

## Waihora (Lake Ellesmere) and Kaitorete

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**1. Introduction**

Waihora was once known by its more ancient name of Te Kete Ika O Rakihautu or at the Wairewa end as Te Kete Ika O Tutekawa, now it is more commonly referred to as Lake Ellesmere.<sup>1</sup> (doc H9: 39) The lake itself was one of Ngai Tahu's most precious resources, renowned for the quantity and variety of its fish, bird and other resources. The rights to these resources were shared by many different hapu, with Ngai Tuahuriri having access to the northern reaches, Ngati Ruahikiki to the southern waters, while the hapu of Banks Peninsula also had access to the fishery where the lake reached the bottom of the peninsula's hills. Other Ngai Tahu from more distant regions could call on its resources through the complex networks of tribal whakapapa. In the mid-nineteenth century the lake was much larger than it is today. Drainage, reclamation and the more frequent opening of the lake to the sea have lowered its level and reduced its expanse. The foreshores which were once swampy wetlands rich in indigenous fauna, have long since been turned into pasture. Resources once present in abundance, such as tuna and patiki are now scarce. Runoff and pollution are seriously damaging the quality of the water itself.

Although the Crown has claimed title to the lake and the foreshore ever since the Kemp purchase in June 1848, evidence presented to this Tribunal demonstrates very clearly that Ngai Tahu have persistently believed that their prior right to the resources of the lake and to parts of its shore, such as Kaitorete, had never been extinguished.<sup>2</sup> This belief can be traced back at least to the 1860s. In 1866 W.J.W. Hamilton wrote that 'From all the Maoris have told me, and so far as I could understand them, I doubt if Kaitoreti ever was ceded by them to Mr.

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1. Evidence of Rewi Brown, Taumutu, 16 April 1988, see also, W.A. Taylor, Waihora, Maori Associations with Lake Ellesmere, Leeston, 1944, p.6. (doc H45)

2. See especially 'Ngai Tahu Fishing; 1840-1908', the evidence of Tony Walzl, doc S7.

Kemp or Mr. Mantell.<sup>3</sup> From the mid-1860s numerous attempts were made to assert ownership of Kaitorete and to protect Maori fishing rights to the lake as they were eroded by overfishing, and the competing demands of pastoralism. In 1868 the ownership of Kaitorete became one of the key tests of the legality of Kemp's deed during Fenton's 1868 Native Land Court hearing. The claim was taken up again before the Smith-Nairn Commission in 1879-1880 and on a number of occasions in parliament when legislation was being considered for the lake.<sup>4</sup>

This claim has two elements which will be examined here. The first is the suggestion that Kaitorete and Waihora were excluded from all of the nineteenth-century Crown purchases. The second is based on the claim that despite these purchases, the tribe were promised that rights to their traditional resources were protected as a specific provision of Kemp's purchase.

## 2. The Kemp purchase, June 1848.

When H.T. Kemp went to Akaroa in May 1848 he took instructions to purchase all the land from coast to coast between the Wairau and Otakou blocks. According to the plan and the deed which resulted Kemp though he had successfully extinguished Ngai Tahu's rights over some twenty millions acres from Ngai Tahu. However, by his own account Banks Peninsula was excluded from this block, because in his discussions with Ngai Tahu, he was lead to believe that the Peninsula had already been sold to the French. The only evidence of Maori understanding of the boundary of the block, coming from the purchase itself is Charles Kettle's recording of the calling of the boundaries.

Commencing from Kaikora one chief went down to the Peninsula. Then Taiaroa called the lands from the Peninsula to Waitake. Then Solomon from Waitaki to Moeraki. Portiki and others southward from thence to the Heads of Otakou.<sup>5</sup> (doc L9: 390)

Kettle's map of the purchase is the only contemporary source which marks the

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3. Memorandum on letter of Te Koro to Colonel A. H. Russell, 3 June 1866, Compendium, I, 243. Hamilton did not have access to Kemp's deed when he made this statement.

4. The details of these appeals and complaints can be seen in Tony Walzl's evidence, doc S7.

5. C.H. Kettle, Field Notebook No.33.

boundary between his purchase and the land supposedly acquired by the French.<sup>6</sup> According to this map, the line ran from an unnamed point north of Port Cooper (Lyttleton Harbour) to another unnamed point north of Kaitorete Spit. On Kettle's map the line is straight. Such a line would in fact be impossible. It is impossible to tell whether the straight line was intended to show more natural boundary following the bottom of the peninsula's hills where they rise from the Canterbury plains. The map includes all of Waihora and Kaitorete in the Kemp purchase. It is hard to mistake the conclusion that as far as Kemp and Kettle were concerned, they had purchased both the lake and the spit from Ngai Tahu, however this needs to be seen in the light of what could have been understood as the boundary of the pre-1858 French transactions with Ngai Tahu.

### 3. The French purchase

The deeds Ngai Tahu signed with the French between 1838 and 1845 were instrumental in the Crown's acquisition of title to Banks Peninsula, but cannot individually or collectively be seen as purchases which extinguished aboriginal title. The early deeds were manipulated, sometimes written after the signatures had been obtained, misdated and in any case the transactions were all but rejected by Commissioner Godfrey as significant for any but a few small areas of land. While the two deeds signed in 1845 represented agreements never completed, their status is more difficult to define. The Crown has argued that Maori tribes did not have the ability under common law in 1845 to alienate their land to a third party, but they maintain that any such transaction could have the effect of alienating the land to the Crown. (doc K1) However the evidence does not suggest that these 1845 transactions were complete, willingly agreed to or seen by Ngai Tahu as conveying any title whatsoever to the Crown. (doc T3: 53-60)

Nonetheless the boundaries of these agreements can shed some light on our understanding of what land Kemp believed he had purchased, and of what land Ngai Tahu believed they were selling in 1848. In 1848 Kemp, Mantell, Kettle and Wills were all left with the impression that they had extinguished the remaining aboriginal title over the entire block of territory between Kaiapoi and the Otakou purchase, subject to their various understandings of where Kaiapoi actually was. Banks Peninsula was excluded from this block on the map, if not on the deed,

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6. Kettle's other more detailed map makes no attempt to identify any of the boundaries of the actual purchase and the deed fails to mention either Banks Peninsula or the French purchases.

because they all understood that the French had already extinguished aboriginal title there. Events were soon to prove this supposition far from correct, and when it was revealed that the French transactions had fallen far short of sales, the Crown was forced to enter into new purchase agreements to buy Banks Peninsula. As a result of this, the boundary drawn by Kemp and Kettle to distinguish between the land he was purchasing and the land already acquired through the French purchase became the dividing line between the Crown's land and that still owned by Ngai Tahu. If the Port Cooper, Port Levy or Akaroa purchases failed to come up to the actual boundary of the Kemp purchase then there remains a slice of land as yet unacquired from Ngai Tahu.

Both the Claimants and the Crown have raised this suggestion, although in slightly different terms. Basing their case on the evidence of Natanahira Waruwarutu and Kiriona Pohau, the Claimants maintain that the boundary of the Kemp purchase as given by Ngai Tahu ran in a straight line from Maungatere to Kaiapoi to Otumatua, (a spur on the Port Hills) and onto Taumutu.<sup>7</sup> (docs B2 3/11: 195; P14 (b): 26-7) Waruwarutu told the Commission that Kaitorete was not on the boundaries mentioned to Kemp but that

the boundary runs through Lake Ellesmere; not through the centre of it exactly, but cutting off a good piece of it, and thence to Taumutu. It runs in a direct line from Kaiapoi to Otumatua, and then to Taumutu, and when it gets to the line of the sea it follows the coast. (doc B2, 3/11: 195)

Pohau testified that this was the boundary which he pointed out to Mantell, telling him that:

"Taiaroa has a claim to Kaitorete: this land was not sold to Kemp". Mantell asked me "Where is Kemp's boundary then? and I said "at Otumatua - from Otumatua in a straight line to Taumutu" - That is all that passed between Mantell and myself. (doc P14 (b): 26)

He continued to explain to Smith and Nairn that:

The beach side of the boundary from Otumatua was not sold at all, but the boundary was more from Kaiapoi to Purehurehu. (ibid, p.27)

Such a line runs down through the middle of Waihora, leaving roughly half the lake and all of Kaitorete Spit outside of the Kemp purchase.<sup>8</sup> (doc Q23 (b))

The Crown has taken this further by suggesting that the 11 August 1840 French deed had a boundary which included Kaitorete spit and went as far as

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7. Evidence presented at Kaiapoi, 8 May 1879, MA 67, National Archives Wellington.

8. Map supplied by Mr Evison.

Taumutu. By implication, this line of argument suggests that Kaitorete was excluded from the Kemp purchase because it had been included in that class of land which was mistakenly classified in 1848 as "sold to the French". Mr Evison has rejected this particular argument by suggesting that the "sandy isthmus" identified as a boundary in the French deed was in fact the narrow neck of land which attached the peninsula to the plains prior to the drainage schemes of the Canterbury settlers when much of the flat land surrounding the peninsula was low lying swamp. (doc Q20)

There is no evidence that Ngai Tahu accepted this 1840 deed as defining the area either sold to the French or "tapu'ed" for further sale to the French. The 1840 transactions were described by Ngai Tahu to Commissioner Godfrey in extremely limited terms. Had this 1843 interpretation of the early French transactions been reiterated to Kemp it is unlikely that he would have come to the assumption that the whole of the peninsula had been sold. It is much more plausible that Kemp's assumption that the peninsula had been already sold had its origin in the 1845 transaction with the French. In excluding the peninsula from the Kemp block, Ngai Tahu were at least partially motivated by the belief that they could still achieve a better deal from the French. Dr Tremewan has shown that the French interpretation of the boundaries of the 1845 transactions ran along the base of the peninsula western hills, from points that roughly correspond with those identified on Kettle's 1848 map and cutting off Kaitorete. The major difference being that the boundary runs for part of its length along the shore of Waihora, whereas the Kemp map appears to place the boundary to the north of the shoreline.

Once it became clear that Ngai Tahu had not sold the whole of the peninsula, either because the deal had not been completed or because there had never been any Maori intention to alienate the whole peninsula to the French, Mantell was sent to extinguish what Maori title remained. He was instructed to pay a limited amount of compensation to Ngai Tahu and lay out reserves. Mantell succeeded in imposing his award on Ngai Tahu at Port Cooper, and on some of those at Port Levy, but at Akaroa he was firmly rejected. It was not until 1856 that an attempt was made to purchase the remaining land on the peninsula.

These later Crown purchases of Banks Peninsula had very similar western boundaries to those ~~at~~ suggested for the 1845 French transaction. The Port Cooper and Port Levy purchases also purport to come down to the lake shore, and they definitely do not include the spit. There is still some remaining controversy

over Hamilton's Akaroa purchase in 1856. This purchase produced no map and a deed with no specific boundaries. Mr Evison has claimed that Ngai Tahu sold only land at Akaroa, and that no land at Wairewa was sold. (docs Q23 (b); U11 (b)) There is no evidence to support this assertion.<sup>9</sup> Ngai Tahu appear to have been satisfied that the money paid over in 1856 included the land at Wairewa. This was acknowledged in 1865 and not disputed by witnesses to the Smith-Nairn enquiry.<sup>10</sup> (doc T1: 201) Nevertheless, it is certain that Kaitorete was not included in this purchase. Both Ngai Tahu and Hamilton were adamant on that. If the Otumatua-Taumutu boundary is accepted as the boundary of the Kemp purchase then Kaitorete and a substantial part of Waihora were never purchased by the Crown.

To summarise the evidence of the various maps. There is a consistency in the contemporary European evidence that there was a major natural and tribal boundary at the head of Kaitorete Spit, just south of Wairewa. The French maps of 1845 show boundaries similar to those in Mantell's 1849 Port Levy and Port Cooper Blocks, despite Mantell having no detailed knowledge of these transactions from European sources. Whereas the Port Cooper, Port Levy and Akaroa agreements all come down to the lake edge of Waihora, the Kemp map appears to detach all the lake and the spit from the peninsula. Only in the Johnstone map is there any indication that that part of the spit could be included in a peninsula purchase.<sup>11</sup> (doc T4: p.397) While all this evidence is from European sources, much of it was created with some Maori input and it is generally consistent. Just how these boundaries can be identified with the tribal division between Ngai Ruahikiki and Ngati Irakehu is less clear. However, the rights of these particular hapu were only part of the story. Waihora was such an important food resource for the tribe as a whole that rights to take mahinga kai from its waters and swamps were very widely distributed.

Kaitorete was something of a no-mans land, partly as a result of the Kai Huanga feud in the 1820s, but more probably because it was main highway. The spit was the most common route between the peninsula and Arowhenua, and places

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9. This will be discussed in more detail by Dr Tremewan in a response to the memorandum files by the claimants, doc U 11 (b).

10. Memorandum on letter of Te Koro to Colonel A. H. Russell, 3 June 1866, Compendium, I, 243.

11. The map shows a shaded area, including Wairewa which Johnstone noted as "Portion of the Peninsula over which the Native claims were not extinguished by M<sup>r</sup>. Comm<sup>r</sup>. Mantell." Johnstone's shading extends a little way down the peninsula.

further south. In the 1840s this was particularly important. The aftermath of the Ngati Toa raids had left Kaiapoi and the plains largely unpopulated, their inhabitants shifting to the comparative safety of the peninsula. The swampy land surrounding the peninsula made travel difficult and the spit was the safest and the most direct link between the communities on the peninsula and the south. If the spit was included in the Kemp purchase, Ngai Tahu could well have believed that this highway status would be retained. In fact the drainage of the plains, the decline of the peninsula and the building of roads and bridges transformed communications, leaving the spit as a backwater, which could be treated like any other area of Crown land and transferred to private control through lease or sale.

Professor Ward's report is highly critical of the haste with which Kemp concluded his agreement, without marking out reserves and clearly identifying which land and other resources would be reserved and which would pass to the Crown. This failure to mark the purchase on the ground, makes it difficult to entirely rule out the Smith-Nairn evidence about the Otumatua-Taumutu boundary. This interpretation of the claim to Kaitorete and Waihora was not explicitly articulated at other times when Ngai Tahu was pressing its claim to these rights. In 1868, for instance, Fenton was told by Heremia Mautai that

I remember Mantell coming I attended meetings previously. At Mantell's coming I was living at Kaitorete. I never lived at Kaiapoi. I remember Kemp coming. I was at Kaitorete at the time. I know [sic] of the meetings but did not go. I did not go because I heard it was only for the sale of Kaiapoi.<sup>12</sup>  
(doc P14 (b):40)

However, the minutes of these deliberations appear to be incomplete, and the transformation of this claim into a general challenge to the Kemp-deed, may well have prevented the details of the claim being articulated before the court.

Had the Maungatere-Kaipoi-Otumatua-Taumutu boundary been given to Kemp at Akaroa, it is doubtful whether it would have meant anything at all. Kemp appears to have been completely unaware where Kaiapoi was located, let alone a spur on the other side of the port hills called Otumatua. Only Taumutu and Waihora itself could have been pointed out on the journey from Akaroa to Otakou and back.

In 1879 it may have seemed to Ngai Tahu that boundary issues were the key to preserving rights to Waihora and Kaitorete, but this may not have been the case

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12. Transcript of the South Island Minute Book, 1B, April 28 1868.

in 1848. It is quite clear that in 1848 Ngai Tahu expected much larger reserves within the Kemp boundaries than those made by Mantell. These reserves would have been sufficient to have ensured access to the resources, even control of many of them. To examine this element of the claim it is necessary to once again review Kemp's provisions for Maori reserves.

#### 4. Mahinga kai

Even if included in the Kemp purchase, Ngai Tahu retained, under the terms of the deed as they understood them, a remaining interest in the waters of Waihora and in the lands surrounding it. Kemp was unable to complete his purchase, and contrary to his instructions did not negotiate and mark out the reserves for Ngai Tahu prior to gaining their signatures to the deed. Instead three classes of reservation were generally provided throughout the area of the purchase,

Ko o matou kainga nohoanga ko a matou mahinga kai, me waiho marie mo matou, mo a matou tamariki, mo muri iho i a matou; a ma te Kawana e whakarite mai hoki tetahi wahi mo matau, a mua ake nei a te wahi e ata ruritia ai te whenua e nga kai ruri.

From Kemp's viewpoint, Ngai Tahu were to have reserved their pa their cultivations, and a further class of reserves once the land was surveyed. There is some indication that he also made promises about urapa, landing places and eel weirs, the latter not necessarily exclusively or totally reserved. (doc T1: 138) Despite Kemp's definition of mahinga kai as 'cultivations', there is no evidence that Ngai Tahu understood that their rights to natural resources were lost by this transaction. The use of the term 'mahinga kai' would not have lead-the tribe to believe that these rights were limited to fixed cultivations. (docs H1; S22; U11 (c))

It would seem that Kemp saw little problem with making such general reservations sight unseen. Kemp's three level of reservation could be seen as aimed at securing Ngai Tahu their villages and cultivations, as well as the most important parts of their hunting and gathering economy, and providing them with a further endowment of land, either as a source of value added income, or as compensation for the loss of other hunting and gathering rights as a consequence of settlement. This confidence that a later Crown official could mark off these reserves without hindering settlement was based on the assumption that the resources Ngai Tahu used were not significant, involving as they did such as a small population and so large a territory. In justifying his actions Kemp commented that,

in obedience to the Lieut.-Governor's instructions their Pas & Cultivations



have been guaranteed to them as expressed in the Deed of Sale they are generally speaking of comparatively small extent ...<sup>13</sup> (doc L9, II: 423)

Ngai Tahu, on the other hand, saw their rights to an extensive range of natural resources confirmed by Kemp's promises. If Kemp had gone to Waihora and worked through some of the cultural misunderstandings inherent in his ship-board negotiations, some of these conflicts in the intention of the parties could have been resolved. The actions of his successor, Walter Mantell, ensured that Ngai Tahu were left without control or even secure access to their traditional resources, while at the same time they were left with no endowment in land to compensate them for that loss. Even sufficient land for subsistence was denied them.

##### 5. Mantell's mission

On 23 September Mantell and Wills, his surveyor, passed through Wairewa on their way to Taumutu. They spent only two hours there, and this only because he had difficulties engaging any of the resident Maori to escort him to Taumutu. There was little need to tarry longer as no reserve was required at Wairewa since Mantell had been instructed not to mark out reserves within the area of the French purchase. With the aid of a single Maori the party travelled from Wairewa down the spit to Taumutu. The lake was at the time open to the sea for they required a canoe to take them across to the kaik.<sup>14</sup> (doc P14 (b): 11, 19-20) Mantell then spent several days at Taumutu, while he and Wills marked out the reserves. These were divided into two, a reserve around the kaik including its immediate cultivations (Reserve no 43) and another close by enclosing existing cultivations (Reserve no 44). Together they totalled 80 acres. Mantell's census put the population at 18.

Compared with Mantell's experiences at Kaiapoi and elsewhere he managed to impose these minimal reserves without the usual intense debate and Maori opposition. The only conflict he recorded was between Pohau and Maopo over the dismantling of a wata to make up survey poles.<sup>15</sup> (doc P14 (b): 13, 21)

Having completed my preparations, I set out southward, and reached the small wretched settlement of Te Taumutu on the 23rd September, passing Wairewa, a small kaika within the French claim. Here I had very little difficulty,

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13. 20 June 1840.

14. Mantell's journal 23 September 1848, ms papers 83, folder . . . Alexander Turnbull Library, transcript doc P14 (b): 19-20.

15. Journal, 27 September 1848. Note: the transcript has "mata" instead of "wata".

Taiaroa and Maopo, the principal men of the place, having secured a share of the payment at the last distribution. Accordingly, after taking the census, I set apart the reserves (6 and 4) in the accompanying map; one or two gardens beyond the limits to be abandoned. I cannot here omit to mention that Maopo's house, court-yard, and gardens, were distinguished by great cleanliness and neatness, and that he conducted himself extremely well. Tiaki Tai, another leading man, was with his family absent on a visit South.<sup>16</sup> (doc P14 (b): 7)

Taumutu did receive substantial recognition in the allocation of money from the Kemp purchase. Along with Taiaroa, Maopo, Pohau and Tiakikai Timaru were all signatories of the Kemp deed. Taiaroa allocated £100 of the £250 given him by Kemp for Taumutu and Pohau received part of the second payment and both he and Tiakikai Timaru were recipients of £40 each from the third payment. There was, however, some later debate on the payment of the second instalment of the Kemp purchase money over the amount which should have been allocated for Taumutu.<sup>17</sup> (doc P14 (b): 9)

The 80 acres of reserve, although strategically placed at the opening of the lake and the end of the spit, fell far short of the promises made in Kemp's deed and from the terms of Mantell's instructions. It must be remembered that when Mantell was at Taumutu he was still under the impression that he was negotiating final reserves for a new agreement which would replace that made by Kemp. As far as Mantell was concerned these two reserves were all that Ngai Tahu were entitled to. Not only did the Kemp deed promise, even in its narrower English version, villages and cultivations, it also allowed for additional reserves. However at Taumutu, Mantell reserved no land beyond the kaik and cultivations. As his report shows, he even insisted that existing cultivations be abandoned. By Mantell's own account, he turned down any request for eel weirs. He later told wrote to Rolleston:

... I feel no difficulty whatever with regard to the eel fishery question. Bound as I then felt, pending the execution of the new deed which the Government deemed absolutely necessary, to maintain the validity of that under comment, I treated with the Natives in all matters connected with their reserves with a high hand, and as if I possessed the unquestionable right to do so. At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an

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16. Mantell to Domett, 30 January, 1849, Compendium, I, 217.

17. Mantell to Colonial Secretary, 30 January 1849, AJHR, 1858, C-3, p.9.

impediment to the drainage of the country that in no case would I give way on this point, although unfortunately my difficulty was increased by their knowledge that a sale then recently made in this island, a general reservation of this right to the Natives had been conceded.

He was also adamant that he insisted that the rights of the Crown to control the level of the lake should not be interfered with, since this would be the means of draining part of the lake for pasture.

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it please with regard to it.<sup>18</sup>

Although this statement was made a decade and a half after the events, several things are clear from it. First, despite the Kemp purchase Ngai Tahu believed that they had a right to their existing eel-weirs as well as the right to make new ones. Second, Mantell denied them their requests to have this right acknowledged against their wishes. Third, Mantell placed the whole issue of European settlement above any reservation of Ngai Tahu's mahinga kai.

Eighty acres of land and a few hundred pounds for the 18 inhabitants of Taumutu was little compensation for extinguishing Ngai Tahu's rights to one of their most prized taonga. The reserves did nothing to acknowledge the seasonal use of the lake and the rights of those from other places who came to take food from the lake and its surrounds. It would seem unlikely that Mantell's mission at Taumutu would have been so easily achieved had Pohau and Maopo been made aware that their rights to the resources of the lake had gone. Mantell was well aware of the possible effects of settlement. His failure to reserve Ngai Tahu any of their fisheries was based on a belief that this form of land and water use would be incompatible with the needs of a settler economy. While Mantell maintained that this was explained to Ngai Tahu at Taumutu (other hapu or rangatira with rights to Waihora were apparently not consulted) it is difficult to see just how Ngai Tahu interpreted these statements. Later comments by Ngai Tahu witnesses at a number of nineteenth century inquiries were unanimous that their rights to fish had been promised. This would indicate some confusion between protecting the rights of Maori to fish along with all Europeans and protecting Maori prior rights to fish, in the light of competing economy use of water and land resources. It

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18. Mantell to Rolleston, 12 April 1866, Compendium, I, 241-2.

must be assumed that had they realised their traditional resources were threatened, they would have more firmly resisted Mantell.

## 6. The Native Land Court 1868.

The claim to Kaitorete spit, identified as the land between Lake Ellesmere and the sea, was a key element in Fenton's 1868 land court hearing. This claim became, in effect, the test case for the validity of Kemp's Deed. Cowlshaw, the claimants' counsel, argued that the deed was invalid

Mr. COWLISHAW submitted that the Crown had failed to prove the extinguishment of the Native Title to this land. The Deed of Conveyance of the land to Mr. William Wakefield, the agent of the New Zealand Company established in London, was illegal, and therefore no title could be derived by it. There was nothing to show what had been sold, or the terms upon which the land had been sold. There was no evidence before the Court to dispute the title of the Natives to the land; and, even supposing the deed were a legal one, the Government had not carried out the stipulations which it contained. The Government had failed to prove that the land had been alienated in any manner whatever.<sup>19</sup> (doc P14 (b): 87)

The judgement which followed was a detailed examination of the nature of aboriginal title which accepted

The Court, then, is of the opinion that, though the several payments made by Mr. Mantell would not of themselves, suffice to prevent the operation of the Statute of Frauds, in avoidance of the agreement now upheld, yet those payments, combined with the receipt and the amended plan, and the subsequent acts of ownership exercised by the Crown (for a piece of the land has been granted), would form sufficient ground to cause a Court of Equity to compel a specific performance, and it will be the duty of the Court, under the order of reference, to ascertain all the terms of the contract, and to make such orders as will secure the fulfillment of them, by the Crown on one side and the Ngai Tahu tribe on the other.<sup>20</sup> (doc P14 (b): 95)

Fenton had recognised the significance of fisheries to the Ngai Tahu economy, an understanding that he brought to his Kauwaeranga judgement a few years later. He also accepted that these may have been clearly protected by the deed.

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19. Proceedings of the Native Land Court, 29 April 1868, Compendium, II, 207.

20. *ibid*, p.215.

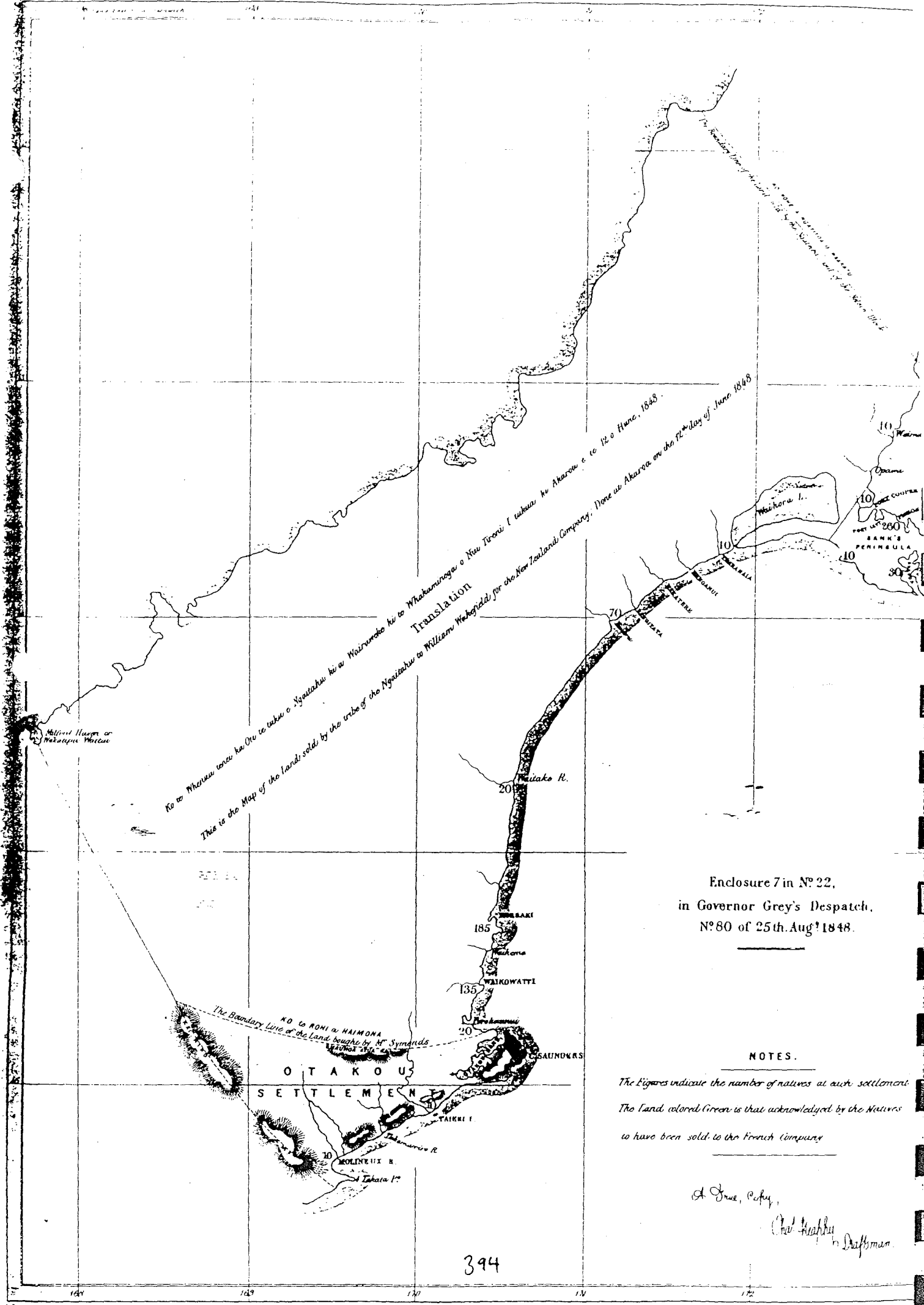
Although dismissing the case against the validity of the Kemp deed, he expressed the view that a fishery easement could be made over the whole of the spit, without compromising the ownership of the Crown. William Rolleston, the Crown's representative at the hearing, was not opposed to such an order, but he expressed the proviso that any measure could not be seen as interfering with settlement. Although a number of fishing easements were made and the reserve at Taumutu was extended considerably, no easement was granted over the spit itself. In interpreting what Ngai Tahu were entitled to in the nature of further reserves Fenton considered himself bound by the evidence of the Crown witnesses.

In all of this two economic systems with different priorities over natural resources were in clear conflict. Ngai Tahu had been promised <sup>as they saw it</sup> that their rights to the traditional economy would be reserved to them, but all the Crown agents were clearly of the view that this economy must make way to the needs of settlement. At Waihora, Maori were primarily concerned about the fishery, but the settlers and their governments were obsessed with land development. Even when clear rights to the fishery were recognised, as at 1868, these were seen as fatally in conflict with settlement. The management of the lake as expressed through the statutory provisions of the house of representatives did treat Waihora as a fishery, but always gave primacy to the agricultural needs of settlement.

## 7. Conclusion.

The very perfunctory manner with which Kemp carried out his task of purchasing the Canterbury Block from Ngai Tahu leaves some doubts as to whether the boundaries of the block and the peninsula were meaningfully agreed-upon by Kemp and the tribe. But nonetheless it would seem likely that Waihora, and Kaitorete were at least nominally included in the Kemp purchase. However, this is not really the central issue. Whether included or not Ngai Tahu believed that their rights to the natural resources of the lake had not been compromised by the sale. There is no evidence that they willingly parted with their rights to these resources and considerable evidence that they wished to retain them. The terms of Kemp's deed gave them good reason to expect that their access to the resources of the lake would be in some way protected. They may have been led to believe that they would share these resources but they appear not to have realised that their priorities over the use of the resources would be overtaken by land settlement and agriculture from which they were effectively excluded by Mantell's tiny reservations. Despite additional reserves at a later date, Ngai Tahu's ongoing interest in the lake and the spit would appear not to have been adequately

addressed.



Enclosure 7 in N<sup>o</sup> 22,  
in Governor Grey's Despatch,  
N<sup>o</sup> 80 of 25th Aug<sup>r</sup> 1848.

**NOTES.**

The figures indicate the number of natives at each settlement.  
The land colored Green is that acknowledged by the Natives  
to have been sold to the French Company

A True Copy,  
Chas. Hapley  
Draftsman.







NGAI TAHU  
 LAND SALES  
 TO THE FRENCH  
 ON  
 BANKS PENINSULA

- 1: Camp Bay
- 2: Port Levy
- 3: Pigeon Bay
- 3: Akaroa

NOT SOLD BY NGAI TAHU

(Abstract from  
 Map Exhibit "B")

To Wairerehu

To Mt Grey

Otumatua

Mantell's Port Cooper Block

1

2

3

Mantell's Port Levy Block

Hamilton's Purchase

4

NGAI TAHU

CHRISTCHURCH

Kaiapoi

Mt Grey

Banks Peninsula

To Wairerehu