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IN THE MATTER OF
The Wellington Tenths
Waitangi Tribunal Claim # 145

#E13

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REPORT ON:
The Wellington Tenths Reserve Lands

29 January 1995

S. P. Quinn

Because some of the secondary source material is derived from footnoting from other papers which is incomplete, the footnoting may change in the final draft of this report.

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Introduction

My name is Stephen Quinn, I am a legal researcher of Wellington. I have degrees in Law and Social Sciences from the University of Waikato. I have assisted in claims research for Ngati Tuhourangi and Ngati Wahiao over the past three years. Last year I produced a report commissioned for the Waitangi Tribunal on Claim Wai 468: the Haparangi forest. This report was produced over a period of 10 weeks from mid-November.

The object of this paper is to outline the issues as the claimants see them in the second half of the nineteenth century. The paper is designed to supplement the submission of the claimants, *The Origins of the Crown's Demesne at Port Nicholson, 1839 - 1846* by Duncan Moore. The evidence in this report is sourced, in part, from reports already written on the Wellington Tenths Trust by Duncan Moore, Neville Gilmore, Robyn Anderson, Alan Ward, Bruce Stirling and David Armstrong as well as other researchers who have assisted the Claimants in the preparation of this claim. In particular, this paper draws upon the voluminous amount of notes and submissions of claimant researcher Duncan Moore. This material has been enlarged on where necessary by researchers Stephen Quinn, Terence Green and Philipa Biddulph who have been working on this claim for the past three months.

Summary of "The Origins of the Crown's Demesne at Port Nicholson 1839 - 1846".

This paper attempts to given an insight into the issues occurring after 1846 and to demonstrate to the Tribunal that while the central issues which claimants view as breaches of the Treaty of Waitangi occurred from 1839 - 1846, Wellington Tangata Whenua were disadvantaged by continuing Treaty breaches right through the second half of the nineteenth century.

In the main submission to this hearing, Moore writes that it will be easily established that in the 1870's the compensation the Crown paid to Maori for the loss of the native reserve lands endowed to the hospital and Wellington College was somewhat less than the market value of those lands. [Moore 1995, pp 9-10] He states that there are two reasons for adjusting the compensation down: the lost Court of Appeal decision in Regina v Fitzherbert and the belief that 'the Crown had already been so generous to Maori in the settlement of lands in 1846-47, and that this had constituted an "advance" in the part off-setting the loss of the endowment grants.' [Moore 1995, p10] Crown researchers apparently agree that the Courts judgement did lower the value of the compensation of the Maori interest in the hospital and college. [Armstrong and Stirling summary p30]

Moore notes that the supposed generosity of the Crown is behind Crown justification for the early - 1850's appropriations of reserves. He quotes Lt. Governor Eyre's June 1848 memorandum arguing against forming a trust in native reserve lands, and in favour of alienating some the native reserve lands for public purposes. [Moore 1995, pp10-11] With its supposed previous generosity to the Tangata Whenua as the basis of its claim, the Crown granted away many of the most valuable Native Reserves in the early 1850s.

In arguing that the Crown was generous, Eyre implied that in 1846-47 Maori would not have already expected the things which they were then "given". The items which constituted the Crown's generosity were:

- the already existing native reserves given over to individual Maori and hapu
- the large blocks of outlying land given over to individual Maori and hapu
- the 100 acres domain
- the expenditure on the hospital

However, the claimant's position is that this settlement was not generous because the 1846-47 award of these items *was not anything which Maori had not already been*

granted in the 1844 - 46 settlement. Thus, Maori *already* owned the land they were "granted" in 1846-47, were *already* promised the expenditure on the hospital. Therefore the 1846-47 settlement was not generous: it gave the tangata whenua *no more* than the already had, or were promised.

Moore's Preliminary Statement of Findings

Moore's preliminary statement of findings are listed at pp 12- 16 of his report. His findings have been listed here to provide an introduction to this paper. These are:

- The Crown's initial policy for settling ownership rights in New Zealand was not concerned with preserving Maori customary interest. The Crown's first property policies were concerned with acquiring a large land estate as quickly and cheaply as possible.
- Land Claims Ordinances allowed the Crown to claim lands *prior* to Land Claims inquiry.
- Governor Hobson proclaimed large areas of land as Native Reserves, Public reserves and Town Belt, despite knowing that Maori denied the sale of these lands or any desire to sell them, and were living on and using many of the lands.
- Roads and the harbour foreshore were vested in the Municipal Corporation of Wellington without consultation, compensation or any consideration paid to the holders of the Maori customary interests in those lands.
- Governors Hobson, Shortland and FitzRoy all made the funding of the hospital contingent upon the completion of the Port Nicholson purchase. This amounts to virtual extortion.

By 1846, the investigation into the Port Nicholson purchase had ascertained that Maori did not admit the sale of the site of Wellington and that the Company had obtained possession of the area by force. The Colonial Secretary in 1840, and the Governor in 1841 made pledges to Maori which stopped their efforts to repel the intruders. The Crown, under Acting Governor Shortland, then conducted arbitration to perfect the New Zealand Company's title which maintained the pledges and policies. These pledges and policies were:

- The Crown would fulfil the Company pledge to award one tenth of the Company awarded lands to Maori, which would be held in trust by the Crown.
- Only the land scheduled, surveyed and sold under the 1840 agreement would be awarded by the Crown under the 1840 agreement.
- Before claiming title to surplus lands, the Crown would make similar arrangements to the Company's arrangement and therefore would grant compensation or create reserves out of these surplus lands.
- Pa, cultivations, clearings and burial places would be excluded from sale.

- 15 - 20 % of the proceeds from the sale of Crown lands would fund "Native Institutions", including the Protectorate.

These pledge and policies of the Crown eroded so that they were not honoured.

The lands which were "awarded" to Maori in 1847 were lands which the Crown had little or no claim to because these lands were *excepted* from sale based on the 1844 deeds of release, and the pledges of the Crown as listed above.

All pa, cultivations, clearing and burial places were already excluded from being sold by the 1844 deeds of release. Thus when the Crown "awarded" this land to Tangata Whenua in 1847, it was in fact *already* Maori owned. A large proportion of the lands that the Company selected and surveyed as Native Reserves, Public Reserves and Town Belt, as well as all the outlying areas which the Company did not survey were excluded from sale in the 1844-46 settlement. Thus when the Crown awarded these lands in 1847, it was again given land which Maori *already* had owned and which the Crown had no right to.

The hospital had been promised to Maori as soon as the reserve system was settled. Thus the granting of the hospital was nothing 'new' or 'additional' which shows the Crown as being generous.

Two Classes of Native Reserves

After the introduction of the McCleverty awards, two classes of Native Reserves were created. One is the **1847 McCleverty reserves** themselves. McCleverty reserves were lands which Te Atiawa needed for their immediate use and as such were selected by Maori in 1847. McCleverty granted lands, being awarded to individual hapu, were closely administered by Te Atiawa.

Government officials then clarified the distinction between these two types of reserves. Company-selected reserves which were not assigned in 1847 (therefore native title was extinguished because they were held by the Crown) and the 1847 reserves which had been assigned to Maori hapu by McCleverty (therefore native title was not extinguished.[1]

"According to Lt. Col. McCleverty only the lands not occupied by natives, but reserved for their use [went] to the native trustees as native reserves proper."[2] Thus lands *occupied* by natives were reserves which were administered by Maori themselves as they were awarded to hapu (McCleverty awards). Native reserves *not occupied* by natives were the reserves not mentioned by McCleverty. Lt. Governor Eyre instructed the new Board of Management to administer the "not occupied" Company selected reserves for Maori benefit but that any major disposition of the lands required tangata whenua consent.[3]

In terms of the town reserves, of the 110 one acre Company selected reserves (confirmed by the Spain Commission), only 45a 2r 37p were assigned to hapu, signatories of the 1847 exchanges. 2a 0r 27p were granted to Wi Tako and Ihaia

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[1] Old Land Claims File # 1041 Dommett 2/9/50 Doc A37 pp41-42.
[2] Old Land Claims File #1041 Doc A37 p31.
[3] 6 October 1848, Colonial Secretary Dommett's memo to Boards of Management A26, pD14 From Hanson Turton *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of N Z.* Wellington 1883 Vol. II.

Porutu. The majority of the Company selected reserves, 62 a 0r 14p, were not assigned, but taken administration of by the Crown's Board of Management.[4]

Land that was not awarded as McCleverty reserves were still Native Reserves and these are the company-assigned reserves, the "Tenths" or the **unassigned reserves.** The fact that they were unassigned to any hapu and were not selected by McCleverty does not, in the claimants eyes, change their status: they remained native reserves held in trust for Maori. The evidence that these lands became Crown Lands available for public purposes is minimal, nor is there *any* evidence the claimants are aware of which indicates signalling Te Atiawa ever *agreed* to relinquish their interest in the Native Reserves held for their benefit.

The key difference between the reserves is that the unassigned reserves were administered by the Crown. There was little Maori involvement in their administration in contrast to the McCleverty Reserves. This does *not* mean that Te Atiawa relinquished *ownership* of the unassigned reserves however. Maori did not *need* to indicate their interest in the Tenths lands. In effect, the Crown was acting as a Trustee, with Te Atiawa as beneficiaries of the Native Reserves. The fact that Te Atiawa did not have much to do with the day to day administration of the lands did not mean that Te Atiawa gave their assent to these lands being passed out of Te Atiawa ownership. Indeed it is the claimants view that the lack of correspondence by Maori in relation to Tenths reserves is indicative that Maori were satisfied that unassigned reserves were being administered by the "Board of Management of Native Reserves", the body charged with administering lands for *Maori benefit.*

As Moore indicates, these "tenths" had been repeatedly pointed out to Maori as "Native Reserves," linked to a "Trust" for their benefit. Further, in January 1848

[4] The administration of the native reserves in the 1840s had become very ad hoc, in the hands of Henry St. Hill with no real shape or legal authority. Jellicoe A24 p303, citing Eyre's memo.

they were designated as "Native Reserves" in the Port Nicholson Crown Grant; and as we shall see below, after 1848, to the extent that they *were* administered, almost all of them were administered for Maori benefit.

It should be noted that the lands now claimed by Te Atiawa were shown as "Native Reserves" on both the 1846 Crown Grant and on the 1848 Crown Grant.[5] The fact that these lands are listed as "Native Reserves" indicates that their function is as described by the name. These two Crown Grants list "Public Reserves" as a separate category of reserves and it is these reserves which are available for public benefit. To suggest that lands listed as "Native Reserves" are not in fact reserves for the benefit of natives, but are actually for public benefit would seem unusual, given their title and the fact that there was already a separate class of public reserves.

Another example to show that Native Reserves were supposed to be for the benefit of Maori is the Attorney General's belief in 1850 that lands designated as "Native Reserve" still belonged to the New Zealand Company, and that these were being held in trust for Maori benefit. In June 1850, when Lieutenant Governor Eyre asked him whether he could grant the two acres of Native Reserves at Mount Cook to the Military Wakefield replied in July 1850 that the lands, "cannot be granted without the consent of the natives beneficially interested therein." [6] Therefore in 1850 Wakefield did not believe that "Native Reserves" were simply "Crown Estate".

This point is apparently disputed by Crown researchers, who hold the view that the McCleverty reserves gave to Maori the land that they wanted and therefore extinguished Maori claims to the unassigned reserves or Tenths. Claimants believe

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[5] Note that the 1846 Crown Grant failed while the 1848 Crown Grant was successful and legally effective in creating secure title to lands on which Crown Grants were issued.
[6] MA 17/1 A34 pp 95-99.

that the evidence strongly points to the view point that these lands were still Native Reserves, for the benefit of the natives, as was their original intention.

Native Affairs Policy

Alan Ward described how, in the early 1860's, "direction of policy was still awkwardly divided between Governor and Ministers." In particular, "relations between Civil Commissioner and Resident Magistrate were uncertain and sometimes unhappy."[7] Te Atiawa / Taranaki's reserves became a bone of contention in rivalries between Provincial and National Government, and between the newly formed Native Land Court and the Native Secretary/Department.

It was an especially significant period for Te Atiawa. Wars raged in Taranaki and confiscation of "rebels" and Kingites' lands took hold. The signatories to the reserves agreements in the 1840s were growing old and the first generation of successors were reaching adulthood, just as the Native Land Court held its first sittings in Wellington. At the same time, the Conference at Kohimarama renewed interest in the Treaty, By the end of this period, the status of the native reserves became a key object of the Tangata Whenua's goal to secure their lands.

Te Atiawa/Taranaki in the Wellington District remained mostly friendly to the Government in the early 1860s, but many were also deeply involved in both the Hauhau and Kingite movements. Rophia Moturoa and Wi Tako Ngatata were both prominent Kingite leaders.[8] Considered together with the so-called "rebels" in the newly defined Confiscation Districts established by the 1863 Settlements Act, their moderate Kingism brought the threat of confiscation of their reserves in Wellington. In a meeting at Waikanae 3 June 1864, Colonial Secretary William Fox told Wi Tako Ngatata,

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[7] Ward, A. Show, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland University Press/Oxford University Press, 1973 p 131-2, E7 pp295-297.

[8] 17/3/1868 Dispatch Governor Bowen to Duke of Buckingham, Turton's Epitome A26 p A185.

> "You are liable, as well as the rest, to have all your lands taken from you. But if you are prepared today to make your submission - to give up Kingism forever and sign the declaration of allegiance - the Government will not touch any of your lands or punish you in any way."

Wi Tako Ngatata replied that "It was I who commenced Kingism here...From the first time my Kingism was clear and good, but Waikato put it wrong and now it is crushed and dead. My advice was always put aside, and their plan took a different shape from mine." Accordingly, he renounced Kingism, and the Crown refrained from seizing his lands. [9] This indicates that there was substantial pressure from Crown officials on Maori to abandon kingism under threat of official sanction.

Policy Regarding the Two Classes of Reserves

There were differences between the Crown and Tangata Whenua regarding the apportionment of control over the unassigned reserves versus the lands assigned by McCleverty in 1847. By 1850 some officials were certainly clear as to what policy was: the Crown controlled the unassigned reserves which had not been mentioned in any of the 1847 deeds, and 1847 deed signatories controlled the 1847 McCleverty reserves which had been assigned to hapu.

In fact, actions of officials demonstrates that the administration of reserves was not so clear cut. As noted above, in 1850 the Attorney General Wakefield had declared that Native Title remained unextinguished over an unassigned reserve since it had never been purchased; and therefore the Crown's administrative control was constrained.[10] Maori were themselves constrained in the administration of the McCleverty reserves which were awarded to hapu. Until 1865 the Native Land Purchase Ordinance 1846 prohibited Tangata

[9] Excerpt from Wellington Spectator, 22 June 1864, MA 24/22 Doc E8 pp 437-438.

[10] 17/7/1850 Statement, Attorney General Daniel Wakefield OLC 1/1041 A37 p35.

Whenua leasing these reserves themselves, so affecting their administrative control and their ability to provide an income for themselves.

In the early 1860s the Crown hoped to shift Native Affairs from Imperial to Ministerial control - though this objective was tempered on the one hand by the desire to retain Imperial control over Imperial forces in the wars, and on other by Grey's "new institutions" seeking a measure of Maori self-management.[11] The broad shift to Ministerial control appears to have wrought some confusion over who was to do what with Maori Reserves because fundamental Native Affairs policies changed almost annually. [12] Therefore, the tasks assigned to Reserves Commissioners became diverse, and sometimes conflicting.

In general instructions, Reserves Commissioners were to arrange the issue of Crown Grants on reserves. They were sent a package of blank grant forms. Major decisions were to be referred to the Land Purchase Officer, Provincial Councillor Fitzherbert. At his appointment in 1862, Swainson found that the available means of resolving succession disputes were confused and too cumbersome, and so Swainson, in addition to being a Commissioner, was warranted to conduct investigation, for the purposes of ascertaining title under the Intestate Natives Succession Act.[13] On 17 October 1864 Commissioner Swainson was instructed by Acting Native Secretary Halse not to issue Crown Grants to "avowed Kingites". [14]

[11] Camhist pp 106-109; A.Ward, eg: pp 131-132 E7 pp298-299.

[12] Col.Russell, "Statement on Native Affairs", 26/6/1866, 1866 AJLC p 3-5, E8 pp441-443.

[13] 10/7/1865 Swainson to Mantell E8 p390, MA 4/6 p422 E8 p450. Swainson's appointment was published in The New Zealand Gazette on 25 April 1863, cited in Turton's Epitome A26 p D43.

14 20/4/1859 Assistant Native Secretary to T.H Smith to Commissioners of Reserves Wellington MA 4/4 p 90; Feb 1860 circular forwarding forms for ceding lands under cl.17, MA 4/4 p 279; 7/4/62 Fox to all Commissioners of Native Reserves to put reserves admin "on a proper footing" MA 4/4 pp 563-4; 11/10/62 Domrnett/Swainson, MA 4/5 p 213-15; :Native Office to Swainson, forwarding 50 Blank Crown Grants, MA 4/6 p 203; 11/12/63 Shortland to Swainson, no Kingite grants, MA 4/6 p 203; 17/10/64 Halse, Acting Native Secretary to Swainson, MA 4/6 p 441 All in E8 pp 446-450.

Confusion as to the Status / Title of Native Reserves

As Moore notes in *The Origins of the Crown's Demesne at Port Nicholson* , the depth of the initial confusion on the part of the Board of Management and other Government officials involved in the Native Reserves was substantial. This makes it difficult to determine whether consent was obtained from Tangata Whenua for the losses of the unassigned reserves. From the start conflict and confusion reigned, primarily because the reserves scheme threw traditional rohe into confusion. Halswell made the comment in his early reports that Te Atiawa / Taranaki resisted occupying certain reserves because they were rival hapu's lands.[15] In the mid-forties, settlers had stepped up their encroachments of traditional cultivations, and begun leasing unassigned Company-selected reserves.[16]

Certainly at the beginning of the 1850s there was definite confusion about who held title to the Native Reserves. This confusion both influence the policy and practise of Native Reserve administration as put in place by Eyre, and no doubt contributed to the neglect of the management of these reserves. Eyre writes to Governor Grey on 25 July 1849:

> "Some time ago I sent you up (in May) a dispatch on the subject of the position of the Crown in this province in respect to land - pointing out the great embarrassment caused by the opinion of our Attorney General. As all questions of this kind are now in abeyance I should be pleased if you would give me your instructions on the subject as soon as you can - according to Mr Wakefield's law the very ground upon which Government House stands belongs to the NZ Company and ALL the Native Reserves - an opinion in which Mr Wakefield informed me Mr Fox fully concurred - in fact the letter stated to him that if he stood upon his right he could claim and receive all the rents from these Reserves - the Crown therefore is in the degrading position of holding every thing by the difference of the NZ Company's land agent - surely this ought to be at once remedied if it is so... "[17]

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[15] Spain final report A10(a) doc 6 p 4; McCleverty to Grey 17/2/47, A26 p D8.
[16] See table No.10 in GBPP, Further Papers relating to Native Affairs in NZ, Appendix: Statistics of New Munster, NZ 1841-1848, pp 168-169, A33 p 102.
[17] Eyre to Grey 25/7/1849, Auckland City Library, Grey Collection E.

This certainly illustrates the depth of confusion over just who held title to these Native Reserves. The situation was "resolved" by Eyre's refusal to establish a Trust, and by the New Zealand Company going into receivership in 1851.

Confusion as to Distinguishing Between the Two Types of Reserves.

Problems in distinguishing between unassigned Reserves and 1847 McCleverty Reserves arose again in 1865. Attorney General Sewell made the point that the 1847 McCleverty Reserves had effectively been granted to Te Atiawa/Taranaki. Native Commissioner Swainson suggested that "Native Title has not been extinguished in the tenths of the land set aside by the New Zealand Company" [the unassigned reserves]. Attorney General Sewell noted the legal niceties were of little practical importance, and like his predecessor, suggested that the Native Commissioner obtain authority over them by assents under the 1856 Native Reserves Act.[18] It seems that in this action, the Crown was seeking to control these reserves itself rather than fostering self-management of them by Maori.

Despite continued urging that assents should be obtained from Maori to allow the Crown to administer the McCleverty reserves, the *only* formal assents given by Tangata Whenua for administration of McCleverty Reserves in the Wellington region were obtained not by Reserves Commissioners, but by the Native Land Purchase Commissioner, William Searancke, in 1859 in Ohariu.[19]

Instead, around 1860 the Commissioners often treated the two different classes of reserves - McCleverty and unassigned reserves - quite similarly. For instance, Island Bay (Town District sections 6 & 7), Ohiro Bay (section 26) and Wainuiomata (section 1 or 4) all were sold under the authority of Governor Grey shortly after his return to office at the end of

[18] 21/4/65 Swainson to Sewell, 26/4/65 Sewell to Swainson, 16/6/65 Swainson to Mantell, 17/6/65 Mantell to Sewell, and 19/6/65 Sewell to Mantell, Turton's Epitome, A26 pp D46-8.

[19] A27 pp109-111.

1861.[20] Yet the 1860 sale bundled the unassigned Island Bay Reserves with Ohiro Bay McCleverty Reserves, and apparently treated 50 acres of Ohiro Bay 26, an unassigned Reserve, as unencumbered Crown land. At about the same time Island Bay was being sold as "unalloted", Commissioner St. Hill actually *assigned* the unassigned Reserve sections Ohiro 19 & 21 - just several hundred metres away from Island Bay 6 & 7 - over to Hemi Parae's administration when he had "returned from the treaty at Kohimarama".[21] In February 1863, the Commissioners had tried unsuccessfully to purchase Pipitea's entire 80 acre reserve in Tinakore for public purposes.[22] The pattern of the early 1860s became one of loss of Maori control and alienation of reserve lands.

Thus while the distinctions between the two classes of Reserves was carefully maintained in Swainson's and Heaphy's reports to Parliament, in actuality the *operative* distinction between unassigned Reserves and McCleverty Reserves remained quite informal right up to the 1870s. Perhaps one of the major reasons for this is that, as noted above, Reserves Commissioners were called upon to perform a range of duties involving them in the "lives" of Maori in succession disputes, housing issues, and medical and health matters.

The confusion which reigned in the distinction between the two classes of reserves represents a fundamental flaw in Crown Native Reserve policy which prejudiced and disadvantaged Te Atiawa / Taranaki in Wellington. In treating the two classes of reserves as the same the Crown prejudiced Maori in three ways:

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[20] For a full explanation of the Island Bay sections see Appendix A to this report: Alienation of individual McCleverty reserves.

[21] MA 4/4 p 179 and 259; 7/12/59 Native Secretary to Commissioners, MA 4/4 p 241; All in E8 p455. Swainson to Native Secretary. re Island Bay & Wainuiomata (registry entry only), NO 1/63/666; 3/3/1863 Swainson to Native Secretary. re Wainuiomata (registry entry only), NO 1/63/299; 28/10/1863 forwarding deeds for both (registry entry only), NO 1/63/1659 - all registry entries only, letters not extant; "Crown Land" see District Land Registrar, where Ohiro 26 was never recorded as being Native Reserve; "proceeds" see Jellicoe A24 p 314 (no citation given); Scholefield, Dictionary of New Zealand Biography Vol.1 pp 420-21, E8 pp 456-458. Irvine-Smith, Streets of My City p 261, mentions Hunter's Happy Valley Station, E8 p 459; "unallotted" see Swainson's Report, 1867 AJLC, A25 p 8; Hemi Parae see 1874 AJLC No.7, A25 p 27.

[22] 2/2/63 Mantell to Swainson and 10/2/63 Swainson to Mantell and 17/2/63, MA 17/1 A34 pp 38-9.

- Maori self management of the reserves assigned to hapu was hindered

- Unassigned reserves were not properly administered for the benefit of the Tangata Whenua.

- Native Reserve Commissioners were given many conflicting task which hindered their management of the native reserves.

Management of Native Reserves

The Native Reserves having been created for the express purpose of benefiting Maori, the Crown can be shown, from at least 1843, to have failed to set up a workable Trust for the administration of these Reserves, to have failed to appoint a Commissioner under "The Native Reserves Act 1856", and to have used money returned from these Native Reserves to compensate settlers in Taranaki during the 1850s. As a result the Crown completely failed to institute a workable, legal, accountable and responsible system for the administration of Native Reserves. This amounts to a pattern of neglect which can be seen to be the primary cause of confusion over the title of Native Reserves.

By the end of the 1850s there was no hope of Maori controlling the reserves themselves, instead the reserves were fully controlled by the Crown and rented as estate lands of the Crown.

In his 23 June 1848 Memorandum Eyre explains how the Reserves had been administered since they were created, and then sets out his policy for the future management of the Native Reserves

> "It was originally intended to have placed them [the Native Reserves] under the direction of Trustees, who without the power of alienation, might make such arrangements for letting or leasing them as would realise the largest possible return, and this return was to be directed entirely to objects connected with the general welfare, advancement and improvement of the Native Race.
>
> The Trustees who were nominated however having found many obstacles to the execution of their Trust gradually ceased to act at all and at last formally resigned: in the meanwhile many private arrangements had been entered into with settlers for the occupation by them of various Reserves or portions of Reserves but as these arrangements were not legally binding, the agreements were either kept or not as best suited the interests of the occupants and very few rents were ever paid...It is essential that the Government should retain in their own hands control over the reserves, because circumstances have made it desirable that is some instances total

alienation of the land should be sanctioned, as for Ordnance purposes, to provide sites for Hospitals, for churches, for public offices, or for other similar indispensable objects of general and public utility: the Government having no land left them in the Province of New Munster available for such important and necessary purposes...It is proposed therefore in all cases where the Government finds it necessary for purposes of public utility or promote the general advantage, to appropriate any of the reserves, that such portions of them should be taken as may be required for the object in view and that the native reserve fund should be compensated by the Government allowing a fair and reasonable rate for the *purchase* money taken. The assessing the amount of this compensation would in such case constitute one of the duties of the Board of Management, other duties attached to them will be the inquiring and examining into the present state of reserves, and all arrangements which have been partially entered into with respect to them...hearing and considering all applications for abatement or remission of rents and all requests for leases or renewal of leases, the...terms upon which lands should be let, and in fact the investigating and considering [of] all questions connected with the management of the reserves, so as to enable the Board to recommend such arrangements for adoption by the Government as maybe best calculated to promote the establishment and growth of a fund arising from the reserves which can be devoted to objects having in view the welfare and civilisation of the natives." [23]

On 24 June 1850, Eyre sent a memorandum to the Board of Management, and enclosed with it the general memorandum of 13 June. In his instructions to the Board he referred again to previous arrangements and set out procedures and guidelines for administration of the reserves:

> "...with regard to all existing arrangements to take each case on its own merits and make such arrangements as fairness and equity may require - as each case is enquired into and a recommendation made upon it, the Board will lay it before the Lieut. Governor for approval, prior to the arrangements being carried out - the Crown Solicitor will then be directed to prepare any legal documents which may be necessary or to carry out any legal proceedings which may be determined upon - The treasurer has already been directed to receive any payments which may become due under the reserve and to keep such receipts under a report heading to be determined the Native Reserve Fund. This Fund it is proposed shall be from time to time drawn upon and appropriated to objects having in view the welfare and advancement of the Native Race, by the Lieut Governor acting under the advice of the Executive Council of the Province...with regard to the sum which the Board may assess as fair and just for the Government to allow to the reserve fund for any section which they may find it necessary to alienate for public purposes - it is not proposed to pay such sums over immediately to the fund, but simply let a record of

[23] Eyre's Memo 23/6/1848, NM8/1850/1151 A40 Vol.2 pp 311-314.

circumstances of the amount assessed be entered into the Board's book until such times as returns, showing the sums expended in procuring lands for the natives or promoting objects being in their view [consistent with] their welfare and improvement, shall have been obtained and laid before the Executive Council and some general arrangements resolved upon for balancing the account between the Government and the fund." [24]

Thus the fund was apparently meant for the Tangata Whenua's welfare and improvement. In an attempt to remedy the rather loose arrangements for leasing of Native Reserves, on 13 June 1848 Lieut. Governor Eyre informed Colonial Secretary Dommett, that hence forth:

> "all applications for leases of land and all communications relating to questions connected with the Native Reserves [are] to be addressed to the "Board of Management of Native Reserves" - at the Colonial Secretary's Office Wellington." [25]

Eyre's June 1848 Memoranda shows clearly that his motivation for setting up the Board of Management was the final resignation of the original trustees of the Native Reserves, and the cause of their resignations was the difficulties of ad hoc leasing arrangements. Eyre then realised how unsatisfactory these leasing arrangements were, and that a new management structure was necessary.

> "The Trustees who were nominated however having found many obstacles to the execution of their Trust gradually ceased to act at all and at last formally resigned: in the meanwhile many private arrangements had been entered into with settlers for the occupation by them of various Reserves or portions of Reserves but as these arrangements were not legally binding, the agreements were either kept or not as best suited the interests of the occupants and very few rents were ever paid. This state of things being most unsatisfactory and having from various causes continued for a considerable length of time.."

It seems that Eyre concurs that management of the Tangata Whenua's asset - the native reserves - was faulty throughout the 1840s. Therefore "by appointing Land Boards of Management under whose enquiries and recommendations the Government can carry out

[24] Eyre Memo 24/6/1848, NM8/1850/1151 A40 Vol.2 pp 306-309.
[25] Lieut.Governor Eyre to Colonial Secretary 13/6/1848, NM 8 Vol.1 A40 pp 191-192.

the necessary details" relating to leases. This was to be one of their principal roles, and would "turn the Reserves to some profitable account".[26]

What, then, was done by the Board and Government, to whom they made recommendations, about the many ad hoc arrangements and leases which they found already in place when they were established as a Board of Management in 1848? The question needs to be asked, what steps were taken by the Board of Management to legalise these leases and agreements if any? What does their action or inaction on such matters show about neglect of Native Reserves administration? Did the Board of Management take sufficient steps to protect the Maori beneficial owner's right to a receive the rents once agreed upon? Claimants submit that the Board of Management did not protect Maori owners, continued to maladminister the reserves and therefore prejudiced the Tangata Whenua.

The underlying assumption in the Crown's administration was that the Crown could help Te Atiawa/Taranaki use or manage the reserves better than they could themselves. This was the reason for the Crown provision of voluntary "assent" and for Land Court determination of title. The fact that Wellington Tangata Whenua did not avail themselves of the Crown's "assents" or determinations perhaps reflects their desire and capability for self-management.

Where there is a serious maladministration of the native reserves, one of the reasons for the lack of complaints about the management is that Maori were very much preoccupied by other things:

- Seeking enough available land for cultivation for survival: Settler encroachment on cultivation lands and on Native Reserves allocated to Maori continued to intensify during the 1850s. This is an indication of the Crown's failure to effectively administer Native Reserves for the Tangata Whenua.
- Many were moving to Taranaki to defend their interests there as land was being sold and reserves allocated. Fitzroy's 1844 purchase of the Fitzroy Block at

[26] Eyre's Memorandum 23/6/1848, NM8/1850/1151 A40 Vol.2 pp 311-314.

New Plymouth and Grey's purchase of the Grey and Omata Blocks in 1847 caused a substantial number of Te Atiawa / Taranaki people to return to that area to ensure that their very important lands were reserved for them.

- Other Maori were, through allegiance to the Kingite movement, seeing a vision of a stronger better alternative Government for their people.

The fact that Maori complained about interference in McCleverty awarded land simply indicates that Maori were against interference in the land which was actually assigned on a hapu basis. In that respect it is a contrast to Maori attitude to unassigned reserves, where it appears that Maori expected these lands to be administered - but not owned unencumbered - by the Crown *if* these reserve were *administered for the benefit of the Tangata Whenua.*

Maori strenuously objected to Crown interference in Town Acre 635, a McCleverty awarded reserve assigned to Pipitea Maori. The Board of Management of Native Reserves had leased this section to a settler which Maori objected to as the lease was made without their knowledge or consent. This indicates that Maori felt entitled to control their McCleverty assigned reserves. The Board of Management then sought an opinion from the Attorney General as to whether it had full power and management over McCleverty reserves under the New Zealand Native Reserves Act 1856 or whether these reserves vested in Maori for whose name and benefit they were made.[27] The Board did not have control over these reserves - only the unassigned reserves.

All through the 1840s, 1850s and 1860s - and right up until 1882 legislation - the Commissioners of Native Reserves (and the Ministers and Governors under whom the Commissioners acted) often - though inconsistently - recognised and sanctioned traditional Te Atiawa/Taranaki interests in and authority over the Native Reserves which had not been assigned in 1847. From the mid-1870s, though, such support amongst Crown officials all but disappeared and the changed attitudes of government officials indicates a confused and changing native reserve policy.

[27] Native Reserves Commissioners to Attorney General 23/6/1859, A26 p D33.

The view from the mid-1870s on holds that *rents* on Te Atiawa/Taranaki's reserves were properly included with those of Maori from Whenuakura to Wairoa [28] and exclusively applied to administrative and charitable purposes anywhere in-between. This view also holds that such reserves were to be administered with no specific regard for Te Atiawa/Taranaki custom or authority. These views are the substance of Regina v Fitzherbert - the presumption of the Crown's right and duty to administer Te Atiawa / Taranaki's reserves.

Te Atiawa / Taranaki have continued to this day to seek self-management of their reserves, finally obtaining it in 1987, albeit subject to the restrictions of perpetual renewals, 21-year rent-reviews and rent ceilings.

In October 1869, Native Minister Donald McLean offered Major Charles Heaphy the job of Commissioner of Native Reserves. However on 15 August, 1870, the Committee reporting on the 1869 native reserves Bill, chaired by Henry Sewell, recommended against its passage. While acknowledging the quality and importance of Heaphy's work in making an inventory of the existing reserves, the Committee recommended appointing local administrators, who were to be under "direct control" of Government.[29] In the interim, as the lands were already coming through the Court under the 1867 Act, they successfully proposed the office of a Native Land Frauds Prevention Commissioner, who was Heaphy.

The Executive Council reasoned that:

> "the question of the mode [by] which the interests of the native population should be protected from any loss they might sustain from this arrangement [of the native

[28] See eg. Report of Commissioner of Native Reserves AJHR G5 1875 pp 1-6, A24 p 89.

[29] Sewell Report on the Native Reserves Bill, 1870, 15/8/1870, 1870 AJLC pp 8-9, A25 pp 20-21.

> reserves was to be] left for the further consideration of the Government when a return shall be made of the sum already advanced and expended by Great Britain for the benefit of the Natives in the erection of hospitals, the purchase of reserves for them, etc, etc [and] has been laid before the Executive Council." [30]

Eyre's policy shows striking similarities to the opinion of the Executive Council. It seems from Eyre's June 23 1848 Memorandum that what was to operate was a system of debt / credit or expenditure / earnings. To be weighed on the expenditure side of the account was that the Government had "given up to [Maori] 100 acres reserved as domain, had purchased land for them, brought out leases to give vacant possession to Maori and spent large sums "to advance the welfare and interests of the Native race generally". To be weighed on the earnings side of the account were rents received from leased Native Reserves.

It seems that this opinion of the Executive Council, was essentially the beginning of Lt. Governor Eyre's explicit policy of taking reserves for public purposes. If the sum assessed by the Board, and then recommended to the Government as being the amount of compensation to be finally approved and paid into the fund by the Government for the alienation of parts of Native Reserves was noted in a register, and was to be paid later, was this money ever actually paid into the fund? And was there a workable system in place and actually operating for this process?

This principle of debit / credit appears to be the principle on which the administration of Native Reserves in the 1850s was to be built. Namely, that decisions concerning the way in which the loss of rent and the land itself, as an asset, caused by the appropriation of Native Reserves, were to be compensated were to be made only after these endowments had been made and a return had been collected? If this is one of the hallmarks of Eyre's policy, then can this be shown to be workable, accountable and responsible?

[30] 24/2/1848 Extracts of Minutes of Executive Council, MA 17/1 A34 pp 105-7.

Legislation And Policy

In 1856 the first substantial legislation for the management of Native Reserves was passed: The Native Reserves Act 1856. The act was described in the legislative chamber at that time as "an instrument of practical good to the Native race" and seen as a mechanism to ensure those reserves created by the New Zealand Company were used to the best advantage.

The Native Reserves Act 1856 was more fully entitled "An Act for the management of lands set apart for the benefit of the aboriginal inhabitants of New Zealand." In the preamble of the Act it states that, "it is expedient that the same should be placed under an effective system of management..." This Act then was to be instrumental in remedying the previously ineffective management of Native Reserves by setting in place a system of management. Under the provisions of the Act the cornerstones of this management were to be the Commissioners of Native Reserves to be appointed by the Governor (s.1), three per commission (s.3) and where necessary districts may be set out (s.2). 31

Yet no Commissioners were appointed for the Wellington province till 1858, this implies that the Act was in effect not working in the province of Wellington until this date and that *ineffective management* of Native Reserves continued throughout the 1850s. That no one was appointed here until 1858 is some measure of the neglect of Native Reserves administration here and perhaps indicates that confusion had become so great that there were few who would be willing to take on the task of bringing the existing system in line with the 1856 legislation.

In a letter dated 24 September 1857 from Superintendent William Fox of Wellington to the Chief Land Commissioner wished, "to call your attention to the fact that no Board of Commissioners under The New Zealand Native Reserves Act session IV No.10 appears to

[31] Statutes Victoriae.X 1856 A21 pp 6-7 (handwritten).

have been yet appointed for this Province and that difficulties affecting such reserves and involving the relations of the European and Native races, very frequently occur, which at present there are no means of adjusting." [32]

Section 14 states that:

> "Where any lands shall have been set apart or reserved for the special benefit of the said aboriginal inhabitants or any of them, or where upon any sale of lands by Natives a certain portion of the district sold shall have been or shall be specially excepted the Native title shall not have been extinguished, it shall be lawful for the Governor, with the assent of such aboriginal inhabitants, to be ascertained in a manner provided by this Act, to declare such lands to be subject to the provisions of this Act, and to appoint Commissioners for the management thereof in like manner as if Native title had been extinguished."

Section 17 then outlines the procedures for registering such assent:

> "The Governor shall appoint some competent person to ascertain the assent of the said aboriginal inhabitants, and such person shall proceed according to such rules as shall be prescribed in that behalf by the said Governor. And the report of such person, if adopted by the Governor, shall be final and conclusive as to such assent, and the publication of such report and the adoption thereof in the Government Gazette of the said Colony shall be evidence of such assent...the land to which the same relate...shall then become subject to the provisions of this Act." [33]

Thus assents for lands to become subject to this Act had to e obtained in the form noted here. Commissioners were sent forms for ascertaining such assent so that it seems that between 1859 and 1863 the Native Department sometimes regarded the Reserves Commissioners' main job to be the gathering and assessing of assents to have 1847 McCleverty Reserves brought under their control. On 15 January 1866 the appointment of Commissioner Swainson and the Commissioners in other Provinces to ascertain assent under the 1856 Native Reserves Act was published in The New Zealand Gazette.[34]

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[32] Superintendent William Fox to The Chief Land Commissioner 24/9/1857, WP3 1856-66 pp 9-11.

[33] Statute Victoriae. X 1856 A21 p 6-8; NB: Swainson makes interesting comments about how he used, interpreted and implemented these section of the Act, MA 24/21 Misc NO files, E8 pp 460-464.

[34] 15/1/1866 Gazette Extract appointing Swainson, Turton's Epitome A 26 p D53.

The question arose as to whether the Board of Management required Te Atiawa/Taranaki's formal "assent" (under The 1856 Native Reserves Act provisions) to administer the 1847 McCleverty Reserves. In December 1859, in the case of "land within the boundary of the Pah Pipitea", Attorney General Whitaker stated that, without such assent, the 1847 McCleverty Reserves were not under the authority of the Board.35 A letter of remonstration sent by Maori to the Board of Management respecting the lease of half of Town Acre 635 [discussed above] to John Moore (a McCleverty reserve) is noted in a letter dated 23 June 1859 in which the Board asks the Attorney General:

> "Has the Board full power of management and disposition over reserves of this class under the provisions of 'The New Zealand Native Reserves Act, 1856' or does the law vest that power in the Natives, in whose names and for whose benefit such reserves have been made?"[36]

On 24 September 1859 the Attorney General replies with Grey's opinion that "the lands given in exchange for their cultivations by Colonial McCleverty, acting on behalf of the Government, are *not* Native Reserves within the meaning of The New Zealand Native Reserves Act, 1856."37 Thus the Attorney General saw the unassigned reserves as the *only* reserves which come under the ambit of the 1856 Act. This struggle for control of the 1847 reserves between the Crown and Maori, who desire self management, becomes a focus of activity for Native Reserves Commissioners in the 1870s. Trying to get assents for McCleverty Reserves to be administered under the Act not only took away from Maori self management of the reserves but also appears to conflict with the opinion of the Attorney General at the time.

Even when these Commissioners were appointed they appeared to be in a somewhat voluntary capacity, combining their position of management of Native Reserves with other official appointments. This had the effect of little substantial improvement of

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[35] 17/7/1850 Statement Attorney General Daniel Wakefield OLC 1/1041 A 37 p35.

[36] 23/6/1859 Board of Management to Attorney General, Turton's Epitome A26 p D33.

[37] 24/9/1859 Opinion Attorney General Daniel Wakefield, Turton's Epitome A26 p D34.

administration during the 1850s. Commissioners were expected to fit their duties in around existing Government Appointments when the task itself required fulltime attention. In 1861 Commissioner Swainson, describes the circumstances surrounding the en masse resignation of the Commissioner appointed under The 1856 Native Reserves Act:

> "Because the original Act of 1856 was found unworkable (at least in this province) from the fact that the Commissioners appointed being gentlemen whose other official duties prevented them from investing that time and attention which was necessary to stop the (illeg) distrust of the Natives as to our intentions with regard to the Reserves, not only made for them but by them. I can safely I think say that...the repeated resignations of the Commissioners themselves, led the Government to amend the Act of 1856" [38]

As from 8 October 1862 District Surveyor, G.F. Swainson was appointed under the 1862 Native Reserves Act as the Governor's delegate in whom the reserves would vest. A letter from Dommett to Swainson 11 October 1862 acknowledges Swainson's tender of service and outlines his duties as Surveyor and Commissioner. [39] It was hoped that in his appointment he would encourage survey, partition and granting of reserves in the region. This appears to be a breach of the Treaty of Waitangi as partition and granting of the reserves was inevitably the first step towards alienation of the reserves.

The 1862 Native Reserves Act took the authority to ascertain assent from the Commissioners and placed it with the Governor in Council, who could then appoint a delegate. Most likely this was the "Native Reserves Commissioner" : Heaphy signed himself "Governor's Delegate" on a lease agreement for sections 65-67 & 150A at Porirua in March 1866.[40] The Act also made provision for Maori to voluntarily place their reserves under the administrative control of the Governor who would then administer it through the officers of the Native Department.

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[38] Swainson Memorandum to Mantell 10/7/1865, MA-MT 1/1A/28 E8 pp 390-396.
[39] 11/10/1862 Dommett to Swainson, MA 4/5 pp 213-5 E8 pp 448-9.

[40] 5/8/1872 Heaphy Minute, A36 p 147.

One of the outcomes which occurred because of the discontent of Te Atiawa / Taranaki in the administration of the native reserves (highlighted by Swainson, Mantell) was the flurry of Native Reserves legislation which began in 1867 and lasted until 1882. The 1867 Native Lands Act had provided for the Native Land Court to determine interests in, and recommend grants to Te Atiawa/Taranaki's 1839/44 reserves and their 1847 "McCleverty" reserves. Even with the provisions enabling restrictions on alienability, for some the Act no doubt raised the possibility of further land losses. Furthermore, when the Native Land Court had initiated sittings at Wellington in 1866 several attempts were made to claim title to undeeded Company-selected Reserve lands (eg. Ohariu 12 & 13, Pakuratahi). It then fell upon Commissioner Swainson to attend all hearings to defend the Crown's claim to such lands under The Native Reserve Act 1856 and 1862.

On September 1867, Rophia Moturoa's claim to the ex-reserve lands at Tiakiwai and Raurimu came before Judge T.H.Smith's Native land Court. Commissioner Swainson, along with Robert Hart on behalf of the Hospital Trustees, dispute the claim, and won its dismissal. [41]

The struggle for control of the administration of native reserves between Te Atiawa/Taranaki and the Crown is highlighted by the Native Reserves Act 1873. On one hand the Act gave the Commissioner's the power to bring the 1847 McCleverty reserves under their administrative control (which the 1862 Act had given to the Governor in Council). On the other hand, the Act contained other powers specifically encouraging Maori self-management. All decisions about management were to be made by Maori representatives *and* the Commissioner on a Board of Direction.

[41] MLC Minute Book Wairarapa 1, pp 57-8, E8 pp 469-471. See excellent plan of Tiakawai prepared by Swainson for this hearing, at E8 p 471a.

This "Board of Direction" was to be established under section 7 of the Act, and through it Maori and the Commissioner were to make decisions related to leases, administration and alienation.[42]

The provisions of section 7 of the Act were not included in the original Bill as it was passed and presented to the Legislative Council. Therefore the Bill held no provision for Maori self-management of the reserves. The Honourable Wi Tako Ngatata was quick to speak out against this. On 10 September 1873, when Dr Pollen presented the Legislative Council with the original Bill The Honourable Wi Tako Ngatata objected strongly:

> "...I understand now that our houses and lands are to be placed in the hands of Commissioners. Have you Europeans a similar law? I believe not...Do not direct that the Maoris shall be treated in one way and the Europeans another; that is wrong...Now, I say it is not right that somebody else should take care of my house and land. I can take care of them, and of my wife and of my children too...".[43]

While this Act was passed into law, a "Board of Direction" was never implemented. However, the power struggle between Maori and Crown continued, becoming focused on the getting and giving of assent for reserves to be brought under the Commissioner's control.

[42] Statute Vic.LX Native Reserves Act 1873, A21 p 14.

[43] 10/9/1873 NZPD, Wi Tako Ngatata speech, A20 p 46.

Case Studies in the Administration of the Native Reserves

Te Aro in 1874

Throughout the 1860s and 70s gaining Maori assent continued to be important for the Crown (variously the Commissioners, the Governor and officers of the Native Department) if it was to gain control of these reserves. Because Te Atiawa/Taranaki did not avail themselves of the Crown and preferred to manage their reserves themselves, an agreement whereby a reserve was "voluntarily placed...with Heaphy" - mentioned in his 1873 & 74 reports - provides an interesting, well documented case[44] because it is an instance of Te Atiawa/Taranaki expressly seeking the Crown's hands-on "partnership" in the reserves. The example bears close examination, as it shows that Te Atiawa/Taranaki's 1870s "ideal" was for the Commissioner to act as their "agent" - providing business expertise and contacts that would enable them to achieve the objectives they had set out for their reserves.

This semi-formal "assent" was obtained at a meeting of owners (ie. signatories to the 1847 deed of exchange) at J.H. Wallace's store, 6 May 1873. Heaphy phrased the agreement,

> "1st that the [lands] should be placed in the hands of the Commissioner of Native Reserves, for administration, and notice given to the tenants thereof.
>
> 2nd that Waaka Houtipu should be the "kaikorero" to assist [the] Commissioner with tenants and to place him in possession of papers, plans, etc.

[44] A24 p 59 reports that Te Aro's Polhill Gully, Ohariu 91, and Kinapora sections 7 & 8 (already leased) were all voluntarily brought under the 1856 Act. A24 pp 84-5 leases subsequently made by Heaphy at Polhill Gully and Ohariu 91. Although the focus is on the Newtown/Polhill Gully "assent" arrangement, many of the discussions reported below seemed also to extend to the Ohariu and Kinapora "assents".

3rd that the natives named in the margin should for the future "share and share alike" in the rentals of the lands now set forth...

4th Commissioner is empowered to let the unused land at Polhill's Gully."[45]

Heaphy's brief minute of the assent was vague, but definitely fell short of stating that by it, the lands were to legally vest in the Governor. The assent appears intended by both Heaphy and the owners at the time as much more narrow than a "vesting" or even "entrusting".

The significance of Waaka Houtipu's role as Kaikorero is difficult to assess: Traditionally, nga Kaikorero are people of high mana acting as family spokesmen or representatives, with speaking rights on the Marae. So fairly clearly, Waaka Houtipu was spokesperson for the owners. [46]

After the 5 May assent, Heaphy submitted regularly to Hemi Parae's and others' directions for distribution of rents on the Polhill Gully reserves. [47] Further, Heaphy's "power" under the "assent" to "let the unused land" was heavily qualified, or even non-subsisting; two days after the "assent", he sought the signed authorisation of the "Kaikorero" and Henare Pumipi before even showing some empty sections to prospective tenants. [48] Similarly, in January 1874, Heaphy asked Te Aro to "ratify" his lease of an acre-part of their reserve. [49]

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[45] Heaphy Minute Book, A36 p 164.

[46] Metge J The Maoris [sic] of NZ Rautahi", Routledge & Kegan Paul 1976, pp 85, 189, 256, 258, 337, E8 pp 506-511.

[47] Eg. Minute Book A36 pp 165, 175 & 178.

[48] 6/5/1873 Heaphy Minute, A36 p 165.

[49] 30/1/1874 Heaphy Minute, A36 p 175, cf.1/12/1874 p 184.

Heaphy also assumed the practical tasks of receiving and distributing rents. Formerly, Wellington Tangata Whenua seem to have assigned individual Maori to receive rents on particular sections of these 1847 McCleverty reserves.[50] In November 1873, the first rent payout after the assent, Heaphy paid each of the 17 named beneficiaries £3.3.6, and thereafter rents were evenly distributed.[51] This "share and share alike" provision may or may not have reflected the Maori rent-receivers customary practice.

Most telling of all, after six months, a difference of opinion arose between Heaphy and the owners over the mode of arranging, and the terms of, a lease of eight Polhill Gully acres to Dr Johnston. Wi Tako Ngatata, Henare Pumipi and 12 others wrote to Heaphy "that they had resumed control of [the] 82 1/2 acres at Polhill Gully"[52] Te Atiawa/Taranaki saw Heaphy's agency, in other words, as fully revocable - and Heaphy agreed, so it seems that Te Atiawa/Taranaki's "ideal Commissioner" was to be a sort of land agent "engaged" by them. While it lasted, the assent agreement created a co-operative relationship between Te Atiawa/Taranaki and the Crown, with clearly defined roles for both parties, but with the balance of power very firmly with the Maori owners of the reserve. This seems to be a remarkably different management structure than that which eventuated with other native reserves and it is indicative of the type of structure which the Tangata Whenua sought.

Rents on the Native Hostelry

Amid all the conflicting roles and confusion over the handling of different types of reserves in the early 1860s, Commissioner Swainson and Native Minister Mantell had been working to develop and exploit Te Atiawa/Taranaki's reserves generally. On confirmation of his

[50] Eg: 6/5/1873 Heaphy Minute Book, A36 p 165; also Report on Native Reserves in the Province of Wellington AJHR F-1B 1872, A24 p 55-6.

[51] 12/11/1873 Heaphy Minute, A36 p 169.

[52] 18/11/1873 Heaphy Minute, A36 pp 173-4.

appointment as Native Reserves Surveyor and Commissioner, Swainson was instructed as to his duties by Dommett and was to take his instructions from Mantell, then a Cabinet Minister without a portfolio, until he could receive instructions from Native Minister Bell. Mantell himself was Native Minister from December 1864 to July 1855. [53]

In October 1863, Swainson set about finding a favourable arrangement for the previously unlet 29 acres of reserve along the ridge at the south of Newtown. Seeing the loss of pasturage at Pipitea due to the Endowment to Wellington College, and seeking to complement the passage of Kaipakapaka (Ohiro 19 & 21) into Te Aro hands, he leased the east 11 acres to Hemi Parae for five years at one pound six shillings, - "nominal rent authorised by Mr Mantell". A year later, he advertised for tenders for the west 18 acres (Town Acre 872-898 inclusive). Mantell's was the only tender. The month before he became Native Minister, then, Mantell entered a 21 year lease at £24 p.a, raised to £32 p.a. the second seven years, and £36 p.a. the third seven. Probably the whole was arranged for Hemi Parae's purposes, since although Mantell's lease technically prohibited subletting, he allowed Hemi's pasturage of the east 11 to extend over to the west 18, owing to "his aroha for him". [54] The next year Swainson rented three other reserves in rapid succession - Kaipakapaka and 2 parts of Town Acre 543 in April 1864, December 1864 and July 1865, respectively.

In June 1865, orders were gazetted requiring Swainson to advance £600 from the Native Reserve Fund to pay for the construction of the Native Hostelry on Town Acre 574. [55] In effect Swainson was required to pay rent to the Hospital Trustees for using land that had been given them out of Te Atiawa/Taranaki's reserves. Together with the Treasury's

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[53] A.Ward, *A Show of Justice* Appendix p 316.

[54] Return of Reserves AJHR A-17, MA 17/1 A34 pp 9-10; 15/11/1864 Mantell to Swainson, MA 17/6 A35 pp 315-17, and 30/5/79 Heaphy/Fox pp 184-89; “aroha” Heaphy memo nd; Commissioner Swainson Note MA 17/6 A35 p 314.

[55] 7/6/1865 Gazette Extract, Turton's Epitome, A26 pp D45-6.

demand that rents be deposited to their account (July 7), the bill for the Native Hostelry prompted Swainson to plea the impecuniousity of the Reserves Fund. The Native Reserves fund was instituted under Eyre in 1848 when the Colonial Treasurer had been "directed to receive payment [ie from rents] under the special head Native Reserve Fund" [56], after July 1852 all rents from the Native reserves were allocated for repairs and maintenance of the Hospital [57] Swainson reported that, after deducting the Native Hostelry building expenses, the Fund would have only £69.6.0, minus the £25 that would pay the rent collector's salary.[58]

[56] NM8 A40 Vol.2 p 306-308.

[57] 1852 Native Reserve Accounts NM 8/1852/972 A40 Vol.2 pp 433-4.

[58] Swainson memo to Mantell; note that one account apparently lumped together Te Atiawa/Taranaki and Ngati Toa reserves at least up to Waikanae MA-MT 1/1A/28 E8 pp 388-396; see 16/5/1867 Rent-collector Baker's accounts of Native Reserve rents MA 17/1 A34 pp 9-12.

Refusal to pay rents because of confused state of the Native Reserves Administration while Tangata Whenua seek Reserve Land for Kainga and Cultivations

Early in 1867, slowed in his duties by consumption, and rumoured to be given to "intemperate habits," Swainson was fired.[59] Upon Swainson's dismissal, Mantell stopped paying rent on his lease of the Newtown reserves. His actions were a gesture of protest, perhaps born out of frustration at the state of Native Reserves' administration. Heaphy later reported three reasons for Mantell's withholding: there was no completed lease; boundaries had never been pointed out, (and could not be, as the survey pegs in the area had gone missing); and finally, Mantell maintained that there was no person legally qualified to receive his rent. Indeed in the three year between Swainson and Heaphy, the Reserves were managed by the rent collectors, first Baker [60], then E.W. Puckey, and then T.E.Young - authorised only by circulars from the Native Ministers.[61]

In 1868 Henry Halse, the Native Department Under-Secretary, [62] reported that one of the reasons for Mantell withholding his rents for the Newtown reserve was "in consequence of Mohi Ngaponga's application to Mantell to give up his lease as the natives need the land for cultivation."[63] Ngaponga had begun his efforts to secure land for a settlement for his people. His need for a place to settle his people was occasioned by the return of Mohi

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[59] 15/5/1867 Swainson to Under-secretary Native Office & 13/5/1867,9/5/1867 Mantell Memorandum (with drafts), 20/4/1867 telegram Rolleston to Halse in A34 pp 13-21; also entire NS[1?]/66/982 file, found attached at the end of MA 17/1, A34.

[60] It appears that for at least two months Baker was employed to tidy up work that had been left unfinished after Swainson was fired see 13/5/67 Baker to Under-Secretary Native Office & 26/5/67 Swainson to Under-secretary Native Office, MA 7/1 A34 pp 7-12 & 14-15.

[61] 30/10/71 Heaphy to Native Minister MA 17/6 A35 pp 308-314 and pp 286-288; note that also in March-November, 1867 Ngauranga Maori were arrested and fined for pulling up survey pegs, see 26/5/1867 Baker to Under-secretary Native Office, MA 17/1 A34 pp 6-8.

[62] A.Ward, *A Show of Justice* Appendix p 316.

[63] 30/7/68 Halse to Puckey, Puckey to Mantell, Mantell to Puckey, MA 17/6 A35 pp 304-5.

Ngaponga's sister and his wife and children from Opitiki in 1867-68. Two years later in December 1870 when requesting the reserves from McLean he asked that:

> "the people of the Government should give me that land as a place for my children and my sister. They came from Opitiki and have been here three years..." [64]

Ngaponga's efforts may have been intended to link with Hemi Parae's pasturage of the east 11 acres and the 25 acres of cultivations at Kaipakapaka. [65]

Meanwhile on 30 July 1868 Rent collector Puckey wrote to Halse acknowledging that his duty is to collect Mantell's rents but finding that the rent had been withheld, requested that Halse commit to paper Mantell's reasons for non-payment of rents. In his reply of the same date, Halse stated that:

> "the rent due for the third year is withheld in consequence of Mohi Ngaponga's application to Mr Mantell to give up his lease as the natives need the land for cultivation."

Halse understood that Mantell,

> "would be willing to hand over his lease to the Government on receiving the amount of rent already paid (£50) and a discharge of any rent that may be due if the natives will undertake to fence and cultivate the reserve, it would be a great boon to obtain the lease and let them have the land."[66]

In September 1868, Rent collector Puckey and Under-Secretary G.S.Cooper's response to the suggestions contained in Halse's reply to Puckey was that it seemed "unjust to the others interested to give the possession of it to Mohi for his sole benefit". The Crown, then, construed Mohi Ngaponga's application to lease the reserve as being for his own benefit.

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[64] 30/7/1868 Puckey to Mantell, Mantell to Puckey, and 24/12/1870 Mohi Ngaponga to McLean, MA 17/6 A35 pp 292-3; cf Moturoa's request for land for Mohi and his wife Hera in January 1865, Report on Native Reserves in the Province of Wellington, AJHR F4 1871 A24 p45.

[65] See Halse note re: Hemi Parae. Ngaponga and Marangai, (n.d) directing Puckey to "take a letter to Manihera and Moturoa" 30/7/1868 Puckey to Mantell, MA 17/6 A35 p 307.

[66] 30/7/68 Halse to Puckey, MA 17/6 A35 pp 304-5.

Yet it would seen unlikely that a Rangatira such as Mohi Ngaponga in the late 1860s would have acted alone - claimants see his action in the tribal context. It appears that the land was for a *settlement*; in this same memo Puckey comments that "Mohi told me yesterday he wanted the lands to lease for his own benefit - today he says he wants to make a Maori Kainga there." As his later letter to Donald McLean shows those who were, initially anyway, to live in this Kainga were his whanau.[67]

Puckey the then conveyed his misgivings (endorsed in the margin by those of Cooper) to Native Minister J.C. Richmond, who, however, recommended an open meeting to gauge the assent of other Maori interested, and if sufficient, to draw up a lease. [68] Apparently before this could happen, Mohi Ngaponga's wife, a close relation of Wi Tako Ngatata's, fell ill. Mohi Ngaponga was already £82 in debt to the Native Department from having hosted the "old men liberated from New Castle" and therefore could not afford an appropriate tangi. So in December 1869, he wrote to ask for £30 from the Native Reserves Fund. Mantell supported the request and asked that the amount be a debit to Mantell's witheld-rent account.[69]

In 1870 Mohi Ngaponga renewed his request for a Kainga in Newtown outlining his increasingly desperate situation which was his primary motivation for continuing to seek a secure lease of the reserve at Newtown (by its nature set aside for Maori benefit).[70] In May 1871, Halse suggested to Bell that as Mohi Ngaponga could not pay Mantell's back rent, perhaps it could be written off.

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[67] 2/9/1868 Memorandum Puckey & 3/9/1868 Richmond reply MA 17/6 A35 p 302.

[68] 2/9/68 Rent Collector Puckey to Native Minister Richmond, 5/9/68 Commissioner Cooper to Native Minister Richmond, and 3/9/68 Native Minister Richmond to Rent Collector Puckey, MA 17/6 A35 pp 302-3.

[69] 23/12/69 Mantell to Gisborne & Fox (nd); and Cooper to Gisborne, MA 17/6 A35 p 297-300.

[70] 31/12/70 & 26/5/71 Mohi Ngaponga to Donald McLean, MA 17/6 A35 pp 292-3 & 289.

The next month, though, Judge Prendergast recommended to the Native Minister that Heaphy demand Mantell's rent upon threat of suit. [71] This done, Mantell agreed to pay his rent and Heaphy drew up a proper 15 year lease to effect the remainder of the initial lease (at the same terms). [72]

In 1871, Mohi Ngaponga's hopes for a kainga upon the Newtown reserves had died with him, and Mantell's lease on the land had re-issued. In 1872 Mantell paid up his rents we he had been refusing to pay because of the confused state of native reserve policy, and in July 1873 he assigned his lease of the west half of Newtown ridge to Dr. Alexander Johnston. Johnston apparently considered the parcel a "white elephant" on its own, so on 28 October, he asked Heaphy to lease him the east eighteen, including a right to a sixty year lease of at least two acres. Heaphy responded with an approval for the assignment from Mantell, and a public tender for the east eighteen acres.[73]

Johnston tendered on the 14th of November, and on the 18th Heaphy notified him that his tender for a regular 21 year lease of the Newtown east-eighteen had been accepted. (It was the highest tender).[74] The owners of Polhill Gully complained in 1880 that they had had no notice of Heaphy's advertisement, and had missed the opportunity to tender themselves.[75]

On 18 November, Johnston obtained the Newtown sections. He called at Heaphy's office with a group of Polhill Gully owners, proposing to lease eight acres there, including a purchase option on three (Wi Tako's own Crown granted section 19 and two

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[71] 1/6/1871 Prendergast to Heaphy, MA 17/6 A35

[72] 23/11/1871 Commissioner Heaphy to Native Minister McLean, MA 17/6 A35 p 277.

[73]Transfer see A36 p 169; "white elephant" 19/11/73 Johnston to Heaphy, A35 p 275; request A35 pp MA 17/6 A35 pp 259-61.

[74] 27/10/1873 Dr. Johnston to Heaphy, MA 17/6 A35 pp 262-276.

[75] Petition Le 1/1882/6, A38 p 1.

others). Heaphy objected that reserves "that were tenths" could not be sold. Evidently, Heaphy now construed the 6 May agreement as being an assent under the Native Reserves legislation - once formally acknowledged by the Governor, vesting the reserve in the Crown.[76]

However, on November 21, Henare Pumipi sent Heaphy "a letter to state that they had resumed control of 82 1/2 acres at Polhill Gully in order to let it to Dr. Johnston, and that they did not wish a newspaper advertisement respecting the letting."[77] Their lease to Johnston was signed five days later.[78] Their purpose accomplished, on 9 February 1874, the Polhill Gully Maori assentees rescinded their revocation, thereby restoring the 6 May "assent."[79]

Two years later, Johnston wrote to Heaphy reminding him of his initial plans to build, and requested a 60 year extension under the 1873 Native Reserves Act. Heaphy conceded the desirability of long-term building leases on urban reserves; Wellington's population had doubled now to around 8000, and Newtown was being subdivided and built upon. The 21-year terms limited the class of dwellings tenants would erect on the reserves.[80] He rejected Johnston's proposal, though, for while the 1873 Act had enabled long term leases (s 19), it also required the consent of a Board of (Maori) Commissioners to any such leases (s 7). No such Board having been constituted, Heaphy did not believe he could authorise such extensions[81] and Native Minister Donald McLean agreed.[82]

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[76] 18/11/1873 & 19/11/1873 Heaphy Minute, A36 pp 172-4.

[77] 21/11/1873 Heaphy Minute, A36 p 174.

[78] District Land Registry Deeds Volume 42/854, E8 p524.

[79] 9/2/1874 Heaphy Minute, A36 p 178.

[80] A. Mulgan pp 205, E7 p 248; A35 pp 245 and 253.

[81] 15/11/1875 Heaphy to Under-secretary Native Office, 4/11/1875 Dr. Johnston to Heaphy, MA 17/6 A35 pp 259-60. Note that, at least in Greymouth, Commissioner MacKay failed to comply with the 1873 Reserve Act specifically because "if this Act were brought into operation and a Board of Natives constituted, [MacKay's]

Johnston continued to ask for the extension to the leases but the Minister and Heaphy remained wary about 60-year leases of the Newtown reserves as no such long-term leases had yet been approved on any reserves in New Zealand.[83] Instead, a new 21 year lease was issued privately for Johnston in January 1878, in effect granting a more modest three-year extension of his existing lease, perhaps to hold out for new legislation.[84]

In March 1879, the Native Office arranged a compromise with Dr. Johnston:

> "An extension of the lease for 42 years to be offered by public auction - the present value of [Johnston's] lease to be ascertained by some competent person and made a premium to be paid by the purchaser of the extension. If [Johnston] buys, of course there will be no premium to pay. If other persons buy [the lease], they will pay the present lessees the amount of such premium - who will thereupon surrender their lease."

The premium was set at £3,721. The 6 May assentees observed that, by Johnston setting off this premium against his rent, they would be precluded from deriving any profit from the lands.[85] Heaphy recommended to the Native Department that he seek the Governor's assent under the 1856 Act before the auction, but then proceeded to advertise on only the Cabinet's approval.[86]

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promises [to settlers, that their reserves leases would be renewed] could not be fulfilled, inasmuch as the Natives directly interested in the land - who numbered about twenty - were unanimous in their declaration that at the termination of the existing leases no renewal would be granted." In this regard, the failure of the 1873 Act was tied directly to the introduction of perpetual renewable leases for Native Reserves. See Parliamentary Debates 1876, A20 pp 56-58, cited in D1 para 3.34 pp 18-19.

[82] 15/11/1875 Heaphy to Under-secretary Native Office, MA 17/6 A35 p 253.

[83] "wary" see 29/9/1878 Heaphy Memorandum, MA 17/6 A35 p 244.

[84] 27/5/1879 Heaphy Memorandum, MA 17/6 A35 p 187.

[85] 16/3/1879 John Shanan to Heaphy & 26/4/1879 Heaphy to Under-secretary Native Office, MA 17/6 A35 pp 225-226; premium p 219; precluded see Native Affairs Committee Minute Le 1/1882/6 A38 p 1.

[86] A35 pp 216 and 182.

Having apparently having received "remonstrances made on behalf of [Te Aro]", the Executive Council, under Grey, overrode the Cabinet's approval, and the auction was abandoned. While the Government changed, debate ensued over whether Commissioners were to act under Ministerial direction, or as independent agents of the Imperial Governor in cooperation with the Ministers. [87] Meanwhile, Heaphy challenged the premium & valuation and arrived at a new figure of about £1539. [88]

Johnston eventually agreed to the new valuation, an auction was proposed for 1 October 1880. Heaphy was to offer the reserve in two lots (11 and 18 acres), for 42-year leases (to be built upon and improvements left to the reserve at the end of the term), with no premium (but instead a rent rebate equal to the value of Johnston's remaining interests if he won the tender).[89]

Before the auction, though, Wi Tako Ngatata, Waaka Houtipu (Kaikorero) and four other May 1873 assentees, and Paora Teretiu and Wi Tamati te Wera wrote to Native Minister Bryce: "We the people of Te Aro are quite satisfied as to those lands being ours. Friend Mr. Bryce, we will never lose sight of those reserves, whatever Government may be in office."[90]

Omitting reference to his own allocations of Kaipakapaka and Wiremutaone, [now Native Land Court Judge] Heaphy reported from Wanganui that:

> "the lands referred to are general reserves that have never, like McCleverty's awards, been allocated to any particular native or family...The income derivable

[87] 23/7/1879 Heaphy Memorandum, MA 17/6 A35 pp 160-183; remonstrances see Le 1/1885/6, A38 p 1 and Papers p 4.

[88] 23/2/1880 Heaphy to Lewis, MA 17/6 A35 p 125.

[89] 10/8/1880 Telegram Heaphy to Dr. Johnston, MA 17/6 A35 pp 50 and 72-3.

[90] 13/8/1880 Wi Tako Ngatata and others to Native Minister Bryce, MA 17/6 A35 p 62-64.

from them is available for general purposes connected with the administration of Native Reserves, Hostelries, etc, for passages for natives, and their occasional pecuniary assistance."

He recommended giving them fifty pounds for the winter, "as they have several older persons to support."[91]

Te Aro re-iterated and clarified their position on 13 August. They wrote to Bryce,

> "We disapprove of the lease of our land being renewed or sold by auction. We wish to retain it as a permanent place of residence for ourselves."[92]

One of the protesters, Ahanihi Himiona (Agnes Simeon), resident at Te Aro Pa with her Pakeha husband, had also recently protested against Heaphy's approval of the sale of non-resident Waaka Houtipu's Pa lot.[93]

By this time, Johnston was supposed to have surrendered his old leases to enable the auction of new leases. He had already abandoned his planned Newtown estate, and built in Wadestown around 1876-77 instead. Now Dr Johnston was holding the leases back. No doubt retaliating against Te Aro's growing opposition to the deal, Johnston withheld his rent on Polhill Gully - for which "Maori annoying."[94] The next month, though, 4 October 1880, Johnston surrendered the leases. On the 22 October, Heaphy had the surrenders registered.[95]

[91] 9/8/1880 Heaphy to Lewis, A35 p 59.

[92] 13/8/1880 Wi Tako Ngatata & others to Native Minister Bryce, MA 17/6 A35 p 55-57.

[93] Misc files NO 78/3743, E8 p516.

[94] Telegram William Rattray to Heaphy, MA 17/6 A35 p 69.

[95] 22/10/1880 Heaphy to Under-secretary Native Office, 4/10/1880 Dr. Johnston to Native Minister MA 17/6 A35 pp 33-38.

The auction was set for 6 December 1880, with Johnston the planned winner, able to bid a rent which would, upon acceptance, be reduced by the rebated value of his surrendered lease. On the 30 November, though, Te Aro informed Native Minister Bryce of the approaching auction, and protested:

> "we have not asked him to do this nor have any Maori Commissioners [under the 1873 Act] agreed to his doing so, and we feel sure that his object is to acquire the reserves for the Crown. Be it known now that we intend to manage our own reserves and we will either bring the question before Parliament or the Supreme Court as our solicitor advises. We now therefore apply to you to stop the sale of those reserves [leases] until it is ascertained whether the land is ours or the property of the Crown."[96]

The signatories were both prominent and mostly assentees under the 6 May 1873 agreement, including the Kaikorero:

te Teira Whatakore
Ropana Te Owhiro
Ihikaira te Wai
Wi Tako Ngatata
W. Tamati te Wera
Taare Tohua (obscure)
Paora Teretiu
Ihaka Te Rou
Te Waaka Houtipu

Heaphy responded again with his unimplemented 1879 Royal Commission recommendation that heads of families receive equal shares of rents. Moreover, he now stressed "Waaka Houtipu and the other natives have at present no equitable right in the Reserves beyond what any native in the Wellington District may claim to have." He argued to their solicitor, Seivwright, that the reserve was "vested in the Governor."[97]

Johnston now trying to cash out altogether, the auction was re-scheduled for 29 December 1880. At the start of the auction, though, Mr. Seivwright read Te Aro's protest. The auction proceeded, but the upset prices for the Newtown reserves were not

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[96] 30/11/1880 Te Teira Te Whetakore and others to Native Minister Bryce, MA 17/6 A35 pp 24-26.

[97] 3/12/1880 Heaphy to Lewis, MA 17/6 A35 pp 27-29; "vested" see p 17.

bid. Seivwright forwarded the protest to the Native Department to be laid before the Executive Council.[98]

The same day, Ahanihi Himiona and several of the other protesters moved onto the reserves to take possession. Heaphy then set to work disclaiming the registered surrenders, so as to reinstate Johnston's leases (and remove doubt in planned trespass proceedings).[99]

The petition was not considered by the Select Committee on Native Affairs until seventeen months later, in July 1882. In the interim, Te Atiawa / Taranaki resolutely retained occupancy of the land. In September 1881, Dr. Johnston filed a complaint of trespass, and criminal proceedings began in the Supreme Court.

The proceedings went slowly - possibly due to the ambiguities surrounding the surrenders, the lack of any Land Court determination of ownership to Te Atiawa/Taranaki's reserves, the administrative limbo created by the 1873 Act, and by the lack of formal "assent" given to the Governor in Council for these reserves to be administered under the 1856 and 1862 Reserve Acts.

As it was still under adjudication when the Select Committee met, the Committee decided not to act. We know from the Court Register of Civil Actions that the Court found against the Maori protesters, and they were evicted.[100] Johnston got his lease, without extension, but under the 1882 legislation, the lease was assigned to the Queen and apparently leased back to Johnston.

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[98] 14/12/1880 Heaphy Memorandum & Native Minister Bryce reply & 30/12/1880 Executive Council to Under-secretary Native Office, MA 17/6A35 pp 16 and 20.

[99] A35 pp 3-11; disclaiming see Le 1/1882/6, A38 Papers pp 11-12.

[100] The Civil Action files from this period have been destroyed, though, and no newspaper accounts have been located.

The 1852 Lease Of Town Acres 659 & 660

The case of the leasing of town acres 659 & 660 is a case study showing that unlike the smooth process of inquiry and recommendation by the Board of Management and approval by the Governor, envisaged by Eyre in his 1848 Memoranda, many people became involved in decisions concerning the administration of the reserve. Their conflicting opinions then created rather than resolved uncertainty over the rights to and title of the reserve land in question.

Here the person who Maori owners proposed leasing the reserve to and the actual occupier under a pre-1847 ad hoc arrangement were different people. When the Maori owner proposed a formal lease the Board of Management and Government officials seemed incapable of sorting out the confusion.

On 7 January 1852, Te Kepa Ngapapa wrote to Kemp saying that: "I desire to rent a portion of our allotment [to] W.Couper for twenty years...the decision rests with you whether I shall do so or not."[101] On 10 January 1852 William Couper himself wrote to Kemp:

> "It is my intention to have a portion of an acre of land, part of the Native Reserve, adjoining the Caledonian Hotel and belonging to the Maori Apapa [sic], may I request the sanction of His Excellency the Governor in Chief for doing it". [102]

Mr Kemp wrote to Governor Grey, enclosing a note explaining that because the land had not been in Ngapapa's physical possession after being assigned in the 1847 arrangement (ie. he was not the occupier), he [Kemp] should check with at least two other rangatira before approving the lease.[103] Grey approved, as long as Kemp also considered the lease term and rent were fair.[104]

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[101] Te Kepa Ngapapa to Colonial Secretary Kemp 7/1/1852, NM8/1852/42 A40 Vol.2 pp 413-414.
[102] William Couper to Colonial Secretary Kemp 9/1/1852, NM8/1852/42 A40 Vol.2 p 411.
[103] 10/1/1852 Kemp reply, NM8/1852/42 A40 Vol.2 p 412.
[104] ibid.

However a few months later, on 25 June 1852, Hugh MacKenzie, the current tenant (and apparent occupant) of section 659 protested against Ngapapa's deal. He said that the Maori who long before had leased the section to him (presumably someone other than Ngapapa) still "wished me to continue". This small problem sent the Board of Management and the Native Secretary into a confused spin, resulting in a flurry of memos some of which have dates obliterated, so one cannot be certain of the order of communication. Nevertheless they are revealing.

The Board of Management recommended that they "deal with the section 659 as may be most beneficial to the Trust Fund. Governor Grey concurred. Dommett, in directing Government Surveyor Fitzgerald to mark out the boundaries between acres 659 & 660 asserted that the "natives have nothing to do with 659". Yet McCleverty's deed assigned Town acres 659 & 660 to tangata whenua, Kemp recalled that both acres had been given, one by Spain and one by Richmond "as intended by the Governor" and McCleverty recalled land on one side of the stream assigned to one tribe and the land on the other side of the stream assigned to another. Grey himself acknowledges ongoing Maori interests in the sections in his instructions to Native Secretary Kemp, "to inform the natives that any agreement which they may make for the leasing of their land must be subject to the approval of the Government."

The Lease of Section 514

It was proposed that the Government assume the lease of section 514 from the Board of Management of Native Reserves to "arrange [the premise] into court house, public offices, Legislative Council Chamber, Res. Magistrate's Court, etc." This Barrett's Hotel lease was one of the reserves' success stories, dating from April 1842, and bringing in £54.5.0.[105] Between May and October 1849, the Government Offices were moved into the hotel, a lease arranged, and there they remained for many years.[106] The advantageous lease

[105] A 26 p D3
[106] Eyre/Grey 9/6/49 in GBPP VII p 85.

agreement on section 514 was lost in 1851, when the section was included in the endowment of the Hospital, and the lease transferred to that institution.[107]

[107] Transfer: A26 p D22; A39 29/8/73: Heaphy "Remarks" ND 73/5398 p 211.

Appropriations

Tangata Whenua view the appropriation of some 77 acres of urban native reserves as a breach of the Treaty of Waitangi. We have shown above that the native reserves could, after 1847, be divided into two classes. We have also shown the confused state of affairs regarding the management of the two classes of native reserves. While there is evidence to show that Te Atiawa acquiesced to Crown *management* of unassigned reserves, claimants have not found evidence to show that Te Atiawa ever agreed to *give up* these reserves to the Crown. Further, the main reason given by the Crown as to justifications for appropriating the choicest native reserves: that the Crown was generous to Te Atiawa in the awarding of the McCleverty reserves has been shown - in the main report in this submission to be a myth. Maori were awarded nothing in the award by McCleverty that they did not already possess.

About 77 acres of urban land was removed from reserve in the first few years after their final "creation" as reserves. This represented about a quarter of the 340a 2r 22p of town lands reserved or granted as gifts for Te Atiawa/Taranaki by 1850 - nearly all the remaining reserves close to the harbour and developing city centre.

At the beginning of the 1850s Crown officials did not regard the urban Native Reserves as being available for Maori use. The arrangements they made, initially for Maori benefit, failed to preserve the Maori proprietary interest in those lands, and ended in over 77 ares of urban Reserve being alienated for public purposes.

Reserve lands taken in this period include Town Acres:

89 & 90 - Mt Cook Barracks (Ordnance Department)
270-272 - Wellington College Endowment
278-279 - " "
539 - Wellington Hospital Endowment
545 - " "
574 - " "

Pt 580 - " "
Pt 584 - " "
Pt 594 - " "
591-592 - " "
636 _ " "
601-608 - mixed Hospital and College Endowment

Pt 514 - Anglican School

Pt 542 - Anglican Church

These sections total 24a 3r 18.5p.[108]

In the 1850s, most of the takings were confirmed with "very informal" and possibly invalid Crown grants:

Hospital Endowment	5/11/51 total	12a 0r 1p
Grammar School	7/10/53 total	10a 1r 32p
Cathedral Site	20/7/53 part sec. 542	
Anglican School	13/8/53 part sec. 514 [109]	

All of these sections having been specifically allocated and labelled as Native Reserves (in Col. McCleverty's own handwriting) at this time, on a plan accompanying the Port Nicholson Crown Grant, which was issued in January 1848, gave a clear message to Te Atiawa/Taranaki that these were indeed reserved for their benefit. Believing therefore that they were to be held in trust for their benefit why should they feel any need to reassert their interest in these Reserves?

Significantly, none of the otherwise thorough accounts of Native Reserve takings - the judgement in Regina v Fitzherbert, Heaphy's Reports and Memoranda, Mackay's history, nor the office of the Public Trustee/Roland Jellicoe's account - claims that Te

[108] Doc A39 p 175 & draft at p 180 19/3/74: Heaphy to Native Dept. Undersecretary. (Schedule A of lands to value for compensation at p 183.

[109] "Validity": Doc A39 p 213 Frederick Whitaker memo, 21/3/64; also Litchfield unpublished. paper "Wellington Reserved Tenths" Feb. 1988, Doc E8 pp 332-340; also AJHR 1870 A3 p iii, Doc E 8 p 341; Doc A39 pp 246-47,20/8/73: Heaphy valuation memo; the acreages given by trustees in the 1869 Royal Comm. are Hospital 12a 0r 11.5p and College 10a 3r 17p AJHR 1870 A3 pp 17-18; Cathedral 17p and school 38p; ibid pp 6-7.

Atiawa/Taranaki consented to them. Heaphy instead noted that he could find no clear indication of Maori opinion.[110] Likewise, claimant researchers have not found any indication of the Crown seeking or inviting Maori opinion. It must be argued that the alienations themselves proceeded in a cloudy, piecemeal fashion, and so occasioned neither questions of consent nor opportunity for dissent at the time they occurred.

Justifications for Appropriating Land

Lt. Governor Eyre's explicit policy of taking reserves for public purposes, which is stated fully in his memorandum of 23 June 1848.[111] Eyre concludes that:

> "it is essential that the Government should retain in their own hands all control over the reserves, because circumstances have made it desirable that in some instances total alienation of the lands should be sanctioned, as for ordinary purposes, or to similar indispensable purposes, or to provide sites for hospitals, for churches, for public offices, or for other similar indispensable objects of general and public utility, the Government having no land left them in the Province of New Munster available for such important and available purposes."

Eyre justified taking reserves for public purposes on grounds that the Government had:

> 1) "given up to [Maori] 100 acres reserved as a domain,"
> 2) Purchased lands for them,
> 3) Brought out leases to give vacant possession to natives,
> 4) Spent large sums "to advance the welfare and interests of the Native race generally."
>
> "Already many instances have unavoidably occurred in which the original intention of the reserves has necessarily been departed from":
>
> 1) Some were given up to the Maori themselves,
> 2) Some were exchanged for other lands,
> 3) Some were put to other [ie military] purposes "unavoidable from the circumstances of the Colony and the anomalous position of a Government in a new Colony without an acre of land at its disposal for the most important public purposes".

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[110] A39 p 202 Heaphy "Remarks" 29/8/73.
[111] Jellicoe A24 pp 303-4, citing Eyre Memo, Mackay's Compendium, Vol 2 p 278.

As sincere as these justifications *may* have been, they need to be examined further. The 100 acre domain, and the lands and leases purchased (for Ngati Tama and for Te Matehou), amounted to little more than £1000 - perhaps the value of two or three Town Acres in 1848. More to the point, though, Eyre was clearly counting the Crown costs for these sections twice: the Crown had already counted them in the 1846-1847 exchanges, "as given up" in payment to Ngati Tama's and Waiwhetu's ngakinga on sections cross-claimed by settlers. Were Maori now to pay the costs for purchasing their traditional cultivations for them?

Few, if any, Crown land was actually "exchanged" in 1847. The bulk of the unsurveyed lands which Maori received was either already promised them in the 1844 agreement, or was occupied land, which (under the Treaty and even the 1846 Constitution) the Crown had no claim to anyway. Likewise, The Crown had not "given up" any Company-selected reserves to Maori in 1847, as these had been excluded from extinguishment in 1844. They did not represent a cost to the Crown, because the Crown had never owned them.

Very clearly the Crown's whole rational for granting away reserves for public purposes, then comes down to the simply fact that the Crown had no other lands available (other than by purchase) for public purposes. And, this of course, was no justification at all.

By October 1848, Colonial Secretary Dommett sent to the various Boards of Management of Native Reserves a clear set of guidelines and procedures for letting or selling native reserves. He reported frequent requests to let or sell reserves. The Crown, it had been decided, would authorise sales upon certain conditions:

1) Maori didn't need the land,
2) Government approved the arrangements or terms,
3) all money was paid to Government for reinvesting in land,
4) short term leases only, with good security for arrears,
5) Maori may receive rents themselves.[112]

[112]Colonial Sec. Dommett's memo to Boards of Management, 6/10/48 A26 p D 14.

It was these guidelines and justifications for alienating reserves which were consulted in the 1870s when the Crown finally attempted to calculate the "fair and reasonable rate of purchase-money" for the reserves taken for barracks and endowments. Eyre's justifications were to become extremely influential.

Military Seizure

About one third of the reserve lands lost - and most importantly, the *first* third - were initially taken for military purposes in times of near-war. Perhaps the greatest irony is that, as it was put in retrospect by Dommett in 1865:

> "Nothing...could be conceived more thoroughly and even poetically just than that the natives should be made to contribute some slight portion towards the maintenance of those troops whose presence was necessitated by their turbulence." [113]

As early as 1842 the Crown's policy of locating military installations alongside Maori occupations was proclaimed on maps. The Surveyor-General, Felton Mathew's map of Wellington of that year showed three "watch-house" sites chosen by Lieut. Governor Hobson - one inside Pipitea Pa, one adjacent to Te Aro pa, and one on the Newtown Ridge.[114]

The first wave of takings was prompted by the Wairau incident in June 1843, where 20 Pakeha were killed. In the mood of near-panic which prevailed, Wellington settlers built the first Thorndon redoubt immediately adjacent to Pipitea pa.

> "It stood very close to the cliff above Pipitea [pa], between the present steps at the foot of Pipitea St [ie, Moore St.] and the English Church of St.Paul's, but much

[113]A 34 p 59 Dommett to Mantell 27/1/65, emphasis his; I would stress that Te Atiawa/Taranaki were not "turbulent" in these wars, but actually fought alongside the Crown's forces. Note, by 1865, when Dommett wrote, the principle of taking land "in exchange" for the burden of policing Maori territory had been enshrined in the Settlements Act 1863 and the outlying Police Districts Act 1865.)

[114] GBPP/NZ Vol.3 (583) pp 183-187 & map, E 8 pp 371-379

nearer Pipitea St. than the church. Just below it on the beach front, now Thorndon Quay, was the police station."[115]

At the same time they, "formed a working party, cut a track to the flat top of the hill [ie, Clay Point, roughly now Plimmer Steps], and dragged up three of the NZ Company's guns - ship's howitzers (18 pounders) in wooden carriages." Together with the nine-foot trenches surrounding it, the work was named "Waterloo Redoubt".[116]

In 1844 the Government proposed the Thorndon Barracks for the Raurimu cultivation area.[117] The proposal was soon approved and completed. When approving the site of the barracks on the Raurimu cultivation reserve, Governor FitzRoy informed the military that "land better suited to the natives and which they prefer will be set apart for their exclusive use in exchange for the[se] reserves."[118]

The next wave of fortifications followed in the wake of the 1845-46 struggles. In April, 1845, Thorndon Fort was erected on Town Acres 597, and a fort at Te Aro "immediately to the West of the palisaded Te Aro pa"[119]. By April 1845, there were three detachments of regulars posted at Thorndon, Te Aro & the Hutt - about fifty soldiers at each. They drilled regularly with about 200 Wellington militia authorised under FitzRoy's militia Ordinance. By March, 1846 every day a guard of twelve militia mounted at Thorndon Fort, and every morning between 5.00 and 7.00 am, Companies of five men went out from Forts at Thorndon, Te Aro and Clay Point, patrolling "in the rear of the town".[120] Of course, they were watching for suspicious movements by Maori.

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[115] Cowan, J NZ Wars Etc. Vol 1: 1845-64, pp 92-3, E 8 p 380
[116] Cowan p 93, A43 p 380; L Ward p 132, A42 p 216; and Mulgan p 125, E 7 p 237
[117] 1844 prop. Barracks sketch IA(cs) 1/26. 1844/645: tracing with detail of stream of Acres 591,592,601,602,603-608, attached to letter: 21 Feb. 1844 from Divisional Secretary J.W.Hamilton to Lieut. Bennett, Commanding Royal Engineers at Well. E 8 pp 381-85; Thorndon cultivations: see Ward, "Early Wellington" p 308, Doc A42 p220, citing NZ Journal 10/3/1849).

[118] IA(cs) 1/26 1844/645 E 8 p 383
[119] L Ward *Early Wellington* E7 p233-4
[120] ibid. p132

The Hospital Endowment

Like the military installations, the temporary positioning of the hospital quickly became permanent - it was even rebuilt in 1851. On January 29 1851 Governor Grey wrote asking Earl Grey's approval to endow hospitals and schools, but failed to mention that some endowments were to come out of Native Reserves. Earl Grey approved, and on November 11 the Governor granted the hospital site along with about 11 acres of reserves to the trustees of the hospital.

The original endowment was made to appear to be more attractive: in a report made shortly after it had opened, Governor Grey had characterised the Colonial Hospital as one "in which the Maoris and Europeans were to be alike received and treated."[121] After the endowment grant though - according to one of the original Trustees, William Fitzherbert -Maori and European were not received and treated alike:

> "In pursuance of [their] powers [the Trustees]...let portions of the land...The money [was] devoted to the repairs of the hospital and in payments to the Provincial Government towards its maintenance in respect of Maori patients".[122]

So although their land had been taken, at least their rental was to pay for Maori medical care. Remarkably, so was the rental of all the *other* reserves in the Crown's possession. In Wellington, by 1854, the Board of Management even requested to Colonial Secretary Dommett that Provincial Superintendent Featherston appoint new Hospital Trustees with expanded powers so that they could "act as a Board of Management for the unappropriated reserves, thus relieving the General Government of some expense." They proposed that "as those [rents] derivable for the hospital endowment are not at present sufficient to cover the expenses of the Native patients, the former rents [on the unappropriated reserves] should also be appropriated."[123] Their proposal seems to have succeeded as, later still, the Provincial Surgeon in charge of the Hospital, Dr Alexander Johnston, complained that the

[121] Grey/Earl Grey 8/11/47 A39 p 218.
[122]Evid W. Fitzherbert to Comm Mr Dommett, 15/11/69 AJHR A3 pp 17 & 18, E8 pp 354-55
[123]A26 p D21

"revenue arising from the Native Reserves is scarcely sufficient for, and has always been expended upon landlord's repairs."[124]

In effect, Te Atiawa / Taranaki's loss did not end with the initial hospital endowment; maintenance of that endowment and subsidisation of the "free" medical services for Maori consumed the entire monetary benefits from their remaining reserves as well. This "free" medical service for Maori was intended, in great measure, to offset the appropriation of their reserve. However, the asset being alienated, the benefit to Maori was only relatively short term, by the 1860s a dramatic decline in Maori patient numbers was evident.

[124] AJHR 1870 A3 p 22, E 8 p 359.

Specific Appropriations of Urban Reserves:

Cultivation Reserve At The Top Of Waipiro Stream:

In October 1852, in a climate of pressure to restore the Town Belt, Governor Grey purchased Kumutoto's 52 and 3/4 acre cultivation Reserve at the top of Waipiro Stream (now the Botanical Gardens) for £160. Sixteen days later he granted it to the Methodist Mission to endow a native school. The claimants take the view that Wi Tako may have agreed to the sale in anticipation of having a school nearby, and perhaps *only* agreed to the sale because he was led to believe a school would be built there. However, the school was never built and the church sold the still-vacant land to the Provincial Government thirteen years later for £3500, and used the proceeds to fund a school in Foxton and to lend on church buildings around the region. [125]

The Urban Reserves Of Kumutoto:

The urban lands of Kumutoto were obtained by the Crown for similar purposes as the other unassigned reserves taken for public purposes. Kumutoto, however, managed to receive purchase money and rents. In August 1846, Lieut. Governor Grey's special Armed Police assumed occupancy of a house at Kumutoto's Town Acre 487 as barracks, promising rents to Wi Tako. In late 1847, Lieutenant Governor Eyre obtained initial approval for the arrangement, and in mid-1848, the Police paid back-rents and finalised a three-year lease.

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[125] (A10(a) Doc 3 pp 28-9; "climate" see 29/2/48 dispatch of the Secretary of the NZ Company to Earl Grey in "Adjustment of Land Questions of the NZCo, 1848" Stewart & Murray Old Bailey: London. 1848, pp 67-8, Doc E8 p 366a; and "Colonial Botanic Garden, Well." Alexander Turnbull Library Cartographic Coll. 832.4799gbbl/A/1875/Acc 2751 in E8 p 366b; A26 p 19; on resale see "History of Well. Methodist Charitable & Education. Endowments Trust",pp 11-13, in Doc E8 pp 367-370

By exertions of Wi Tako Ngatata, the then unique situation arose where he obtained the Crown grant for the section (in 1853) and continued receiving rents on it for many years.[126]

Town Sections 89 and 90

Alongside its claims of military necessity and Maori health, the Crown stated that the initial occupations of some reserves would only be temporary, while stating that other seized reserves would be leased, and still others exchanged for other lands. For instance the 1846 positioning of military barracks on Te Aro's sections 89 & 90 - and later the hospital and school - were initially planned to be only temporary, at least in the sense that "it was the intention of the Government to pay compensation for them and restore the value if not the actual sections."[127]

Te Aro Reserves 89 & 90 differ slightly from the others in that they were not Crown granted to the Ordinance Department until 1874, subsequent to payment of £500 to Wi Tako and 34 others (mostly Te Aro). While these acres were not endowment lands, they were taken together with them, for the same purposes, in the same time period and under some of the same authorities.

Town Acres 89 & 90 were first approved in December 1846 - just as McCleverty was beginning his resettlement work - by Superintendent Richmond, upon Lt Col. McCleverty's recommendation, "as eligible sites for the [powder magazine and temporary wooden barracks for a hundred men]." By "temporary" was meant a "defensible post" designed to last from ten to fifteen years. [128] However, by 1848, the Major General Commanding in

[126]Police Barracks: Eyre/Grimstone/Crown Solicitor 5/11/47, NM 8/47/870 in A40 pp 145-147, and Eyre/Durie/Dommett-May-June 1848 NM 8/48/571 A40 pp 185-187: Grant & after: WAI 145 A26 pp D18 & 22, and AJHR 1865 E7 in Doc E8 pp 364-366.
[127] Hospital to Heaphy "Remarks" 29/8/73, in A39 p 203
[128]Collinson, Royal Engineers of Superintendent 4/12/46 A34 pp 82-;also NM 8/46/569 with Richmond's approval minuted on reverse Doc E8 p 387a; and A39 pp 234-5 1/6/50 Lt. Col. Bolton, Commander Royal Engineers to Inspector General of Fortifications.

New Zealand had ordered a permanent military post of 500 soldiers in Wellington. The Ordnance requested Crown grants from Lieut-Gov. Eyre for sections 89 & 90, as well as for the Thorndon barracks at Raurimu / Haukawakawa (Town Acres 591, 592, 601-604).[129]

Lt Governor Eyre forwarded the request to the Governor-in-Council, who decided it was "essential to the safety of the Town and prosperity of the province that Wellington should be made the principal Military depot." William Fitzherbert later testified to a Royal commission that the trustees of Wellington College did not protest against the Ordnance's occupation of the Raurimu / Haukawakawa lands because "strong local influences were brought to bear not to press this point, lest it should be taken hold of as a reason for not sending troops here."[130]

In the end, the Executive Council promised a grant of section 89 & 90 subject to the Ordnance Department submitting plans and other particulars. They declined to grant the lands on Thorndon Flat, but promised to "allow the Ordnance to occupy them until they were required for any other purpose by the Government" - probably alluding to the conflicting school plans -and undertook to compensate the Ordnance for any improvements. The Ordnance was simply to purchase outright other non-reserve sections on the other side of the Te Aro barracks and at the Colonial Gaol.[131]

The Ordnance Department prepared the plans of section 89 & 90 the month after Eyre's Memo, and forwarded them to the Colonial Secretary in the month of Col. Wakefield's death, September 1848.[132] No grant ensued immediately, and there then occurred much discussion in the region about the status of lands and grants generally. When the proposal was finally submitted to Attorney General Daniel Wakefield on 6 July 1850, Eyre and the Ordnance Department were told by Attorney General Wakefield that in his opinion, the

[129]Royal Engineer Capt Y.B Colinson to Col. Sec. of Southern Provinces 22/2/48 A34 p 62.
[130]Evid 1869 Religious & Educ.Endowments Comm. AJHR 1870 A3 p 18, E 8 p 355
[131]Eyre/Collinson 25/2/48 pp 35-7 & 66-8; and 25/7/48, A34 pp 64-65
[132] MA 17/1, A34 pp 70-75

reserved lands "cannot be granted without the consent of the natives beneficially interested in them."[133]

As an interim measure, Governor Grey directed that a lease be offered to the Ordnance Department "at a nominal or peppercorn rental" on terms similar to the Thorndon arrangement, ie. "for such time as they shall be required for any Ordnance purposes."[134] He later recalled that he intended the Ordnance to "occupy these reserves for a time, the Government then resuming them for Native owners."[135]

The Executive Council reasoned that:

> "the question of the mode [by] which the interests of the native population should be protected from any loss they might sustain from this arrangement [was to be] left for the future consideration of the Government when a return has been made of the sums already advanced and expended by Great Britain for the benefit of the Natives in the erection of Hospitals, the purchase of reserves for them, etc etc [and] has been laid before the Executive Council"[136]

The validity of this grant of sections 89 and 90 which were later given to the Hospital and College grant is questioned in 1864. St. Hill resigned as a trustee and his resignation was forwarded to the Secretary of Crown Lands.[137] Attorney General Whitaker was then asked on the procedure for replacing St.Hill, and the validity of the Wellington Hospital and College grant was raised. Whitaker, in his reply of 21 March, gave his legal opinion that this grant to the Hospital and College was "very informal and I think invalid". It is then quite clear that no Trust has ever been established, and Whitaker recommended "placing the Trust upon some proper footing" by statute and stated that appointing a new Trustee, therefore, should "be left as it is, as no appointment would have any real validity". [138]

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[133] Eyre/Wakefield and Wakefield/Eyre 6/6/50, A34 pp 91,92 & ff
[134] Dommett to Ordnance 16/1/51, A34 pp 137-8.
[135] Rolleston Memo 12/2/68, A34 p 28
[136] Excerpt from Minute of Executive Council 24/2/48, A34 pp 105-107.
[137] March 1864 Henry St.Hill to Colonial Secretary, 1A1/1872/1571 p 116.

[138] ibid.

In October 1863, Swainson and Mantell began inquiring by what authority Town Acres 89 & 90 were occupied by the War Department. All they were able to discover was that they had been initially given by Governor Grey.[139] In the House of Representatives on December 3 Mantell moved for papers explaining the situation.[140] Colonial Secretary William Fox replied in November 1863 and suggested to Governor Grey that the War Department be allowed to continue their occupancy so long as required, paying "the Native Trust a reasonable rent." Not content with Fox's proposal Mantell wrote to Attorney General Sewell requesting an opinion. Dommett, who Sewell consulted, merely suggested an exchange and Sewell himself acknowledged that the Government was in a bind, and hoped "the Native Minister will suggest some solution".[141]

Mantell then put two options before cabinet for discussion: the Government could either return the land - "a course which might immediately be adopted by permitting the Commissioner of Native Reserves to bring an action in the Supreme Court" - or else buy the sections, for which "the minimum price could not be fixed at less than £1000. Mantell's suggestions were minuted, "to be considered by the Executive Council". But the matter seems to have lain there until 1867.[142]

Swainson's 1867 report to Parliament successfully resurrected the debate over sections 89 & 90. Swainson mentions the lack of authority for the military's occupation of these reserves, and remarks to the Legislative Council that the owners had "received no compensation or payment for the occupation of these sections during the past eighteen years."[143]

Two months later, Under-Secretary Rolleston asked Stafford, "Should not His Excellency be requested to state what was the intention as to how long the reserves were to be held?"[144]

[139] MA 17/1 A34 pp 38-54
[140] MA 17/1 A34 p 58 & 61
[141] MA 17/1 A34 pp 43 & 59
[142] MA 17/1 A34 p 55 Mantell Cabinet Memo 22/3/65
[143] A 25 p 6
[144] Rolleston/Stafford 30/10/67; Stafford/Rolleston 30/10/67 in MA 17/1 A34 p 103.

Stafford asked, and Governor Grey replied, "It is I think quite clear that I had neither the power nor the intention to do more than occupy these reserves for a time, the Government resuming them for the native owners paying for any buildings upon them. Clearly after such a length of time they should be given up."[145] On the strength of this reply, Native Minister Richmond requested the Governor to direct the Officer Commanding the Troops to give up the reserves 89 & 90 in three months from that date.[146]

Governor Grey so directed. The Commander of Forces in New Zealand, Col. R. S Beatson, replied acknowledging the Governor's "request", but forwarded instead copies of the 1848 correspondence between Collinson & Dommett, assuring a Crown grant would be made "on faith of that unconditional promise, several thousand pounds have been expended by the Imperial Government" on buildings on section 90. He demanded full compensation for the War Department, and hoped that "under those circumstances, His Excellency may be pleased to reconsider the request alluded to."[147]

Under-Secretary Rolleston outlined a rebuttal of the War Department's "promise" argument; that Dommett's wording could equally be interepted as "meaning merely that the Ordnance would be put in possession of the sections". He reiterated Attorney General Wakefield's legal opinion that the Crown had not authority to make such a grant without explicit consent. But especially he stressed the benefits of returning the lands:

> "The alienation of their reserves in Wellington without their consent and in contravention of engagements expressed and implied is a constant source of grievance to the natives and the cause of much of the discontent and disloyalty which prevails.
>
> I submit that whatever promises may have been made or supposed to have been made in respect of this property cannot take away the reserves from the natives - restoration of their property to them as recently called for is the first step - the buildings being given to them as back rent...I know of nothing at the present time

[145]MA 17/1 Rolleston memo 13/2/68 A34 p 28
[146]MA 17/1 A34 p 103 Native Minister Richmond Memo 27/11/67
[147] NO 68/441 29/1/1868 Commander of Forces in NZ Col. R.S Beatson/Private Sec. of Governor in MA 17/6 A35 pp 31-2

> which would give more satisfaction than the recognition of their rights in respect of these reserves."[148]

Government officials were not the only parties questioning the endowment grant of these sections to the College and the Hospital. Maori were extremely active in their efforts to have the endowment land returned to them. On May 27 Governor Grey replied to Raniera Tuara (whose original letter is not extant) and promised to "look into the Raurimu affair". On 23 August 1865 Pene Te Riri and Taituha Tumoana of Ngati Tama take up the same matter with Governor Grey: "You must give us our land - Raurimu [the traditional name for the Kainga on, and the area around the Hospital and College endowment] - at the house of Mr.Baker thence to the Barracks of the soldiers", saying "that piece of land belongs to us two". [149]

On 30 August Swainson wrote a memo relating to the claim set out in the Pene Te Riri & Taituha Tumoana's letter. In it he acknowledges intensive Maori claims to Native Reserves at this time, "This is one of the claims to original Native Reserves which are continually being brought forward". Swainson goes on to describe the appropriation of Native Reserves for endowments as "a continual source of complaint by natives who formerly lived in Wellington".[150] Thus it was clearly Maori rather than Crown dissent that drove the enquiries into the matter of endowment Grants which were to culminate in the Regina v Fitzherbert case.

On 25 September 1865 Pene Te Riri & Taituha Tumoana renewed their request for Grey to return Raurimu to them[151] and again on 28 September Raniera Taura & Rota Whaunga request that Grey return Raurimu to them and they mention "Wikitoa" who had come with

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[148] Rolleston memo 13/2/68 in MA 17/1, A34 pp 27-30
[149] 23/8/1865 Pene Te Riri & Taituha Tumoana to Governor Grey, IA 1/1872/1571 p155.

[150] ibid.

[151] 25/9/65 Pene Te Riri & Taituha Tumoana to Governor Grey, IA 1/1872/1571 pp 150 & 153.

Raniera Taura on an early visit to Grey at which at which the matter was discussed. [152] However, on 9 October, Pene Te Riri & Taituha Tumoana wrote to Fitzgerald, refuting Raniera Taura & Rota Whaunga's claim to Raurimu and reiterating their own. [153]

It is only after all this persistent Maori dissent, that in December 1865 Native Secretary, William Rolleston asks Swainson: "Ought not the Crown Grant [for the endowment] be submitted for legal opinion in order that the step [sic] may if possible be retraced?", and asks that a general explanation be prepared for the Attorney General. [154] On the 1 January 1866 Swainson signals his agreement to Rolleston's proposal. [155] Meanwhile, on March 1866 Wikitoa Te Kaea himself writes to Grey asking for £1000 for Raurimu (letter not extant) [156] On 7 April 1866 Swainson completes his explanation of the endowment-granted reserves for the Attorney General and asks if the lands are legally granted and if so have these grants been fulfilled? [157]

In August 1866 Swainson submitted to Native Minister J.C. Richmond a valuation of only the Reserves "appropriated for the Hospital and a non-existent College & Grammar School." Probably of more relevance to Native Reserve administration is Swainson's report to Parliament of the same month:

> "In many cases the property so endowed has been purchased from private individuals for the purpose; but in cases where the land has been ceded by the natives or diverted from original native purposes, as in the case of Hospital and Grammar school, Wellington, no compensation has been given or payments made."[158]

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[152] 28/9/1865 Raniera Taura & Rota Whaunga to Governor Grey, IA 1/1872/1571 pp 148 - 149.

[153] 9/10/1865 Pene Te Riri & Taituha Tomoana to FitzGerald, IA 1/1872/1571 pp 145.

[154] ibid.

[155] A41 pp 171-172.

[156] MA 1/1866/264.

[157] 7/4/1866 Swainson to Attorney General, IA1/1872/1571 pp 133-138.

[158] 13/8/66 Swainson to Native Minister, A39 pp 248-50 (no ND number).

Under Eyre's 1848 policy, a type of balancing of what had been expended for Native benefit (and we note that very little was actually expended) and what had been returned from Native Reserve rents was promised. Swainson clearly realised that the promised compensation for land appropriated for public purposes (for the supposed benefit of Maori) had never been paid to the fund. To add further insult, land endowed for College purposes was still not being used for that purpose, and at about the time of Swainson's report the best of the College Endowment lands remained unlet, and the rest brought in only £121 rent per year.[159] This would seem to indicate that Wellington Tangata Whenua have been severely prejudiced in the dealings with these sections.

Sections 89 & 90, the Hospital Endowment, the endowments to Wellington College and to the Wesleyans, the Cathedral site, and the site of Thorndon Parish School

The 1869 Report of the Religious, Charitable and Educational Trust Commission to the House of Representatives ran to over 90 pages, covering trusts and endowments made from Te Atiawa / Taranaki's reserves. It focussed of the lack of action taken on most of the endowments rather than on their origins. The Commission made no firm recommendations regarding Wellington Hospital because, as of late November 1869, when the Commission reported, the grants were subject to a suit in the Supreme Court.[160]

However, the question of the actual benefit derived by Maori from these institutions build on their reserves is an important one, no less because all along the Crown had claimed, as a justification for appropriating reserves for public purposes, that Maori would benefit greatly. Exactly how many Maori used the Hospital, for example?

[159] Swainson's Report on Native Reserves, AJHR 1870 A3 (A24?) p 22.

[160] 1870 AJHR A3 pp 17 & 18 Evid of Fitzherbert to Commissioner Dommett 15/11/1869

We have already seen that in Native Minister Richmond's opinion, "the choicest lots have been granted to endow institutions by which the Europeans are almost alone benefited - Hospital, Grammar School..." In the speech to Parliament that followed just a few days later in 1868 he enlarged upon this:

> "Maoris never have adopted our hospitals save in rare exceptional cases; they do not attend English Church services; they have had no opportunity of attending an English Grammar school and if and when such institutions are opened in connection with the endowments in question, it is certain they would not be practically available for their Maori. The estate might more properly have been employed for the construction of a public highway open to persons of all races."

Yet it is alleged that "Large numbers of Maori thereafter [after Grey's November 1847 dispatch to Earl Grey re Hospital being fully operational] received treatment at the institution" and they quote, "85 between October and December 1847; 180 in 1848; 340 in 1849; and 905 during 1850-1851.[161] While the Crown uses statistics to support their supposition that numbers of Maori using the hospital greatly increased, the uneven periods for which patient numbers are quoted exaggerate any upward trend. Other evidence reveals a quite difference picture of Maori hospital use.

It is clear that the use Maori made of the Hospital and, therefore, the benefit they derived from it, declined dramatically from the 1850s onward, while at the same time all the rents from the reserves held in trust by the Crown for their benefit were being channelled into hospital maintenance, repairs and subsidising their own "free" health care.

Of the 196 patients listed on the 1867 Patient Register of Wellington Hospital only 9 are Maori (8 living in Wellington & 1 living in Porirua). In 1868 these same Patient Registers list 137 patients, of these only 3 are Maori (all live in Wellington).

For the following year, 1869, of the 92 patients listed 11 are Maori (2 living in Wellington, 1 in Terewhite, 1 in Porirua, 1 in Napier, 1 has no fixed abode, 1 is a prisoner and 4 are

[161] GBPP 1849 (1002) A33 pp 42,51,56,81,218 & 266; IA Vol 2 pp 279 ff.) (C1 p 226)

sailors). In 1870 only 4 of the 104 patients are Maori (3 live in Wellington & 1 in Wanganui).[162]

In 1865, The Hospital Reserves Act had safeguarded the doubtful Trustees' titles. In August 1866 Swainson submitted a valuation of only the Reserves "appropriated for the hospital and a non-existent College & Grammar School". Guided by the Town Board Assessment 1863, and by consulting knowledgeable persons, Swainson calculated a total unimproved value of £11,270.5.0 (with improvements £18,280.5.0). He called the Town Board's £140 value suggested for the endowment lands at Clapham's Paddock/Haukawakawa-Raurimu "absurd", given that in 1865 an arbitrator had valued nearby sections at £700 per acre. He used "a fair average" of £500 per acre, noting that all the sections involved were "most valuable as building sites".[163]

In the same month Swainson submitted a report to Parliament: "No College or Schools exist that might derive benefit from these lands, nor have the Natives received compensation for or benefit from their annexation" And later,

> "In many cases the property so endowed has been purchased from private individuals for the purpose; but in cases where has been ceded by the Natives or diverted from original native purposes, as in the case of Hospital and Grammar school, Wellington, no compensation has been given or payment made."

Swainson hinted at deception:

> "In these later cases, the wording of the grants, that such lands 'had been marked out and distinguished on the charts of the New Zealand Islands as College, &c.(or Hospital) reserved lands' would lead to the supposition that they had always been so reserved, whereas, on the contrary, they were, as already noted, portions of lands reserved for the natives under the New Zealand Company's Settlement Scheme, and were only constituted College or Hospital Reserves at the time and by issue of the grants conveying them as such".[164]

[162] Wellington Hospital Medical Records. No copy submitted.
[163] A39 pp 248-50 Swainson/Native Minister, 13/8/66
[164] AJHR 1866 D16 "Return of Grants of Land to Religious Bodies in the Province of Wellington.

It would appear that larger forces were at work in delaying the establishment of the College and Grammar School. The central issue with Grey's school endowments had become racial segregation. The national Government pushed for integrated races, endowing and funding schools upon condition that children of all races attend, while Provincial Governments pushed for segregation, asking for assistance in establishing separate Maori Schools.[165] In Wellington, there also appears to have been a problem with disinterested reserve trustees - about the time of Swainson's report the best of the College Endowment lands remained unlet, and the rest brought in only £121 per year.[166]

Amazingly, though, only six months after Swainson's complaining report to Parliament, a Wellington College was fully established. On 4 February, 1867 the Trustees of the endowment obtained a school on Woodward Street run by Rev.H.E Tuckey and W.S Hamilton, and it became Wellington College. They soon moved the school to the old military barracks on the endowed lands in Thorndon (Fitzherbert Terrace), and shortly after to a site in Clifton Terrace, made available by the Wesleyans, who also had not built a school on their 52 acre Kumutoto reserve / endowment. Construction of the school between 1867 and 1869 consumed the entire accumulated Trust fund (£436) plus required a debenture of £750. In 1874 the College was removed to its present site, an area taken from the town belt.[167]

The plea to the Governor by Native Minister Richmond, and his speech to cabinet the following week, after the correspondence related to a request by Governor Grey to the Commander of the Forces in New Zealand had the effect of raising the whole issue of endowed / reserve lands including Hospital & College endowments.

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[165] Alan Ward *A Show of Justice* p 212
[166] AJHR 1870 A3 p 22
[167]Mulgan, pp 188-9; AJHR 1870 A3 p 22

Wellington College Endowment

Whereas the Ordnance Department had failed to obtain a Crown grant for Raurimu / Haukawakawa cultivation area, on 13 August 1853, Wellington College succeeded. The College was granted this area plus an additional 5 acres of Te Aro reserves to endow their institution.[168]

In 1863 Mantell picked up a proposal to establish a Native Hostel in the Native Reserve near Government grounds in Wellington. He suggested to Native Minister F.D Bell that they "enlarge the powers of the [hospital] trustees" so they could legally rent the proposed site of the hostelry to the Native Reserves Commissioners. Mantell writing to Bell sets out the state of the endowments at that time:

> "you are aware that this section 574 with many adjacent ones, was originally a Native Reserve, but that they have been granted to a Hospital and to a college which does not exist, rightly or wrongly matters little, as it will be cheaper to pay the rent than to try the question. But I regret that the Raurimu sections which would have made such an excellent paddock for the Maori's horses, are already leased by the Trustees. Perhaps you would kindly let me know by return mail whether the Government consent to rent this section in order that the building may be begun."[169]

Eight months later, Attorney General Whitaker wrote, as stated above, that he thought the Hospital and College grants were "very informal and I think invalid".[170]

[168]A39 p 247, Heaphy valuation.
[169]Mantell/Bell 26/6/63 Alexander Turnbull Library Mantell family MS papers 83/219, E8 pp 465-7.
[170]A39 p 213, 29/8/73: Heaphy "Remarks" ND 73/5398 "Enclosure C," Whitaker Memo 21/3/64.

Overview of Rural Native Reserves

The following is a rough overview of the unassigned company - selected native reserves:

A. Part of Ohariu 12 & 13 (unassigned Reserves) were promised to Paiura Rangikatata in 1867 and then disputed. In September 1873, Heaphy decided the distribution of rents on these sections according to customary ownership of the lands (as if they were assigned reserves). On the same basis he allotted 36 1/2 acres of section 13 to two other Maori individuals for "subsistence". In 1877 about 15 acres of section 12 was granted to Paiura Rangikatata. Later all section 13 was granted to individual beneficiaries, and the remainder of section 12 eventually vested in the Native Trustee in 1930 ("but beneficially owned by separate Natives") to be sold in 1964.[171]

B. Makara 22 & 23 (also unassigned Reserves) "were, in 1862, let by two chiefs of the Ngati Tama to a tenant for a term of 21 years". In 1874, Heaphy allotted Parata Te Kiore 5 acres of "Usufruct" with Harata Wi Pakata's widow. It was stated that Peter Trotter, the tenant, had possession of 200 acres without this 5 acres and consented to the 5 acres being leased. By this Heaphy also authorised Te Koire's prior 21-year lease of the acres for a Catholic Church. [172]

C. Hokowhitu / Upper Hutt 120/121 (land purchased by Te Aro) was briefly proclaimed a Native Reserve by an Order in Council on 17 August 1875 before

[171] Distribution and subsistence: Report in A24 p 58 and Minutes of meeting with "Komiti" in A36 p 148; 1877: Report in A24 p 112; Grant and "beneficially owned" in Jellicoe A24 p 309n (citing Native Trust Records 6/50) and Certificate of Title 401/280 in E8 p 517-518.

[172] 1862: 1873 Report in A24 p 58; 1874: in Minute Book: A36 p 183.

being "conveyed"" to its Te Aro purchasers at some time between the Order in Council and this minute dated 27 August 1875.[173]

D. In the early 1850s Taringa Kuri obtained possession of Upper Hutt 98 & 102 (undeeded Reserves). In 1869, Taringa Kuri and several other Ngati Tama leased the sections to a sawyer/shopkeeper, Thomas Burt, and then were Crown granted the sections in 1871.[174]

E. According to C.Evan's M.A. Thesis of the Hutt Lands, "In 1856, [Ngati Tama] under Te Teira Whetu, squatted on the Pakuratahi reserves in order to be near [Taringa Kuri at sections 98 & 102], and six years later, they asked Grey to give the those reserves [which were of obscure origin, but definitely not deeded in 1847]. However, although Grey gave them to understand he would do so, the transaction was held up because these particular people had only joined Ngati Tama after 1840, having come from as far away as Wanganui and the Chatham Islands. The Commissioner of Native Reserves did not, therefore, think it fair to grant them reserves made for the benefit of those who had been in residence at the time of the sale. Eventually, in 1866, Te Teira Whetu was given the use of fifty acres, and another Ngati Tama squatter, Henare Wirehana, the use of twenty-five acres. A few years later these people moved back to Taranaki, but continued to draw income from rents paid by European tenants on the reserves."[175]

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[173] Minute Book A36 p 191.

[174] Possession, see Evans p 74 in E8 p 518b; Heaphy 1871 Report A24 p 51, Jellicoe A24 p 314 citing Heaphy's 1871 report, and District Land Registrar Deeds 40/217 in E8 p 519.

[175] Quoting Carol Evans p 75, in E8 pp 518b-c.

F. Waiwhetu obtained possession of Wainuiomata / Lowry Bay 1 & 4 and 39 (all unassigned reserves) early on - perhaps always being regarded as "theirs". According to Evans, "Since [these reserves] were useless for agriculture, Grey exchanged section 39 for a more suitable one, either section 22 or 28, and sold 1 & 4, investing the proceeds, on their behalf, in a section in Palmerston North. The Maori later regretted the sale, and tried unsuccessfully to regain the land by returning the purchase money." In 1873, Waiwhetu presented Heaphy with evidence of Swainson and Grey's arrangements for their beneficial ownership of the Palmerston North lands. Hence, from 1875, Heaphy leased the lands, and distributed proceeds to 22 beneficiaries (formally determined by Heaphy at a meeting called by "kahiti" notice). Waiwhetu collected and distributed the rents on the Wainuiomata Reserve section 22 themselves. [176]

G. Maori apparently never occupied Mangaroa / Upper Hutt 132 (another unassigned reserve). From 1875, the section was leased by Heaphy. However, thirty-three years later, the Maori Land Board vested the land in beneficial owners, Hamapiri Tarikama and Hemi Kuti (James Cootes).[177]

H. Finally, as noted above, Hemi Parae was given occupation of part of Kaipakapaka (an unassigned reserve) in the early 1860's, and received the rents for the remainder until 1873, when Heaphy assumed full administration and apportioned rents to the seventeen Polhill Gully assignees. In the 1880's, the land was vested in the Public Trustee, and by the 1890's, the Native Land Court was treating Kaipakapaka as a linked parcel with the Polhill Gully sections (which were deeded in 1847 to Te Aro). From at least 1902 to 1912,

[176] Ibid in E8 p 518b; Presented: Minute Book A36 p 159. Leased: Minute Book A36 pp 187 & 192; Wainuiomata; Minute Book A36 p 207.

[177] Not occupied: Evans p 75 in E8 p 518c; Vested: District Land Registry, Transfer 67226 in Provisional Register 6981, in E8 pp 520-523.

the Public Trustee and Court both believed Kaipakapaka had been deeded to Te Aro in 1847. The Reserve eventually vested in the Native Trustee in 1930, with proceeds apportioned to the descendants of the Polhill Gully assentees. In 1976, almost half of the land was taken for "sanitary works" (part of the "tip").[178]

In sum, of the 13 and 1/2 Country District unassigned reserves taken administration of by the Crown in 1848, all but one were, in the main, treated as beneficially owned by descendants of the Te Atiawa/Taranaki vendors of the region. Further, all of the Reserves (except the four and a half that were sold early on) were eventually vested in Te Atiawa/Taranaki individuals, similarly to 1847 Reserves.[179] Hence, the clear norm for rural, unassigned Company-selected reserves was for strong traditional claims eventually to override the Crown's claims - so different from the fate of the *urban* reserves.

In this broader context, the picture in Wellington up until the 1870s was of Ministers Mantell and McLean and Commissioners Swainson and Heaphy reaffirming the Tangata Whenua's traditional authority over reserve lands in the area, while offering administrative assistance (via "assents") with the deeded Reserves. Their motives were partially economic (for example Te Aro having been left a "poor subsistence") and

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[178]Heaphy administration and apportionment, Minute Book A36 p 163; Regarded as deeded, see Public Trustee memo excerpt (n.d.) in E8 p 523a-523d; Proceeds apportioned see Jellicoe, p 48 in E7 p 316; `Tip' see Cert. of Title 401/279 in E8 pp 523e-f.

[179] Note that in the late 1870's, under a Royal Commission dated 11 May 1878, Heaphy inquired into the beneficial ownership of many Te Atiawa/Taranaki Reserves from Ohariu to Petone (both deeded and undeeded) and recommended Crown grants of same. See E8 p 523g-523. In the 1880's, the Public Trustee and Native Land Court reached a more effective determination of beneficial interests in the Reserves remaining under Crown administration (completed, in effect, by the 1896 Native Reserves Act Amendment Act). See eg. Jellicoe A24 pp 306-308. While fuller treatment of these more sweeping actions is unnecessary to this submission, we merely note that they corroborate the trend toward increasing recognition of vendors' interests indicated by our Reserve-by-Reserve analysis.

partially evangelical (cleaning up Maori "immorality" and introducing modern European land use and management).[180]

[180]Poor: see NO 78/3743, E8 p 516.

Revenues and Expenditures on Native Reserves

The remaining urban native reserves were Commissioner Heaphy. By the end of the 1860s Swainson reports in his 1867 return that about £418 rent was being paid on all the Te Atiawa / Taranaki Reserves under their control. This figure included only about one third of the leases actually extant, as it excluded 18 leases on which he did not know the terms. Swainson had leased eight reserves of the reserves under his control, bringing £109.6.0, and six others remained unlet. So 8 out of 14 reserves were returning about £109. None of those in his care were shown as occupied by Te Atiawa / Taranaki.[181]

Midway through his appointment, Heaphy found the situation little changed from that reported by Swainson in 1867. Excluding the Porirua-area reserves, he reported about £711 rents received in the years 1874-1875. Of this £258 came from leases on Te Aro/Polhill Gully 1847 McCleverty Reserve, which were already shown as leased by the Tangata Whenua in 1867 (rents unknown). Another £355 came from leases of desirable Ohariu / Johnsonville reserves -but two of these sections had already been leased in 1867 direct from the Maori owners for £130 per annum. Another was let by Swainson for £40, and two others by Maori with rentals unknown to Swainson (one of which was to R.Bould, just across Porirua Road from a similar section for which he paid £100 per year to Te Aro Maori). It seems safe to conclude that excluding the town and Ohariu sections he'd brought under account since 1867, Heaphy's rent roll had only increased between £30 and £50 per year - an increase largely accountable to old 21-year leases having entered their second and third seven-year rent-hikes. [182]

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[181] 1867 Return of all land vested in the Governor under 1856 & 1862 Native Reserves Acts AJHR A17 1867, A24 pp 36-40.

[182] 1874 Report of Commissioners of Native Reserves AJHR G5 1874 pp 1-6, A24 pp 86-88.

By contrast in 1867, Te Atiawa/Taranaki had direct control over 27 leases, bringing in £307 on just the 9 leases on which Swainson had information. They also occupied or used 10 reserves themselves (counting Te Aro Pa, which Swainson excluded entirely). Only three remained unlet. Te Atiawa / Taranaki's self-management appears to have been far more profitable than Crown Management (Compare the 1867 figures, Maori receiving £307 on 9 leases against the Crown receiving £109.6.0 on 8 leases).

Yet, despite this apparent capacity for virtual self-management of the reserves, Commissioner Heaphy claimed to spend nine-tenths of his time settling disputes over interests in 1847 McCleverty reserves leased directly from Te Atiawa/Taranaki. According to his own reports, Heaphy seems to have taken on the role of mediating and settling succession disputes, as well as collecting and distributing rents on these reserves. One must ask why had these disputes not already been resolved by the Native Land Court? [183]

If it is accepted, though, that Heaphy did involve himself deeply in the McCleverty 1847 reserves, one must ask why? There is evidence that it was because Commissioner Heaphy worked with both the expressed desire and the official mandate to bring Te Atiawa/Taranaki's 1847 McCleverty Reserves under his own administration.[184] F.D. Fenton, a lawyer, and later Chief Judge of the Native Land Court drafted the proposed 1869 Native Reserves Act under which Heaphy was initially appointed. Had it been passed the would have at one stroke, given the Commissioner, "general power to manage and administer" the 1847 McCleverty Reserves. [185]

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[183] "9/10" see MA-MT 1/1A/12, Doc E8 p 454; own reports: eg A24 p 56.

[184] Report on Native Reserves in the Province of Wellington AJHR F-1B 1872 pp 3-4, A24 p 56.

[185] see Papers relating to the Appointment of Commissioner Heaphy & to Native Reserves AJHR D16 No. 1-5 1870, A24 p 42-3; 1869 Act Ch 7 & 17, A22 pp 15-19.

As we have seen, Eyre's policy regarding the native reserves seems to be one of debit / credit. At first sight the expenditure appears to outweigh the returns. However the land purchased from the Native Reserve fund: the 100 acre domain, and the lands and leases purchased (for Ngati Tama and for Te Matehou), amounted to little more than £1000 - perhaps the value of two or three Town acres in 1848. As already stated, Eyre was clearly counting the Crown costs for these sections twice: the Crown had already counted them in the 1846-47 exchanges, as "given up" in payment for Ngati Tama's and Waiwhetu's ngakinga on sections cross-claimed by settlers. Were Maori now to pay the Crown's costs for purchasing their traditional cultivations from them?

Similarly, we have seen that few, if any, Crown land was actually "exchanged" in 1847. The bulk of the unsurveyed lands which Maori received was either already promised them in the 1844 agreement, or was occupied land, to which (under the Treaty and even the 1846 Constitution) the Crown had no claim anyway. Likewise, the Crown had not "given up" any unassigned to Maori in 1847, as these had been excluded from extinguishment in 1844. They did not represent a cost to the Crown, because the Crown had never owned them. (of course, even if the Crown's claim to the reserves was good, the same argument applies as for the lands and leases: Maori had already "paid" with their ngakinga for the Crown's claim to the Company-selected reserves).

It is very clear that the Crown's expenditure on Maori was a great deal less than they claimed at the time and furthermore, the rents from Naive Reserves that were being paid into the fund were being used for maintenance of buildings and running costs for the hospital. Maori were being given very little by the Crown and what little they received for Native Reserves in trust was being channelled into a public amenity which would soon yield little benefit. Perhaps this then is to be the final reckoning of the account?

It is worth noting at this point that the money to be paid into the Native Reserves fund as compensation for land appropriated for public purposes is referred to here as "purchase"

money and the land as "alienated". In his 23 June Memorandum, Eyre emphasises that the Reserves were originally to be managed by trustees who had no power to alienate the land.

Once the land was disposed of in this way and the fund spent, no asset (beyond the cash) remained to benefit Maori. At the very least the fund should have been spent on things which would benefit Maori in a lasting way. This is rather questionable: The Wellington Hospital which opened in October 1847 was the result of Governor Grey's policy of appropriating portions of Native Reserve land for institutions which would benefit Maori. However it seems that the 1844 agreement appeared to call for the retention of the land in Maori ownership.

Temporary arrangements for the use of Native Reserves for public utility very quickly became permanent endowments which led to the alienation of Native Reserves, stripping Maori of assets that held in trust for them and therefore permanently removing their economic base. It is worth noting here that it seems that Eyre intended the Board to act in an advisory role to Government who would then make final decisions about the administration of Native Reserves. How did this really work in practice? The merging of the Native Reserve administration with that of Wellington Hospital & College, to which all Native Reserve returns then became directed 186 , had only short term benefits for the Tangata Whenua. By the mid-1860s usage of the hospital was 95% Pakeha. Evidence also shows that money from the Native Reserve fund was used to compensate Taranaki settlers who were reassigned land (see discussion of this issue below).

Native Reserves that were designated for the benefit of Maori and therefore should have been either vested in Maori owners or held in trust for them were being alienated. Siting a school or hospital for Maori on their own reserved land differed fundamentally from taking that reserve permanently to endow the school or hospital, or later, from retaining the

[186] It is worth noting that the idea of using funds from other reserves to maintain the hospital had been put forward as early as 1853 see Superintendent to Civil Secretary Dommett 20/9/1853, CS 1/1853/1261 pp 47-48.

endowment long after it had ceased contributing specifically to the cost of treating Tangata Whenua. The alienations themselves proceeded in a piecemeal fashion. Questions of consent or dissent on the part of Maori do not seen to have entered into the process of alienations of these Reserves.

A Native Reserve Fund was set up and rents were paid into it. The Colonial Treasurer was to act as cashier and accountant to the Board of Management, and to be accountable to the Government.[187] A clerk's wages and compensation to settlers in Taranaki were paid out of it. Accounts were to be submitted each year, these have been located for the 1849 to 1854[188] period but accounts appear to cease at that point since:

> "These allotments have been put in trust inter alia - for the endowment of the Hospital at Wellington. The rents have subsequently been received by those trustees since October 1853."[189]

It appears that the grand weighing up of expenditure and earnings from Native Reserves envisaged by Eyre was never to eventuate because of this.

Misappropriation Of Funds - Native Reserve Returns Used To Compensate Settlers In Taranaki

At the same time that native reserves which had been allocated to the Tangata Whenua were being leased for "their benefit" or appropriated for public purposes, the compensation (or money from compulsory purchase) was held in a Native Reserve fund and was being spent on compensating settlers for having to move off reserve sections. At very best this money was being used only for short term Maori benefit. The land, the asset itself, was being alienated. The Crown, then, failed to administer the Native Reserves in such a way as would have guaranteed Maori a livelihood and a permanent economic base.

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[187] Colonial Treasurer to Colonial Secretary 11/7/1850, NM8/1850/1151 A40 Vol.2 pp 240-241. It is interesting to note that accountability was to Government rather than Maori, for whose benefit the reserves were supposedly being managed. And that the return from reserves was seen as "part of the ordinary revenue of the province", rather than in trust for Maori benefit.

[188] Native Reserve accounts 1849-1853 CS 1/1853/1412 pp 51-56 & NM8/1852/691 A40 Vol.2 pp 427-431.

[189] T1/1857/609 p 57; also Native Reserve Accounts 1851-52, NM8/1852/691 A40 Vol.2 pp 427-431.

It appears that money from the Native Reserves fund has been used for a number of purposes, particularly that of compensating settlers who had to be moved off Native Reserves, both in Wellington and in New Plymouth, so that Maori could occupy them or so that the Crown could use them for public utility. Indeed this expenditure was used by Eyre as one of the justifications for using lands for public utility. Perhaps it is also the reason that Eyre felt unable to form a trust in 1848; the use of Native Reserve funds was just too messy and difficult to account for.

On 29 November 1851 compensation of £43. 5 - was paid to Mr. William Billing for his removal from certain Native Reserves in the Taranaki district.[190] This was for land in the Moturoa Native Reserve, Grey District. The section was allocated to Billing by the NZ Company and a Crown Grant issued for it in his name. However while occupying it Billing was driven off by Maori who claimed it as a cultivation area. Having suffered personal & property losses he applied for another section to be allocated to him instead, and for compensation for his loss. [191]

On 5 January 1852 an account of the Native Reserve Trust Fund shows that £198.10.0 was paid to "Mr.John Nairn by order of his Excellency the Governor in Chief as compensation for his removal from certain Native Reserves in the Taranaki district."[192]

In accounts submitted 23 July 1852 a disbursements of £261.15.0 "in cash paid to Mr.James Smart of New Plymouth by order of his Excellency the Governor in Chief for losses sustained by him from the aggression and interferences of the natives." [193]

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[190] Native Reserves Accounts 1851-52 NM8/1852/691 A40 Vol.2 pp 427-413.
[191] Native Reserves Accounts 1851-52, NM8/1852/691 A40 Vol.2 pp 427-431.
[192] 1851-52 Native Reserve Accounts NM8/1852/972 A40 Vol.2 pp 433-434; also see T1/1857/609 p 63 account dated 5 August 1852.
[193] NM8/1852/972, A40 Vol.2 pp 433-6.

In a covering note by Dommett on accounts dated 23 July 1852, "All of the reserves that are producing rent have in fact been made over to trustees for the maintenance of the colonial hospital after (this would be the case for the future) last outstanding debt to one Mr Smart for compensation at Taranaki has been paid." McCleverty is mentioned as conducting the negotiations in Taranaki, "When they report the liquidation of the debt the future rents can be received by the new hospital trustees."[194] In effect, Te Atiawa / Taranaki's loss did not end with the initial hospital endowment - maintenance of that endowment and subsidisation of the "free" medical services for Maori consumed the entire monetary benefits from the remaining reserves as well.[195]

[194] 23/7/1852 Dommett note, NM8/1852/972 A40 Vol.2 p 433 & 434.

[195] A26 p 21 and Minutes of Evidence for Province of Wellington Church of England Religious, Charitable Reserves, AJHR 1870 A3 p 22 in E8 p 359.

Tangata Whenua forced to leave the Region

From the start of the native reserve scheme, conflict and confusion reigned, primarily because the reserves scheme threw traditional rohe into confusion. Halswell made the comment in his early reports that Te Atiawa / Taranaki resisted occupying certain reserves because they were rival hapu's lands.[196] In the mid-1840s, settlers had increased their encroachments of traditional cultivations, and begun leasing Company-selected reserves. In the late forties, the largest cultivations that Te Atiawa/Taranaki exchanged had been those near the town in Karori.[197] Between 1847 and 1848, Maori cultivation in the region apparently dropped from over 800 acres to about 300 -nearly 65 percent. [198]

Around 1850, hapu from Kumutoto and Te Aro were moving out to the Hutt to find sufficient cultivation lands. The Crown had been told of this by Te Aro Maori, at Spain's Court held 24-26 February 1844, before agreeing to the 1844 releases. Wesleyan missionaries' accounts at Te Aro corroborate the picture. In 1849, Rev. Aldred wrote that "the Natives have generally speaking, left town through scarcity of land." Rev. James Watkins, in 1851, wrote that "some of our Natives have to go fifteen miles to cultivate potatoes on land rented from the white men." and, "some of the Maori are saving money to buy back some of the land of which a few years ago they were the unquestioned masters...I don't think they got sixpence an acre...what must they give to get it back, at least two pounds." The Wesleyan Circuit Report in 1853 noted Maori who had moved to the Hutt, "for the purpose of raising food, which many of them on land which they rent from

[196] Spain final report A10(a) Doc 6 p 4; McCleverty to Eyre 17/2/47, A26 p 8.

[197] A18 pp 31,40-42, citing Kemp 1850, and Watson, M.K & Patterson B.R "The Growth and Subordination of the Maori Economy in the Wellington Region of New Zealand, 1840-52" in Pacific Viewpoint Vol.2 No.3 1985.

[198] see table No.10 in GBPP, Further Papers relating to Native Affairs in NZ, Appendix: Statistics of New Munster, NZ 1841-1848, pp 168-169, A33 p 102.

Europeans."[199] It appears very clear that Maori were being squeezed off traditional cultivation sections by settler pressure for land.

It would seem likely that as European settlement in the harbour area continued, Tangata Whenua must have felt that there was a bleak future for themselves. By 1850 some of the most renowned kaka snare areas had been cleared and, as noted above, lands on the Raurimu and Haukawakawa flat had been taken for military purposed and for the hospital.[200] Reclamations began in 1852 so that the Tangata Whenua's canoe landing sites, pipi beds and other sources of kai moana were vanishing [see appendix on Reclamation].

During the 1870s Te Aro Pa and its inhabitants seemed to undergo a dispersal. In May 1873, lots at Te Aro Pa began to be sold to the Provincial Council, and in November 1873, the inner harbour coastline from Te Aro around to Evan's Bay was granted for reclamations.[201] Most of this reclamation did not eventuate, but if the extent of the planned reclamation was known to Te Atiawa / Taranaki then it may have contributed to sales of Pa sections. The death of one of Te Aro's most notable rangatira, Rophia Moturoa in 1874,[202] the Mayor's "slum clearing" of the pa area in 1874, and the driving of Taranaki Street through the middle of the pa in September 1875 no doubt contributed to the exodus.[203] By 1877 Heaphy had developed a policy of approving Pa lots for sale,

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[199] A26 pp D99; John Roberts, "The Wesleyan Mission at Te Aro, 1839-1877", pp 12-13, E8 pp 426-27, citing Methodist Archives: Aldred to W.M.S., 8/1/1853; Watkins to W.M.S., 14/8/1851 (Auckland Archives.); the Report of the Southern District Meeting, 12/10/1853 (Archives CHCH).

[200] G. Adkin pp57 and 95

[201] IA 36/128/1873 is a large approved plan for the "proposed grant". It is yet to be confirmed that this grant was actually made. The reclamation issue is discussed in this paper at Appendix B of this report.

[202] John Roberts, The Wesleyan Maori Mission at Te Aro 1839-1877, p 18, E8 p 430; also Bell Gully Izard to Mackay, NLC Greytown, 1888/466 in Aotea District, Old File on Wellington Te Aro block, Correspondence 1866-1908, E8 p 514.

[203] "Slum clearing" in Mulgan A. The City of the Strait: Wellington and its Province, AH & AW Reed, 1939, p 207, Doc E7 p 247.

as he regarded Te Aro as "a nest of immorality".[204] By 1882, 14 of the 27 Pa lots had been sold.[205]

Since the 1840s Te Aro had suffered from a lack of land to sustain themselves. In 1852 Hemi Parae had begun cultivating sections 120 & 121 in Upper Hutt on a lease-to-buy basis under Governor Grey (in effect, purchasing their own reserve). In the 1860s and early 1870s Hemi Parae and Mohi Ngaponga had sought to obtain more direct control and use by Te Aro of existing reserves closer to town - both Native and Public. Hemi Parae included Kaipakapaka (Ohiro 19 & 20) and Waitangi (from Basin Reserve to the Harbour) as land he had successfully applied for control of in the 1860s. Others were Ngakaru, Patahuna, section 89 & 90, and some "Te Aro Town" acres.[206] Therefore many reserves were already in Te Atiawa/Taranaki's control before Heaphy's administration.

On 7 July 1873, Heaphy obtained Hemi Parae, Henare Pumipi, and Waaka Houtipu's agreement to extend the 6 May 1873 "assent", discussed above, to encompass Wiremutaone (Johnsonville 7 & 8) and Kaipakapaka (Ohiro 19 & 21) reserves.[207] With this control shifted again the other way. Heaphy's arrangement mixed the administration of and interests in 1847-deeded Reserves (Wiremutaone and Polhill Gully) with that of Reserves which had not been deeded in 1847 (Kaipakapaka). In this Commissioner Heaphy was continuing a trend initiated by Commissioners St.Hill and Swainson in the 1850s.

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[204] 7/10/1878 Heaphy to Clarke NO 78/3743, E8 p 516.

[205] J.Roberts p 18, E8 p 430.

[206] Petition 1874 AJLC, A25 p 27.

[207] "Extension" Minute Book A36 pp 163 & 168.

The disappearance of traditional resources vital for the Tangata Whenua's survival is only part of the pressure which led to Maori leaving Wellington in great numbers. Maori were being pulled to other areas - causing many to leave the region altogether - about 200 Ngati Tama left in the mid-forties and Wi Kingi's 587 Te Atiawa / Taranaki returned to Waitara in 1848. Fitzroy's New Plymouth city block was purchased in 1844 and Grey's Purchases of the Grey & Omata Blocks nearby in 1847 were just the beginning of the purchases. Attempts to purchase further blocks through the 1850's soon led to inter-Hapu disputes. Only by returning to Taranaki could one be sure of gaining a share in a reserve-portion of land by being a signatory to the sale of the bulk of it. Governor Grey's repudiation of Fitzroy's award increased pressure to return. Tonks states:

> "The Governor decided that FitzRoy had been wrong to set aside the Commissioner's recommendation [of an award of 60,000 acres]. Although the Maori claimants told him that they would stand by FitzRoy's award and would not sell any more land, Grey ignored their warning - the 60,000 acres was Crown land, he said, it would be surveyed, and compensation of no more that 1s 6 d per acre would be paid to the Maoris. In the face of Ati Awa opposition, however, Grey had to back down, and resort to repurchase. The Government managed to buy over 27,000 acres at New Plymouth between 1847 and 1848. However, attempts to make more purchases in the area were abandoned by 1849 because they had soon led to inter-tribal disputes, and the Ati Awa exiles who had resettled on the Waitara River's south bank in late 1848 became increasingly opposed to Government land-buying activities in their vicinity.[208]

For the rest of Grey's governorship, Maori who were in Wellington therefore felt the pull of returning to Taranaki to help re-assert their customary rights and to protect the lands in Taranaki from government purchase. When purchasing in Taranaki resumed after Grey's departure, pressure increased on Te Atiawa to return to Taranaki: Maori could only receive a share of the reserve portion of the land if they were physically present to give their signature to the wider sale. Due to this and other forces mentioned, by the end of the 1850s Te Atiawa/Taranaki's numbers in the Wellington region had declined by probably over a third. [209]

[208] Tonk pp308-9.
[209] A18 p 39

Furthermore, Maori faced pressure from the settlers and the Crown, who wished to see Te Aro pa removed from the town.[210] The Directors of the New Zealand Company directed William Fox to acquire the pa saying that it:

> "occurred to them that, with the cooperation of the Government and the Trustees of Native Reserves, those Reserves may supply a ready mode of effecting an equitable arrangement, which, by removing the present occupants of Te Aro to a less crowded locality, may at the same time contribute materially to the permanent improvement of the town."[211]

Lt.- Governor Eyre then stated that:

> "the Local Government are prepared to cooperate with the agent of the NZ Company in endeavouring to obtain possession of Te Aro Pah for that Body upon reasonable and just conditions."[212]

Basically, it seems that Tangata Whenua faced considerable pressures - all of them directly related to the start of European settlement - to leave the township of Wellington.

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[210] Doc A18 pp36-37 citing Earl Grey to Grey, 9/11/1849, GBPP 1849.
[211] Directors of the NZ Company / Fox. Crown Law Volume 208 pp367-370
[212] Eyre / Dommett to Fox 15/7/1850, NM 8/1850/858 A40 p227

Maori Action over reserve lands in the Wellington Area and Regina vs Fitzherbert.

It has been shown that Te Atiawa/Taranaki's desired to assert a claim of title over endowment lands, formerly reserved for their benefit, and that this became increasingly vocal in the 1860s. A number of Maori had already taken their claims to reserve land to the newly established Native Land Court.

In 1869 Wi Tako Ngatata took up a subscription amongst Te Atiawa/Taranaki (£2 apiece) to pay Charles B. Izard fifty pounds to sue for "nga whenua ngaro" at Te Aro and Wellington. Izard had recently represented Ngai Tahu in the similar Princes Street Reserves action. His role in Wi Tako Ngatata's suit may have been somewhat limited: Attorney General Prendergast had recently estimated a test of the College endowment would cost the Government £175 - and Heaphy described Izard's fee as merely "for a legal opinion to guide them." [213] On the 15 July 1869, Izard filed Wi Tako Ngatata's declaration in the Supreme Court at Wellington. [214]

Before the declaration went to trial, several contemporary bids for control of the endowment lands remained active. From 2 December 1870 to 24 June 1871, Tamati Pirimona (Ngati Mutunga) sought a re-hearing of Rophia Moturoa's 1867 Native Land Court claim to Takiawai and Raurimu. He disclaimed the rights of Wi Tako Ngatata, Te Rophia Moturoa, Ihaia Porutu and Te Puni (who had all claimed the lands either by writing to the Native Office or applying to the Native Land Court), to this part of the Hospital and College endowment lands. Tamati Pirimona's claim never reached Court, though, as Judge Smith informed Chief Judge Fenton, "the Native Land Court has no jurisdiction and has

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[213] Peti Ruri to Native Land Court, Aotea District MLC. Old file for Wellington Te Aro Block, Correspondence, 1866-1098, 93/1610, Doc E8 pp 472-475. Izard's fee, in Prendergast Memorandum 8/2/1869, IA1/1872/1571 p 46 and Heaphy report A24 p 46n.

[214] A7(b) p 16.

already so declared in the case of the claim of Rophia Moturoa & others (N.L.C 66/2076) which included these reserves...The real question which is sought to be raised is the validity of the grants of these Reserves to the Hospital and / or Trustees, and is one which cannot be dealt with by the Native Land Court." [215]

Shortly after this - perhaps to avoid the costly Court of Appeal option - Wi Tako Ngatata tried an alternative for retrieving the lost lands. On 9 October 1871, Wi Tako Ngatata and four others petitioned the House of Representatives for return of the lands. His complaint was discussed briefly, but action was postponed to see what came of the actions in the Native Land Court and Supreme Court. [216]

The case of Regina vs Fitzherbert eventuated. This case was the most important issue affecting the status of the native reserves in the 1860s. In 1865 the Government had begun withholding rent from the Hospital Trustees on the site of the Native Office. It withheld the rent with the aim of eventually testing the 1851 endowment grant. It came to be tested under a writ of *scire facias*, though not by the Crown.

The writ of *scire facias* features in New Zealand's history, being the same one used in R. v Symonds to test grants made under Fitzroy's waivers of pre-emption, in R.v Clarke to test grants made with Fitzroy's extensions of boundaries awarded by the Land Claims Commissioners, and in R. v MacAndrew to test the validity of the Provincial Council's grant of the Princes Street reserves in Dunedin.

A writ of *scire facias*

> "is a judicial writ founded upon some matter of record, requiring the person against who it is brought [in this case, the Hospital Trustees] to show why the party bringing [the action] should not have the advantage of the record, and in the case of

[215] MLC Aotea District, 12 July 1988, inventory and descriptive list of Special Files of extracts from Wellington 139; also Smith/Fenton 24/6/71 in this file, E8 pp 476-480.

[216] Le 1/1871/8, E8 pp 481-482. Note Wi Parata participated in the Legislative Council's discussion.

a *scire facias* to repeal a Crown grant, why the record should not be annulled and vacated."[217]

Although the suit was centred on proving the validity or otherwise of the 1851 endowment grant of Native Reserve land to the Hospital Trustees, the proceedings of the case also have important consequences for how both the history of the reserves' allocation and their administration would subsequently be viewed.

Everything came to rest on the Court Action. The 1872 Court of Appeal report of the case outlined the introduction of a record in Wi Tako Ngatata's declaration, followed by the Supreme Court trial of the issues in the declaration, with two amendments to the declaration introduced during the trial. The Supreme Court (and Native Land Court) findings upon the issues were then entered at the Court of Appeal on 15 April 1872, argued 14 June and the 11-13 November, and decided 4 December 1872.

The declaration and the initial plea, between them, directly raised at least 21 of the issues decided in the Supreme Court - over half of the total 38. The Court of Appeal's decision appears to have hinged on the same three points as the declaration and the plea. In summary the three points stated in the declaration are:

i) That the 1839 purchase (including its covenant to reserve) was sound.

Judge Johnstone referred the matter to the Native Land Court. There, on 24 October 1871, Wi Tako made his statements of the validity of the 1839 purchase. He testified that Te Puni, Wharepouri and Matangi "were entitled to deal with the land according to Maori custom." He stated that "There was but one sale. The Government gave us further payment to condemn what Wakefield had done".[218] Mohi Ngaponga supported him, claiming "We took the money because it was offered. We did not ask for it. The payment of Wakefield

[217] Hackshaw, p 119, A42 p 13.

[218] Wi Tako evidence 24/10/71 and 24/10/71

was very correct...We all considered the land had gone over to Wakefield.". Both Wi Tako and Ngaponga now played down the various interferences with Company surveys in the 1840s as isolated actions of old women and young men. It is ironic that it was now the Hospital Trustees who now denied that the "parties to the said deed...had...title to the said lands."[219]

There were two further key points expresses in the Declaration:

> ii) That the purchase was allowed by the Crown.
>
> iii) That the Crown's resumption of the Company's estate therefore saddled it with the Company's covenant of a trust to reserve.

The defendants, the Hospital Trustee, denied all three points:

> I) They argued that the signatories of the 1839 deed were not the true owners of the region, and so the purchase had been disputed by other rangatira, by the C.M.S., and by other purchasers - and even repudiated by some of the signatories.
>
> II) As a result of the 1839 deed's incompleteness, the 1839 sale agreement *per se* was not allowed by the Crown under the 1840 and 1841 Land Claims Ordinances.

They further argued that Russell's 1840 Agreement, like the 1839 deed and 1845 grant, was ambiguous and had never been fully effected. Instead, Earl Grey's 1846 Instructions had required Maori to register their interests in land, and that Te Atiawa / Taranaki's interests in the endowment lands had never been so registered (as the 1847 Reserved lands had). The Company-selected Reserves thereby became certainly mere Crown demesne, supporting the Trustees' initial plea. And finally, since the 1848 Crown grant of the region had issued four days too late, the Company (and then the Crown) had not acquired the region by it, but by the 1847 Act Authorising a Loan to the Company, which had vested the demesne in New Munster in the Company (acceptance of argument probably implicit in findings 29 & 31). The specific provisions of the invalid 1848 grant were therefore irrelevant.

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[219] Ngaponga testimony 25/10/71; Hospital Trustees A7(b) pp 15 & 17.

Before the third denial, the Trustees set out their version of the statutory foundations of their own 1851 grant, concluding in this that the grant made through the Governor's power to grant waste lands for public purposes. They closed with a firm denial that any such comparable grant, deed or document had declared a trust for the benefit of Te Atiawa/Taranaki affecting the Hospital lands.

Wi Tako won the issue of whether the 1839 purchase was valid - largely determining Native Land Court perceptions and interpretations of the creation of the reserves up to the present day - but lost the issue of whether the Crown had directly allowed the 1839 purchase *per se* (finding 3.16 and 11). If the Crown had not directly allowed the purchase, then of course it had not expressly declared the trust covenanted in that purchase agreement (finding 23). In place of any formal allowance or express trust, though, Judge Johnston did find that the reserves had been "indicated and treated" and "acknowledged" as reserves (finding 6, 22,23 & 29) and were not intended to be granted away (finding 11).

The Court of Appeal's final decision was to the effect that there had been no allowance and so no express trust, and so there could be no legal right enforceable by *Scire facias*.[220] Premising these conclusions, of course, lay the Court's adoption of the view that the reserves were Crown demesne (which was argued by the Trustees, but not seriously challenged by Wi Tako or Izard). The Court noted the lack of evidence specially in support of either of Wi Tako's amendments, including the averment that the Native Title to the reserves remained unextinguished.[221] Besides its denial of the validity of the 1848 Crown grant (which excepted the Reserves from the estate conveyed), the Court gave two particular reasons it regarded the reserves as Crown demesne as of 1851:

> "From and after the purchase of these lands by the Company for the Natives [by the 1839 deed], they became, by virtue of the alienation itself, part of the demesne lands of the Crown; insomuch that even if the purchase by the Company had been investigated by Commissioners under the Land Claim Ordinance No. 1, and the same had been approved, and the Commissioners had recommended grants or a

[220] A7(b) p 29
[221] A7(b) p 26

> grant to the Company accordingly, it would have remained at the discretion of the Crown to make or refuse such grant."

And second:

> "This title the Crown has always asserted; and although, after the selection by the officer of the Company of the [Raurimu/Haukawakawa] lands in question, as reserves for the benefit of the Native chiefs, the Crown forbore to interfere with the lands thus selected, it has done no solemn act to encumber, much less to alienate, its estate; but in 1847 the Crown asserted its title by building a hospital on one of the sections, in 1851 made the grant now impeached, and has continued to maintain its title till the present time.[222]

However, prior to this grant, as Moore's paper on The Origins of the Crown's Demesne shows, there was no clear basis for a Crown claim to owning the Company-selected Reserves (or the unsurveyed lands in the region). And in this context, it can be seen how ambiguous the Crown's early leases of several Reserves - and particularly its use of reserves as sites for a stationing of a peacekeeping force and for providing medical care - was as an "assertion of title".

Thereby, the period preceding the 1872 Native Reserves Act ended with the reserves no longer merely loosely organised. They had now been declared non-existent but by the grace of the Crown.

[222] A7(b) p 29

Conclusion

A closer examination of material presented in relation to the 1850s period tells quite a different story from that presented by the Crown who argue that Te Atiawa/Taranaki were silent over the management of the Tenths land. Maori people were greatly occupied in attending to survival; finding land to cultivate in the face of huge pressures on traditional lands and lands reserved for them, and in protecting their lands in Taranaki in the wake of purchases there. The Native Reserves that Maori had every reason to believe were being held in trust for them in Wellington were badly managed, the returns that were to be their benefit were either paid to Taranaki settlers in compensation or channelled into the Maintenance of the Wellington Hospital which ultimately failed to provided lasting benefits. Through use as public utility, land was alienated reducing the future economic base for beneficiaries of the Tenths.