maori involved and the owners of the land, Ngati Rangiteaorere, considered they were transferring much less than the complete ownership of the block.

After the Treaty all land purchases which had occurred before the coming of the Crown were examined by a Land Claims Commission to see if they were valid. Only one of the Te Arawa signatories to the deeds, and not a member of the hapu who owned the land, was able to give evidence. The commissioner, Edward Godfrey, did not and could not recommend an award of land to the CMS. He did however consider that a sale had taken place.

In 1854 acting Governor Wynyard issued a Crown grant to the CMS, but there had never been a proper investigation of the original purchase. The Crown had not properly investigated whether Ngati Rangiteaorere had sold the land, before it issued a title to the Church. The issuing of the grant also appears to have been invalid. Ngati

Rangiteaorere were deprived of their land without adequate consultation or consent, in breach of article 2 of the Treaty of Waitangi.

The land is still owned by the Church and administered by the Anglican Church Mission Trust Board. The mission abandoned the land even before the Crown grant was issued, and the tribe reoccupied the block until it was leased in the 1870s. It has continued to be leased until the present, and the revenue used for pastoral purposes. The Church wishes to hand the land back to the tribe, an action which the tribunal fully endorses and commends. However there is a problem. When the Crown grant was issued, it was subject to a trust which said that the land was to be used for the benefit of the poor and needy throughout New Zealand and any of the Pacific Islands. For the land to be used by the claimants the title should be freed from this trust. Neither the Church nor Ngati Rangiteaorere were responsible for the imposition of this trust and the return of the land requires a new tribal trust be created. This is best achieved by legislation and the tribunal considers that the Crown should provide this legislation.

The tribunal has turned down a request by the claimants that it recommend punitive damages for the loss of the land, but it has recommended that compensation be paid to Ngati Rangiteaorere for loss of revenue over the period that the land has been leased by the Church.

There were a number of ancillary matters which the claimants raised as part of their claim. Two of these related to Lake Rotokawau and we are pleased to report that one of these has been resolved by negotiation between the tribe and the other party involved. A number of small claims relating to individual pieces of land lost to Ngati Rangiteaorere have also not been pursued by the claimants, as the evidence on these blocks has unfolded.

However the tribunal has considered a number of ancillary matters and made findings and recommendations where these were appropriate.

(a) The rating of Lake Rotokawau was the result of a deliberate attempt by the Crown to punish the owners for not parting with the lake. We have recommended that the Crown repay any rates which have been paid and make good any arrears.

(b) Some of Ngati Rangiteaorere's lands were taken for roading at the end of the last century under the Maori Land Court Act 1886, which allowed the Crown to take Maori land for roads without compensation. If European land was taken by the Crown under the Public Works Act, compensation was paid. We considered the taking

of the tribe's land without compensation a breach of both article 2 and article 3 of the Treaty of Waitangi, and have recommended that this long standing breach be finally remedied by the payment of compensation.

(c) There are two pieces of land which the Crown is already considering returning to Maori ownership.

(i) A piece of closed road near the junction of the Rotorua-Tauranga Rotorua-Whakatane highways has been offered back at a sum of \$2000. The tribunal supports this offer as fair and reasonable.

(ii) A sliver of land between the main highway and Whakapoun-gakau 7 blocks is owned by the Crown as a result of road realignment. This strip prevents access to the Maori blocks. The Crown has offered to return this land to the adjoining blocks for \$7200. As this land was originally part of the CMS block we have recommended that this land be transferred at no cost to the owners.

The tribunal did not consider a claim relating to the taking of land for survey costs.

Lastly, the claimants have a long association with the Tikitere geothermal resource. They raised issues relating to the ownership and control of this resource. The tribunal did not investigate these matters. They may well be dealt with later by another tribunal in conjunction with claims by other Maori in relation to other geothermal resources.

The tribunal has made the following recommendations under section 6 of the Treaty of Waitangi Act 1975:

With regard to the Te Ngae mission farm

1 We recommend that the Crown at its expense in all things legislate to effect the following:

(a) The vesting of the Te Ngae Mission Farm, plus such other adjoining land that the New Zealand Mission Trust Board and Waiapu Board of Diocesan Trustees wish to add, in the eponymous ancestor of the claimants, Rangiteaorere.

(b) The status of such land be Maori freehold land as defined in the Maori Affairs Act 1953.

(c) The land be freed from the present trusts.

2 We recommend that the Crown should commission an actuary to calculate the rentals that Ngati Rangiteaorere would have received had they, rather than the Church, leased out the land from 1 July 1875, the commencement date of the first lease, until 1 September 1990, the culmination date of the last lease, with this sum adjusted to take

into account the loss of the use of the rental money throughout the period. However the sum should be reduced by 5 per cent, in acknowledgement of the fact that Ngati Rangiteaorere received some benefit of church activities, partly funded by its rentals from Te Ngae, and because they also had some minor use of the land while it was leased, probably until the 1920s.

With regard to the rating of Lake Rotokawau

3 We regard the Crown's action in advising the Rotorua County Council to levy rates a clear breach of the principles of the Treaty. We recommend that the Crown refund the beneficiaries of Whakapoungakau 4C any rates they have paid over the years, plus interest, and also pay any outstanding arrears.

With regard to roads taken without compensation

4 We recommend that the Crown commission a registered valuer, acceptable to the claimants, to value the land in the public roads taken from Ngati Rangiteaorere without compensation, at the dates of acquisition, with the valuation updated by actuarial calculations to the present to take into account the loss of use of the money. The aggregate sum, to be paid as compensation to Ngati Rangiteaorere.

With regard to lands surplus to highway requirements adjoining Whakapoungakau 7

5 We recommend that these slivers be returned to the adjoining blocks, without any cost to the owners concerned.

DATED this 18th day of December, 1990.



H K Hingston, presiding officer



M P K Sorrenson, member



Sir M E Delamare, member

Chapter 2

A Claim from Ngati Rangiteaorere

- 2.0.1 On 14 April 1987 the tribunal received a claim from the following on behalf of Ngati Rangiteaorere of Te Arawa:

Te Aho Welsh
Amarama Te Kirikaramu
Tuku Hohepa
Ngana Te Kirikaramu
Ngawai Dulcie Hapeta
Dr Ngahuia Te Awekotuku
Montigue Rangiteaorere Curtis
Constance Mary Ganderton
Bonita Makarena Morehu
James Te Kiri
Pirihira J Fenwick
Rauawa Manahi

Their claim concerned the Te Ngae mission farm, a block of land consisting of just over 300 acres at the junction of the Rotorua-Tauranga and Rotorua-Whakatane highways. The block is illustrated in figure 1. The land had been granted to the Church Mission Society in 1854 on the basis of agreements made between their tupuna and Anglican missionaries in 1839, just prior to the Treaty of Waitangi. According to the claimants the land had not been sold, but was gifted to the church, for however long the tribe wished to maintain a mission on the site. The Church received a Crown grant, which gave it title to the land under the terms of a trust, which did not allow for the land to be returned should the mission station close. Nor did it acknowledge the tribe's right, as the claimants saw it, to continue to use the land. The claimants sought the return of the land:

To our way of thinking, we supported the Church in its time of need, the Church has had our Land for a century without benefit to us, we have the need now and it is right—morally and in custom—that that part of the Land as remains, should now return to us. (see appendix 1.1)

- 2.0.2 On 1987 Mr Paora Maxwell was commissioned by the tribunal to examine the history of the church mission farm at Te Ngae, both from written documentary records and from the oral traditions of the

claimants. His report was filed on 11 February 1988 and was distributed to parties.

- 2.0.3 Mr Maxwell's report raised some doubts as to the validity of the original 1854 Crown grant. Because the land was the subject of a pre-1840 land purchase it appeared that the Crown grant should have been issued on the basis of the Land Claims Ordinance, following a hearing of the claim by a land claim commissioner. Mr Maxwell's research indicated that the Crown grant had been issued, despite the fact that the commissioner involved, Commissioner Godfrey, had not recommended a grant because he had had insufficient evidence on which to make such a recommendation. The Crown's historian, Ms Stephanie McHugh, later suggested that the Crown grant may have been issued on grounds other than the Land Claims Ordinance.
- 2.0.4 On the basis of Mr Maxwell's research the claimants filed an amended statement of claim on 12 April 1989. They claimed that the issuing of the Crown grant was a unilateral act by Governor Grey, not based on the Land Claims Ordinance, and done without consultation with Ngati Rangiteaorere. They further claimed damages from the Crown for the loss of use and occupation of the land and general damages for the alienation of the land without the tribe's consent.
- 2.0.5 A number of ancillary matters were also raised concerning Lake Rotokawau. This lake is shown in figure 2. It was claimed that when the land surrounding the lake had been converted from bush to farm land, under one of Sir Apirana Ngata's land development schemes, Ngati Rangiteaorere had been concerned to preserve their lake in its natural state ensuring that the bush was retained from the shore of the lake to the skyline. According to the tribe, when surveys were applied to the surrounding farm blocks it was found that one of the adjoining farms had title right to the shoreline of the lake. This the claimants alleged, was wrong. They maintained that the chief surveyor, in approving the plans of the survey for the lake and surrounding blocks, denied Ngati Rangiteaorere the full, exclusive and undisturbed possession of their lake and surrounding lands. Furthermore they claimed that a road had been built up to the lake without consulting the tribe and without their consent, allowing public access to the lake as if it was a publicly owned lake and not the property of Ngati Rangiteaorere. The claimants sought return of the land running down to the lake and no longer in their possession, or right of access across this land. They also sought the closing of the public road and return of title to them, and that the lake be exempt from rating.
- 2.0.6 Mr Bill Patrick, a retired registrar of the Maori Land Court, was commissioned by the tribunal to prepare a report on this issue and his report was received by the tribunal and distributed to parties.

Following the first hearing the claimants and Kiwi Ranch, the present owners of the block concerned, reached agreement over these problems and this part of the claim was withdrawn, although the tribunal heard further evidence on the rating of the lake and has considered the issue in this report.

2.0.7 The first hearing was held at Mataikotare marae and the Maori Land Court in Rotorua in the week beginning 4 December 1989, following a conference of parties held in Wellington on 13 November 1989. Details of notice and appearances are provided in appendix 4. At that hearing the tribunal heard submissions from kaumatua of Ngati Rangiteaorere and the research reports of Mr Maxwell and Mr Patrick were presented. The tribunal also took the opportunity to examine the mission farm, Lake Rotokawau and other blocks of interest to the claimants.

2.0.8 At this hearing a number of additional matters were raised, including Ngati Rangiteaorere's rights to thermal resources located on or about the Tikitere B block, commonly known as "Hell's Gate". It was alleged that the Crown was shortly to introduce resource law management legislation, and the claimants maintained that they were entitled to be consulted on this issue prior to the introduction of any such legislation. Following these representations the tribunal issued an interim report to the Minister of Maori Affairs, recommending that government not introduce legislation that dealt with geothermal resources issues until Maori who had customarily utilised these resources had been consulted.

On 2 April 1990 the claimants provided further particulars of their geothermal claims (appendix 1.3). They maintained that the geothermal resource associated with Tikitere B block, owned by Ngati Rangiteaorere, was a taonga, as described in article 2 of the Treaty of Waitangi. They also maintained that any management regime that did not take full account of the views of the tangata whenua was contrary to the principles of the Treaty, and that the Geothermal Energy Act 1953 was contrary to these principles in that it vested the right to use and control geothermal resource in the Crown. They claimed the right to control the Tikitere resource, either alone or in conjunction with the regional authority, called for licenses to use the resource to include a requirement that the licensee conduct research on the capacity of the resource. They also claimed that the tangata whenua should be an equal party to the licensing of the resource and be entitled to an equal share of any license fees or royalties.

The claimants requested that the tribunal defer hearing of this issue until they had had the opportunity of making submissions to the select committee examining the Resource Management Bill and of

seeing if any further amendments to the Bill took their view into account.

- 2.0.9 A number of issues which arose from the two commissioned reports were also raised at this hearing. These included lands taken for survey cost and lands taken for roads without compensation. A number of small ancillary matters which were of concern to some of the claimants were also raised. These related to small pieces of land taken mainly for roads and now no longer used for these purposes. The tribunal issued a memorandum on 15 December 1989 (A9), which listed some of these ancillary matters and the Crown and claimants filed joint memoranda on these matters in 23 February 1990 (A11). Preliminary papers were filed for the Crown by Sister Josephine Barnao on Lake Rotokawau (A15) and on the survey costs for the Whangapaungakau-Pukepoto blocks (A17), and Ms Stephanie McHugh on the Te Ngae mission block (A14). A paper was also filed for the Crown by Mr David Alexander on an allegedly "lost" portion of the Tikitere B block (A16). As a result of this paper the claimants did not pursue this matter further.
- 2.0.10 The second hearing was held at Mataikotare Marae, Rotorua, from 16 to 17 July 1990, to hear evidence from the Crown. Very detailed reports were presented by Ms McHugh, on the Te Ngae church mission block, and by Mr Alexander on other matters relating to Ngati Rangiteaorere lands, including lands taken for roading and for survey costs.
- 2.0.11 Final submissions were made at the Maori Land Court at Rotorua on 27 August 1990. The claimants' final submissions, in response to the final submissions of the Crown, were filed by memoranda on 4 September 1990.
- 2.0.12 Although this claim involves only a few blocks, the history of these blocks is involved and complicated, much of it going back to the time of the Treaty itself. That the tribunal has been able to examine these matters in such detail has been due to the professional research presented by Messrs Maxwell, Patrick and Alexander and Ms McHugh. The Crown's witnesses presented their evidence as they found it, openly acknowledging fault where the evidence indicated it and ensuring that the tribunal had before it all relevant evidence that could be located.

Chapter 3

Ngati Rangiteaorere and the Te Ngae Mission Farm

3.1. **Nga Kupu o Nga Tupuna: the Traditions of Ngati Rangiteaorere**

Ngati Rangiteaorere are one of the eight iwi of the Arawa confederation of the Rotorua district. They trace their descent from Tamatekapua of the Arawa canoe through Kahumatamomoe, Tawakemoetahanga, Uenukumairarotonga and Rangitihi. It was Rangitihi who, with his four wives, produced the eight children, nga pu manawa e waru, the eight hearts of Rangitihi, who gave their names to the iwi of Te Arawa. According to the traditions, the Arawa canoe had its final resting place at Maketu. Though the Arawa people were to settle mainly around the lakes with another branch, Tuwharetoa, on the shores of Lake Taupo, they have always sought to preserve their corridor through the Kaituna river to the coast at Maketu. Ngati Rangiteaorere, with their foothold at Te Ngae on the eastern shore of Rotorua, were strategically placed to exploit that corridor once Pakeha traders and missionaries came to Maketu and Rotorua.

Yet Ngati Rangiteaorere were both assertive of territorial rights and conscious of their obligations to other Arawa kin. If Te Ngae was their property, and Mataikotare was one of their several marae, so they had obligations with other Te Arawa iwi, and more especially their near neighbours and kin, Ngati Uenukukopako, to share with them the bounties of Te Ngae. Likewise those other people of Te Arawa had to reciprocate when they were tangata whenua on their marae and Ngati Rangiteaorere were manuhiri. This point is important when we come to consider the "sale" of Te Ngae to the Church Missionary Society (CMS). Ngati Rangiteaorere may have "sold" it (or gifted it, as they prefer to put it), but representatives of other Te Arawa iwi had their hands on the transaction. Indeed they provided most of the signatories of the deeds.

The web of kinship obligations is wound also from the strands of history, which is keenly remembered by the kaumatua of today. Much of it was told to researchers of the claim and at the hearings on the marae at Mataikotare. Thus Hiko Hohepa recounted traditions relat-

ing to Rangiteaorere; his father's instruction that if he was a boy, he was to be named after the clouds that passed in the sky; his up-bringing with his mother's people who were of Mataatua descent, at Puketahu near Te Teko; his growing prowess as a warrior when he joined his father at Mourea, above Okawa Bay at Rotoiti, culminating in the defeat of a Tainui force in occupation of Mokoia Island. This brought the whole of Rotorua under the mana of the children of Rangitihī (A2:8-9).¹

Though there were frequent disputes between the various iwi of Te Arawa over land, these related mainly to boundaries, since their general territorial locations were largely agreed. Ngati Whakaue occupied the land around the western shore of Rotorua from Hinemoa to Weriweri; Ngati Rangiwewehi the land around the north of the lake from Awahou almost to Mourea on the Ohau channel outlet from Rotorua; Ngati Pikiao the land from Ohau, encompassing Rotoiti, Rotoehu and Rotoma; and Ngati Rangiteaorere and Ngati Uenukukopako the land fronting the eastern side of Rotorua from Mourea to Owhatiura, where they adjoined Ngati Whakaue. Mokoia Island was claimed by all of the iwi around the lake.² The land claims and whakapapa of Ngati Rangiteaorere and Ngati Uenukukopako were so intertwined that it was difficult to separate them. In 1882 the Native Land Court awarded the 10,350 acre Whakapoungakau-Pukepoto block, running inland from near the lake shore to Tikitere and the Whakapoungakau range, jointly to the two iwi. But in 1886 they went back to the court for a sub-division which divided the land into 16 blocks, awarding seven in the northern portion to Ngati Rangiteaorere and the other nine in the south to Ngati Uenukukopako (A2:12-13). Te Ngae mission farm, the subject of this claim, fronted the Ngati Rangiteaorere blocks and was therefore within their tribal territory, though Ngati Uenukukopako and indeed other Arawa iwi could lay some claim to it by way of kinship connections.

3.2. The CMS Mission and the "Purchase" of Te Ngae

Invasion from the north

- 3.2.1 The territorial alignments of the iwi of Te Arawa had been established long before Pakeha contact brought about a new turmoil in the lives of Te Arawa. At first this contact was indirect and the trouble was caused by the intrusion not of Pakeha, but of long-standing Maori enemies of Te Arawa, armed with the deadly weapons of the Pakeha. The Ngapuhi of the Bay of Islands were the first to get a substantial supply of muskets, and from about 1818 embarked on annual expeditions to the south under the leadership of Te Morenga and Hongi Hika. In 1823 Hongi led an expedition to the Bay of Plenty and, seeking utu for the killing of a relative at Motutawa (Green Lake), brought his

great war canoes overland into Rotoiti and Rotorua to set upon Te Arawa on Mokoia Island. They were decimated. Many were slaughtered; many others taken as slaves back to the north. It was not until 1831, when the Danish trader Hans Tapsell established a flax trading station at Maketu, that Te Arawa got access to muskets. However his attempt to establish an agent at Rotorua failed.

Christianity comes to Te Arawa

- 3.2.2 Yet Hongi's raid had one useful result. It brought the Arawa prisoners into contact with the missionaries at the Bay of Islands. One Ngati Whakaue woman became the wife of a northerner called Pita, who had become an assistant to the missionary Richard Davis. The two of them were able to travel back to Rotorua, taking news of the missionaries and their religion, before those missionaries arrived in their district. In 1831 Te Arawa sent an emissary, Wharetutu, to the north to ask for a missionary for Rotorua. Henry Williams, the head of the CMS in New Zealand, came back with Thomas Chapman, the intended missionary. They preached a Christian service at Ohinemutu on 28 October 1831 and, before they left, selected a mission site nearby at Koutu, on the invitation of the chiefs.

Chapman did not return for three and a half years and then stayed for only ten weeks. He and his assistant, H M Pilley, erected a mission house at Koutu with the help of Ngati Whakaue. Chapman returned in September 1835 accompanied by his wife, Pilley and another assistant, S M Knight, but even this more concerted attempt to establish a mission failed. The Rotorua district was soon enveloped in further warfare, with invasions by Ngaiterangi of Tauranga and Ngati Haua of Matamata. When Te Waharoa and Ngati Haua attacked the district in August 1836 the mission buildings were destroyed. Chapman and his party withdrew, but he returned for a visit in May 1837 and more permanently in January 1838, this time accompanied by his wife and John Morgan and his wife. On this occasion they decided to establish their station in relative security at Puketi, on Mokoia Island. However Mokoia had disadvantages for missionary work, so, when peace had apparently returned, Chapman and Morgan began to look for a site on the mainland. They fixed on Te Ngae, on the eastern shore of Rotorua and with good access through Rotoiti and the Kaituna to the coast at Maketu.

The mission finds a home: the deeds are signed

- 3.2.3 Hitherto, it seems, Chapman had not attempted to negotiate formal purchase deeds for mission sites at Koutu or Puketi, though he had paid some blankets for the latter (B2:16).³ But on 14 and 25 September 1839 Chapman and Morgan formally negotiated the purchase of an estimated 600 acres of land at Te Ngae, which they recorded in

two deeds of purchase (see appendix 2). The deeds are similar to some other CMS deeds negotiated at this time and are written in Maori. The first deed has 42 tohu, or marks; the second has 28 tohu and five handwritten signatures. Neither deed is signed by the missionaries or any other Pakeha witness. There are two English texts and some later translations for the two deeds. The deeds were for adjoining parcels of land, described rather vaguely by geographic features. The first deed described a block of land lying along the shore of Rotorua from the Waiohewa river to “the bush at the Ngae”, then running inland to the edge of the bush known as Te Takauere, then to the edge of other bush known as Te Poti-a-ta-Mangu, and through the middle of other bush by Paiwhenua until it reached the Waiohewa, and back along that river to the lake. Then the deed named the kainga within the boundaries: Tatua o te Hauiki, Poti a te Mangu, Ineawa Koaoao, Tuterakura, te Kahu, and te Hoie. The second deed is even more vague, describing the land as “our home at Rotorua—Te Takauwere and Te Turi-o-te-Uirangi” (which are kainga, not boundary lines). The deeds listed the goods paid over: an assortment of blankets, implements, clothing, items for personal adornment, pipes and tobacco. Finally, the deeds were quite explicit on the sale, or selling, of the land. Thus the first deed, which was the more expressive, concluded with the following:

In witness of our fully agreeing to this selling by us of the land above named we have put our hand by name or sign: the land with all things upon the land and below the surface of the land, are sold by us to Messrs. Chapman and Morgan, on behalf of and for the Church Missionary Society, for them and their heirs and assigns, to sell, sit upon, give away, or to dispose of in whatever manner they may please, for ever. (see Turton's Deeds, p 380)

Or as in the translation provided at the Godfrey enquiry:

These are our names or marks subscribed by us to this document as evidence of our consent to this sale of the land above described as also all things upon or within the said land to the said Chapman and Morgan on behalf of the Committee of the Church of England to them all and to their successors or purchasers from them or otherwise forever. (see appendix 2)

The second deed has a somewhat briefer rendering of this statement, omitting the reference to all things above and below the land.

The nature of the agreement

- 3.2.4 Several matters relating to these deeds need to be noted. In the first place, we have very little evidence about the nature of the negotiations and the Maori understanding of the deeds, either in missionary records or Te Arawa oral traditions. Chapman himself appears to have written nothing on the matter, and there is only one comment in

Morgan's journal, an entry for 21 September 1839 (a week after the negotiation of the first deed, and four days before the second):

A great portion of Mr. Chapman's time and my own for the last month has been spent in purchasing land at Te Ngae for a station which after much difficulty and vexation arising from disputed claims and the very unreasonable demands of the natives we have accomplished. (B2:163)⁴

We are left to speculate over what Morgan meant by disputed claims, but he and Chapman had clearly not satisfied them since the purchase, far from being "accomplished", had to be followed up by the second deed—though this was for a separate parcel of land and was signed largely by a separate group of claimants. Only three appear to have marked both deeds (B2:38-9) and, if we look at the subsequent behaviour and statements of signatories, as well as of claimants who did not sign, there must be considerable doubt, at least on the Maori side, as to whether there was a "sale" at all. Nevertheless the two missionaries, and their parent body, had no doubt that the signatories had sold, as the English text of the deeds said, and that they had a valid title to the land which should be confirmed by the Crown.

- 3.2.5 There is also considerable doubt about the involvement of Ngati Rangiteaorere who were resident on the land. The deeds appear to have been signed at the mission station on Mokoia (B2:45), rather than at Te Ngae, although there was probably some negotiation at Te Ngae, particularly to try to resolve disputes over boundaries (B2:159). From the evidence presented to us, it is well nigh impossible to identify Ngati Rangiteaorere as distinct from signatories from other Te Arawa iwi. In a statement to Mr Paora Maxwell, which is quoted in his report, Mr Hiko Hohepa said that all of the signatories to the deeds were able to claim descent from Rangiteaorere, though many of them lived with and had their principle rights from other iwi, such as Ngati Whakaue and Ngati Rangiwehewhi (A2:21). When giving evidence to the tribunal on 17 July 1990, he admitted that only one Ngati Rangiteaorere tipuna from Te Ngae had signed, and that most of the leading rangatira, including Matuha, Uamakerewhatu, Te Wehikore, Te Awekotuku and Tamarangi, had not. This might explain why Chapman and Morgan had trouble completing the "purchase" and why, in subsequent years, there was local Ngati Rangiteaorere opposition, especially when the church leased the land in the 1870s.

By taking signatures from representatives of other iwi, no matter how remote their Ngati Rangiteaorere affiliations, the two missionaries were probably trying to conciliate them, with a share of the payment and access to future bounties, for locating the new mission station in Ngati Rangiteaorere territory. In any case they were probably quite happy to "sell" land they had only a remote claim to, a common

occurrence in Maori land transactions with the Pakeha at this time. The apparent lack of signatures from resident Ngati Rangiteaorere must cast doubt on the validity of the sale, although this does not appear to have deterred the CMS in its later attempts to obtain a Crown grant, or the Crown in finally issuing one.

Selling the land for ever?

- 3.2.6 The next question to be considered is whether the Maori signatories believed that they were “selling” the land “for ever”, as the first of the deeds said. Once again, it is impossible to be absolutely certain what was in their minds, so long after the event. The claimants, in speaking to the tribunal’s researcher and in giving evidence to the tribunal, were generally although not entirely unanimous in the opinion that the land had been gifted, not sold. As was the case in Maori custom, gifts were supposed to be returned when they were no longer needed for the original purpose. Mrs Aho Welsh, who is in her late seventies, used the whakatauki, “ki a koe to taua koti”, “to you our coat”, to emphasise that such a gift was not forever:

It is understood that it is only because the storm has blown up and you haven’t brought a coat, so it is a covering, but in the future you’re expected to return it. In the Church’s hour of need the old people came forward. (A2:3)

And she quoted her mother, Ruihi Ratema, as saying that the land was given because the church had lost its original mission station at Te Koutu during Te Waharoa’s invasion. She recalled that her koroua, Ratema Awekotuku (a minister at the Te Ngae church), helped himself to fruit from the farm orchard, though the farm was leased to a Pakeha, and distributed it to the local people, saying it was “From the farm” (A2:3-4); as if to say, “We gave the land to the church, but it is ours”. This oral evidence is consistent with the documentary record, for there is a report of the same Ratema Awekotuku saying to the native minister, John Ballance, at a meeting at Mokoia on 18 February 1885, that “the land was given as a mark of affection to the missionaries for religious purposes, but, seeing that it is no longer put to that use, we think that the land should come back to us” (B3:471).⁵ As we shall see, Ngati Rangiteaorere continued to occupy the land after it was “sold”, they continued to cultivate it (albeit on a larger scale), and, no doubt, they continued to collect mahinga kai. They were keeping alight their ahi kaa. And when the CMS abandoned the mission, when Chapman eventually left for Maketu, they quite naturally assumed that the land had reverted to them, as had happened with the mission sites at Te Koutu and Mokoia.

Though the missionaries and later the Crown regarded the deeds as sufficient evidence that the land had been sold, there is no clear

evidence that the Maori signatories so regarded them. Te Arawa had no previous experience of selling land, except perhaps in the case of Tapsell's acquisition of a site at Maketu and they may have had some second-hand knowledge of the selling that had been going on at the Bay of Islands. The first deed uses the verb *hoko* for "to sell", or variations of it such as "*hokona atu e matou*" for "we sell", and "*tenei hokonga o te wahi whenua*" for "this selling of this land". Of course it was the missionaries who drew up the deed who are equating *hoko* with selling. But, according to the Williams *Dictionary*, the word can mean "exchange, barter, buy or sell". It is reasonable to conclude that those who agreed to the Te Ngae deeds believed that they were bartering or exchanging, rather than parting with the land forever, in return for certain continuing secular and spiritual services that the missionaries were expected to provide. In any case, few if any of the "sellers" would have understood the written documents—after all only five attempted to write their names on the second deed—and they would have been guided by the spoken explanations, whatever they were, of the missionaries. Once again, the subsequent behaviour of Ngati Rangiteaorere was consistent with a more limited transaction than outright sale—something like a conditional lease or right of occupation.

3.3. The CMS Occupation of Te Ngae

After completing the "purchase" of Te Ngae in September 1839, the missionaries took almost a year to establish themselves at their new station. Morgan's and Chapman's papers record some of their day to day progress. On 14 January 1840 Morgan reported that he had been across to Ohinemutu (not Te Ngae) and "engaged two parties of natives, one party to build me a house at Te Ngae...and the other party to get stones out of the lake for a chimney" (B3:164).⁶ On 5 March Morgan noted that he had spent the day with "my own natives and party from the native village felling trees, pulling up ferns, preparing stones for my chimney, making out the site for my house and sharpening a saw" (B3:167).⁷ And on 24 May he wrote that they were preparing to move from Mokoia to Te Ngae and hoped to move with their families in about six weeks. But it is not clear when they actually moved, for Morgan wrote in his report for October 1840 that he had been using his week days:

cutting stones and building a chimney, in superintending my natives felling some trees, sawing clearing ground and erecting a dwelling house for myself and family, and in removing of the station ... from the island to the mainland. (B3:40)⁸

But if the Morgans occupied the house at all, it could not have been for long. In that same month he moved from Rotorua, due to his wife's

ill health, and in February 1841 opened a new mission station at Otawhao in the Waikato.

- 3.3.1 Chapman was left to carry on alone. He too seems to have made only slow progress, reporting to the CMS in London in February 1842 that he had “nearly completed all the buildings necessary for a settlement” (B3:35).⁹ Chapman was also suffering from ill health and over the next few years he was frequently away from Te Ngae. He spent a term at Bishop Selwyn’s theological college at Waimate in 1844 as a candidate for the diaconry, and towards the end of the year relieved for A N Brown at Tauranga, leaving S M Spencer, who had established a mission at Te Wairoa by Lake Tarawera, to watch over Te Ngae. Even when he returned to Te Ngae, Chapman was unwilling to reside there permanently, preferring to avoid Rotorua’s cold winters by staying at Maketu for at least two months each year. By 1847 he was wanting to increase that period from “the very beginning of winter...until the middle of spring” (B3:153).¹⁰ In November 1849 the CMS agreed to allow him to move permanently to Maketu, though he spent some time at Te Ngae in 1850. T H Smith, a former government surveyor who was then a candidate at St John’s Theological College, also spent some time at Te Ngae in 1850, but it was not occupied by any CMS missionary after that year. Once again, Spencer had to watch over it from Tarawera.

- 3.3.2 The missionary papers also contain scattered information about Maori activities and attitudes during the ten year occupation of Te Ngae. This material needs to be treated with some caution since the missionaries tended to veer from extreme optimism at their apparent success in converting the Maori to Christianity, to almost total despair at Maori recalcitrance in sticking to their heathen practices. As was common elsewhere, the younger people were the earliest and most enthusiastic converts, and the older ones, more especially prominent chiefs and *tohunga*, refused to go over at all. In the early 1840s there was apparently great progress in conversions and in displays of Christian worship, and by 1845 the station was said to have a congregation of 1400 (A2:28).¹¹ However by the end of the decade there had been a considerable falling off.

Though precise details are sketchy, Chapman and his Maori helpers seem to have made considerable progress in developing the mission farm, running stock, cultivating wheat and potatoes, planting an orchard, and constructing a mill and bakery (the remains are still visible). As Chapman wrote on one occasion:

We hope the introduction of cattle, agricultural implements, the cultivation of wheat and hand mills will continue and gradually dislodge the present mode of civilisation. (A2:29)¹²

Such increased production was needed to feed the local people, others who had taken up residence at the mission station, and the many visitors who came to attend Christian services or other hui. Chapman established a school and a dispensary. There seems little doubt that during the 1840s Te Ngae became a thriving settlement—as the missionaries would have seen it, an oasis of Christian civilization.

However, the situation there was never quite as rosy as this. Rather, to the dismay of the missionaries, Maori who flocked to the mission station often had distinctly secular goals in mind. Chapman was forever complaining about their exorbitant demands, writing on one occasion:

I had hoped the good people here...would have graduated their love a little upwards ... but lo? It turns out that we are daily sinking lower and lower in their estimations, and consequently they have felt it their duty to rise higher in their demands, to pester, to harass and worry us until I am fairly worn out....I have also been civilly told ... not to touch that firewood yonder and Mr Morgan has been very ill used because he won't pay for a little dirt *he* dug to help build his chimney and some stone *he* gathered by the lakeside!!!!!!...In fact you would really think they had combined to drive us civilly away... (B3:144)¹³ (emphasis in original)

- 3.3.3 It is difficult to know what to make of such statements since there was obviously a good deal of cross-cultural misunderstanding going on. However, we need not doubt that the Maori who gathered at Te Ngae used the missionaries for all they were worth, so long as they did not in fact drive them away. Also, by claiming payment for dirt and stones, the local Ngati Rangiteaorere seem to have been asserting continuing rights over the land that the missionaries assumed that they had bought. At times Chapman was a little uneasy about his title to Te Ngae. Once he wrote to his fellow missionary A N Brown that:

should once the notion get fairly abroad, that land purchased was not...purchased; each native would consider himself at liberty to settle the question of quantity....It was but the other day I was informed that this purchase here was rite [finished]. I had had it long enough to pay for the taonga given for it! (B2:56-7)¹⁴

Again there is some difficulty in knowing how to interpret these statements. The first sentence actually refers to the chief Te Rangihaeata disputing an alleged sale of land in the Hutt valley. But in the next two sentences Chapman seemed to be admitting that he was expected to pay another instalment of taonga or “rent” as the condition of his continued occupation of Te Ngae.

3.4. The CMS Title to Te Ngae

The establishment of a land claims commission

- 3.4.1 Captain Hobson's instructions from the Marquis of Normanby of 14 August 1839 required him to negotiate a cession of sovereignty with the Maori and to issue a proclamation on his arrival in New Zealand, stating that no titles to land would be recognised that were not "derived from, or confirmed by" a grant from the Crown. In the meantime, the boundaries of the colony of New South Wales were extended to include New Zealand. The governor and Legislative Council of New South Wales were instructed to appoint a commission to investigate all previous purchases of land from Maori and report on whether confirmatory grants should be issued by the Crown. Governor Gipps of New South Wales accordingly issued a proclamation prohibiting further land purchases in New Zealand on 14 January 1840, and Hobson issued a similar proclamation on 30 January on his arrival at Kororareka. He then proceeded to negotiate the Treaty of Waitangi from 5 February, and proclaim sovereignty over New Zealand on 21 May. On 4 August the New South Wales legislature passed an ordinance providing for the appointment of commissioners to investigate the pre-1840 land claims. New Zealand was separated from New South Wales at the end of 1840 and on 9 June 1841 Hobson enacted a land claims ordinance to replace that of New South Wales. Claimants were given 12 months to submit their claims. It was under this New Zealand ordinance that the CMS claim to Te Ngae was investigated.

On 25 June 1841 Hobson appointed two commissioners to investigate claims, Major Matthew Richmond and Colonel Edward Godfrey, and later in the year a third commissioner, William Spain. They were issued with instructions which, among other things, required them to give advance notice of intended hearings; hold court in such places as would provide "the greatest facility" for producing Maori witnesses; be guided by "the real justice and good conscience" of the case, rather than strict laws of evidence; record all evidence; and not hear a claim unless a protector of aborigines or his appointee was present to represent the rights of the Maori and protect their interests (B2:67-8).¹⁵

The CMS submits its claims

- 3.4.2 Thomas Chapman, who was secretary of the Southern District Committee of the CMS, as well as resident missionary at Te Ngae, submitted a schedule of claims to the commission on 10 May 1842, less than a month before the expiry date for submitting claims. The schedule contained claims for 11 CMS purchases ranging from Manukau, through various stations in Waikato and the Bay of Plenty,

and including Te Ngae. This was listed as two claims to correspond with the two deeds, although they were eventually heard as a single claim.

The Te Ngae claim was heard by Commissioner Godfrey at Tauranga in July 1844. It was presented by John Morgan, rather than Chapman. Edward Shortland, sub-protector of aborigines at Tauranga, acted for the protector and also served as interpreter. Morgan presented copies of the two purchase deeds, described the boundaries and the goods paid over, and claimed that:

The possession of this land by the Mission has never been disputed since the purchase, either by Natives or Europeans. (B3:172)¹⁶

He then presented a single witness for the vendors, known as Te Ao. He had signed the second deed, of 25 September 1839, being one of five who actually wrote his name but was not from Te Ngae. He was of the Ngatihauora hapu of Ngati Rangiwewehi and came from Ngongotaha (B2:76; and evidence of Hiko Hohepa, 17 July 1990). However he also had kinship connections with Ngaiterangi, which probably explains why he was the sole representative of the vendors to risk attending the hearing at Tauranga. The Tauranga tribes had recently been at war with those of Rotorua. In his evidence Te Ao stated that the places described in the second deed were sold to Chapman and Morgan some years ago by those whose names were affixed to the deed, and that the payment received had been correctly described. He also noted that young men had been employed by Chapman to dig a trench to mark the boundaries, but that they had not got it in quite the right place—perhaps a hint of a boundary dispute that appears in other documents. And he made a slight error in that he said “Te Hoie” was a place within the land described in the second deed, whereas it was within that described in the first deed (B2:76-7).¹⁷

- 3.4.3 Since Godfrey had adopted the rule that at least two witnesses for the vendors must give testimony at a hearing, he was unwilling to make a recommendation on the Te Ngae claims at the Tauranga hearing. But he did give the CMS a ten week period in which to produce further witnesses—at Auckland. When they failed to do so, he reported to the colonial secretary, on 30 September 1844, that he could not recommend a grant to the CMS for the Te Ngae land:

The Natives of Rotorua being inimical to those in Tauranga when this claim was advertised for Investigation, permission was granted to the Claimants to produce their witnesses at Auckland, at any point before the 30th of September 1844.

They having neglected to do so No Grant can be recommended. But, the Commissioner, in thus reporting, from the deficiency of proof, must add

his conviction that considering the Evidence of Mr Morgan and Teao, purchases of Land have been made by Messrs Chapman and Morgan, for the Society, at Rotorua. (B3:171)¹⁸

Godfrey appears to have been a conscientious commissioner, scrupulously carrying out his duties as he saw them. He was right in refusing to recommend the grant and his final aside would have been harmless, had it remained where it was.

- 3.4.4 Its fate will be discussed below, but in the meantime it is necessary to make some brief comment on Godfrey's hearing of the claim. In the first place, his choice of Tauranga as the venue for the hearing was quite at odds with the rule that the hearing should be held at such a place as would provide "the greatest facility" for producing Maori witnesses. On Godfrey's own admission, Tauranga was unsuitable in view of the enmity between the peoples of Tauranga and Rotorua. Nor was the proposed alternative venue any more practicable since Auckland was a very considerable distance from Rotorua. Godfrey, in refusing to proceed from Tauranga to Te Arawa territory at Maketu, where witnesses were prepared go (B2:82),¹⁹ to hear the Te Ngae claim, was clearly considering his own convenience more than that of the claimants and witnesses. Secondly, in his unguarded final comment, he was placing undue faith in the word of Te Ao who was a signatory of the second, not the more important first deed, and in the word of the missionary Morgan. This is not to say that Morgan was not telling the truth as he saw it, merely that Godfrey willingly accepted Morgan's belief that an outright sale had taken place. He did not investigate the possibility that the Maori who agreed to the deeds may have thought that they were conveying somewhat less, and expecting a continuing reciprocity from the mission as well as a continuing right of occupation. Godfrey, like Morgan, continued to think in terms of English conveyancing law, not Maori custom. Finally, there is the point made by Ms McHugh in the Crown's research report, that Godfrey and Richmond, having had to wrestle with numerous exorbitant claims by speculators, were inclined to give the CMS's far more modest claims "the benefit of the doubt unless...there was specific Maori testimony to the contrary." She goes on to present her analysis of the commissioners' reports on 24 CMS claims:

Of these, two were disallowed after negative Maori testimony. Twenty two were recommended; ten on the evidence of two or more Maori witnesses, nine on the evidence of only one Maori witness, and three without any evidence from Maori at all. In these last three cases, the testimony of the missionaries alone (the alleged purchasers) was sufficient. (B2:80-1)

According to this analysis, Godfrey was in fact tougher on the CMS in relation to Te Ngae than he, or Richmond, was for most of the other CMS claims.

Crown moves to issue a grant to the CMS

- 3.4.5 Unfortunately the Crown decided to ignore Godfrey's recommendation that no grant be made, but to accept his aside that he believed a purchase had taken place. The first move in this direction came when governor Robert FitzRoy received the file, a fortnight after Godfrey had made his recommendation on Te Ngae. He minuted for his registrar of deeds:

Mr Fitzgerald

Prepare a Deed of Grant in respect of the within mentioned land at Rotorua. (B3:170)²⁰

Though that instruction was not implemented, possibly because other CMS grants were yet to be attended to, at least the die had been cast and it was presumed that the CMS was entitled to a grant for Te Ngae.

- 3.4.6 Nevertheless the matter lay fallow for some years, until the CMS parent body in London took the initiative in 1846 by setting out the terms under which it wanted trust deeds to be drawn up for mission lands. Then the local committees of the CMS in New Zealand took up the matter. George Clarke wrote to the colonial secretary in October 1847, asking when the grants for the CMS land claims would be ready (B2:94-95).²¹ But grants could not be issued until the land claimed was surveyed, a process that took several years. The governor, Sir George Grey, stayed with Chapman at Te Ngae over Christmas in 1849, when they talked of erecting a mill and a hospital, and, no doubt, the CMS title to Te Ngae. In the New Year Grey reciprocated the hospitality: Chapman visited Auckland and stayed with Grey who:

promised that when the Surveyor General visited Rotorua, relative to the proposed Hospital ... that then enquiry should be made and the Land surveyed by him, and this done he (Sir George) would order the proper Deeds to be made out. The matter of the Hospital still remains unsettled and so, necessarily, the Land also. (B3:236)²²

Another, more picturesque, version has Grey making the promise of a deed to Chapman during a ride around Auckland's military pensioner settlements (B3:178).²³

But it was still necessary to have the land surveyed. A survey of a kind was carried out by T H Smith who had been a tenant briefly at Te Ngae in 1850 and was appointed resident magistrate for Rotorua at the end of 1851. Smith appears to have done the survey early in 1852, although it was not until May 1853 that Chapman forwarded the survey plan to Grey, reminding him of:

the kind promise Your Excellency made me ... that you would grant a deed to the Church Miss. Society, for the Rotorua (Ngae) Estate, as soon as surveyed. (B3:178)²⁴

In appealing directly to Grey, Chapman seems to have been seeking a Crown grant under the governor's prerogative power, since the attempt to obtain the grant under the Land Claims Ordinance had failed when Godfrey refused to recommend one. Chapman now claimed the grant on the ground of undisturbed possession:

as I have held quiet and resident possession, from, previously to the arrival of the late Governor Hobson, I beg to be permitted to use the remark you made to me on this hea[d?]-that you could but consider that this overrode any objection which might be made on the grounds of any informality. (B3:178)²⁵

In fact Chapman had not been in "resident possession" since prior to Hobson's arrival. He did not occupy Te Ngae until mid 1840, he was frequently absent from it after that date, and he gave up his residence altogether about the end of 1850, not being replaced by any other missionary.

Grey was a little hesitant in accepting Godfrey's aside that the land had been purchased. On receiving Chapman's letter, he minuted to his colonial secretary:

Dr Sinclair

If the native title has been extinguished this grant can be made to the Church Missionary Society in the usual form. (B3:179)²⁶

But there appears to have been no further inquiry into whether the Maori title had in fact been extinguished. The request was now forwarded to the surveyor general who decided that Smith's survey was not sufficiently detailed. Smith provided the additional details which Chapman sent to the colonial secretary on 10 September 1853. But, although Grey asked for the grant to be sent to him for signature without delay, it was not in fact ready before he left New Zealand at the end of his governorship on the last day of the year. Indeed nothing was done about it until well into 1854. In May the acting governor, Robert Wynyard, asked for the grant to be prepared as Grey had directed, but it was not presented to him for signature until 23 August. Two days later an exasperated Thomas Chapman arrived in Auckland:

Having...determined to visit Auckland (if God permitted) and plead my own course personally—lest in the meantime another Governor should arrive and new obstacles be presented. (B3:237a)²⁷

He need not have worried since Wynyard finally signed the Crown grant on 21 September 1854.

3.5. The Validity of the Crown Grant

- 3.5.1 With the amendment of the Treaty of Waitangi Act in 1985 the tribunal was given jurisdiction to examine claims relating to breaches of the principles of the Treaty since the initial signing at Waitangi on 6 February 1840. The CMS deeds to Te Ngae were of course negotiated before that date but, since they were converted into a Crown grant subsequent to it, we need to examine the process whereby the grant was issued. Although this tribunal is not a court it can comment on legal issues. We can make a finding on whether the Crown's actions in relation to the grant were in accord with the principles of the Treaty.

The claimants have argued that the land was "gifted" to the CMS for a mission; that when the land was no longer required for this purpose, it should have been returned to Ngati Rangiteaorere; and that the Crown in issuing a grant to the CMS after the abandonment of the station was acting contrary to the principles of the Treaty of Waitangi (A2:1-2).

- 3.5.2 We understand from the evidence and submissions before us that, in the immediate post Treaty years, there were three possible authorities whereby a Crown grant could be made in claims like Te Ngae pursuant to:

- (a) the Land Claims Ordinance 1841;
- (b) the Australian Waste Lands Act 1842; and
- (c) the exercise of the Crown prerogative.

A further authority was enunciated by Mr Justice Prendergast in the *Wi Parata v The Bishop of Wellington* case of 1877²⁸ namely, an act of state. We shall comment on this below, but note here that the Crown did not plead this authority in support of its case.

Since the legal authority for the Crown grant was not spelled out on the grant itself or in any of the documents presented with the research reports, the tribunal asked counsel representing the claimants and the Crown to address themselves to this issue. The questions are summarised as follows:

- (a) if the grant was issued under the Land Claims Ordinance, 1841, was it valid in the light of *Queen v Clarke* (1849-1851) NZ PCC 516?
- (b) alternatively, if the grant was issued under the Australian Waste Lands Act, 1842, (as had been suggested in Ms McHugh's research report) did the land qualify as waste lands under that Act?

(c) or if, as a third possibility, the land had been granted under the governor's prerogative, did this allow him to grant the land without the consent of the Maori owners?; and

(d) finally, was this an absolute grant, and, if not, who held the reversion?

We now summarize the counsels' replies, referring first in each instance to those of the Crown counsel, followed by those of the claimants' counsel, and finally our own comments.

- 3.5.3 Before commenting on the above queries, Crown counsel made some observations on the nature of the 1839 transaction. He admitted on behalf of the Crown that the Maori vendors "may have had a different expectation" from the CMS view that this was an outright sale, "for ever"; that the vendors "may have regarded themselves as continuing to have rights in the land..."; and that the CMS had "an obligation to surrender its title when the purpose for which the land was acquired was definitely at an end" (C3:8-11). This was accepted by the claimants' counsel (C4:2) and is in line with our own views on the nature of the transaction, as expressed above. But this concession from the Crown has important consequences for our interpretation of the validity of the Crown grant, since it suggests that the Maori customary title to Te Ngae had not been fully extinguished and that the land was not therefore waste land of the Crown at the time it was granted to the CMS in 1854.

Nevertheless the Crown's counsel went on to argue that, under the common law doctrine of pre-emption (reiterated in article 2 of the Treaty), whatever rights the Maori vendors had surrendered passed not to the CMS but to the Crown which was the only source of title under English law. This was supported by quotations from the leading New Zealand case, *The Queen v Symonds* (1847) NZPCC, though Crown counsel admitted that Chapman J in this had been "thinking in terms of an outright purchase which extinguished all aboriginal rights" (C3:13). Mr Blanchard was sure, however, that the "doctrine would also have to apply to any acquisition of a substantial permanent or semi permanent interest" (C3:13). We are not so sure. Counsel for the claimants argued that the doctrine of pre-emption could not apply until the Crown had obtained sovereignty; and, in any case, any settlement of the CMS claim would need to follow the terms of the legislation passed in 1841 to determine pre-1840 land claims, the Land Claims Ordinance.

- 3.5.4 We now consider counsels' submissions on the possible sources for the Crown grant. First, there was the question that, if the grant was issued under the Land Claims Ordinance 1841, was it valid in light of

Queen v Clarke? Here the Crown conceded that the Privy Council decision in *Queen v Clarke* applied since the grant to Te Ngae was made without Commissioner Godfrey's recommendation and would therefore "fall to the ground", as Clarke's grant did.

- 3.5.5 Secondly, there was the possibility that the grant had been issued under the Australian Waste Lands Act, which initially applied to New Zealand. However it was admitted by the Crown that this application was removed by the 1846 New Zealand Charter and accompanying instructions.
- 3.5.6 The final source of authority, the Royal prerogative, was argued forcefully by the Crown, but contested by counsel for the claimants. However we note that, if the prerogative was used, Te Ngae would have been a gratuitous grant which could only have been issued in accordance with the letters patent and instructions to the governor of 1846 and 1848. The Crown admitted that a grant such as that for Te Ngae was prohibited under section 14 of the 1846 instructions but this section was revoked by the additional instructions of 1848 which allowed such grants if a principal secretary of state so directed. We were informed by the Crown that such a direction was issued by Earl Grey in a dispatch of 14 April 1848, accompanying the additional instructions. The Crown argued that this direction was applicable to the Te Ngae grant. However, we do not accept that the "directive" went as far as was contended by the Crown. In our view Earl Grey's despatch empowered Governor Grey to grant one portion of Crown land in exchange for other land previously granted—in this case to Messrs Whitaker & Heale at Kawau Island. Governor Grey was authorized to issue a "fresh" grant to them. The despatch went on to authorize the governor to act in similar manner in any cases that might arise in the future. The Crown argued that Te Ngae was such a case. But, as the matter at Kawau was the issue of a fresh grant of Crown land in lieu of a prior grant, we cannot read the directive to include a gratuitous grant (at Te Ngae) in satisfaction of any equitable claim to land.

Moreover the governor's authority to satisfy any claim was qualified by the 1846 Instruction and reiterated by further instructions of 13 September 1852 which laid down that he must consult his Executive Council before exercising such authority. Counsel for the Crown admitted that there was no record in the Executive Council minutes of any consultation over the Te Ngae grant, adding that, for this reason, "the validity of the Crown grant remains uncertain but it is my submission that the grant should be treated for the purposes of the present enquiry as being valid in formal terms" (C3:22-3). Counsel for the claimants argued that, in view of the failure of the Executive

Council to endorse the grant and confirm that endorsement in its minutes, there was no evidence that the Royal prerogative had been used. We appreciate the Crown's candour in bringing this defect to light but conclude that the grant to Te Ngae, if issued under the Royal prerogative at all, must be regarded as defective in view of the lack of evidence, first of a direction from a principal secretary of state, and secondly of an Executive Council endorsement. We think it is unlikely that the grant was ever referred to the council. Indeed, like counsel for the claimants, we can find "no clear evidence under what authority the governor did exercise such a power [to issue title]" (C4:8).

- 3.5.7 There is a further objection to the Crown grant which has not been fully discussed by counsel, although it was implied in some of Mr Blanchard's earlier reasoning: that the Maori title to Te Ngae had not been fully extinguished, and therefore the land was not unencumbered waste land of the Crown. We are of the opinion that a Maori customary right of occupation—to occupy the land alongside the CMS—still existed when the Crown grant was issued, and should have been acknowledged in that grant. There should also have been provision for the land to revert to the Maori occupants in the event of the CMS not continuing its mission. Indeed, since missionaries had been absent from the site for nearly four years when the grant was issued, the Crown should have insisted on re-occupation as a condition of issuing the grant in the first place.

We are of the view that the issue of the Crown grant was the culmination of a series of blunders commenced by Governor FitzRoy who, despite Commissioner Godfrey's decision not to make a formal recommendation, directed the registrar of deeds to prepare a Crown grant for Te Ngae. Governor Grey allowed the mistake to be perpetuated when he minuted to his colonial secretary that, if the native title was extinguished, a grant should be issued. Acting Governor Wynyard made the final error when he accepted that both FitzRoy and Grey had approved the grant and executed it.

We note that nowhere in any of the proceedings was there any suggestion that the prerogative was being exercised. However, we believe it is significant that when Robert Vidal, on behalf of the CMS appealed for the issue of a grant for a CMS claim at Opotiki (also previously declined by Godfrey), Dr Sinclair, after consulting Attorney General Swainson, stated that, because Commissioner Godfrey had not recommended a grant, "His Excellency [Lieut-Governor Wynyard] is not aware of any authority by which he could make a valid Grant of the same" (B2:119).²⁹ Nevertheless Wynyard assumed he had the authority to issue a grant for Te Ngae in similar circumstan-

ces in August 1854, since FitzRoy and Grey in turn had recommended it. But neither Sinclair, nor Swainson, nor Wynyard appears to have said that they were proceeding by way of the prerogative, and they must have been aware that the Te Ngae grant had not been referred to the Executive Council for approval. The view expressed by Sinclair above was reiterated in 1855 by acting Attorney-General Whitaker when Vidal, dissatisfied with the terms of the trust written into the Crown grant for Te Ngae, asked for a new grant to be issued. Whitaker said that, "the Crown Grant already issued appears to have been made without the sanction of and rather in opposition to a Commissioner's recommendation and is therefore invalid..." (B2:137).³⁰ It seems evident from these remarks by Sinclair and Whitaker that there was no legal basis for the Crown grant, either under the prerogative (since the proper procedures, by way of direction from the secretary of state and approval by the Executive Council, were not followed), or under the Land Claims Ordinance (since it was made in defiance of the recommendation of the commissioner). The grant therefore necessarily falls. Although the Crown was made aware soon after the grant had been made that it was defective it failed to rectify the situation.

We have before us a situation where senior government officers—the colonial secretary and the Attorney-General—were aware that the grant was defective. The claimants argue that these matters were placed before Native Minister John Ballance in 1885 (see below, 3.8.4), that he should then have acted to correct the alleged wrong, and that his failure to do so was a breach of Treaty principles. We do not disagree with the thrust of that argument, but suggest that the breach was much earlier in time, that is, when the Crown grant was issued in 1854.

- 3.5.8 Authority for the making of the grant as an act of state was earlier referred to in *Wi Parata v The Bishop of Wellington*. In that case Ngati Toa of Porirua had gifted land in 1848 to the Bishop of Wellington for a college to educate their children. A Crown grant for the land was issued to the Lord Bishop of New Zealand in 1850. The college was never established. In the 1870s Wi Parata of Ngati Toa took a case for the restoration of the land that resulted in a Supreme Court decision against him written by Chief Justice Prendergast in 1877. The decision, once Prendergast had put aside procedural problems faced by Wi Parata, appeared to rest on two primary points of law. The first assumed that Maori had no settled form of law prior to 1840. This meant that the supreme government executive must acquaint itself as best it may of its obligations to respect Maori proprietary rights and must be the sole arbiter of its own justice. Moreover whatever it did could not be examined by the courts except

on the Crown's initiative. The second point of law appeared to rest on the view that, as Prendergast put it:

the Maori tribes are, *ex necessitate rei*, exactly on the footing of foreigners secured by Treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court.³¹

While tribunal cannot overrule the *Wi Parata* decision, we can comment on whether it is applicable to the Crown grant before us. The two acquisitions are distinguishable in the sense that Te Ngae was originally acquired in 1839 whereas the Porirua land was obtained after the Treaty, in 1848. So far as the Porirua grant was concerned, it could not have been made pursuant of the Land Claims Ordinance or the Australian Waste Lands Act. We therefore presume that it was made in exercise of the Crown's prerogative, as Prendergast implied in his statement that, "the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over which it comprises has been extinguished".³² If the Crown's prerogative was used after a direction from a principal secretary of state and after consultation with the Executive Council, then the decision would appear to be unimpeachable. We have found that these procedures were not used in the Te Ngae grant.

We refer now to Chief Judge Prendergast's second reason for deciding against *Wi Parata*: the act of state. The authorities appear to be unanimous in their view that two pre-requisites are needed for the exercise of an act of state:

- the exercise was in non-British territory; and
- the person against whom it was exercised must be an alien or foreigner.

The authorities for these two propositions are *Walker v Baird* (1892) AC 496 (PC); *Johnstone v Pedlar* (1921) 2 AC 262; and *Attorney-General v Nissan* (1970) AC 179 (HL). It is relevant to record that an alien who was a citizen of a country friendly to Britain (ie not at war) would succeed against the act of state defence raised by the Crown if the act complained of was carried out in Britain or its dominions and the alien there was a resident. As Viscount Cave put it in *Johnston v Pedlar*, "so long as he [an alien] remains in [this] Country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations". Lord Phillimore in the same case said that, "between Her Majesty and one of her subjects there can be no such thing as an act of State".³³

In so far as the territorial argument is concerned, we accept the view expressed by Richardson J in the *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 671 that:

It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 established Crown Sovereignty over New Zealand.

The proclamations referred to were the two issued by Hobson at Port Nicholson on 21 May 1840 declaring Crown sovereignty over New Zealand. There is no doubt that Te Ngae was within British territory when Commissioner Godfrey made his investigation and when the Crown grant was issued to the church.

As far as British citizenship is concerned, Ngati Rangiteaorere were at those dates, as article 3 of the Treaty assured them, under the Her Majesty's protection and entitled to the rights and privileges of British subjects. This was no more than a declaration of the colonial law that, on annexation as a British colony, the indigenous people became British subjects. They were not, as Chief Judge Prendergast put it, "*ex necessitate rei*, exactly on the footing of foreigners", but rather were entitled to the protection of the Crown. We conclude that the Crown could not exercise an act of state against Ngati Rangiteaorere, either under the law or the Treaty; indeed, under the Treaty, it was bound by its fiduciary duty to protect them and this it failed to do in issuing, and later failing to cancel, the Crown grant for Te Ngae.

We note that the Crown has conceded that the grant of 21 September 1854 gave to the CMS more than Ngati Rangiteaorere "sold" to the CMS. We accept this as a possible breach of the principles of the Treaty but, in view of our finding in respect to the validity of the grant, we believe the issue is wider than that accepted by the Crown.

Crown responsibility for the issuing of the grant

- 3.5.9 We must now consider the related matter of the Crown's malfeasance in granting to the CMS in 1854 more than Ngati Rangiteaorere had given in 1839. In his oral submissions Mr Blanchard for the Crown admitted that "the grant was not all it should have been. In that respect...it was too wide in terms of who could benefit under it"; and he thought the Crown had "to take some of the responsibility for not making it clear that the grant was to be divestible if the church ceased to make personal use of the property". He conceded that the Crown grant should have included a right of reversion to Ngati Rangiteaorere (transcript 2). We note that this concession, properly made by the Crown, could also apply to other Crown grants to the church, including that at Porirua which was the subject of the *Wi Parata v*

Bishop of Wellington case, where the grant awarded more than the Maori involved had agreed to relinquish. However if the Crown grant for Te Ngae had been litigated last century, because of the then judicial climate in New Zealand, it probably would have been treated in the same way as Prendergast treated Wi Parata's claim over the Porirua Crown grant.

3.6. Treaty Principles and the Crown Grant

- 3.6.1 This tribunal is not restricted to issues of legality and under our statute we are obliged to take a more expansive view of the Treaty of Waitangi than Mr Justice Prendergast. We have to measure whether a particular proceeding of the Crown, in relation to any claim before us, is in conformity with the principles of the Treaty. In looking at the principles we need to take into account the provisions, as spelled out in the two texts of the Treaty, English and Maori. The Treaty made no reference to pre-Treaty purchases—these were dealt with by Gipps' and Hobson's proclamations of 14 and 30 January 1840, and the resulting Land Claims Ordinances. We consider that this legislation was an attempt to give proper effect to the principles of the Treaty in the sense that it endeavoured to ensure, through enquiries by a commissioner, that the land claimed had been willingly sold by the rightful Maori vendors. The rules issued under the Ordinance further elaborated this protective function. The Treaty, in the English text, stressed the anxiety of the Queen to protect the "just Rights and Property" of the chiefs and tribes (in the preamble) and "the full exclusive and undisturbed possession of the Lands...so long as it is their wish and desire to retain the same in their possession" (in article 2). The Maori text, with its stress on te tino rangatiratanga o o ratou wenua, was less detailed but in a sense more comprehensive since the full or unqualified exercise of their chieftainship over their lands implied a complete control according to Maori customs (Kawharu 1989:319).

The Waitangi Tribunal's *Manukau Report* (1985) p 95 says that the Treaty not only obliges the Crown to recognize Maori interests specified in it, but also actively to protect them. This tribunal is heartened by the acceptance of this active protection principle by Sir Robin Cooke P when he confirmed that "the duty of the Crown is not merely passive but extends to active protection of Maori in the use of their lands and water to the fullest extent practicable".³⁴ This approach was also supported by Casey J.³⁵ In essence we have the highest court in the land requiring active protection by the Crown of Maori land, yet, before us, a situation where it was clear to the Crown that the grant to Te Ngae should not have been but was issued.

We believe that the Crown's obligation under the Treaty to protect the Maori and their lands involved also an obligation properly to consult them before disposing of their lands to the Crown or, by way of Crown grant, to any other party. They were not to be deprived of their lands without due legal process, or by unilateral action. Article 2 of the Treaty gave the Crown an exclusive right of pre-emption to acquire such land as the proprietors "may be disposed to alienate at such prices as may be agreed upon". Moreover it was not just a matter of willingness to sell, since the Treaty, especially in the Maori text, assured them of their "tino rangatiratanga o o ratou wenua"—not merely ownership but control over their lands, to be exercised by their rangatira. This surely meant that chiefs, acting as trustees for their iwi, had a right to be consulted over and indeed to control the disposal of their lands. That was the rangatiratanga they had retained while transferring kawanatanga, or governance, to the Queen; and that rangatiratanga, in Maori eyes, was somewhat more than the kawanatanga given to the Queen. In the view of the Crown the exercise of kawanatanga, or sovereignty in the English text, clearly included the right to legislate; but in our view this should not have been exercised in matters relating to Maori and their lands and other resources, without consultation. Likewise, in the implementation of such laws, Maori should have been involved in the decision making process, possibly as assessors or commissioners (as they were to be involved in later years, for instance as assessors in the Native Land Court). Above all, the Crown had an obligation to ensure that they willingly participated in the alienation of their lands, either to the Crown or to third parties.

Findings as to breach of Treaty Principles

- 3.6.2 In the light of this, the tribunal must assess whether the Crown, by way of Godfrey's inquiry into the Te Ngae claim, and in subsequently issuing a Crown grant for Te Ngae, properly ensured that the land had been willingly sold by the rightful owners. We agree with Godfrey's conclusions that insufficient witnesses had been produced at Tauranga to justify the issue of a grant but, by the same token, his opinion that the "native title" had been extinguished was not proved. The word of Te Ao, at best a tenuous claimant to the Takuere copse named in the second deed, and of Morgan, who as one of those who drew up and negotiated the deed had a vested interest in it, were insufficient guarantee that there had been a full and final purchase. The failure or refusal of some of the principal Ngati Rangiteaorere kaumatua to sign or mark the deeds was overlooked. There was no inquiry into whether the transaction might have been regarded by the signatories as something less than an outright sale. We find that the issue of a Crown grant by Wynyard, without any further investiga-

tion of the nature of the original transaction and the Maori view of it and purely on the repeated urgings of Chapman, was in breach of the principles of the Treaty whereby the Crown was obliged to consult and protect. The grant was issued in spite of the fact that Ngati Rangiteaorere continued to occupy the land and exercise various rights of ownership—indeed they had a better claim to “quiet and resident possession” than Chapman himself. The Crown did not protect Ngati Rangiteaorere’s “just Rights and Property” at Te Ngae. Having improperly issued a grant, the Crown failed to recall it when it became aware of the deficiency. This was a further breach of the Crown’s obligation to protect Ngati Rangiteaorere’s rangatiratanga over their lands. Lastly, we find that, since the Treaty of Waitangi Act 1975 binds the Crown, it must take responsibility for the wrongful issue of the Crown grant to the CMS and a corresponding responsibility today to put it right with the claimants, as we shall recommend below.

3.7. The CMS Trust at Te Ngae

The Crown grant (see appendix 3) issued for Te Ngae differed from most others issued to the CMS for its pre-1840 land claims, though it was similar to grants issued to the society for educational purposes at Porirua and Otawhao. It comprised 318 acres 2 roods and 10 perches (not the 600 acres originally claimed). The grant said that the land described had “for some time been used as a Mission Station” by the CMS and that it was “expedient” that it should be permanently set aside for this purpose. It went on to describe the boundaries and to specify the form of trust it was to be held under:

as a Mission Station or as a Site for a place for Public Worship or for School purposes connected with the religious and moral Instruction or in other like manner for the use and benefit of our subjects inhabiting the Islands of New Zealand or of other persons being the children of the Poor or destitute Inhabiting any Islands in the Pacific Ocean. (A2:71)³⁶

These terms would have surprised the original signatories, had they been consulted. They had willingly made the land available for a mission station and for the instruction of their own kin, but hardly for other inhabitants of New Zealand, let alone the Pacific Islands.

- 3.7.1 The form of the trust also shows that the Crown was using for its own broader educational purposes land originally sold or gifted by Maori for more specific purposes and benefits of their iwi. Governor Grey and Bishop Selwyn had embarked on a broad educational strategy of using mission stations as a spearhead for promoting Maori education generally and indeed that of Pacific Islanders. Selwyn had established a Melanesian Mission and was bringing Melanesian youths back to New Zealand for schooling. Not that any attempt was ever made to

send them to Te Ngae, since the CMS had abandoned it as a mission and educational station before the grant was issued.

- 3.7.2 In any case, the CMS was somewhat embarrassed by the form of trust written into the grant for Te Ngae. On 15 March 1855 Robert Vidal wrote to the colonial secretary, on behalf of the society, complaining that the grant for Te Ngae had not simply conveyed the land in an unspecified trust, like the grants for other pre-1840 mission purchases, and asking for a new title to be issued in this form (B3:186).³⁷ That request led to a new round of discussions on the CMS title to Te Ngae. It was referred to the acting Attorney General, Frederick Whitaker, for an opinion. He replied on 2 August stating that:

The Governor has no authority to issue a grant under the Land Claims Ordinance, in opposition to the recommendation of the Commissioner. (B3:188)³⁸

However, he added that Godfrey had not reported that no purchase had been effected, merely that the claimants had not produced their witnesses, and concluded:

It is open therefore to the parties yet to substantiate their claims before a Commissioner, and if a grant were recommended it might be made. (B3:188)³⁹

The colonial secretary was prepared to follow this advice and proposed that the CMS surrender its grant and proceed as Whitaker had advised. Wynyard asked for the matter to be referred again to Whitaker. He replied on 4 September:

The Crown Grant already issued appears to have been made without the sanction of and rather in opposition to a commissioner's recommendation and is therefore invalid there does not appear to be any doubt that the Native Title has been extinguished and the best course to pursue would be to treat the claim as undisposed of, refer it to a commissioner under the land claims ords, and make a new grant in conformity with his recommendation. (B3:189)⁴⁰

- 3.7.3 But no further action was taken on the CMS grant for Te Ngae. Whitaker's opinion that it was invalid has never been tested.

Interestingly, the CMS made no attempt to follow Whitaker's advice and apply for a new grant when the Native Land Claims Settlement Act was passed in 1856 to allow a new examination of unsettled pre-1840 land claims. The CMS put forward four claims for re-examination, but not Te Ngae. The two old claims to Te Ngae were re-numbered but not re-examined by the new commissioner, F D Bell. He merely remarked on a memorandum on CMS claims in March 1857 that "Governor FitzRoy ordered Grant for 318.2.10",⁴¹ and in a schedule on the claims of 29 October 1859 that Te Ngae was a "special grant for general purposes" (B2:139).

- 3.7.4 It seems that, in the end, the CMS preferred to retain its somewhat inconvenient trust rather than have the claim to Te Ngae, now no longer occupied by the mission, re-opened with the possibility of a re-examination of its original "purchases". However the Crown had a responsibility to refer the Te Ngae grant to Commissioner Bell under section 16 of the Act. Its failure to do so amounts to a breach of the Treaty principle of protection.

Finally, so far as this tribunal is concerned, it is necessary to comment on the Crown's role in spelling out the nature of the trust. By so expanding the nature of the trust to include the poor and destitute of New Zealand and the Pacific Islands, it was going far beyond what the original signatories could have believed they were conveying to the CMS in the original deeds of 1839. And it was doing so, moreover, without any attempt to consult Ngati Rangiteaorere and the other Rotorua iwi.

3.8. The Church's Administration of Te Ngae

- 3.8.1 Once the Crown grant had been issued the Crown had a continuing responsibility to ensure that the trust was fulfilled. For this reason it is useful to provide a brief resume of events at Te Ngae after the issue of the Crown grant. This also throws some retrospective light on Ngati Rangiteaorere attitudes towards the original CMS transactions.

Te Ngae after the missionaries: the land returns to Ngati Rangiteaorere

- 3.8.2 After Chapman had withdrawn from Te Ngae, there was some falling off in Maori support for Christianity, though Maori teachers he had trained carried on with the work of the mission. This falling off was exacerbated by the New Zealand wars and particularly the unsettlement caused by the campaigns in the Rotorua district of the guerilla leader Te Kooti Rikirangi. Most of Te Arawa remained loyal to the Crown and many took part in the campaigns against Te Kooti. Spencer, the last remaining CMS missionary in the district, left Te Wairoa at this time. The CMS did not resume mission work in the district after the wars, though to some extent the Anglican church filled the gap, occasionally ordaining Maori clergy, including Ihaia te Ahu, one of Chapman's converts at Te Ngae, in 1855, and Frederick Bennett in 1896, later to become the first Bishop of Aotearoa (A2:31). Te Ngae became a parish—which covered a very much larger area than the CMS Te Ngae block—as part of the Waiapu Diocese. In 1891 the assets of the CMS were transferred to the Church Mission Trust Board which had been formed to take over the work of the CMS.

Te Ngae itself remained unoccupied after Chapman's departure and Smith's brief tenancy. Ferdinand Hochstetter passed by in 1859 and

found the mission station "deserted and in decay" (A2:32).⁴² In 1871 Ollivier C Morton reported that "little or nothing could be traced of the buildings" (A2:32).⁴³ Nevertheless newspaper reports at this time indicate that the land at Te Ngae was being cultivated by Maori, and that the old flour mill was being used.

Renewed European occupation of Te Ngae

- 3.8.3 In 1876 the CMS leased Te Ngae to two Pakeha, Robert and Francis Scott, on a 30 year term. But they were soon in dispute with local Maori. On 21 June 1876 the *Bay of Plenty Times* reported that:

Messrs Scott Brothers have again been interfered with by natives in their farming operations at the Ngae—ditching and fencing being destroyed, tools thrown away, and boundaries disputed, although the land is held under a Crown grant. This is not the first time that those enterprising settlers have been interfered with by natives... (B3:496)⁴⁴

The Scotts' farming operations were the first sign for more than 25 years that the CMS, through its lessees, was resuming its claim to Te Ngae. Although there could have been a quarrel over boundaries in this dispute, it appears that Ngati Rangiteaorere were also disputing the CMS title. They were probably unaware at this stage that a Crown grant had been issued to the society more than 20 years previously. In any case, since Chapman had left and not been replaced, Ngati Rangiteaorere must have assumed that the land had reverted to them. They had had over 25 years of "peaceful and undisturbed" occupation, a longer period than Chapman had had when he claimed title. Moreover their passive resistance to the Scotts' occupation continued unabated (B2:148-53). In 1878 the Scotts, tiring of opposition, sold their lease.

- 3.8.4 Nevertheless Ngati Rangiteaorere opposition continued intermittently through the 1880s. In 1885 they took their complaint to the Native Minister John Ballance when he visited Rotorua. Their rangatira, Ratema Awekotuku, stated:

We ask that a piece of land at Te Ngae, three hundred and sixty acres, given to the missionaries, may be rchear'd. The reason we make this request is that the people living here are not aware of how the missionaries became possessed of that land. Our idea is that the land was given as a mark of affection to the missionaries for mission purposes, but, seeing that it is no longer put to that use, we think that the land should come back to us. Another reason why we wish the matter to be inquired into is that we may know how the missionaries became possessed of that land. We do not understand at all how it was that the land passed from us. (B3:471)⁴⁵

That of course suggests that Ngati Rangiteaorere did not know anything about the proceedings which had led to the CMS getting its

Crown grant. But Ballance hastened to tell them that the land was held by the CMS on a Crown grant, adding:

Now, you know that a Crown grant cannot be disturbed. Their title is complete, and cannot be disturbed now. My advice to you, therefore, is to let the missionaries remain undisturbed in the land. (B3:473)⁴⁶

All of which must have sounded strange to Ngati Rangiteaorere since the missionaries had not been there for 35 years. This was a second opportunity for the Crown to rectify the defective grant by proceeding to the Supreme Court for a writ of *scire facias*.

However a succession of Pakeha lessees remained firmly entrenched on Te Ngae. The most recent lessee, Ronald Bishop, took up his lease on 1 August 1965. It has been renewed several times and expired on 1 September 1990. There appears to be no clear record of how the rentals were dispersed in the early years of the lease, though in recent years they have been used for general diocesan purposes within Te Ngae parish. Since some Ngati Rangiteaorere lived in the parish they would have received some benefits from this expenditure, but they were far from being the only beneficiaries.

The church as trustee

- 3.8.5 Finally, we think it is necessary to comment briefly on whether or not the church has fulfilled the original purposes of the trusts recited in the Crown grant. The Crown, in view of its fiduciary responsibilities under the Treaty of Waitangi, had a responsibility to ensure that the trusts it had granted were honoured. In support of this we note the report of the 1905 Royal commission into the Porirua, Otaki, Waikato (Otawhao), Kaikokirikiri and Motueka schools trusts, chaired by none other than Mr Justice Prendergast.⁴⁷ This looked into the administration of these trusts, including “Whether the original trusts have been carried out, and if not, why”. For some reason this commission was not asked to look at Te Ngae, which is surprising since it did examine Otawhao which had an almost identical trust deed. The commission found that in most instances the letter of the trust deeds had not been observed—with the lands no longer being used for schooling but, like Te Ngae, leased out and the proceeds devoted to general diocesan purposes. However it did not recommend that any of the deeds be terminated, let alone that the land be returned to the original Maori donors. It was as if Prendergast had applied the doctrine of *cy pres*, which he would have used in the *Wi Parata* case if he had not already dismissed the suit on the principle of act of state.

Since we do not accept the validity of the act of state doctrine, we need to consider whether *cy pres* applies to the Te Ngae case. Was the church’s leasing of the land to Pakeha and expenditure of the

proceeds for diocesan purposes sufficiently in accordance with the terms of the trust, as the principle of *cy pres* requires?

If we regard the original Maori signatories to the CMS deeds as the settlors, then clearly the church was not fulfilling their original purpose, which was the establishment of a mission and the development of a farm for *their* purposes.

But of course Ngati Rangiteaorere were in no way informed of or involved in the terms of the Crown grant of 1854, under which the Crown was technically the settlor. We find that the Crown did nothing to ensure that the church was fulfilling the terms of the grant—not even bringing it within the compass of the Prendergast commission of 1905. We note that Crown counsel, in the course of our hearing, admitted that the leasing of the land may not have been in accord with the terms of the trust (oral submission, 27 August 1990). We do not think that the doctrine of *cy pres* could be stretched far enough to cover the Crown's deficiency in failing to ensure the proper application of the trust.

Nevertheless, the church is prepared to hand back to Ngati Rangiteaorere what is now a fully developed farm property, without compensation for improvements, plus an additional adjoining area of 59.5 acres which the Mission Trust Board purchased from the Crown in 1918. These matters must be born in mind as we discuss the claimants' case for compensation.

3.9. Compensation

In his final submissions counsel for the claimants requested the tribunal, if it found breaches of the principles of the Treaty, to recommend that these be put right by the Crown by accepting responsibility for the costs of passing any necessary private act of parliament, as well as recompensing Ngati Rangiteaorere for the loss of use and mana of the land at Te Ngae. The tribunal has found that there were breaches of the principles of the Treaty and we agree that the costs of returning the land to Ngati Rangiteaorere, whether by legislation or otherwise, should be borne by the Crown.

We note that the church, without any request from the tribunal, has agreed to transfer, without charge, 59.5 acres of adjacent land, as well as the original Te Ngae farm, described in the deed as comprising 318 acres 2 roods and 10 perches. We commend the church for adopting such a reasonable and generous approach. However the claimants have argued that such generosity does not absolve the Crown from its duty to compensate; they see the additional 59.5 acres as putting matters right between them and the church.

The claimants have sought exemplary or punitive damages from the Crown, but in this regard we agree with the Crown that it is not appropriate to recommend punitive damages. Having said this, however, we have addressed the lesser question of compensation for the loss of the use of the land after it was leased in 1876. (We are bearing in mind that Ngati Rangiteaorere did have the use of the land after the CMS had withdrawn in 1850 until it was leased in 1876.) We have come to the conclusion that the Crown should commission an actuary to calculate the rentals that Ngati Rangiteaorere would have received had they, rather than the church, leased out the land from 1 July 1875, the commencement date of the first lease, until 1 September 1990, the culmination date of the last lease, with this sum adjusted to take into account the loss of the use of the rental money throughout the period. However the sum should be reduced by 5 per cent, in acknowledgement of the fact that Ngati Rangiteaorere received some benefit of church activities, partly funded by its rentals from Te Ngae, and because they also had some minor use of the land while it was leased, probably until the 1920s. We accept that the rentals Ngati Rangiteaorere are likely to have received may not be very different from those actually received by the church, but it has to be remembered that the church leases made no provision for compensation for improvements. The church is offering to return a well developed farm with considerable capital improvements, free of charge. Ngati Rangiteaorere may have done better with the farm over 115 years; or they may not have done so well. We believe that our recommendation is a reasonable compromise of these imponderables.

3.10. **Conclusions**

The tribunal records its appreciation of the stance taken by the Church Mission Trust Board and the Waiapu Board of Diocesan Trustees of the Anglican Church of New Zealand. The mana of the tribunal was enhanced by the attendance throughout of the Most Reverend Whakahuihui Vercoe, Bishop of Aotearoa, and for part of the time by the Most Reverend George Connor, Bishop of Waiapu. Throughout our hearing we have made it clear that, without the church voluntarily offering to return the mission farm to Ngati Rangiteaorere at least, it would have been much more difficult to reach an equitable solution. The information placed before us demonstrates that the church authorities have been willing to return the mission farm to Ngati Rangiteaorere for some time, but they quite properly wish to ensure that in doing so they do not breach the trusts upon which the land is held. Nor do they wish to become liable for any costs and expenses in returning the land.

Counsel for the various parties involved have addressed the mechanics of the proposed return of the land and appear to be agreed that legislation is the preferred mode. This tribunal agrees, notwithstanding the lengthy delays that have occurred in passing legislation recommended in other tribunal reports. In the meantime, however, we understand that the church intends to appoint representatives of Ngati Rangiteaorere as trustees to replace the existing trustees, thus in effect severing the church's connection with the mission farm. The land will remain subject to the present trust until such time as there is either judicial intervention or legislation. Since the lease of the property has recently expired, this is an opportune time to involve Ngati Rangiteaorere in the administration and the future use of the land.

We have considered the future status and vesting of the freehold of the land. We have suggested to Ngati Rangiteaorere's legal advisers that it be vested in their eponymous ancestor, Rangiteaorere, and that it become Maori freehold land as defined in the Maori Affairs Act 1953. As we see matters, the Maori Land Court, under s 438 of that Act, can appoint trustees to administer the property for all Ngati Rangiteaorere and declare a suitable trust order. Vesting the land in the eponymous ancestor would inhibit any future alienation of the fee simple. If, from time to time, Ngati Rangiteaorere wanted the trusts varied, the Maori Land Court can do this promptly and inexpensively. We note that counsel in this claim are aware that variation of the present trust means legislation or, possibly, costly and lengthy High Court proceedings, with no certainty of result. We would not wish the latter regime on Ngati Rangiteaorere in the future. Counsel for the claimants was prepared to accept our suggestion of legislation vesting the land in the eponymous ancestor, with the Maori Land Court setting up the trusts, though he suggested, as an alternative form of legislation, that which established trusts for Port Waikato lands returned from the church to Tainui. We would prefer the former.

Accordingly, we recommend that the Crown at its expense in all things legislate to effect the following:

- (a) The vesting of the Te Ngae Mission Farm, plus such other adjoining land that the New Zealand Mission Trust Board and Waiapu Board of Diocesan Trustees wish to add, in the eponymous ancestor of the claimants, Rangiteaorere.
- (b) The status of such land be Maori freehold land as defined in the Maori Affairs Act 1953.
- (c) The land be freed from the present trusts.

Chapter 4

Additional Grievances

During the course of the hearing Ngati Rangiteaorere placed a number of ancillary grievances before the tribunal. These were not dealt with by counsel in their final submissions, but we believe there is sufficient evidence and agreement on these to report briefly, or to refer them elsewhere. Evidence on these issues was contained in two reports commissioned by the tribunal by Mr Paora Maxwell and Mr Bill Patrick, and in a report by Mr David Alexander which was commissioned by the Crown with the agreement of the claimants.

4.1. **Lake Rotokawau**

- 4.1.1 This concerns the integrity of the title of Whakapoungakau 4C Block (Lake Rotokawau). Ngati Rangiteaorere claim that when lands surrounding the lake were developed, it was understood that Rotokawau, which lies in a natural crater, would be left undisturbed. In 1925 the Maori Land Court partitioned the lake and the surrounding slopes up to the lip of the crater, creating Whakapoungakau 4C Block with an area of 194 acres (74 Rotorua MB 213). It appears that survey of blocks adjoining this lake title resulted in another title, now in European ownership, which encroached down one lip of the crater right to the water's edge.

Evidence put before the tribunal convinced us of the justice of Ngati Rangiteaorere's complaint, but we consider it is unnecessary to proceed with it since Ngati Rangiteaorere reached agreement with the European owner, during the course of our sitting, to resolve the matter between themselves. The two parties presented us with their written agreement on 7 December 1989 (A7).

The rating of Rotokawau

- 4.1.2 There was also a separate complaint also relating to Rotokawau: the rating of the lake by the local authority—then the Rotorua County Council—from the mid-1960s. At that time the Crown investigated the possibility of buying Rotokawau but Ngati Rangiteaorere clearly let it be known that they would not sell their lake. This refusal prompted the then minister for Maori Affairs to instruct the Rotorua County Council to rate the lake. They did so and it has been rated ever since.

The other lakes in Rotorua County are not rated. We regard the decision of the Minister of Maori Affairs to advise the Rotorua County Council to rate Rotokawau, in retaliation for Ngati Rangiteaorere's refusal to sell it, as a breach of the principles of the Treaty which we have spelled out above in relation to Te Ngae, namely, that the Crown, far from pressuring Maori to sell their lands, should endeavour to preserve them in Maori ownership, for Maori benefit. This would seem to us to be especially so in the case of a lake virtually surrounded by Maori land. We are pleased to note that the Crown's advisers have accepted that the ministerial intervention was ill-advised and that the Crown has requested the local authority (now the Rotorua District Council) to grant rate relief. The Rotorua District Council has advised Ngati Rangiteaorere to apply to the Maori Land Court to set the land apart as a reservation pursuant to s 439 of the Maori Affairs Act 1953 and at the same time to apply for rates exemption. Should this application be unsuccessful, we give leave to Ngati Rangiteaorere to come back to this tribunal for further remedies.

Finding and recommendation

- 4.1.3 We regard the Crown's action in advising the Rotorua County Council to levy rates a clear breach of the principles of the Treaty. We recommend that the Crown refund the beneficiaries of Whakapoun-gakau 4C any rates they have paid over the years, plus interest, and also pay any outstanding arrears.

4.2. **Compulsory Taking of Ngati Rangiteaorere Lands for Roads without Payment of Compensation**

- 4.2.1 During the course of the hearing the Ngati Rangiteaorere claimed that the Crown in the 1890s had compulsorily taken a considerable amount of their lands for roads and they had never received compensation. At the hearing, counsel for the Crown undertook to investigate this matter. The Crown's counsel and the claimants' counsel agreed that research should be undertaken on this issue and Mr David James Alexander was commissioned to research the matter.

Mr Alexander later delivered his evidence in a comprehensive report to the tribunal. The following text is his examination of the issue, which we believe fairly summarises the events surrounding the taking of roads (B4).

Compulsory taking for roads: David Alexander's report

- 4.2.2 A road from Rotorua to Maketu had been put through Ngati Rangiteaorere lands prior to 1871, and this route was upgraded during 1871 and 1872. During 1889-1890 an additional road was constructed to Tikitere, the survey department reporting in its annual report:

Tikitere Road (2.5 miles). This is a new road formed for tourist traffic. The work has been done by contract, native labour being employed. (B4: doc 3)⁴⁸

Following construction a need arose for the Tikitere and other roads to be declared public roads. The Minister of Lands received a petition from "inhabitants" asking to have roads and landing places laid off round the Rotorua lakes area.⁴⁹ From subsequent references it would seem that the "inhabitants" referred to were European business people or civic leaders concerned for the tourist trade at Rotorua. The minister approved of surveys being carried out by a surveyor, J C Blythe, with the further instruction that Blythe was to report back "if any trouble [was] likely to arise from Natives".⁵⁰ The Native Minister was advised by the Minister of Lands that Blythe would "do nothing rash".⁵¹

A warrant was issued by the governor to Blythe for the survey of roads through the Whakapoungakau-Pukepoto Block, and Blythe attempted to start work on the ground⁵². During January and February 1891 a sequence of correspondence shows that he encountered some difficulties.

Blythe: I had to act in hurry on warrant ... so made no proper survey, and natives dispute the road. Shall I make a survey of road further along?⁵³

Under Secretary: Has matter of Te Ngae landing been settled?⁵⁴

Blythe: The only arrangement I could make with Native owners was that they would not obstruct tourists landing at Waiohewa etc.⁵⁵

Under Secretary: It would be better to take permanent road to the north of cultivations etc.⁵⁶

However, before Blythe could take the matter any further, he died.

The difficulty over access for tourists remained, and the local member of the House of Representatives expressed his concern:

Re landing place at Te Ngae. Natives are causing obstruction.⁵⁷

Blythe's successor as roading surveyor, C W Hursthouse, was instructed:

To proceed to the ground and see natives, and if they still object to road, telegraph to me and a fresh warrant to take the road will be sent.⁵⁸

Hursthouse did report back, but there is no record of the contents of his report⁵⁹. All that can be stated is that no warrant was issued as a result.

One year later the matter resurfaced, when the chief surveyor in Auckland was instructed to:

Furnish a plan and description to enable a warrant to be issued to one of your officers for purpose of proclaiming road, so as to prevent natives levying blackmail from tourists.⁶⁰

This request was probably prompted by an approach from the Rotorua Town Board:

Drawing attention to excessive charges made by natives upon tourists.⁶¹

The chief surveyor replied:

Enclosing litho showing the several roads for which Governor's warrant is required to make them legal.⁶²

As a result a warrant was issued in March 1894 to another surveyor, J Baber.⁶³

While Baber was carrying out his surveys, the correspondence continued.

Chief Surveyor: Tikitere natives have reduced their charges from 4/- to 2/-. Object to loop road around heights. Shall I proceed with survey?⁶⁴

Surveyor General: If you mean the old road over the hills to Tikitere, I do not know of any reason to retain it.⁶⁵

Chief Surveyor: Advising that additional warrants required in favour of J Baber re connection with roads now being surveyed at Rotorua.⁶⁶

Surveyor General: Warrant issued.⁶⁷

Baber's survey plans show both the main road from Te Ngae junction to Tikitere, and a side road to Lake Rotokawau⁶⁸. His plans were approved by the chief surveyor as conforming to the technical survey standards, and by the governor for the purpose of declaring the land to be taken for road. In 1898 the roads shown on the plans were proclaimed to have been duly taken.⁶⁹ No compensation was paid.

The warrants were issued in terms of the legislation applying at the time, s 93 Native Land Court Act 1886. This stated that:

It shall be lawful for the Governor, at any time hereafter, to take and lay off for public purposes one or more line or lines of road through [Maori] lands provided that the total quantity of land which may be taken, inclusive of any already taken, for such line or lines of road shall not exceed one-twentieth part of the whole.

Officials were conscious of the effect this could have on the Maori landowners. The form covering letter sent to the chief surveyor with the Blythe warrant stated:

Will you be good enough to instruct Mr Blythe accordingly and to direct him to inform the owners or occupiers of the land of what he is about to do, and to invite their inspection of the road as it is laid out, producing the Governor's warrant if desired...

As complaints have been received from Natives and others that the roads taken through their lands are not only injurious to their properties

but in some cases unnecessary, before approving the plans will you please ascertain not only their technical accuracy, but also that the position of the road as affecting the block it intersects is so far as you know the best.⁷⁰

The surveyor to whom the warrant was issued would also have been given a form notice of explanation in Maori which he could show to the landowners.⁷¹

The main road was further proclaimed to be a public road in 1911, under the provisions of the Thermal Springs Districts Act 1910.⁷² I am not aware of the reason for this action, though the 1911 proclamation refers to the line of the formed road in public use at that time, which may have been different to the line of road proclaimed in 1898.

- 4.2.3 The sketchy nature of the information that I have uncovered makes it difficult to draw any firm conclusions. The bulk of Baber's survey seems to have been of a road which had already been constructed, from the Te Ngae junction to Tikitere. The difficulty with the Maori owners may have related to the area immediately around the Te Ngae landing place at the mouth of the Waiohewa Stream, and may have been concerned with approvals for tourists to have access from the landing place on the lakeshore up to the public road at Te Ngae junction. This would involve access through the area occupied by the marae today. It is worth noting that this short stretch was not roaded until 1896-1897, when the Lands and Survey annual report recorded that:

Te Ngae Landing Road: A distance of 20 chains of formation has been constructed from the lake up to the main road, enabling passengers from the launches to get into the coach for Tikitere or elsewhere on the shores of the lake.⁷³

From Mr Alexander's research he was unable to say whether the side road to Lake Rotokawau was constructed prior to Baber's survey in the same way that the main road seems to have been. If not, I have found no reason to explain why the roadline should have been defined and taken for a public road. I can only speculate that the taking of such a roadline for a future road could have been motivated by the opportunities for tourism provided by a lake in such an attractive setting. Lands and Survey Department was at the time the Crown agency involved in the provision of tourist facilities in the Rotorua region.

- 4.2.4 This completes Mr Alexander's evidence on the taking of these roads. The evidence clearly demonstrates that Ngati Rangiteaorere were against this invasion of their tribal domain, but their objections do not appear to have been considered. The Crown compulsorily took

their land for roads and did not pay compensation. We now consider each of these issues in turn.

Compulsory acquisition of land

- 4.2.5 In its *Mangonui Report* (1988) the tribunal briefly considered the compulsory taking of land—in this case for a sewerage scheme—but raised no objection because the land concerned was not traditional Maori land, having been acquired by the Ngati Kahu claimants from a Pakeha landowner after the land had become subject to a public works designation. Because of this and also because there had been no legal argument on the matter, the tribunal did not examine the question of “whether the Treaty forbids the compulsory acquisition in any circumstances”. We too have not had any legal argument on the compulsory taking of Ngati Rangiteaorere land for roads and for that reason refrain from making a finding. Nevertheless we believe that it is appropriate to make some observations for future legal argument.

As mentioned earlier in this report, *kawanatanga* in Maori eyes is and has always been something less than *rangatiratanga*. In the context of land, *rangatiratanga* includes the exclusive rights and control over who may live there, pass through, hunt or harvest the land’s bounty; in fact the absolute dominion and authority over the land against all persons subject only to the gods. In pre-European times these rights were jealously guarded and any encroachment by other *iwi* without consent usually resulted in warfare. On the other hand, *kawanatanga* as Maori Treaty signatories understood it from missionaries, was a new concept which was primarily associated with the control of Pakeha who were beginning to stream into the country. It did not involve taking control or *rangatiratanga* from Maori. Had Maori been told in 1840 that *kawanatanga* would mean the limiting and eventual loss of *rangatiratanga* over their lands, they would not have signed the Treaty. Indeed some who feared that this might happen did refuse to sign.

If we turn to the English text of the Treaty, as it was understood by the English, then it could be argued that the Maori, in ceding sovereignty or *kawanatanga* (governance) in article 1 of the Treaty, were conceding to the Crown the right to ensure the free passage of its subjects, of both races, throughout the land, and in this respect the right to acquire land for public roadways. The argument could be extended to allow for compulsory acquisition, in the last resort, of necessary public rights of way, on payment of fair compensation. This principle was in fact embodied in the Public Works Act 1882 which was in force at the time the Ngati Rangiteaorere land was acquired. But against this attribute of sovereignty we must balance the promise

to Maori in article 2 of the Treaty of "the full exclusive and undisturbed possession of their lands..." and the reservation to the Crown of a sole right to purchase such land as Maori wished to sell; or, in the Maori text, the rather stronger guarantee of "te tino rangatiratanga o o ratou wenua" which allows a chiefly control over, as well as possession of, their lands.

The question at issue goes to the very heart of the Treaty: it is whether the Crown's exercise of sovereignty (kawanatanga) guaranteed to it in article 1 can override the chiefs' exercise of rangatiratanga guaranteed to them in the second article. That question is insoluble, unless we are prepared to assume that one article can override the other, or find a compromise. Where the Treaty is contradictory, as it is in this case, we must try to find a compromise if it is to work at all. Fortunately, in this respect we can find some guidance in previous tribunal reports. In the tribunal's *Motunui* and *Manukau* reports it was held that the gift to the Crown of the right to govern and to make laws was in exchange for the protection by the Crown of Maori rangatiratanga *Motunui Report* (1983) p 61 and *Manukau Report* (1986) p 90. The *Muriwhenua Report* (1988) p 195 spoke of a need to reconcile the concepts of kawanatanga and rangatiratanga: "neither partner in our view can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit". The *Mangonui Report* spoke of a need for a priority of Maori interests in some cases and "a careful balancing of interests" in others, with the Mangonui sewerage scheme in the latter category. The Crown's exercise of kawanatanga was to be constrained by the need of the two Treaty partners to behave towards one another reasonably and in good faith. This requires proper consultation.

In exercising our statutory function, we note that in any claim before us we have an exclusive authority to decide issues raised by differences between the two texts of the Treaty. We are also aware of the well known principle in international law, cited by the Tribunal in its *Motunui Report* pp 53-58, that ambiguities in a Treaty should be construed against the party writing the document.

If we apply these principles to the claim before us, we must express doubt whether the Crown could properly assert its kawanatanga over Ngati Rangiteaorere's rangatiratanga—by compulsorily acquiring their land for roads. In any case, the Crown failed to carry out the necessary pre-requisites. It failed to consult Ngati Rangiteaorere in the first instance about the need for a public road; and it failed to negotiate genuinely with them to purchase the land. The Crown therefore had no right to proceed to compulsory acquisition. It was clearly in breach of article 2 of the Treaty, which provided no sanction for

compulsory purchase of land, either in the English or the Maori text. And it infringed Ngati Rangiteaorere's rangatiratanga which included the right to control entry to as well as ownership of their land.

Taking land without compensation

- 4.2.6 We now consider the second issue: the compulsory taking of land *without* compensation. This turned an acquisition into a confiscation. Whatever the merits of compulsory acquisition, as a last resort, there can be no justification for the failure to pay compensation. The Public Works Act, which was the normal mechanism for acquiring private land for public purposes, provided for the payment of fair compensation. But in this instance the Crown chose to use s 93 of the Native Land Court Act 1886 which allowed it to take Maori land for roads without compensation. We find that section and the use of it by the Crown discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects. If it was necessary to take the land at all, it should have been taken under the Public Works Act and compensation paid.

Recommendation

- 4.2.7 We recommend that the Crown commission a registered valuer, acceptable to the claimants, to value the land in the public roads taken from Ngati Rangiteaorere without compensation, at the dates of acquisition, with the valuation updated by actuarial calculations to the present to take into account the loss of use of the money. The aggregate sum, to be paid as compensation to Ngati Rangiteaorere.

4.3. Road Alignments

- 4.3.1 There are two further minor claims addressed by Mr Alexander in his report on roading matters. These arose out of separate roading re-alignments, first at Te Ngae near Waiohewa and secondly involving mission farm lands. The roading work resulted in closed road being available for disposal.
- 4.3.2 Insofar as the Te Ngae lands near the junction of the Rotorua-Whakatane and Rotorua-Tauranga highways are concerned (see figure 1) there have been negotiations by the Crown with Ngati Rangiteaorere that appear fair and reasonable and we can only support the offer by the Crown to sell the lands to Ngati Rangiteaorere for \$2000.
- 4.3.3 The second matter concerned the upgrading of the state highway fronting the New Zealand Mission Trust Board farm and resulted in slivers of surplus land being left along the western side of the road. These small parcels obviously should be added to the various land titles fronting the western side of the highway and the Crown has

offered them to the Ngati Rangiteaorere concerned for a sum of \$7200. The land was originally taken from the CMS block and when the road was realigned in the 1960s and remained in Crown hands dividing the road from the Maori owned Whakapoungakau 7 blocks. The Crown's decision to return the land to the owners of these blocks and so give them full access to the road was a sensible one. Since the land was originally part of the Church mission station block, and we consider that the Crown has an obligation under the Treaty to facilitate the return of this land to Ngati Rangiteaorere, we recommend that these slivers be returned to the adjoining blocks, without any cost to the owners concerned.

4.4. **The Taking of Ngati Rangiteaorere Lands for Survey costs**

In developing their case in respect to the mission farm, Ngati Rangiteaorere expressed concern that a considerable amount of their tribal estate had been awarded to the Crown in payment for survey costs. This question was researched for the Crown by Mr Patrick who found that 348.5 acres of land had been awarded to the Crown for survey costs (A4). Moreover this land had been taken along the road frontage, effectively bisecting many of the parcels of land, and causing other parcels to lose road frontage. However, after Mr Patrick's report was filed, the claimants failed to follow up the matters.

There are two matters at issue. First there is the question of whether the Crown, in taking land via the Native Land Court for survey charges, was in breach of the principles of the Treaty. We believe that another division of this Tribunal is currently addressing this in relation to the Pouakani claim. It has the assistance of more in depth research and legal argument and will be in a better position to rule upon the principles at issue. Accordingly, we have decided not to take the matter of Ngati Rangiteaorere's survey claim any further but give them leave to re-open it, should they wish, when the Pouakani Report is published.

The second issue concerns the location of the land taken for survey charges. But, since the claimants have not taken action on it, we take the matter no further.

4.5. **Geothermal issues**

A further ancillary matter raised by Ngati Rangiteaorere orally before the tribunal in December 1989 and by formal written claim on 2 April 1990 (appendix 1.3) concerned the geothermal resource centred on and about Tikitere B Block, land which Ngati Rangiteaorere have owned since time immemorial. The area is an internationally renowned tourist resort, owned by Ngati Rangiteaorere, and com-

monly known as "Hell's Gate". Initially Ngati Rangiteaorere complained that the Crown was shortly to introduce legislation into Parliament (the Resource Management Bill) which, amongst other things, proposed to deal with the control and exploitation of geothermal resources in New Zealand, without consultation with them. As a result, this tribunal formally made an interim recommendation to the Minister of Maori Affairs (appendix 5) on 7 December 1989 that the government should not introduce legislation that dealt with geothermal resources until it had consulted Maori who have customarily utilised this resource. We regarded any attempt to legislate for control over geothermal resources, without consulting the Maori concerned on a matter that involves their taonga, as a breach of the Treaty guarantee of rangatiratanga over such resources.

The Resource Management Bill was subsequently introduced and is still before the legislature. Ngati Rangiteaorere indicated to us in the amendment to this claim that they intended to make submissions to the select committee considering the Bill. We regard this as a rather late stage for consultation. We recognise that we are unable to comment on the Bill while it is before the House, unless it is specifically referred to us by resolution of the House, under ss 6(6) and 8(2) of the Treaty of Waitangi Act 1975. The House has not passed such a resolution.

Finally, we note the possibility that Ngati Rangiteaorere's claim might be the subject of joint investigation by the tribunal with similar such claims.

References

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- 6 see n 4, vol 1, p 107
- 7 *ibid*, p 117
- 8 J Morgan, report, 1 October 1840, Missionaries Joint Reports 1837-58, micro ms, 4 CMS, reel 43, Alexander Turnbull Library, Wellington
- 9 Chapman to secretary, Church Mission Society, Thomas Chapman Papers, vol 1, 1830-73, qMS Cha, Alexander Turnbull Library, Wellington
- 10 Chapman to Brown, 28 December 1847, Chapman letters to A N Brown, 1836-42, M 556, Auckland War Memorial Museum, Auckland
- 11 R G Webb *The Anglican Church in the Hot Lakes District* (Rotorua Post, Rotorua, 1949) p 29
- 12 *ibid*, p 30
- 13 Chapman to Brown, nd, see n 10
- 14 *ibid*, the letter is undated but an annotation on it suggested that it was written in 1845
- 15 "Instructions for Edward Lee Godfrey and Mathew Richmond Esquires. Commissioners appointed to hear and report on claims to grants of land in New Zealand under the provisions of the ordinances of Council. 5 Victoria Session 2, No 14", colonial secretary's outwards letter books, LA 4/253, National Archives, Wellington
- 16 Claims Nos 444h and 444i, Church Missionary Society Claimants, Tauranga 12 July 1844, OLC 1/694-695, National Archives, Wellington
- 17 testimony of Te Ao, *ibid*
- 18 *ibid*
- 19 Evidence of R Burrows, Commission of Inquiry into Public Religious, Educational and Charitable Trusts 1869
- 20 see n 16
- 21 G Clarke to colonial secretary, 29 October 1847, New Zealand Mission Secretaries and Missionaries Correspondence, 1831-66, ms micro, 4 CMS Microfilm, CN/07
- 22 T Chapman, Letters and Journals from Thomas Chapman to CMS London, 1830-69, vol 2, qMS Cha 1830-69, Alexander Turnbull Library, Wellington
- 23 "Plan of Survey for grant to Ch. Mission. for land at Rotorua", 21 May 1853, see n 16

- 24 *ibid*
- 25 *ibid*
- 26 *ibid*
- 27 Chapman journal, vol 3, p 532 see n 22
- 28 3 NZ Jur [NS] SC 72
- 29 Sinclair to Vidal, 21 September 1852, Correspondence between government officials and home and mission secretaries, ms micro, 4 CMS, Alexander Turnbull Library
- 30 Whitaker, 4 September 1855, minutes to Vidal's letter of 16 September 1855, see n 18
- 31 see n 28, p 79
- 32 *ibid*, p 78
- 33 *Johnston v Pedlar*, p 276
- 34 *New Zealand Maori v Attorney-General* [1987] 1 NZLR 641, 644
- 35 *ibid*, p 702
- 36 Crown grant, Department of Survey and Land Information, Wellington
- 37 Vidal to colonial secretary, 16 March 1855, see n 30
- 38 Whitaker, 2 August, 1855, see n 30
- 39 *ibid*
- 40 Whitaker, 4 September 1855, see n 30
- 41 "Claims of the Church Missionary Society", OLC 1/658-659, National Archives, Wellington
- 42 cited, R G Webb see n 11, p 31
- 43 Ollivier C Morton *A Visit to the Boiling Springs of New Zealand* (J Hughes, Christchurch, 1871)
- 44 *Bay of Plenty Times*, 21 June 1876
- 45 see n 6
- 46 *ibid*
- 47 AJHR 1905, G-5
- 48 AJHR 1890 C-5, p 23
- 49 Minister of Lands to Under Secretary for Lands, 15 May 1890. Lands and Survey Head Office file 12898. It appears this file no longer exists, having most likely been destroyed in the Hope Gibbons Building fire in 1952. The only surviving record is a register book held by DOSLI Head Office which records in summary form (ie approximately one line) the contents of each letter or memorandum on the file.
- 50 Under Secretary for Lands to Chief Surveyor Auckland, 4 June 1890. Lands and Survey Head Office file 12898
- 51 Minister of Lands to Native Minister, 28 June 1890. Lands and Survey Head Office file 12898
- 52 Surveyor General to Chief Surveyor Auckland, 18 August 1890. Lands and Survey Auckland file 2068 folio 84
- 53 J C Blythe to Under Secretary for Lands, 6 January 1891. Lands and Survey Head Office file 12898

- 54 Under Secretary for Lands to J C Blythe, 5 February 1891. Lands and Survey Head Office file 12898
- 55 J C Blythe to Under Secretary for Lands, 17 February 1891. Lands and Survey Head Office file 12898
- 56 Under Secretary for Lands to J C Blythe, 28 February 1891. Lands and Survey Head Office file 12898
- 57 W Kelly MHR to Surveyor General, 4 February 1892. Lands and Survey Head Office file 12898
- 58 Surveyor General to C W Hursthouse, 22 February 1892. Lands and Survey Head Office file 12898
- 59 C W Hursthouse to Surveyor General, 31 March 1892. Lands and Survey Head Office file 12898
- 60 Superintendent to Chief Surveyor Auckland, 21 February 1894. Lands and Survey Head Office file 22429
- 61 Rotorua Town Board to Surveyor General, 20 February 1894. Lands and Survey Head Office file 22429
- 62 Chief Surveyor Auckland to Surveyor General, 3 March 1894. Lands and Survey Head Office file 22429
- 63 Surveyor General to Chief Surveyor Auckland, 30 March 1894. Lands and Survey Head Office file 22429
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- 66 Chief Surveyor Auckland to Surveyor General, 14 November 1894. Lands and Survey Head Office file 22429
- 67 Surveyor General to Chief Surveyor Auckland, 17 November 1894. Lands and Survey Head Office file 22429
- 68 Hamilton Survey Office plan 7335, Sheets 1-3.
- 69 *New Zealand Gazette* 1898, p 507
- 70 Surveyor General to Chief Surveyor Auckland, 18 August 1890. Lands and Survey Auckland file 2068 folio 84
- 71 Notice to Owners. Lands and Survey Auckland file 2068 folio 91
- 72 *New Zealand Gazette* 1911, pp 2903-2904
- 73 AJHR 1897 C-1, p 57

Appendix 1

The Claim

1.1. The Claim received 15 April 1987

30th March 1987

Tena koe.

Ki nga Kaiwhakahaere o Te Taraipunara o Waitangi, tena koutou, tena koutou, katoa.

Kua rongonuitia i te motu, a koutou mahi hohonu, taumaha whakaharahara, whakatikatika, i nga take e pa ana ki ngai-matau, nga morehu o ratau kua huri ki te Po.

No reira, he mihi pono tenei ki a koutou, me te inoi ki te hinengaro, kia tau te maramatanga, me te rangimarie ki runga i a koutou, a ki a tatau katoa.

WE—

Te Aho Welsh of Tikitere, Kuia
Amarama Te Kirikaramu
Tuku Hohepa
Ngana Te Kirikaramu
Ngawai Dulcie Hapeta
Dr Ngahuia Te Awekotuku
Montigue Rangiteaorere Curtis
Constance Mary Ganderton
Bonita Makarena Morehu
James Te Kiri
Pirihira J. Fenwick
Rauawa Manahi

CLAIM, under the Treaty of Waitangi Act 1975, that we, and the Ngati Rangiteaorere Tribe of which we are members, are prejudicially affected by the action of the Crown in granting to the Anglican Church our land at Te Ngae, commonly known as the Te Ngae Mission Farm, without ensuring its return to us when it ceased to be used as a Residential Mission Station.

A.

In particular we say as follows:

1. That the Te Ngae Mission was established in about 1836 on Ngati Rangiteaorere Land, by Lake Rotorua.
2. That in the course of time certain of our elders and others then attending the Mission Station acceded to the transfer of that Land to the Rev. Chapman for the purpose of maintaining that Mission Station. Some of our people had their kainga on the Land.
3. That irrespective of whatever deed may have been executed, the Rangiteaorere understanding of the transaction was that the Church should be supported in its time of need and in its mission to the Rangiteaorere people, for so long as a mission station was continued for the purpose of serving us, without prejudice to our occupation of the Land, and for so long as we wished to maintain the Mission. It is our tradition, that we had no understanding of the transaction, as an irrevocable sale or gift, in which the Mana of the Land would pass from us forever. The transaction was also completed by persons who were other than Ngati Rangiteaorere.
4. That thereafter, the Church was granted Title to the Land by the Crown, upon terms of trust that did not provide for the return of that Land to us and maintenance of our occupational rights. That action of the Crown we say, was contrary to the Principles of The Treaty, which undertook to protect us, from the alienation of our Lands and Kainga, without our clear consent and understanding of the transaction, as an irrevocable alienation.
5. That subsequently, the Church did not maintain the association of Rangiteaorere with the Land, as it ought to have done, in accordance with our understanding of the transaction and in accordance with the customary Maori approach to Land transaction. In particular,
 - (a) The Mission Station ceased to exist but the Church did not return the Land to us, despite our several requests.
 - (b) That without reference to us, the Church sold parts of the Land and leased the rest.
 - (c) That the Church has applied the Revenues from the Land for general Church purposes and has not applied Revenues, for the exclusive and specific benefit of Ngati Rangiteaorere.
6. That today, Ngati Rangiteaorere has little Tribal Land remaining—in fact, only its Marae adjoining the Mission Farm on Lake Rotorua. Though rich in history, in material terms the Marae is one of the poorest in Rotorua. The adjoining homes are also poor bungalows

and garages are used as homes. Most of our people have had to shift to Rotorua city. We wish to re-establish our tribe.

7. To our way of thinking, we supported the Church in its time of need, the Church has had our Land for a century without benefit to us, we have the need now and it is right—morally and in custom—that that part of the Land as remains, should now return to us.

8. That the Crown should not have permitted our Tribe to be rendered virtually landless, and should have assured the ultimate benefit of the Te Ngae Mission Lands to Ngati Rangiteaorere.

9. That although we were not signatories to the Treaty of Waitangi, we did that which in our view is far more important—we affirmed our loyalty to the Crown and the principles of the Treaty of Waitangi, by our actions in Peace and War.

B.

Therefore we ask, that the Crown cancel the Church's Title to the Land, and convey that Title, subject to existing encumbrances, to a Ngati Rangiteaorere Trust Board:

1. To provide better housing for our families.
2. To maintain our Marae and general Tribal purposes.
3. To provide holiday accommodation for our families living away.
4. To establish a Maatua-Whangai base, for our mokopuna (i.e. the street-kids of the cities throughout New Zealand), and to provide training modules best suited to their needs.

We believe that these activities will develop, not only their practical skills but more importantly, their spiritual affinity to the land, further strengthen their cultural ties within the whanau and hapu, and develop self-esteem and respect in the knowledge that *here*, on their ancestral land, they can stand tall.

C.

Ngati Rangiteaorere is without any independent funds, (our people have current problems paying rates on their land) and we ask:

1. That a Research Officer be appointed to collate the necessary history and documentation of the Mission, to investigate the current Rangiteaorere landholdings and state of housing on our ancestral lands, to investigate the application of revenues by the Church and to report prior to any hearing.
2. That P.B. Temm QC be appointed as our Counsel.

3. That because we cannot provide full hospitality for full hearing, that the Tribunal open at our small Marae, Mataikotare, to hear our elders for the first day, then adjourn for subsequent hearings to the Maori Land Court, Rotorua.

4. That the Tribunal give notice of this Application to the Crown Law Office and the Anglican Church, and request the Anglican Church not to proceed to any sale of subdivision of the land, or any lease for any term exceeding two years, pending the Tribunal's report.

DATED at Mataikotare Marae this day of 1987

Signatures of Ngati Rangiteaorere Tribe

Te Aho Welsh
Amarama Te Kirikaramu
Pirihira J Fenwick
Ngana Te Kirikaramu
Ngahuia Te Awekotuku
Montigue Rangiteaorere Curtis
Ngawai Hapeta p.p.
Constance Mary Ganderton
Tuku Hohepa
Rauawa Manahi
Ngatai Te Awekotuku Te Kiri
Bonita Makarena Morehu

1.2. **Amendment to claim received, 12 April 1989**

19 April 1989 [sic]

Tena ano Koe,

AMENDMENT TO CLAIM, AND ADDITIONS TO CLAIM

1. We, whose names are given below, and who are the claimants in a notice of claim dated 30 March 1987 relating to the land commonly known as Te Ngae Mission Farm, hereby amend and add to that claim as follows

AMENDMENT OF CLAIM

2. (a) That in view of the report filed by P Maxwell, it appears to us that the origin of the Church's title was not in fact an award from the Lands Claims Commission based upon the agreements as signed, but was a unilateral grant by Governor Grey, without consultation with Rangiteaorere, and upon terms of trust with which we had not agreed.

(b) That the Crown Grant was the action of the Crown contrary to the principles of the Treaty of Waitangi, in that it alienated our land without our permission, consent or approval and upon terms of trust that were not agreed to.

(c) The Act or other authority empowering Governor Grey to take that step was contrary to the principles of the Treaty.

(d) We therefore claim damages from the Crown, for the loss of use and occupation of the land and general damages for alienating our land without our consent.

ADDITIONS TO CLAIM

3. (a) Persons of Ngati Rangiteaorere including the claimants in this claim, are also the owners of a block of land known as Whakapoungakau 4C, which includes the whole of our lake, called Lake Rotokawau, and an area of land surrounding, to the rim of the former crater. Lake Rotokawau sits in an extinct volcano.

(b) In the 1920's, when Sir Apirana Ngata was Minister of Maori Affairs, the Government proposed a massive development to convert our bush land to farmlands. Our forebears were not convinced that the project was good, especially as it was proposed to settle on the land, under leases, persons who were not of our tribe.

(c) Nonetheless it seemed to our forebears that they could not stop it, but when the Maori Land Court sat to divide up the land for farming, that first thing our forebears did was to insist that certain areas of very special importance to them, would be cut out. In the result 3 area were cut out, on 25 June 1924, and they were

Whakapoungakau 4A which is an urupa

Whakapoungakau 4C which is also an urupa and

Whakapoungakau 4C which is Lake Rotokawau.

Our forebears intended that the Lake would never be disturbed, and that as the surrounding lands were brought into farming, Lake Rotokawau, and its associated bush for as far as the horizon as viewed from the lake, would remain, as a reminder of what our lands were once like.

Accordingly, after hearing our forebears, the Judge of the Maori Land Court directed that 4C be cut out "to include the Lake Rotokawau *and surrounding slopes to make 194 acres*" (Rotorua Minute Book 74/213 of 25.6.24, but with underlining added).

(d) Whakapoungakau 4C however, remained unsurveyed. In the meantime Maori Affairs developed the surrounding lands, and the farmers they settled on the land, who were not of our tribe, were

assisted to buy out our tribal land-owners, until, quite often, the lessees became the major shareholder. Then, as the lessees reached retirement age, about the 1950's and 60's, they called Meetings of Owners to sell their farms. Since they held major shares in the block, our people were often outvoted, and the farms were sold.

(e) As the farms were sold, we continued to think our lake was still protected, together with the surrounding lands to the crater's edge. But surveys were done in the 1960's, as the adjoining farms were sold, and the surveys depicted the adjoining farm blocks on the Western side of the lake as holding title to the lake's edge. This we say, was wrong. The original title for the lake, which we understand was PR 160/2, gave a straight line and not the lakes edge, as the boundary. The survey gave no regard to the Judge's direction to include the surrounding land with the lake title.

(f) Those surveys required the approval of the Chief Surveyor. We had already lost some 600 acres because we could not pay the money for the surveys that were done. Nonetheless, it was practice for the Surveyors at that time, to nibble away at Maori land wherever they could. We claim that the action of the Chief Surveyor in approving plans without adequate regard to our interests was contrary to the principles of the Treaty, as the effect was to deny us the full, exclusive and undisturbed possession of our lake and surrounding lands.

(g) The effect on us has been

(i) the loss of the crater edge land on the western side of the lake, reducing Whakapoungakau 4C from 194 acres to 192- ac 1r 28p.

(ii) that the owners of the adjoining land, now Kiwi Ranch, have been able to cut through the bush, cutting down trees, to provide an access way to the lake for the many children who stay there, and we have been powerless to do anything, for their title (quite wrongly), gives the lake edge as the boundary.

(iii) we ourselves have lost vehicular access, because the land now owned by Kiwi Ranch, and which ought to have been ours, is the only area providing practical access.

(h) In addition, a roadway has been laid out and sealed to a point near to the crater edge. It continues as a "paper roadway" to the lake edge. It is a public road, with the result that we cannot prevent the general public from gaining access.

(i) We had no advice of the laying off of the road. We never agreed to it. The lake is not public property. There was no right for the road to be so laid out as to make it public property.

- (j) By allowing roadways to be laid off the Crown has threatened the full exclusive and undisturbed possession of our lands.
- (k) We are prejudiced because the native bush has been cut on one side, we have no practical access except across Kiwi Ranch land, and the public can get legal access to the lake edge along a paper road.
- (l) We should also not have to pay rates for a lake that we have kept in virgin condition, and which produces no income. We have kept our lake clean. We have kept motor boats out (although Kiwi Ranch now runs one boat there). There is now much broken glass around the lake, horses have been ridden into it and our lake is now under threat.

WE ASK AS FOLLOWS

1. That Piri Wiri Patrick, retired Registrar of the Maori Land Court at Waiariki, Rotorua, and now living at 29 Robinson Avenue Holdens Bay, be engaged by the Tribunal to research and report on the whole record of surveys, roadways, and rates, that he report to the Tribunal, and that he be authorised to engage a surveyor if need be.
2. That the Tribunal recommends
 - that the land on the western side of the lake be restored to the 4C title, or in the alternative, that we be given a right of way over that land.
 - that the public road to the lake be closed and that the land therein be vested in the 4C title.
 - that the land be made exempt from rating.
3. That we be allowed to amend our claim after Mr Patrick has reported.

Dated at Rotorua this day of 1989

The Aho Welsh of Tikitere, Kuia
 Amarama Te Kirikaramu
 Tuku Hohepa
 Ngana Te Kirikaramu
 Ngawai Dulcie Hapeta
 Dr Ngahuia Te Awekotuku
 Montigue Rangiteaorere Curtis
 Constance Makarena Ganderton
 Bonita Makarena Morehu
 James Te Kiri
 Pirihiira J Fenwick
 Rauawa Manahi

By their solicitor
and duly authorised agent

D M T HALL

1.3. **Amendment of claim received 3 April 1990**

2 April 1990

We, whose names are given below, and who are the claimants in a notice of claim dated 30 March 1987 and an amendment of claim dated 19 April 1989 relating to the land commonly known as Te Ngae Mission farm, hereby amend and add to that claim as follows:

AMENDMENT OF CLAIM

1. That the people of Ngati Rangiteaorere are the owners of Tikitere B block (PR129/31) (ML Plan 19230). Centred on and about Tikitere B is a geothermal resource.
2. The geothermal resource has always been and continues to be considered by the Ngati Rangiteaorere as taonga as described in the second article of the Treaty of Waitangi.
3. That any regime for the use of the geothermal resource which does not take full account of the views of the tangata whenua is a breach of the second article of the Treaty of Waitangi.
4. That the provisions of the Geothermal Energy Act 1953 whereby the right to use and control geothermal resource was vested in the Crown rather than the tangata whenua was a breach of the Treaty of Waitangi.
5. We therefore claim that the Tribunal recommend:
 - (i) That the right to use the geothermal resource in the vicinity of Tikitere B be strictly controlled by the tangata whenua, the Ngati Rangiteaorere either alone or in conjunction with the regional authority
 - (ii) That any licence to use the geothermal resource include an obligation on the licensee to conduct research into the capacity of the geothermal resource.
 - (iii) That the tangata whenua be an equal party to any licensing of the geothermal resource and be entitled to receive an equal share of any licence fees or royalties payable by any licensee.
6. We are making submissions to the Select Committee considering the Resource Management Bill, proposed to be introduced by the Government. We therefore ask that the Tribunal defer consideration

of this amended claim pending the report back to Parliament of the Select Committee on the Resource Management Bill. Should the Resource Management Bill be amended to take into account our concerns we would propose withdrawing our amended claim in respect of the geothermal resource centred at Tikitere B.

7. That we be allowed to amend our claim after the select Committee on the Resource Management Bill has reported back to Parliament.

Dated at Wellington this 2nd day of April 1990.

The Aho Welsh of Tikitere, Kuia
Amarama Te Kirikaramu
Tuku Hohepa
Ngana Te Kirikaramu
Ngawai Dulcie Hapeta
Dr Ngahuia Te Awekotuku
Montigue Rangiteaorere Curtis
Constance Makarena Ganderton
Bonita Makarena Morehu
James Te Kiri
Pirihira J Fenwick
Rauawa Manahi

By their solicitor

and duly authorised agent

D E HURLEY

Appendix 2

Deeds of Purchase

2.4. Deed of 14 September 1839

TE NGAE BLOCK, ROTORUA, BAY OF PLENTY

This document is from a copy of the deed presented to the Old Lands Claim Commission and it differs in some places from the copy in Turton's Deeds.

Kia mohio nga tangata katoa ki enei tohu o te pukapuka nei. Na, ka hokona atu e matou ki a te Hapimana raua ko te Mokena mo te Komiti o te Hahi o Ingarani, tera wahi wenua ki te taha o Rotorua, ko te awa, Waioheua, te rohe ki te tahi taha, ko te motu ngaherehere, me te Ngae to rohe ki te tahi taha, haere ki uta tonu ki te taha o tenei motu ki te pito o tera atu motu ngaherehere ko te Takauere. Na! No te tino pito o tenei motu ngaherehere me haere i uta te tahi wahi ki te taha nota o tenei motu; rohetia atu ki te pito o tera motu iti, ko te Poti a ta Mangu; tapaihia atu ki te wahi wenua ki waenganui o te motu, me te puke Paiwenua, haere tonu ki uta te tahi wahi, haere tonu atu ki te awa Waioheua, hoki tonu mai ki te taha o tenei awa, a ko te kongutuawa te wakamutunga. Na! Ko enei nga ingoa paenga kainga, ki roto ki tenei rohe nui. Ko te Tatua o te Hawiki. Ko te Poti a ta Mangu, ko Ineawa. Ko te Koaoao. Ko Tuterakura. Ko te Kahu. Ko te Hoie, me era atu pea kihai tuhituhia mai ki tenei pukapuka. Ko enei nga mea e homai ana, e raua ki a matou hei utu mo tera wahi wenua. O nga Paraikete, e ono tekau. O nga Toki, e witu tekau. O nga Kapukapu, e toru tekau ma rima. O nga Karaune, e rima tekau ma rima. O nga Kohua, e toru tekau. O nga Hate e toru tekau. O nga Taraute, e toru tekau. O nga Katikati, e toru tekau ma ono. O nga Karahe, tekau ma wa. O nga Heu, e wa tekau. O nga Paipa, e rima tekau, me te tahi poro Tupaka, he mea nui. Ko ta matou ingoa ranei, tohu ranei, e tuhituhia ana e matou ki tenei pukapuka, hei tohu o ta matou tino wakae ki tenei hokonga o te wahi wenua i tukitukia o runga, nga mea hoki o runga o te wenua, o raro o te wenua, e matou ki a te Hapimana raua ki te Makena, mo te Komiti o te Hahi o Ingarani, mo ratou katoa me o ratou tamariki ranei, hoko ranei, noho ranei, ho ata ranei, aha ranei, ake tonu atu.

Ko ta matou tuhituhinga tenei ki te ra 14 o Hepetima, ko te tau 1839.

Nga kai tohutohu

Ko te tohu o Ikairo x.
o Nini x.
o te Awere

Ko te tohu o te Waru x
Ko te tohu o te Rongoa x
Ko te tohu o te Ahimanaua x
Ko te tohu o te Kata x
Ko te tohu o te Rangiamohia x
Ko te Watuariki x

Ko te tohu o te Puruhi x
o Ngataua x
o Rangihuia x
o Haurauwiti x
o te Wakairo x
o Mawiti x
o Kaiwa x
Ko te tohu o Rainui x
o Ngauwo x
o te Keno x
o te Manu x
o te Haupapa x
o te Rangitapukea x
o Piwairange x

Ko te tohu o Tarakawara x
o Tohe x
o Puhirake x
o te Hurepu x
o Mataka x
o Parera x
o te Rakeroa x
o te Piko x
o te Tangaroa x
o Rohu x
o Matuaiti x
o Ngaora x
o te Patu x
o Rangikauama x
o te Kahuroro x
o Tumataura x
o Ngokingoki x
o Hoihau x
o Tamakaua x

TRANSLATION

Let all men know by virtue of this document that we do hereby sell to Chapman and Morgan as on behalf of the Committee of the Church of England all that land situate on the shores of Rotorua the boundary thereof being on one side the Wai-o-heua River—the clump of bush and Te Ngae being the boundary on the other side and thence inland on the outskirts of the said bush to the edge of that other bush known as Te Kauere—thence from the extreme end of that said bush proceeding inland to the northern edge of this bush and extending thence to the edge of that small bush (known as) Te Poti-ata-Mangu and thence cutting through the middle portion of the bush by the hill Paiwenua extending thence to that other side thereof until it reaches the River at Waioheua and thence returns along the edge of this river as far as the mouth thereof and ends there. The following are the villages within the outer boundaries—Te Tatua -o- Te Hawiki, Te Poti a ta Mangu—Ineawa -[Koaoao]- Tuteru kura—Tekahu—Te Hoie and others probably not written in this document.

The following are the goods which they give us in consideration for that parcel of land.

Blankets	60
Axes	70
Adzes	35
Digging forks	55
Pots	30
Shirts	30
Trousers	30
Scissors	36
[Shaving boxes	14]
Razors	40
Pipes	50
Roll of tobacco 1 large	

These are our names or marks subscribed by us to this document as evidence of our consent to this sale of the land above described as also all things upon or within the said land to the said Chapman and Morgan on behalf of the Committee of the Church of England to them all and to their successors or purchasers from them or otherwise forever. Our signing being on this the 14th day of September 1839.

2.5. Deed of 25 September 1839

TAKAUERE, ETC., BLOCK, ROTORUA, BAY OF PLENTY DISTRICT

Kia ronga nga tangata katoa ki enei tohu o te pukapuka nei. Na, ka hokona atu e matou ki a te Hapimana, raua ko te Mokena, mo te Komiti o te Hahi o Ingarangi, ta matou kainga ki Rotorua ko te Takauwere me te Turi o te Uirangi nga tino ingoa. Ko enei ano nga mea e homai ana e raua ki a matou, hei utu mo era wahi wenua. O nga Paraikete, e toru tekau ma tahi. O nga Toki, e rima tekau. O nga Kapukapu, ko tahi tekau. O nga Purupuru, ko tahi tekau. O nga Heu, e rua tekau. O nga Maripi, ko tahi tekau. O nga Kutikuti, ko tahi tekau. O nga Raka, ko tahi tekau. O nga Inihi, ko tahi tekau. O nga Matau nunui, e waru tekau. O nga Wairu nunui, ko tahi tekau. O nga Paraka, e rua tekau. O nga Tarautete, e rua tekau. O nga Hate, e rua tekau. O nga Wiri, e rua tekau. O nga Kohua e rua tekau. O nga Waru, ko tahi tekau ma toru. O nga Karahe, ko tahi tekau. O nga Tupeka, ko tahi rau pauna.

Ko ta matou ingoa ranei, tohu ranei e tuhituhia ana e matou ki tenei pukapuka hei tohu o ta matou tino wakaae ki tenei hokonga o era wahi wenua i tuhituhia o runga, e matou ki a te Hapimana raua ko te Mokena mo te Komiti o te Hahi o Ingarangi, mo ratou, mo te hoko ranei, noho ranei, aha ranei, ake tonu atu.

Ko ta matou tuhituhinga tenei ki te ra 25 o Hepetima, ko te tau 1839.

Ko nga kai tohu tohu

Ko te tohu	o Huka x	o Pango x	o Rotorua x
	o Ngahihi x	o Korokai x	o Pukuatua x
	Kanapu	o Taiamai x	o Mauherehere x
	o Ngatohe x	o te Arawaka x	o Ngamoni x
	Tikorekore	Warekiekie	o te Hae x
	Ngapaoro	o Kahuroro x	o Taumanu x
	o Hiakiawa x	o Kauakaua x	o Tawake x
	o Ngatupeka x	o Urutaua x	o te Mihi x
	o Manurau x	o Paia x	o Kura x
	Koteao	o Ikuero x	o Rohu x
	o Nini x	o Papaiti x	
	o Ranginui x		

TRANSLATION

Now let all men know by the purpose (Tohu) of this document (pukapuka). We do sell to Chapman (Hapimana) and to Morgan (Mokena)—as for the Committee of the Church of England, our home at Rotorua—Te Takauwere and Te Turi-o-te-Uirangi as more particularly known. The following are the goods handed to us as payment for these those parcels of lands

Blankets—31; Axes—50; Adzes—10; Chisels—10; Razors—20; Knives—10; Scissors—10; Locks—10; Hinges—10; large Fish Hooks—80; Large files—10; Pad-locks—20; Trousers—20; Shirts—20; Gimlets—20; Pots—20; Spoke-shaves—[13]; Looking Glasses—[10]; and Tobacco—100lbs.

Hereto are our names or marks which we subscribe to this document as evidence of our full approval of this sale of the said parcels of land as above mentioned to Chapman and Morgan as for the Committee of the Church of England.

Our writing this (i.e. signing hereof) being on the 25th of September in the year 1839.

Appendix 3

Crown Grant to the Church Mission Society

Victoria By the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and so forth.

Grantees George Adam Kissling
John Alexander Wilson
and Robert Vidal

Ac. R. P.

318 " 2 " 10

To all to whom these presents shall come Greeting

Whereas the piece or parcel of land hereinafter particularly described and intended to be hereby granted and conveyed hath for some time been used as a Mission Station by the Church Missionary Society and it is expedient that the same should be permanently set apart for the purpose aforesaid. *Now Know Ye* that in consideration of the premises We for us our Heirs and Successors *Do hereby Grant* unto George Adam Kissling John Alexander Wilson and Robert Vidal their heirs and assigns All that piece or parcel of land situated on the Eastern Shore of the Rotorua Lake in the Province of Auckland in the Colony of New Zealand containing by admeasurement—Three hundred and eighteen acres two roods and ten perches more or less Bounded on the North Waiohewa Stream and by a line one thousand and sixteen links one thousand and ninety links and one thousand seven hundred and twenty links On the North East by a line one thousand and fifty links and by a line in a curve. On the East by a line five hundred and ten links five hundred and ninety links and three hundred and sixty six links On the South East by a line eight hundred links one thousand eight hundred and sixty links and two thousand nine hundred links on the South by a line one hundred and ninety five links and eight hundred and seventy five links On the West by a line one hundred links Again on the North by Te Ngae eight hundred and fifty links again on the East by the Bank forming the Boundary of Te Ngae again on the South by Te Ngae three hundred and fifty links two hundred and ninety links and one thousand two hundred and seventy links And on the West by Rotorua Lake As the same is more

particularity delineated in the place drawn in the margin hereof With all the rights and appurtenances whatsoever thereto belonging To Hold unto the said George Adam Kissling John Alexander Wilson and Robert Vidal Their heirs and assigns for ever *Upon Trust* to permit the same to be used and occupied by the said Church Missionary Society as a Mission Station or as a site for a place of Public Worship or for School purposes connected with the religious and moral Instruction or in other like manner for the use and benefit of our subjects inhabiting the Islands of New Zealand or of other persons being the children of the Poor or destitute Inhabiting any Islands in the Pacific Ocean.

In Testimony whereof we have caused this our Grant to be sealed with the seal of our said Colony

Witness our trusty and will beloved Robert Henry Wynyard C. B. Officer Administering the Government and Commander in Chief in and over the Islands of New Zealand at Auckland this twenty first day of September in the eighteenth year of our reign and in the year of Our Lord One thousand eight hundred and fifty four

Signed R H Wynyard
No 82 R No 4

Signed by the above named George Adam Kissling
John Alexander Wilson and Robert Vidal in the presence of J H Wilson
of Auckland New Zealand Gentleman and G A Wilson of Auckland
New Zealand Gentleman

Appendix 4

Record of the Inquiry

4.6. **Constitution and Appointments**

The Tribunal constituted for the inquiry into the claim comprised Judge H K Hingston, of the Maori Land Court (Presiding Officer), Sir M E Delamare, Professor M P K Sorrenson.

Mr D Hurley was appointed as counsel to assist the claimants, with Ms D Durie-Hall appointed solicitor for claimants.

Mr Tahī Tait was appointed interpreter.

Mr P N Maxwell was commissioned to report on the historical background to the Te Ngae claim. Mr W Patrick was commissioned to provide further research relating to surveys, rates and road ways on Lake Rotokawau in relation to the Whakapoungakau Block.

4.7. **Notices**

Notice of the Te Ngae Claim and first hearing was sent to

Bill Patrick

Paora Maxwell

Te Aho Welsh and others

Counsel for claimants

Dept Survey and Land Information—Director General, Wellington

Solicitor General—Shonagh Kenerdine

Church of Province of New Zealand—Rev J Paterson

Waiapu Board of Diocesan Trustees—The Secretary

Bishopric of Aotearoa—The Secretary

Bishop of Aotearoa—Bishop Vercoe

New Zealand Mission Trust Board—The Secretary

Kiwi Ranch—The Manager

Public notices of the claim and the first hearing was given in the *New Zealand Herald* on 25 November 1989 and on 2 December 1989 and in the *Rotorua Daily Post* on 18 and 29 November 1989 and 2 December 1989.

Notice of the second hearing was sent to

Trustees of Tuarapaki Trust—P J Brown
 East Brewster, Barristers and Solicitors—Alayne Wills
 Mark Bidios
 Treaty of Waitangi Policy Unit—A Frame
 Counsel NZ Mission Trust Board—A Manuel
 Bishop of Bay of Plenty—Rev G H D Conner
 Bishop of Aotearoa—Bishop Vercoe
 Kiwi Ranch
 Minister of Commerce—Director of Energy and Resource Division
 New Zealand Mission Trust Board
 Dept Survey and Land Information, Wellington
 Solicitor General
 Dept Conservation, Rotorua

Public Notices of the second hearing were given in the *New Zealand Herald* on 16, 27 June and 7 July 1990 and in the *Rotorua Daily Post* on 22, 29 June and 14 July 1990.

At the end of the second hearing the Tribunal issued a direction for a final hearing on Monday 27 August 1990 (see *appendix 2.7.3*)

4.8. **Appearances**

The first hearing commenced at Mataikotare Marae, Te Ngae Junction, Rotorua on Monday 4 December 1989. The hearing continued at the Maori Land Court, Government Building, Haupapa Street, Rotorua, before returning to Mataikotare Marae. Those who appeared in a representative capacity were:

Mr D Hurley for the claimants and with him Ms D Durie-Hall
 Ms S Kenderdine for the Crown and with her Ms A Kerr
 Bishop Vercoe, Ms A Manuel and Mr M J Ogilvie for New Zealand Trust Mission Board
 Ms A Wills for Kiwi Ranch

The second hearing was held at Mataikotare Marae, Te Ngae Junction, Rotorua on 16–17 July 1990. Appearing were:

Mr D Hurley for the claimants and with him Ms D Durie-Hall
 Ms S Kenderdine for the Crown
 Bishop Vercoe and Ms A Manuel for New Zealand Trust Mission Board.

Final submissions were heard at the Maori Land Court, Rotorua on Monday 27 August 1990. Appearing were:

Mr D Hurley for the claimants

Mr Blanchard for the Crown

Ms Manual for New Zealand Trust Mission Board

4.8.1 Submissions

In addition to counsel, those who gave written or oral evidence were:

Names

Te Aho Welsh, Ngati Rangiteaorere, 4 December 1989

Hiko Hohepa, Ngati Rangiteaorere, 4 December 1989

T Hohepa, Ngati Rangiteaorere, 4 December 1989

T Te Awekotuku or B Te Kiri, Ngati Rangiteaorere, 4 December 1989

P Maxwell, tribunal researcher, 4 December 1989, (B2)

B Patrick, tribunal researcher, 4 December 1989, (A3, A4)

T Gordon, 7 December 1987

S McHugh, Crown researcher, 16 July 1990, (B2, B3)

D Alexander, Crown researcher, 16 July 1990, (B4)

4.9. Conference of parties

A pre-hearing conference was held on 13 November 1989 at the Waitangi Tribunal Offices, Databank House, 175 The Terrace, Wellington.

Those notified were:

Counsel for claimants

Crown Law Office

Those who attended were:

Presiding Officer, Professor Sorrenson, Member Waitangi Tribunal, Waitangi Tribunal Staff; counsel for claimants; Crown Law Office, A Kerr (Solicitor), Sister Barnao (Senior Research Officer); NZ Mission Trust Board, NZ Bishopric and the Waiapu Diocese, B Scott.

The meeting considered a request from Crown counsel for adjournment of first hearing.

Judge Hingston directed that the first hearing proceed as notified.

Counsel for claimants tabled a series of issues and invited Crown response.

A hearing schedule was discussed.

The Judge requested an interpreter be appointed to assist at the Te Ngae hearing.

Following the end of the conference a chambers conference was held between claimants only and the Tribunal on the matter of legal representation.

4.10. **Record of documents**

Documents A1–A7 were admitted to the record at the first hearing. Documents A8–A18 were admitted to the record after the hearing. Documents B1–B7 were admitted at the second hearing. Documents B8–B10 were admitted to the record after the hearing. Documents C1–C3 were admitted at the third and final hearing. Document C4 was subsequently received.

- A1 (a) Statement of claim, received 15 April 1987
(b) Amended Statement of claim, received 12 April 1989
(c) Amended Statement of claim, received 3 April 1990.
(Registrar)
- A2 Preliminary research report on the Te Ngae Mission Farm and Ngati Rangiteaorere prepared for the Waitangi Tribunal by Mr Paora Maxwell, dated 11 February 1988.
(Registrar)
- A3 Preliminary research report on matters contained in the amendment to the Te Ngae claim concerning Lake Rotokawau prepared for the Waitangi Tribunal by Mr Wiremu Patrick, 12 October 1989.
(Registrar)
- A4 Supporting appendices to A3.
(Registrar)
- A5 Correspondence of Anglican Trusts Board to Presiding Officer dated 13 November 1989 containing a resolution to retire as trustee of the property in favour of local trustee/s.
(Registrar)
- A6 Maps used in site visits 6 December 1989
 - (a) Whakapoungakau Block
 - (b) Lake Rotokawau
 - (c) Tikitere B
 - (d) Epapara
 - (e) Te Taheke Block
 - (f) Tikitere B
(Registrar)
- A7 Heads of agreement. Kiwi Ranch Trust and Trustees of Whakapoungakau dated 7 December 1989.
(Counsel for claimants)
- A8 Interim report to the Honourable Minister of Maori Affairs in respect of the geothermal resource of New Zealand, dated 7 December 1989.
(Registrar)
- A9 Memorandum and Directions of Presiding Officer, dated 15 December 1989.
(Registrar)

- A10 (a) Memorandum of claimants counsel regarding meeting with Crown Law Office in relation to new fixture for the proposed pre-conference dated 26 January 1990.
(b) Memorandum of Crown counsel regarding agenda for meeting between claimants counsel and Crown Law Office (Crown agenda) dated 9 February 1990.
- A11 Joint memorandum of counsel for claimants and the Crown dated 23 February 1990.
- A12 Memorandum of counsel for claimants dated 23 February 1990.
- A13 Opinion on the alternatives for the return of the Te Ngae Mission Trust Farm land to the claimants free of the trust set out in the Crown grant by Harriet Kennedy (Crown counsel) received 23 February 1990.
(counsel for Crown)
- A14 Interim report of Ms Stephanie McHugh on Te Ngae Mission Farm dated 7 February 1990.
(counsel for Crown)
- A15 Documents in relation to the rating of Lake Rotokawau prepared by Sister J Barnao received 23 February 1990.
(counsel for Crown)
- A16 Memorandum of David Alexander on a "lost" area in Tikitere B Block, received 23 February 1990.
(counsel for Crown)
- A17 Report of Josephine Barnao on survey cost in connection with the Whangapaungokau—Pukepoto Block.
(counsel for Crown)
- A18 Correspondence of Rotorua District Council concerning the rating of Lake Rotokawau, received 8 March 1990.
(Registrar)
- B1 Opening submission of Crown counsel, (transcript).
(counsel for Crown)
- B2 Evidence of Stephanie Louise McHugh on the Crown grant for the Te Ngae mission property (refer B3)
(counsel for Crown)
- B3 Supporting papers to B2.
(counsel for Crown)
- B4 Evidence of David James Alexander on roading through Ngati Rangiteaorere lands (with supporting papers).
(counsel for Crown)
- B5 Submission of the Maori Trustee in respect of Whakapoungakau 2B2 and 7G.
(counsel for Maori Trustee)
- B6 Memorandum of counsel for the claimants, received 16 July 1990.
(a) Submission on behalf of the Ngati Rangiteaorere Tribe to the parliamentary select committee, dated 1 March 1990.
- B7 Notes on Te Arawa Iwi entitled "Rangiteaorere Thermal Region."
(counsel for claimants)

- B8 Directions of Tribunal, dated 17 July 1990 on questions of Ms S McHugh and Mr D Alexander.
(Registrar)
- B9 Memorandum of counsel for the claimants on Te Ngae Mission Farm, received 24 July 1990.
(counsel for claimants)
- B10 Submissions on the rating of Lake Rotokawau given by Josephine Barnao, received 26 July 1990.
(counsel for Crown)
- C1 Closing submission of counsel for the claimants.
- C2 Memorandum of counsel for claimants on land taken at Te Ngae—Mawhiti and Hikairo, dated 27 August 1990
(a) Whakapapa prepared by Mr H Hohepa
(counsel for claimants)
- C3 Closing submission of the Crown.
(a) Accompanying documents in addition to Crown's closing submission C3.
(counsel for Crown)
- C4 Submission of counsel for claimants in reply to closing submission for the Crown, dated 4 September 1990.

Appendix 5

Interim Report to Minister of Maori Affairs on geothermal resource, 7 December 1989

TO: The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

E Te Minita, Tainui, tena koe,

We report from Waiohewa Marae, home of Rangiteaorere of Arawa.

We began an enquiry on Monday, 4 December 1989 into certain dealings between the Crown, the Church Mission Society and the Rangiteaorere hapu of Te Arawa last century and during this enquiry Mr D Hurley, Counsel for the claimants, raised the question of certain actions being contemplated by the Crown in respect of the geothermal resource of New Zealand.

Rangiteaorere are the owners of the thermal area north-east of Rotorua on the Rotorua-Whakatane highway known as "Hells Gate".

The Tribunal was informed that certain proposals under consideration for proposed resource legislation concerns the geothermal resource and further that there has been no consultation with Maori regarding the future of this resource.

The Tribunal being of the view that any submissions to or by the Crown concerning that resource should not be the subject of legislative proposals unless and until Maori who have utilised this Taonga since time immemorial have been consulted.

The Tribunal is aware of the real problems created by indiscriminate use of the thermal resource in Rotorua and observes that Te Arawa were not consulted over the years as Tauwi exploited the resource to a degree that the whole field was threatened resulting in draconian legislation to save it.

We recommend that if geothermal energy is to be included in the proposed resource legislation Government forthwith initiate consultation with Maori particularly in view of the principles enunciated in the 1989 "Principles for Crown Action of the Treaty of Waitangi."

We believe that to proceed without consultation would be a "policy" or "practise" by or on behalf of the Crown prejudicially affecting the claimant in the claim now before us in terms of Section 6 of the Treaty of Waitangi Act 1975.

We respectfully draw your attention also to the fact that there are other claims concerning the geothermal resource by other tribes as yet unheard who could also be detrimentally affected.

DATED at Waiohewa this 7th day of December 1989.

[Signatures of members]

Appendix 6

Memorandum and Directions, 15 December 1989

SUPPLEMENTARY CLAIMS

1 At the conclusion of evidence and submissions the Tribunal adjourned to 28 February 1990 for a chamber conference at the offices of the Tribunal in Wellington commencing at 10.00am.

2 The Tribunal having had an opportunity of reviewing the various matters raised in this hearing to date is of the view that to assist all parties it would be proper to set out in memorandum form the various issues still at large with particular reference to the supplementary or "undergrowth claims".

3 Dealing with the formal claims:

(a) *Te Ngae Farm*

The Tribunal is of the view that immediate steps should be taken to have the land transferred to Ngati Rangiteaorere preferably by recourse to Section 39 of the Maori Trustee Act 1953.

The Tribunal expressed its preference for the land being transferred in this manner for two reasons; firstly this method, with the co-operation of the Maori Trustee, would be relatively inexpensive and secondly the Maori Trustee could assume the present Trusts upon which the land is held and by vesting the land in Rangiteaorere (Section 39(5) and Section 39(6) Maori Trustee Act) change the status of the land to Maori freehold land thus enabling the Maori Land Court to deal with any variation of Trust as well create a Trust pursuant to Section 438 of the Maori Affairs Act 1953 to administer the land.

If the legal advisors for the New Zealand Mission Trust Board find that the above method of transfer is unacceptable the Tribunal expects that the alternatives are discussed and hopefully settled between the claimants, the Trust Board and the Crown before 28 February 1990 thus ensuring that the Tribunal on that date is fully appraised of the relative difficulties/costs etc to effect the transfer.

In the interim the Tribunal is aware that the Crown will be researching the validity or otherwise of the 1854 Crown Grant and the

Tribunal would appreciate receiving this research along with any other reports/research relating to the Te Ngae Farm some time prior to the conference date.

The Tribunal recognise that Mr Hurley has left at large the question of reparation/compensation for any loss by Rangiteaorere because of the allegedly invalid Crown Grant.

The Tribunal is of the view that if the transfer of the land to Rangiteaorere is effected at no great costs to either the Trust Board or the claimants then any question of reparation/compensation from the Crown must be addressed taking into account the following factors:

- (i) The land being returned intact—(Rangiteaorere now only retains one-third of the total 6,000 acres it once owned).
- (ii) The land being returned fully developed including all buildings without payment of compensation by the claimants.
- (iii) The very real possibility that the 24.1268 hectares (60 acres) belonging to the Waiapu Diocese will be gifted to Rangiteaorere.
- (iv) The fact that up to the 1920's Rangiteaorere have had kainga on the land.
- (v) The fact that lease rentals have always been applied by the Waiapu Diocese to the Te Ngae Pastorate. (The Tribunal recognises that the Te Ngae Pastorate embraces more hapu of Te Arawa than Rangiteaorere).
- (vi) The intent of those of Rangiteaorere who put the Church into possession (ie, for use of the Church) and the willingness of the Church authorities to return the land without the Tribunal having to comment on the probity or otherwise of the 1839 transaction.

The Tribunal expects a clear indication of the claimant's and the Crown's attitude on the reparation/compensation question at or prior to the conference.

(b) *Rotokawau*

The Tribunal recognises that agreement is being entered into between the lake trustees and the trustees of Kiwi Ranch and is only too willing to leave matters to the parties.

The claimant and Kiwi Ranch Trust are congratulated for their approach to what could have been a distressing and onerous matter.

4 SUPPLEMENTARY CLAIMS

- (a) The disputed six acres included in Tikitere B (ML Plan 19230):

This claim to be researched by the Crown and if necessary third parties involved to be invited to the conference on 28 February 1990 to discuss an equitable resolution of any issue that may arise following such research.

(b) The slivers of land to the west of the state highway across from the Te Ngae Farm:

This is to be researched by claimants as it appears that it is included in recent surveys by Mr Ron Phipps, Surveyor, Rotorua in the Whakapoungakau blocks giving them frontage to the state highway. Mr Rauawa Manahi was of the view that Maori Land Court action may be needed to tidy this claim up.

(c) The roadway from the Rotokawa path along through the Whakapoungakau hills behind the Mission Farm to the Whakapoungakau 4C Block (Lake Rotokawau):

The claimants to research this—Mr W Patrick gave evidence that in his view the land is still Maori freehold land.

(d) The roads taken by the Crown without payment of compensation:

This raises important issues which may well have national implications. If the claimants are desirous of the Tribunal proceeding to hear such a claim they must be prepared to present evidence as to if and why such legislation was contrary to the principles of the Treaty of Waitangi. Hansard and other documentation will have to be researched along with evidence of the Crown practise in relation to non-Maori land being taken for roads at the time.

(e) The land taken for survey costs and expenses:

This also raises an issue with national implication as it appears the policy/practise adopted by the Crown of securing survey costs by appropriation of Maori land through the Maori Land Court was widespread.

Again in the claim before us, if the claimants wish the Tribunal to pursue this issue, they must demonstrate by way of researched evidence firstly that there was such a practice and that the policy or practise is inconsistent with the principles of the Treaty of Waitangi as well that they have been prejudiced.

(f) The geothermal issue:

The Tribunal saw fit to issue a recommendation to Government requesting that before the resource legislation was introduced into the House, Maori who have used this taonga should be consulted. If

the claimants wish to take the geothermal energy matter further the Tribunal expects a further additional claim being filed before 14 February 1990 setting out clearly the actions of the Crown that have prejudiced the claimants in relation to their thermal lands; the claim must also demonstrate how such Crown action/policy practise is inconsistent with the principles of the Treaty of Waitangi.

If a claim is lodged the Tribunal will give directions as to service at the conference on 28 February 1990. It may well be that such a claim could be dealt with along with the thermal land claims of other tribes.

In essence, five of the "undergrowth" claims are being treated by the Tribunal as though formal claims had been filed, the thermal issue has been similarly treated *but* if we are to proceed further on that claim the Tribunal requires additional and specific pleadings.

5 To summarise, the Tribunal requirements are:

- (a) Immediate attention to the transfer of the Mission Farm to Rangiteaorere.
- (b) Research on the Crown Grant and any other Te Ngae Farm matters together with claimant's and Crown's view on reparation/compensation question as soon as possible.
- (c) An indication of progress towards settlement and relevant research in the first three "undergrowth" claims as set out above.
- (d) Further evidence/research forthwith on each the road-taking and land appropriation for survey costs claims.
- (e) An additional claim lodged in respect of the thermal issue if it is to proceed further.

DATED at Rotorua this 15th day of December 1989.

H K Hingston
Presiding Officer

Appendix 7

Direction of Tribunal as to Final Hearing, 17 July 1990

DIRECTIONS OF TRIBUNAL

At the conclusion of the hearing on Tuesday, 17 July 1990 the Tribunal issued the following direction.

1 Further questions of Miss S McHugh & Mr D Alexander

(a) Counsel for the Church, claimants and Maori Trustee may on or before Wednesday, 1 August 1990 serve upon Mrs Kenderdine (Crown Counsel) a memorandum setting out questions; a copy of interrogatories to be filed in Registry of the Tribunal and served on other counsel.

(b) Mrs Kenderdine to reply on or before Wednesday, 15 August 1990 and file copy of answers with Tribunal as well serving other counsel.

2 Tribunal will hear final submission at the Maori Land Courthouse in Rotorua, 10.00am, Monday, 27 August 1990.

3 Counsel are requested inter alia to address the following legal questions:

(a) If the Crown Grant was granted pursuant to the Land Claim Ordinance is it agreed on the authority of *R v Taylor [Clake]* NZPCC that the Crown Grant was invalid.

(b) Sale of Waste Lands Act

If as suggested by a Crown witness the grant was pursuant to this Act. Did the land 'qualify' as waste land in terms of the definition in Section XXIII of the Act. If it did not so qualify would the grant have been invalid.

(c) In 1854 was there a Governor's prerogative that allowed Wynyard to set apart Maori owned land by way of Crown Grant without the consent of the Maori land owners.

(d) The Crown Grant provides inter alia—

“...DO HEREBY GRANT UNTO...(here following legal description etc)

and

"...to hold onto the said (grantees)....*UPON TRUST* to...(here follow Trusts).

Was this grant an absolute grant?

If it was not after the issue of the grant held the reversion.

4 If Consensus in principal is reached between the Church authorities and the Claimants—Tribunal expects joint memorandum setting out terms agreed. This to be served as well on Crown Counsel.

5 The Tribunal re-iterates it's earlier advice to the effect that it has no jurisdiction as against the Church and that any terms/restrictions placed by the Church is a condition of their returning of the Mission Farm is at Church's sole discretion.

6 The Tribunal also repeats its earlier suggestion that if at all possible the Mission Farm (if returned) should become:

(a) Maori freehold land vested in an eponymous ancestor probably Rangiteaorere (m) (d).

(b) Such that the land is inalienable by way of sale or transfer of the fee simple.

Dated at Waiohewa this 17th day of July 1990

H K Hingston
Presiding Officer

