Wai 863 #A22
Wai 420 #A1



# Scoping report for The Mataikona A2 (Wai 420) claim

A report commissioned by the Waitangi Tribunal for the Wai 420 claim

October 2002

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# *The Claim and Proposed Research*

## Introduction

This scoping report was commissioned by the Waitangi Tribunal on 23 September 2002.[1] Research for the report was carried out over two weeks between 30 September to 10 October. Much of the preliminary investigation of sources involved discussion with various government agencies and the claimant. Other research was carried out at National Archives Wellington, and regional archives at Masterton and Woodville. The opinions herein are those of the author and not those of the Tribunal members.

[1] Wai 863, doc # 3.13

## The Wai 420 claim

The Wai 420 claim was lodged by George Matthews on 22 November 1992 and amended in 1993 on behalf of the proprietors of the Owahanga station. The claim concerned the proposed oil exploration by AMOCO NZ Ltd and its effect on customary interests. In the amended statement of claim of November 1993, George Matthews asked that the 'Blue water title that automatically stands with customary land be confirmed.'[2] Subsequently, Mr Matthews stated that the Wai 420 claim is about protection of ...[the foreshore and sea] through property right/ownership and access.[3]

## Further Details from Counsel

Counsel for the claimants, Mr Charl Hirschfeld submitted a memorandum on the Wai 420 claim on 3 September 2002.[4] This memorandum provided additional details as to the exact nature of the alleged Treaty breach and prejudice of concern to the Wai 420 claimants. In summary the claim concerns the Crown's presumed ownership of the foreshore and seabed and the impact this has on Maori as proprietors, users and guardians or managers of the sea and foreshore, and its resources.

In distinguishing the Wai 420 claim from what is commonly known as 'the Marlborough Sounds case' currently before the courts, counsel for Wai 420 noted that in the Marlborough Sounds case, the applicants were seeking an order that the foreshore and seabed were customary Maori land. In contrast, the Wai 420 claimants have a certificate of title which names the sea as its eastern boundary, effectively making the boundary the mean low water mark and thus including the foreshore as part of the legal description of the land.[5]

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[2] Wai 863, doc # 1.6

[3] Conversation with claimant circa 17 September 2002

[4] Wai 863 doc 1.129

[5] Mr Terry Lynch, Senior Policy Analyst at the Ministry of Fisheries stated that it is the Ministry's view that between Orongorongo and Cape Turnagain, where stations have title down to the sea, the legal

Further more, counsel argues that through continual occupation and use, the Wai 420 claimants have established what is known as a presumed Crown grant to the seas adjacent to their lands. The land adjacent to the Marlborough Sounds foreshore and sea bed had been alienated by its Maori owners to the Crown. In contrast, counsel for Wai 420 noted that his claimants can demonstrate continuous occupation of the land adjacent to the foreshore and sea which they claim. Counsel said at the judicial conference on 6 September 2002 that he wished to lead professional and tangata whenua evidence to support this presumed Crown grant based on continuous occupation and use. He also noted in his memorandum that the Wai 420 claimants' title and rights to the foreshore and seabed could also derive from doctrines of aboriginal title.

## Discussion

The claim may be seen as having two legally distinct parts – the foreshore and the sea/seabed. The legal basis for the claimants' ownership of the foreshore would seem fairly straightforward – they have a certificate of title which would legally 'trump' the Crown's claim of generic ownership.[6] The claimants' ownership of the foreshore has not, however, been tested in law. It may be that the real issue is not so much who owns the foreshore, but what that means in practice – whether, for example, the claimants are obliged to follow the Crown's rules and prescriptions (the Resource Management Act) in respect of the foreshore.

Given the claimants' 'title' to the foreshore, the question of legal title to the sea and seabed can be seen as a legally separate issue. Counsel argues that the claimants have a presumed Crown grant based on use and occupation (of the sea). It may be that the claim would need to be defined further to indicate the exact nature of the alleged treaty breach and prejudice relating to both the foreshore and seabed.

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boundary is the mean low water mark. In effect, he noted that the owner could control access to the foreshore but did not 'own' the resources which were still effectively under Crown management.

[6] See R Boast, The Foreshore, Rangahaua Whanui report, Waitangi Tribunal 1996, p 25

## Scoping Commission

The commission called for research on the title history of the Mataikona block, Maori traditional and post contact occupation of the block and use of marine resources and legislation which has specifically affected Maori occupation of the block and use of the resources.

## Historical Summary

The land which today comprises Oahanga (also spelt Owahanga) Station was the largest of many blocks reserved from the Crown purchase of the Castle Point block in 1853. Originally known as the Mataikona reserve it comprised 18,131 acres of Wairarapa east coast lands between the rivers Mataikona to the south and Oahanga to the north. The Native Land Court investigated title to the block in 1869 and subsequently issued a certificate of title in three parts. The certificate of title stated in each case that the eastern boundary was 'by the sea'.[7] There may be a question of whether in fact a Crown grant subsequently issued and whether the title is still 'customary' or has in fact been freeholded.[8]

Most of the land was leased to Europeans in the late 19th and early 20th centuries with significant reserves presumably for the owners' settlements and cultivations. The extent of the Maori owners' occupation during this leasing period has not been fully researched. In 1929 at the request of the owners the Native (later Maori) Trustee took over and developed the land as a station under s 45 of the Native Land Claims Adjustment Act (1929). In 1973 the beneficiaries of the station trust voted to resume direct control of the station and the Maori Land Court vested the land in an incorporation called 'The Proprietors of Owahanga Station.' This entity now owns and runs the land known as Mataikona 2A.[9]

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[7] Wairarapa Native Land Court CT # 41-43

[8] See P Cleaver, A History of the Purchase and Reserves of the Castle Point block, Wai 863 doc # A6 p 115, footnote 420, and Switzer to Dodson, 18 March 1992 (letter held by claimant counsel)

[9] Cleaver pp 112-151

The Mataikona 2A block includes some 17-18 kilometres of coast. The coastal shore in this area is mostly a rocky shelf that averages some 200-300 metres in width. Thus, the intertidal zone (the foreshore) is a large area of land. Paua, koura (crayfish) and other marine plants and animals live on the intertidal reef and off shore, as do numerous fish and sea mammals.

Several kainga (villages) were located on the block particularly on coastal river mouths.[10] The location of settlements was probably due to the rich marine resources collected from the intertidal reef and off shore fishing beds. The retention of that piece of coastal land from the Castle Point sale is also likely due in part to the marine resources available in the area. It is notable that Maori chose to retain the Mataikona region over Whareama or Castle Point.

## Research Recommendation

Paula Berghan has already largely assembled the 'paper trail' relating to the survey and title of the Mataikona reserve.[11] Phillip Cleaver has written up the documents into a useful historical report. Tony Walzl is currently preparing a report on the Crown's administration of the block under the Maori Trustee. As such, there would appear to be little more that can be done regarding the legal title history of the land itself. There may be some useful research that could be done establishing the exact legal status of the title and whether there is in fact a Crown grant. It may also be useful to compare the Mataikona title to others along the coast and perhaps in other regions to provide a context for the Tribunal's inquiry.

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[10] See ML plan 3025 for example which records a number of villages and cultivations on the Mataikona reserve lands.

[11] P Berghan, Block histories and document bank for Tararua area.

To establish the historical case for a 'presumed Crown grant' or an argument of aboriginal title to the sea and sea bed, the claimants would need to demonstrate three points[12]:

1. Continuous uninterrupted occupation of the marine resource area
2. Continuous use of the resource
3. The exclusion of others (access to the resource)

Historical research would be necessary to demonstrate these points and it is therefore recommended that a research project be commissioned focussing on these three aspects of the claim. It is also necessary to describe any Crown actions that have affected the area, and what these effects have been.

## *Research Sources*

### General Discussion

For the first point, research would need to peruse the various primary and secondary sources for the pre-1840 traditional history of the Mataikona area. Important sources would be the traditional histories and customary tenure reports currently being prepared for the Wairarapa ki Tararua inquiry. Research should also include the Native Land Court minute books for references to settlement and use of marine resources along that part of the coast.[13] To establish settlement and use during the later 19th and 20th centuries a range of sources, both primary and secondary should be available including Native and Maori Land Court records, document banks, oral interviews and reports relating to Maori use of the sea in that area.[14] Peter Te Tau collected a number of documents on the Waimimiha fishing reserve dispute which may also prove useful.[15] There are a number of

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[12] Boast and discussion with Mr D Riddiford, 7.10.02

[13] The Native Land Court minute books are not so useful for this area as the title was not disputed and thus the information available on rights to resources is slim.

[14] See below for information on DOC and MOF reports that should be reviewed. Paula Berghan's document bank will be a useful source.

[15] Documents held under restricted access at Masterton Archives. The author has given permission for a Tribunal researcher to view.

archaeological reports on specific coastal sites and also over the whole district. These reports should be tapped for information on pre-European Maori settlement on the coast around Mataikona.

The sources mentioned above will also contribute to the second point, the active use of the marine resources. Maori exploitation of the coast should not be restricted to traditional uses. For example, the station files at National Archives contain information on the collection of agar seaweed from the coast in the 1950s and there is a general file on this as well in the MA series. The agar seaweed collection files would contribute to several issues including the use of resources, the exclusion of others, and the 'ownership' of the foreshore. The MA series at National Archives Wellington also have some general files on Maori fishing rights which should also be reviewed. The marine department files should also be checked for information on Maori use of marine resources in that region. Ngati Kahungungu and others petitioned the Crown regarding fishing rights in 1953. This petition and others, if found, could be checked for relevance to the Wai 420 claim.[16]

In terms of excluding others, there is the documented exclusive ownership of the land bordering the coast by the claimants. In addition, research could focus on records of complaint from station owners (or other local Maori) about incursions by others in the coastal and off shore area. There is some information on this in the MA file on agar seaweed collection as noted above. Mr Matthews believes there will be records of complaints and protests over fishing and coastal exploitation by outsiders at the Pongaroa police station and also with the Ministry of Fisheries.[17] There are general letters of complaint from the public concerning over fishing and coastal protection in the local authority archives in Masterton and Woodville. The local authority records also contain information on the growth of pressure on the coast and marine area from increasing settlement and subdivision, particularly in the last 50 years. These records would be

[16] See MA w2490 Box 188 43/1

[17] The agencies concerned have yet to identify the exact location of these records.

useful to indicate the developing need for the claimants to increase protection of the marine resources and also for the Crown to apply management and protection measures.

## Policy Issues

The historical report may need to include some research on policy issues as background. Richard Boast's report on the foreshore would be relevant, as would Dan Riddiford's LLM paper on ownership rights and common law. It may also be pertinent to look at the development of government policy over marine resources in the Wai 262 reports on the Resource Management Act and the ownership and management of marine resources. The rights and obligations of private 'owners' of the foreshore under current legislation, particularly with respect to developing those resources would be pertinent. Marr has already looked at the evolution of government policy relating to the paua and crayfish industries and noted regional information on the fishing industry.[18]

The Woodville and Masterton archive files contain examples of Crown vesting of the foreshore in the local authorities to enable regulation and management as the (mainly European) holiday population and fishing industries developed. This process seemed to occur in an ad hoc fashion as a response to local events (such as people racing cars and leaving fish litter on the beach). There is some information on issues of Crown ownership of the foreshore which would be relevant to the Wai 420 research project. There is also a need to consider any particular Crown actions affecting access and use, as they emerge from the historical record.

## Research Reports

A number of reports prepared for the Wai 863 (Wairarapa ki Tararua) and other inquiries are relevant to the Wai 420 research. These reports are discussed below.

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[18] C Marr, Wairarapa Twentieth Century Environmental Overview report: Lands, Forests and Coast, draft report for Wai 863 inquiry, pp 139-155

*Cathy Marr, 'Wairarapa 20th Century Environmental Overview Report; Lands, Forests and Coasts'*[19]

This report has some 60 pages on the Wairarapa coastline and includes useful sections for the Wai 420 research. For example, the report covers traditional Maori use of marine resources, the impact of new forms of land use, the growth of bach subdivisions and pressure for coastal reserves. Sections on Crown ownership of the foreshore and coastal fisheries, and Crown management systems for paua and crayfish are particularly relevant. Marr also looks at the establishment of a fishing reserve on the Matakitaki block on the south coast.

*Phillip Cleaver, 'A history of the Purchase and Reserves of the Castle Point block'*

The report details the title history of the Mataikona reserve. It covers the original Castle Point purchase in the 1850s, the lands reserved from sale, the Native Land Court title investigation of the Mataikona reserve in 1869 (Oahanga station), subsequent leases, the vesting in the Maori Trustee in 1929, and the revesting in the owners in 1973.

Cleaver does not look in detail at the Maori Trustee's administration of land in the period 1920-1970. This aspect of the station history will be covered in Tony Walzl's forthcoming report on Crown administration of Maori land in the 20th century.

*Paula Berghan, 'Block histories for Tararua and document bank'*

This document bank contains numerous primary documents relevant to the Mataikona paper trail and any substantive Wai 420 research project.

*Boast, Richard 'The Foreshore' Rangahaua Whanui Series, Waitangi Tribunal*

This lego-historical report dealing with generic issues associated with title to the foreshore is very relevant for the Wai 420 claim and a useful overview for the historical research aspect.

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[19] Draft report to CFRT August 2001

*Customary Interests and Traditional History reports*

These reports will need to be reviewed for information on settlement and use of marine resources along the Mataikona coast. Reports in this category include Kawharu and Poledniok 'Customary tenure overview for Wairarapa ki Tararua' and tradtional history reports by Tipene Chrisp and Manahi Paewai/Dorothy Ropiha. The Kawharu/Poledniok report contains occasional references to coastal settlements and resource use.

## Primary Sources

Primary sources identified as potentially relevant to the proposed Wai 420 research report include:

*National Archives Wellington*

MA 1/370 19/1/335 Collection of Agar seaweed

MA 1/149 5/13/257 Waimimiha fishing reserve

MA 1/246-250 13/1 Owahanga station files

MA w 2459/29 & 127 Owahanga station files

MA 1/435 21/3/44-45 Porangahau recreation ground

MA w 1369 Box 48 Native reserves 1862-1878

MA w2490 Box 188 43/1 pts 1 & 2 Fishing rights, general

MA-MT 1/1b #168-199 Wairarapa reserves

AAMK files

Marine Department files

Native Land Court minute books, particularly the title investigation for coastal blocks in the area

*Masterton Archives (Wairarapa local government)*

Castle Point Riding 1940/1 – 11/24 & 22

Castle Point subdivision 1958-60

Castle Point subdivision 1962-66

Castle Point 1958-66 and 1962-64

Castle Point beach, June'58- Feb'66 and 1964-68

Old Castle Point files

Castle Point Reserves and Mataikona County Properties and Reserves 1969-77

Castle Point Reserve Lighthouse 1958-63

Riversdale Reserve 1973-79

Riversdale Beach 1977-78

County Properties and Reserves (including an untitled collection of papers relevant to Castle Point)

Peter Te Tau, *Waimimiha Fishing Reserve* (documents relevant to)

Pre-1957 files held by the Tinui historical society

*Woodville archive (Tararua local government)*

Akitio beach 1937-1965 and 1966-1976 (Box 1.2/2/3)

Various files in boxes (not indexed)

## Other Research

In the preparation of this report a number of proposed research reports were identified that may come available in time to be considered.

George Matthews: The Wai 420 claimant has signalled he intends to do oral interviews of former Oahanga residents on the topic of agar collection in the 1950s. Matthews said he would make these interviews available for any research project if they were completed in time.

Department of Conservation: Local DOC staff in Masterton commissioned Geoff Matthews to research and write a 'state of the environment report' on the Wairarapa which has been ongoing since 1999. Matthews has conducted interviews with local Maori

on marine and coastal issues and plans to do several more. DOC have also commissioned a marine diving survey of the entire Wairarapa and Tararua coastline. Diving will occur off the Oahanga station area in the near future but possibly not in time for the 20 December deadline. DOC also have a scientific and historical literature search report and an intertidal zone report that may be useful for the Wai 420 project. DOC staff have expressed a willingness to share the relevant results of their study provided the Maori informants agree. DOC are currently working with local Maori on establishing some form of coastal and marine protection (a number of options are available) as required under the government's biodiversity strategy.[20]

Ministry of Fisheries: MOF commissioned Joe Potangaroa to write a report on traditional Maori rights to and management of the Wairarapa ki Tararua marine resources. Mr Potangaroa has completed his report and George Matthews is arranging for consent from those who participated in the study. Provided consent is given, the report can be released to the Wai 420 researcher. Should access to the above interviews not eventuate, it may be necessary to interview members of the claimant group on issues identified in the above report.

The Ministry of Fisheries has also been in an extended process to establish some form of Maori fishery/coastal protection in the Tararua district – likely either a taiapure or mataitai fishing reserve. The process begins with local people being selected as tangata kaitiaki and their names declared in the Gazette. MOF have already established taiapure reserves at Porangahau (north of Oahanga station) and Palliser Bay on the south Wairarapa coast.[21] The development of proposals to set up a fishing reserve near Oahanga and the location of neighbouring reserves may be relevant to the Wai 420 research.

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[20] http://www.doc.govt.../003.Theme...

[21] SR 1995/144 (NZ Gazette 13 July 1995) and SR 1996/349 (NZ Gazette 5 December 1996)

## Timetable

The time needed to complete the Wai 420 research project as proposed above is estimated below.

Research

Archives Wellington: 5 days

Archives Masterton and Woodville: 4 days

Secondary sources and interviews: 7 days

Writing

3 chapters at 3 days per chapter: 9 days

Introduction and conclusion: 1 day

Total: 10 days

**Overall Total: 26 days**