

CHAPTER 4

CONTACT AND CONFLICTING VIEWS

4.1 INTRODUCTION

The main issue in this chapter is whether Maori sold the lower river reaches when the surrounding land was purportedly sold by a land deed of 1848. From a Maori perspective, this begs the question. It assumes the matter is to be addressed within the terms of English law, which does not permit of the question of whether anything was sold at all. Were the parties sufficiently of one mind for a sale to have occurred? Did Maori sell knowing of all that a sale entailed in English law? Did they see it as an extinguishment of their ancestral interests? Did they knowingly relinquish their traditional authority over the area or merely give possession? Did they know that settlers coming on to the land would not envisage continuing obligations to the Maori alienators? Or were Maori still affected by their old customs, and if the customs of Maori and Pakeha were known to be different, were they agreed on whose applied?

Was the lower river sold?

No final opinion can be given now on the validity of the deed, for claims about the early land sales have been deferred for later hearings. None the less, because the Crown has contended that ‘the tidal reaches were sold along with other water bodies as part of the 1848 deed of purchase’, and claimant counsel has responded ‘that the text of the Deed clearly does not import any intention to sell the River’, we are obliged to decide the issue by looking at the deed.¹

For context, this chapter also traces relevant parts of the history of the early years of contact in and around the tidal reaches of the river. The focus is on the foundation of the township of Wanganui in 1841 on land that Te Atihaunui still regarded as theirs but that the New Zealand Company claimed to have purchased, and on the conflict that arose over authority in 1847. Here, we are conscious that a focus on land acquisition and the assertion of British control may not give vent to contemporary Maori concerns.

Historical review and cultural perspectives

Just as Maori and Pakeha had different views on rivers, they had distinctive laws on land transactions and on the obligations between the parties concerned. The mental gap was not bridged by contact, change, and adjustment but resolved through the assertion of power.² For the meantime, the early governors were

Distinctive social orders and questions of control

1. Document C21, p 7; doc D18, p 22

2. Historians have made this point before, but for a recent essay on the theme: see James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and Penguin, 1996, especially ch 8.

instructed to protect Maori customs not inconsistent with the principles of humanity from the operation of English law. However, the ultimate objective of British policy was to assimilate Maori into English law and political institutions.³

Maori had other expectations. Early European visitors and settlers would conform to their law and recognise their mana and rangatiratanga as guaranteed in article 2 of the Treaty of Waitangi.⁴ Whose law would apply would eventually depend on might.

When Europeans sought to buy land, their system of private land ownership was unknown to Maori. What mattered for Maori, in terms of their traditions, was not land ownership but hapu authority over individual land users and relationships with other hapu. They were concerned with the balancing of power rather than its aggregation, and the maintenance of personal obligations, which were prerequisites for stability in their social order. Looking back to the early years of settlement, the issue was how Maori and Pakeha would relate, and that was not adequately addressed. Following their own traditions, both sides simply assumed positions of their own.

The historical record suggests that Maori saw the issue as one of authority. This required not a control over Pakeha but a relationship with them on Maori terms. To understand Maori conduct towards the settlers and their governors, we need to review how customary relationships formed.

We begin this chapter, then, by considering Maori relationships and obligations.

4.2 CUSTOMARY TRANSACTIONS

Maori trade

Maori customary arrangements stressed the importance of ongoing relationships, relationships that were founded on trust and respect.⁵ Thus, in ‘gift exchange’, a significant form of Maori trade, there was no thought for an immediate rejoinder when goods were deposited with another group, but mana compelled the receiver to respond with an equal or larger return in time. The cycle of giving and later receiving something back, if repeated again and again, gave rise to a mutually dependent relationship. In a significant number of cases, it was not the prospect of an immediate exchange but the expectation of a continuing trading partnership that motivated the initial proffering of goods.

Notions of honour and prestige, or mana, dictated that giving should be free and generous, whether of goods or access to resources of the land. Receivers were obliged to respond in like manner. If crops failed or the season were bad, survival might depend on the credit that one held through the obligations owed by others.

Ancestral ‘titles’ and incorporation

Again, land was not a tradable or disposable item. Having passed down through forebears from Papatuanuku, it was entailed to the tribe’s future generations –

3. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, Auckland University Press and Oxford University Press, 1977, p 230

4. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.2

5. Ibid, especially secs 2.1–2.3, chs 1, 3, 6

unless they were removed through war. Obligations were owed to the relevant hapu on any use of land. Outsiders could use tribal land by becoming part of the tribe. The incorporation of outsiders was a known Polynesian trait. Alternatively, a group might exist as a separate unit in a client relationship. Either way, the underlying 'title' did not depart from the ancestral line, save for violence, and the right of personal use and occupation was conditional upon continued contribution to the tribal weal.

So land could also be given, but the underlying interest remained with the ancestral hapu, to whom the donees continued to be obliged.

Land gifts

Consequently, Maori, as users of the land, thought in terms of relationships and control, not in terms of ownership. Indeed, some interests in land were not even dependent on possession. The hapu had interests in land even when they permitted occupation by others, as with donees or hapu in a subservient or client position.

Associational
interests

A unique feature of ancestral tenure was the value placed on associational interests. Persons not in occupation claimed interests in land so long as an ancestral association remained alive in their minds. It could be, for example, that their ancestors had been on the land previously, lived and died there, named places there, or spilt their blood there in battle. In submissions on water issues to the Tribunal in the Te Whanganui-a-Orotu claim, Professor James Ritchie put it this way:

Defeat in battle might injure the exercise of rangatiratanga but the mana remained. The ancestors remain. The mana whenua remains even after conquest, and can be restored at any future time. The mana associated with tapu is never destroyed but goes on forever, whoever owns the land . . .⁶

Maori thus referred to European townships on 'their' land long after the land was sold. The survival of this practice testifies to the extent to which it was ingrained. As late as 1977, for the purposes of land-use planning, the New Zealand Maori Council sought and obtained a change to the Town and Country Planning Act to recognise the relationship of Maori to their ancestral land, whether or not the land had long been sold.⁷

There were also land interests through blood connections. Maori with such links to other hapu might choose to join them. Members from distant tribes, like those of Taupo, Taranaki, or what is now the King Country, might claim an interest, albeit latent, in Whanganui lands. While such interests were seen as remote by Europeans, they were real to Maori, being founded on their predominating concepts of ancestry. In all, a variety of interests were respected. What might be considered emotive or remote interests were as real to Maori as interests in possession.

6. Submission of James Ritchie, Wai 55 ROD, doc C2, p 5

7. Section 3(1)(g) of the Town and Country Planning Act 1977. Some years elapsed before the courts appreciated the import of the provision: see E T Durie, 'Will the Settlers Settle?: Cultural Conciliation and Law', *Otago Law Review*, vol 8, no 4, 1996, p 452.

4.3 MAORI AND PAKEHA TRANSACTIONS

4.3.1 The incorporation of Europeans

Customary notions on land devolution and occupiers' responsibilities to tribal 'title-holders' appear to have influenced Maori in seeking out Europeans. For example, with reference to the few and dispersed Europeans who settled in the Far North before the Treaty of Waitangi, land allocations to the Europeans of that time were probably not sales of land but acquisitions of people.⁸ The newcomers were spoken of as 'my Pakeha'. They were expected to contribute to the hapu and the hapu owed them protection.

Trade with
Europeans

Similarly, customary relationships built on generosity, trust, and respect to promote trade and peace appear to have influenced Maori relationships with early European traders, whalers, missionaries, and settlers. By bringing much sought-after trade goods to the hapu, they gave mana to that hapu. Early land buyers were probably perceived as traders and early land transactions as trading transactions.

If the Europeans did not respond as Maori custom required, relationships rapidly soured. Repudiation of agreements or physical action could follow a failure to maintain trade exchanges or an omission to acknowledge the mana of the Maori partner. Maori protocols are punctiliously honed to building relationships through the careful acknowledgement of the status of others, but conversely, a failure to acknowledge the status or the mana of others was a ground for utu (revenge), muru (compensation), or war.

Relationships with
European 'tribes'

Customary considerations did not cease to apply when planned settlement by the New Zealand Company brought Europeans in greater numbers and when land transactions on a much larger scale were made. By Maori custom, the newcomers were obliged to acknowledge who had placed them on the land, preferring them in trade or supporting them against their former enemies. In Maori thinking, the land was still Maori land, and the hapu might even presume to say where the newcomers could site their townships and build their homes.

A question of mana
rather than land

Accordingly, large numbers of European arrivals, as at Port Nicholson (Wellington) in 1840, were not always seen as a threat. Rather, the hapu – or at least their rangatira, with whom the company's land purchase agents had dealt – initially expected that they would be respected and would benefit. Indeed, these land transactions may have been entered into not to terminate their mana but to enhance it. As historian Ann Parsonson has recognised, many Maori and Pakeha transactions are referable to the Maori pursuit of mana.⁹ James Belich has described mana, for ease of Pakeha comprehension, as 'spiritual capital'. 'If capitalism, the Pakeha system, is used as an analogy for the Maori system,' he

8. *Muriwhenua Land Report*, secs 2.3.1, 3.7

9. Ann Parsonson, 'The Pursuit of Mana' in *The Oxford History of New Zealand*, W H Oliver and B R Williams (eds), Oxford and Wellington, Clarendon Press and Oxford University Press, 1981, pp 140–167; compare Angela Ballara 'The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maori, 1840–1890', *Journal of the Polynesian Society*, vol 91, no 4, 1982, pp 519–541

wrote, 'then mana was its capital, the accumulation and use of which was in itself desirable.'¹⁰

Status or mana accrued to Maori through providing for and being acknowledged by others, and land transactions were a way of establishing mana with Pakeha. Again, it was not the land but the relationship that was important, and the transaction was the beginning not the end of an association akin to a partnership. The relationship required that each party should respect the mana of the other and act in good faith, while acknowledging each other's autonomy.¹¹

Imperatives of mana

If the relationships were not maintained as custom dictated, matters could rapidly sour. When settlers acted independently, as though they alone had the say, then previous transactions might be repudiated, and attempts might be made to reinstate the mana that, in Maori eyes, had been taken away. Accordingly, in early land transactions, Maori were concerned not only about the payment that they would receive but about the value of that which might come; for example, from the expansion of trade or public works. It was not the admission of Europeans that was the issue, at least initially; it was the maintenance of a customary relationship with them. Thus, there was ideological conflict from the start.

Authority for the British was based not on relationships between Maori and Pakeha as equals but on the principle of political amalgamation. Peace and good order, in the contemporary British view, would come from the supremacy of the Crown in Parliament, with all people, Maori or Pakeha, as equal citizens. In colonial circumstances, the Crown would be obliged to regulate all relationships between its subjects, especially those between Maori and Pakeha.

Authority for the British

As Maori were unacquainted with European ways and were seen to be untutored in matters of religion, agriculture, industry, and law, and susceptible to European disease and unscrupulous European land purchasers and settlers, the Crown assumed the obligation to provide special protection and assistance. This accorded with the evangelical and humanitarian doctrine that they should be protected until such time as they were sufficiently assimilated for the colony to be granted self-government.

Protection of Maori 'wards'

Under the amalgamation policies of Governor Grey, Maori law and authority were acknowledged only in districts where the Queen's writ could not be enforced. As Belich has pointed out: 'Between 1840 and 1872, and a number of years thereafter, the history of Maori-Pakeha relations is the history of the two independent zones or spheres', neither being politically unified.¹²

Substitution of Maori law

As to land, the presumption was that all land was Crown land but subject to Maori customary usage, where established, until the customary interest was

Settler views on land rights

10. James Belich, 'The Governors and the Maori (1840-1872)', in *The Oxford Illustrated History of New Zealand*, Keith Sinclair (ed), Oxford and Auckland, Oxford University Press, 1990, p 81

11. Maori concepts of partnership and autonomy are considered by the Waitangi Tribunal in the *Taranaki Report*, sec 2.1.

12. Belich, 'The Governors and the Maori', p 75. The Maori zones consisted of numerous tribes and hapu - see the Pakeha zones of 'six colonies' that later became nine provinces: Belich, *Making Peoples*, pp 188, 191.

extinguished by purchase or expropriation (see sec 2.2). This position, however, was reached only after a very considerable debate in official circles in the 1840s.

Wastelands

Influential colonisers, including representatives of the New Zealand Company, which effected the first European settlement in Wanganui, believed that Maori interests should be recognised only in respect of those lands where they had their homes, cultivations, and burial places. The rest was wasteland available for colonisation. Underlying this view was the well-known theory of Emmerich de Vattel, an eighteenth-century international lawyer, that Europeans had the right to plant colonies in the New World and appropriate lands unsettled and uncultivated by the indigenous inhabitants.¹³ On this view, land had value only through the addition of labour and capital and was valueless to Maori unless utilised in some commercial way.

Influence on Maori rights

Notwithstanding official acceptance that all land in New Zealand belonged to Maori until they sold it, the view of some colonists on wastelands was not entirely set aside. It appears to have been assumed, for example, that Maori could not own rivers, lakes, or foreshores, or possibly even swamps; indeed, sometimes such assumptions still persist today. Furthermore, no wrong was seen in acquiring Maori land as cheaply as possible and disposing of it to others at a much higher price, as did both the Crown and the New Zealand Company. The thought was that Maori would benefit from the development of the land about them and that the land they retained would grow in value from the settlers' enterprise.

Minimal Maori reserves

The same thought, reinforced by evidence that Maori were increasingly participating in the European economy and declining in numbers, partly accounted for the general reluctance of the Crown and the company to reserve sufficient land for Maori to provide for their existing and future needs. In fact, the company's policy of reserving for Maori 'tenths' of the land surveyed in town and country allotments, after selection by land purchasers, was deliberately intended to promote peaceful amalgamation. Company reserves were scattered through European settlement regardless of pa sites, cultivations, and burial grounds, though many Crown reserves did include such lands.

Maori and Pakeha views of land transactions

Stemming from the theory of wastelands were fundamental differences in Maori and Pakeha views of land transactions, and, in terms of contracts, on the goal to be achieved. Maori were primarily concerned with relationships to land, land users, and other hapu. These relationships were founded on ancestors and on arrangements with the living. There was no equivalent to English law, where individuals held defined parcels of land without concomitant duties to an associated community, and where land might be given over to strangers without the community's permission. There was no concept that a land transaction put an end to any relationship between the parties. The thought that the parties might not

13. In *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, London, Joseph Chitty, 1834, p 35, de Vattel wrote of hunter-gatherer societies: 'Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.'

have continuing obligations to each other was not only foreign but antithetical to Maori customs.

Accordingly, early documents assuming that Maori entered into transactions on English legal terms must be treated with circumspection. The Maori use of the word 'sale', for example, is not evidence that they understood its meaning. It was simply the Pakeha term for whatever they were doing. Translations putting 'sale' in the mouths of Maori cannot be relied on either, when Maori had no word for it. Then, in the context of making contracts with those of an oral culture, the written contract may not represent the intentions of both parties.

Application of
indicative evidence

Even a shift in the real politic of power does not in itself establish that Maori would have capitulated to the English legal regime. Any substitution of an alternative philosophy on land would happen only over time, with old beliefs and habits continuing to influence what people thought and did. Were it accepted, after time, that 'sale' was an extinguishment of Maori interests in the land, though that was impossible in traditional thinking, the settlers may still have been expected to honour those with whom they had dealt. Ingrained notions of mana could have conceived of nothing else.

Maori, nevertheless, keenly appreciated that the question of whose law prevailed depended on the balance of power. Generally, they were receptive to settlers but wary of the Governor's military might. So long as they were a force to be reckoned with, their view of the relationships between people, arising from contractual obligations, could not be ignored. When the settlers presumed to act contrary to the interests of their Maori 'benefactors', it was necessary to shift the focus from contractual obligations to the changing balance of power.

A question of power
and control

4.4 TRIBAL WARFARE AND UNITY

4.4.1 Guns and warfare

The advantages of European trade first became apparent to Atihaunui during the musket wars of the 1820s and 1830s. Hapu possessing muskets extended their power, while those without them were taxed to maintain their defences. Northern tribes that acquired muskets first conducted raids well down the island, and local infighting followed the weakening of former tribal powers.¹⁴

Atihaunui reacted like many others by uniting for defence; those residing at the fringes withdrew to the central recesses for security. In the European record of interaction with Maori, three Atihaunui rangatira are most mentioned: Topine Te Mamaku of Ngati Haua-te-rangi and Ngati Rangatahi, who lived at Tuhua on the Ohura River north of Taumarunui and at Maraekowhai and Whakahoro on the upper reaches of the Whanganui; Te Peehi Turoa of Ngati Patutokotoko, who lived at Utapu in the centre (and later his son, Te Peehi Pakaro); and Te Anaua of Ngati

Unity and mobility

14. Malcolm McKinnon (ed), *New Zealand Historical Atlas*, Auckland, David Bateman Ltd, 1997, pl 29

Ruaka, who occupied Putiki-wharanui.¹⁵ All three were fighting chiefs who engaged in the musket warfare, and, as a result of outside threats, more regularly acted in concert. All three lived in a number of localities and had interests throughout large areas of the river. They were not confined to the upper, middle, and lower spheres of interest. Te Mamaku figures most in this chapter through his interaction with Europeans.

Initially, Te Mamaku had the larger task of defending the access route down the river. He shifted from the upper reaches to join others in a defensive position further to the south.¹⁶ In the early 1840s, he was in Wellington, 'and by 1846 he had brought his Ngati Haua-te-rangi warriors down to join Te Rangihaeata in support of Ngati Rangatahi in their dispute with the European settlers in the Hutt Valley'.¹⁷ In September 1846, Te Mamaku returned to Whanganui.

The aggregation of Atihaunui along the banks of the middle reaches of the river, such as the concentration in and around Pukehika, for example, commanded the approaches to the ancient network of tracks and waterways linking them with the hapu of the neighbouring descent groups.¹⁸ The rugged terrain and sheer river cliffs, sometimes 80 metres high, provided strong natural defences. 'On parts of the river, notably above Pipiriki,' David Young wrote, 'the local villagers could withdraw their vine ladders, securing themselves from attack and exposing their enemies to the terror of tumbling boulders.'¹⁹

It was nothing new that, while the fringes were at risk, the centre was protected. A poetic name for the river was 'te koura puta roa', an abbreviation of a saying that the people were like the crayfish for which they were renowned, for though the legs are pulled off, they still escape amongst the stones.²⁰

Attacks from Te
Rauparaha and
others

In 1819 or 1820, a musket-armed northern taua (war party) joined by Te Rauparaha and moving south attacked and defeated an Atihaunui pa at Purua near the exposed river mouth. A combined force of Atihaunui, with some help from Tuwharetoa, confronted them on their return journey and eventually defeated

15. For Topine Te Mamaku, see David Young, 'Te Mamaku', DNZB, T49, p 469; I M Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832-1852*, Wellington, Department of Internal Affairs, 1968, p 302.

For Te Peehi Turoa, see Steven Oliver, 'Te Peehi Turoa', DNZB, T115, p 559; doc D25. The chief undoubtedly had other residences as well. His main stronghold was the Manganui-a-te-Ao River, but he extended his influence right down to the lower reaches: see David Young, *Woven by Water: Histories from the Whanganui River*, Wellington, Huia Publishers, 1998, p 31.

For Te Anaua, see Steven Oliver 'Te Anaua', in *The People of Many Peaks: Maori Biographies from the Dictionary of New Zealand Biography, 1769-1869*, Claudia Orange (ed), 2 vols, Wellington, Bridget Williams Books and Department of Internal Affairs, 1991, vol 1, p 152.

16. This, too, is a reminder of Maori mobility. We noted several other examples of how blood connections allowed people to move about.

17. Young, 'Te Mamaku', p 470

18. Document A47, p 9

19. David Young, 'River of Great Waiting', *New Zealand Geographic*, July-September 1989, p 110. He added: 'At least one such ladder, at Arawhata, survived in the 1890s to be photographed.'

20. Richard Taylor, *Te Ika a Maui: New Zealand and its Inhabitants*, London, Wertheim and McIntosh, 1855 (reprinted Wellington, 1974), p 146

them well upriver at Kaiwhakauka.²¹ A further assault came from the Amiowhenua war expedition of 1821 and 1822, which came from the north and part of which Te Anaua managed to defeat at Mangatoa near Koroniti.²² Soon enough, Atihaunui were fighting an intrusion from the interior by Ngati Raukawa under Te Ruamaioro. Atihaunui were besieged at Makakote above Kaiwhakauka, but were spared death by starvation by Te Peehi Turoa.²³

After his eviction from Kawhia by Waikato and Ngati Maniapoto, Te Rauparaha came south once more in 1821 and 1822, with Ngati Toa and Ngati Raukawa on a tribal migration known as Te Heke Tataramoa, forcing Atihaunui to withdraw upriver as he passed.²⁴ Some heavy fighting with tribes in the Horowhenua area followed, in which Atihaunui were also involved. Te Rauparaha attacked Whanganui for the last time in 1829, in part seeking retribution for the death of his Ngati Raukawa relation Te Ruamaioro at Makakote. He laid siege to Putikiwharanui Pa for some two months, eventually gaining victory, but Te Anaua, Te Mamaku, and Te Peehi Turoa were able to escape upriver to the tribe's fastness.²⁵

Some more fighting at the river mouth followed in 1832, as a Te Atiawa heke passed through on its journey south. By this time, and until the signing of the Treaty of Waitangi, most of the Atihaunui were living at upriver pa and cultivations for reasons of security, visiting the coast only seasonally.²⁶ Others, including Ngati Rangatahi from the upper reaches, themselves went south to make contact with the Europeans in Wellington. Some remained on the upper Whanganui, and their descendants are there to this day; others of Rangatahi found an alternative home on the banks of the Rangitikei River.²⁷

The musket war period sheds light on matters relevant to the present claim. It tells us that the people were highly mobile and not constrained by boundaries. It indicates that, though divided into hapu, they still acted as one if required. It shows, too, how Atihaunui were vulnerable to the predatory raids of musket-bearing tribes, since their relative isolation from trading and whaling stations had afforded them few opportunities to obtain firearms themselves. Moreover, after Te Rauparaha settled at Kapiti, he largely monopolised the European trade from the Horowhenua to the Whanganui districts. The vulnerability of Atihaunui disposed them to seek alliances with Europeans through trade and the Treaty of Waitangi.

Significance for this claim

21. T W Downes, *Old Whanganui*, Hawera, WA Parkinson, 1915 (doc A40), pp 119–124

22. Ibid, pp 127–128; Oliver, 'Te Anaua', p 152

23. Document A40, pp 130–132; Oliver, 'Te Peehi Turoa', p 559; Oliver, 'Te Anaua', p 152

24. Steven Oliver, 'Te Rauparaha', *The People of Many Peaks*, pp 272–273

25. Document A40, pp 146–147; Young, 'Te Mamaku', p 470; Oliver, 'Te Peehi Turoa', p 559

26. Suzanne Cross and Brian Bargh, *Whanganui District*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), April 1996 (doc E2), p 7

27. Joy Hippolite, 'Ngati Rangatahi', report commissioned by the Waitangi Tribunal (Wai 145 ROD, doc H4), p 48. Ngati Rangatahi are usually associated with Ngati Maniapoto, but they also have strong Atihaunui connections.

4.5 EUROPEAN CONTACT AND EARLY LAND TRANSACTIONS

Itinerant traders

The earliest recorded visits of European traders to Whanganui were in 1831 – the first trader, Joe Rowe, came to seek dried heads; the second, a Mr Scott, to trade in flax. Rowe died violently, and his own head was taken and preserved. A missionary later suggested that certain Taupo Maori were responsible, since the trader would not give up the heads of two of their leaders while at Kapiti, so they had waited for him at the river mouth, his next known place of call.²⁸ In 1834, John Nicol, whose wife was born near Pipiriki, arrived and traded on the river for some 12 months. He was offered land to establish a store but declined.²⁹

Spread of Christianity

Just as guns were introduced through Maori agents, so also was Christianity. After two attempts by Maori teachers of Ngati Ruanui to spread the gospel ended in their being killed and eaten, Wiremu Tauri, from Taupo, preached the Christian faith at Putiki and gained converts.³⁰ Later, when the first European missionary, Henry Williams, visited the district in 1839, he found Maori throughout the Whanganui River involved in Christian practices.³¹

The first resident missionary was the Reverend John Mason, who established a mission station at Putiki in June 1840 and was expected to cover Whanganui, Rangitikei, and Manawatu. He found the people ‘generally willing to receive Christian instruction’ but very widely dispersed – ‘five thousand people scattered 200 miles on the banks of the River Wanganui, and 130 miles along the sea coast . . . dependent on the feeble exertions of one individual’. When Mason was drowned in January 1843 crossing the Turakina River, and the Reverend Richard Taylor replaced him in May of that year, the majority in most villages were still not baptised.³²

Missionaries and the first land transaction

During his 1839 visit, Williams was concerned to protect Maori from Sydney and New Zealand Company land buyers and arranged a land transaction for that purpose. His son-in-law and biographer, Hugh Carleton, recorded that at the now reoccupied Putiki-wharanui Pa, in December 1839: ‘A council of chiefs . . . approved of their land being purchased, *and held in trust for their benefit alone*’ (emphasis in original).³³

After completing the transaction, Williams left notice of it with Te Anaua, to pass on to the New Zealand Company representative should he arrive, and this Te Anaua was to do.³⁴

28. Document A40, pp 167–170; Young, *Woven By Water*, p 15

29. M J G Smart and A P Bates, *The Wanganui Story*, Wanganui, Wanganui Newspapers, 1972, p 46; R D Campbell, *Rapids and Riverboats on the Wanganui River*, Wanganui, Wanganui Newspapers, 1990, p 11; Young, *Woven by Water*, pp 17–18. Young spells the trader’s name ‘Nicol’.

30. Document A40, pp 170–171

31. Lawrence M Rogers, *Te Wiremu: A Biography of Henry Williams*, Christchurch, Pegasus, 1973, p 149

32. Janet Murray, ‘A Missionary in Action: The Rev Richard Taylor and Christianity among the Wanganui Maoris in the 1840s and Early 1850s’, in *The Feel of Truth: Essays in New Zealand and Pacific History*, Peter Munz (ed), Wellington, AH and AW Reed, 1969, pp 198–199

33. Hugh Carleton, *The Life of Henry Williams: Archdeacon of Waimate*, revised ed, Wellington, AH and AW Reed, 1948, p 274

34. E J Wakefield, *Adventure in New Zealand, from 1839 to 1844, with Some Account of the Beginning of the British Colonization of the Islands*, Christchurch, Whitcombe and Tombs, 1908, p 176

Such transactions were not approved of by the committee of the Church Missionary Society or by the British Government. Later, when the Land Claims Ordinance 1841 provided for the validation of pre-1840 land transactions, no provision was made to validate land deeds creating such trusts, though the Government had been made aware of them, and Williams' trust, like others, fell into obscurity.³⁵

On the secular side, the European settlement of Wanganui was, in the words of Ian Wards, 'an overflow for Wellington', the first and principal New Zealand Company settlement.³⁶ The decision of its agent to open Wanganui land for selection by Wellington settlers may be traced back to a deed executed by Colonel Wakefield for the company and two Maori, aboard the *Tory*, lying off Kapiti, in November 1839. According to evidence later given to Commissioner William Spain, it followed a 'partial sale' on the boat by Ngati Toa, whereafter two Whanganui 'chiefs' offered land, and, after signing a deed, were also presented with merchandise.³⁷

Colonel Wakefield
and the New
Zealand Company
transaction

At best, it was an embryonic proposal, if not a 'farce'. Indeed, it purported to convey the whole or parts of Whanganui, Taranaki, Taupo, Rangitikei, and Manawatu. Though it was probably seen by Maori as trade exchange, it was to lead eventually to the Crown's acquisition of the greater part of the Whanganui coastal territory. The land boundaries were most uncertain and the area must have encompassed well over a million acres, extending from the mouths of the Patea and Manawatu Rivers and inland along their courses to Mount Tongariro.³⁸ This was far beyond what all the Whanganui 'chiefs' could convey, let alone two of them.

Colonel Wakefield promised to visit Whanganui with a cargo of trade goods to 'complete' the purchase but was unable to do so because of bad weather. In the event, his 19-year-old 'lively and irresponsible' nephew, Edward Jerningham Wakefield, went there in March 1840 to meet the people and inspect the country, but at that time the completion of the payment was taken no further.³⁹

E J Wakefield

On that occasion, Te Anaua presented the notice of Williams' transaction, which Wakefield dismissed as an 'arrant falsehood'.⁴⁰ The New Zealand Company should have been aware that, if Williams' transaction were an 'arrant falsehood', its own proposed purchase could be no better, for in January 1840, the Governor had

Transactions by this
time null and void

35. Other missionaries, including the Reverend Richard Taylor, while in north Auckland and before he went to Whanganui, had endeavoured to devise some means to preserve lands to Maori or to make sales more difficult or less general. To that end, many land trusts were formed or implied in missionary land deeds. In November 1840, George Clarke presented Hobson with particulars of 17 such trusts, though many more are known of in North Auckland: see *Muriwhenua Land Report*, sec 3.3.4. With reference to two large tracts held in trust for some hapu in the Bay of Islands, this means of preserving the land had been disapproved of by the committee of the Church Missionary Society: Carleton, p 287.

36. Wards, p 305

37. Report of Commissioner Spain and attachments, 31 March 1845, BPP, vol 5, pp 80–81

38. H H Turton, *Maori Deeds of Old Private Land Purchases in New Zealand, from the Year 1815 to 1840*, Wellington, Government Printer, 1882, deed 421, pp 394–395, 'Whanganui block'

39. John Miller, *Early Victorian New Zealand*, Wellington, Oxford University Press, 1974, p 55; Wakefield, p 177

40. Wakefield, p 177

intervened to stop private purchases, which after that date were ‘absolutely null and void’.⁴¹

Putiki not involved

Despite the law, a transaction was purportedly completed, shortly up the river, on E J Wakefield’s second visit in May. At that time, Putiki, on the left bank, was the main village of the area, though most of its ‘principal people’ were away.⁴² Upriver Maori, however, had gathered where they usually camped for fishing or other purposes on the bank opposite. In the opinion of the local historian T W Downes, this was the site of the present-day Moutoa Gardens in Wanganui City.⁴³

The transaction was executed there without the participation of significant Putiki leaders. Because they were local residents, their interests could not be denied, not that they were the only ones absent. The deed covered several descent groups far afield, in Manawatu, Rangitikei, Taranaki, and the volcanic plateau.

Procedure

There are significant differences between European and Maori evidence of the events, as later given to Commissioner Spain, the former describing total acquiescence, the latter saying that only a few had agreed but that many more were keen to uplift the proffered trade goods. Estimates of those present varied from 400 to 800. Wakefield related that 27 ‘chiefs’ then boarded the schooner, moored in the river, and their marks were secured to the 1839 deed.⁴⁴ Later that day, Wakefield arranged for £700 in trade goods, including a quantity of firearms, to be deposited on the shore, but, in a departure from Maori custom, he did not accompany the goods for their distribution.

The goods were taken from Wakefield’s ship and placed on the shore under the supervision of Kuru, one of the Whanganui Maori who had been aboard the *Tory* at Kapiti. Kuru is not known to have been a leading rangatira, but he acted as Wakefield’s agent, assembling the hapu and advocating in favour of the arrangement. By the time Wakefield arrived on shore, the distribution was already under way. Wakefield observed the proceedings from the roof of a hut. When, in his words, the assembled groups of Maori began to encroach on the space, ‘creeping, without rising, nearer to some tempting heap’, on Kuru’s advice, Wakefield retired to his ship to avoid being embroiled in what seemed likely to be a fight. From there, he observed events through a telescope. In competition for the goods, there was an unruly scramble amongst ‘Seven hundred naked savages’, to the extent that he ‘feared that some loss of life would ensue’.⁴⁵

Cultural
misunderstanding

Wakefield’s graphic but exaggerated account contains no awareness that, if the Maori party were as savage as he described them, the reality of his own transaction might be in question. Here, we reflect on the cultural gap between the parties. Maori gift presentation was accompanied by ceremony, as in the pan-tribal hakari,

41. ‘Proclamation by His Excellency William Hobson, Esq, Lieutenant-Governor of the British Settlements in Progress in New Zealand’, 30 January 1840, BPP, vol 3, pp 129–30

42. Spain’s report, 31 March 1845, BPP, vol 5, p 87

43. Document A40, p 188

44. Wakefield, p 208; note that the deed itself has 34 signatories: H H Turton, *Provinces of Taranaki, Wellington, and Hawke’s Bay*, vol 2 of *Maori Deeds of Land Purchases in the North Island of New Zealand*, Wellington, Government Printer, 1878, p 395.

45. Wakefield, pp 208–210

where the host leader, calling the name of each group, pointed to the goods intended for them, carefully acknowledging each party and mindful of their mana, rank, and roles on the occasion. Were etiquette breached, a graphic response would be sure to follow, debasing the host and memorialising the event as a reminder of why rules are needed. As necessary for their mana, the leading rangatira held back from the *mêlée*, but others like Kuru were quickly involved.⁴⁶

The Reverend Richard Taylor doubted that this could have constituted a proper bargain. Kuru, as Wakefield's agent, secured 'much the largest portion of the booty', and Wakefield 'had received individually their signatures, and he did not in like manner deliver the goods, but abandoned them before delivery'.⁴⁷

Taylor's view

Taylor considered that the transaction would have been seen by Maori as no more than a trade in goods, for on the following day, 10 tonnes of potatoes and 30 pigs were arranged where Wakefield's trade goods had been, and Wakefield was invited on shore to receive them. Wakefield called it a '*homai no homai*, literally "a gift for a gift"'.⁴⁸ In response, he left a blanket for every pig and tobacco for the potatoes. He then departed and did not return to maintain a reciprocal trading relationship.

A gift exchange?

Though Wakefield saw the deposit of his goods as payment for the land, official investigations subsequently exposed grave irregularities in the whole transaction: the huge area involved; the lack of Manawatu, Taranaki, Rangitikei, and Taupo representatives; the absence of Putiki leaders, especially if it was to relate primarily to the coastal area; the lack of protocol; the appearance of gift exchange; and formal evidence from Maori before Commissioner Spain that there was no general agreement to sell. Furthermore, Colonel Wakefield later acknowledged that the Kapiti encounter did not complete the contract. Yet, by May 1840, further contracting was illegal.

Status of the Wakefield transaction

Only a few days earlier, on 23 May 1840, the Treaty of Waitangi had been presented at Putiki, with its Crown right of pre-emption clause a reminder that only the Crown could acquire land from Maori. It was presented by Henry Williams and the Otaki missionary Octavius Hadfield. In essence, it sought to establish a working relationship between two peoples based on promises that each would respect the other's authority, and on 'Peace and Good Order', not only between Maori and Pakeha but amongst Maori themselves. As an agreement for ongoing relationships between Maori and Pakeha, it was something to which Maori could subscribe.

Treaty of Waitangi

Representatives from various parts of the river were present, and 14 Whanganui rangatira signed the Maori text.⁴⁹ Amongst them were Te Peehi Turoa and his son Pakoro; Te Anaua; and Rere o Maki, the mother of Keepa Te Rangihwinui, who

46. The same breach of etiquette marred the first land transaction in Muriwhenua and produced the same result: see *Muriwhenua Land Report*, sec 3.3.1

47. Cited in document A40, p 191

48. Wakefield, p 211

49. Document A40, pp 182–183. In fact, it seems that 10 signatures were collected on 23 May and another four were collected eight days later on 31 May: see Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin and Port Nicholson Press, 1987, pp 62–63.

was soon to become famous as Major Kemp. Te Mamaku – who was probably in Wellington at the time – did not sign, an omission that David Young believes was ‘almost certainly of his own choosing’.⁵⁰

We found no report of proceedings specific to Whanganui, but on 11 June 1840, Henry Williams wrote to Governor Hobson stating that chiefs on both sides of Cook Strait:

as far as Wanganui, signed the treaty with much satisfaction and appeared much gratified that a check was put to the importunities of the Europeans to the purchase of their lands, and that protection was now afforded to them in common with Her Majesty’s subjects.⁵¹

In fact, the envisaged protection was undone by the New Zealand Company within a week.

Focus of early transactions

Looking back on the transactions of 1839, first, with the missionary Henry Williams and, secondly, with the New Zealand Company, the focus for Pakeha was on the land but for Maori was on the relationships that might follow.

4.6 THE COLONISATION OF THE COASTAL RIVER FLATS

Stages of European settlement

Initial European settlement may be seen in four stages. The first concerns the arrival of settlers and surveyors, who were permitted to remain on the site where they were establishing a town, even though the Government still had to recognise that there had been a valid sale of that land. In the second stage, Commissioner of Land Claims William Spain determined that a sale had been entered into, but that those who had not shared in the original payment should receive £1000 compensation and the company in return would be entitled to a Crown grant of 40,000 acres, less reserves. The third stage was marked by military intervention and inconclusive fighting, reflecting Maori determination to maintain their authority over the land and river, and the Governor’s attempts to impose his. Fourthly, and finally, after peace was restored, the land transaction was completed by Donald McLean in 1848.

The question for the purposes of this claim is not whether the land was validly ‘sold’, and on whose terms, but, since the land lay on either side of the river’s lower reaches, whether Maori knowingly and willingly relinquished their traditional authority over that part of the river. The two questions, however, cannot be entirely divorced.

50. Young, *Woven by Water*, p 29

51. BPP, vol 3, p 227

4.6.1 The assumption of settlement rights

The New Zealand Company settlement of lands near the river mouth was effected before the right of settlement was established by law. This may have materially affected the legal process by which Maori and Pakeha rights there were determined. Furthermore, as New Zealand ‘began its constitutional life as a dependency of New South Wales’, the law relevant to this process ‘was patterned on models from New South Wales, where native rights were not part of the design’.⁵² Thus, as the Muriwhenua Land Tribunal has observed, ‘the necessary matters to consider for the protection of Maori interests’ were not specifically spelt out.⁵³

Settlement effected
before rights
established

On 14 January 1840, just before Hobson’s departure from Sydney, Governor Gipps issued three proclamations drawn up in London at Hobson’s request and re-issued by him on 30 January, after his arrival in New Zealand. These Crown proclamations were categorical that all transactions made thereafter were to be ‘considered as absolutely null and void, and neither confirmed nor in any way recognised by Her Majesty’. No title to land purchased from then on would be recognised, unless derived from the Crown. Commissioners would be appointed to investigate past purchases, and future acquisitions of land from Maori chiefs or tribes would be illegal.⁵⁴

Crown
proclamations,
January 1840

The Crown’s pre-emptive right to purchase Maori land was provided for in article 2 of the Treaty of Waitangi, first executed on 6 February 1840. In terms of Normanby’s instructions to Hobson, that right carried with it a concomitant duty to protect Maori interests. To that end, Hobson appointed a protector of aborigines, who was also to conduct land purchases and ensure proper terms.

Crown’s right of pre-emption and duty to protect

Governor Gipps’s New Zealand Land Claims Ordinance 1840 provided for commissioners to investigate claims based on alleged purchases before the date of the proclamations, and for land grants to issue if the claims were allowed, but to a maximum of 2560 acres unless the Governor in Council specially authorised more. Nevertheless, after an interview with a deputation of agitated Wellington settlers in Sydney, he decided to grant the company ‘one continuous block of 110,000 acres’, including the harbour, and to limit further acquisitions of land by the company ‘to localities approved by the Governor and to continuous blocks, each being no less than half a million acres’.⁵⁵

Land Claims
Ordinances 1840–41

After New Zealand ceased to be a dependency of New South Wales, the Land Claims Ordinance 1840 was adopted in New Zealand, then repealed and re-enacted in almost identical terms.⁵⁶

For the purposes of this claim, it should be noted that the Land Claims Ordinance 1841 did not provide the land claims commissioners with authority to exam-

52. AH McIntock, *Crown Colony Government in New Zealand*, Wellington, Government Printer, 1958, p 98; *Muriwhenua Land Report*, sec 4.7

53. *Muriwhenua Land Report*, sec 4.7

54. Gipps, 14 January 1840, BPP, vol 3, pp 123–125; Hobson, 30 January 1840, BPP, vol 3, pp 129–130

55. E J Tapp, *Early New Zealand: A Dependency of New South Wales, 1788–1841*, Carlton, Melbourne University Press, 1958, pp 142–143; McIntock, pp 121–122

56. New South Wales Laws Adoption Ordinance, 3 June 1841; Ordinances, Legislative Council, 9 June 1841, sess 1, no 2

ine transactions made after the 1840 proclamations. Moreover, in the preamble and section 3, it refers to Normanby's instructions to Hobson of 14 August 1839, stating that the Crown would not recognise any title to land thereafter acquired unless derived from, or confirmed by, a Crown grant. Further, the 'schedule B' scale for determining awards provided for purchases only to December 1839.

It should also be noted that there is nothing in that ordinance exempting the New Zealand Company from these provisions. In the event, Commissioner Spain was to begin his 'final report on the New Zealand Company's claim to the district of Wanganui', dated 31 March 1845, by outlining that the claim regarded an alleged purchase in November 1839; but he was to continue that, in May 1840, E J Wakefield was 'commissioned by the principal agent to *conclude* the negotiations for the acquisition of the district of Wanganui' (emphasis added).⁵⁷

November 1840
agreement

Running against this tide was the November 1840 agreement reached by the New Zealand Company directors in London with the Colonial Secretary, Lord John Russell, for a grant of land commensurate with their expenditure on colonisation.⁵⁸ The land was to be selected within the limits of the 20 million acres the company claimed to have purchased in the Wellington and Taranaki districts, as well as the northern part of the South Island, assuming that it had been fairly purchased.

The company claimed, and Russell apparently believed, that 'it was in possession of large tracts of land', but that point still had to be established. Based on an agreed formula of one acre for every £4 expenditure, James Pennington, an accountant nominated by the British Government, estimated that the company was entitled to almost one million acres. This was much more than Russell had expected; indeed, he later said that he 'did not support the view which the Company take of the unqualified nature of the engagement entered into on the part of the Government'.⁵⁹ In January 1841, he appointed William Spain as a commissioner to investigate the company's land claims, and Spain sailed for New Zealand on 20 April 1841.

Statutory
recognition
unnecessary

Special legislation to effect the November 1840 agreement was unnecessary.⁶⁰ If the company's land claims were fair and valid, then, in the exercise of the discretion reserved in the New Zealand Land Claims Ordinance 1840, the Governor in Council could effectuate the agreement and not limit the company to 2560 acres.

Application to
Whanganui

The November 1840 agreement and Pennington's award did not overcome the legal difficulties in relation to the company's claim to land in the Whanganui district. The places where the company could take up land, on account of its

57. BPP, vol 5, pp 80–81

58. Rosemary Tonk, '“A Difficult and Complicated Question”: the New Zealand Company's Wellington (Port Nicholson) Claim', in *The Making of Wellington, 1800–1914*, David Hamer and Roberta Nicholls (eds), Wellington, Victoria University Press, 1990, p 36

59. Adams, p 257

60. For completeness, it is added that statutory recognition was proposed but did not proceed. This was included in the Land Claims Ordinance 1842, which was approved by the Governor but disallowed by the British Government: Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, secs 2.3.3, 2.4.6. In law, this ordinance was unnecessary and did not add anything. All land claims transactions had still to be approved by commissioners. The ordinance merely provided for larger awards for the company in terms of the agreement where company claims were proven.

entitlement, were expressed to be those places where it had established a claim before Hobson's arrival in New Zealand; any other claims had to be abandoned. While Colonel Wakefield claimed Whanganui land had been purchased in November 1839, the cargo of goods he promised to complete the payment was not delivered until May 1840.

Because of the shortage of suitable rural allotments for selection in the 110,000-acre Wellington block, on 22 December 1840, Colonel Wakefield declared that the second series of selectors could, if they chose, select their land in the Wanganui district – notwithstanding the agreement with Gipps that they were to be confined to this compact block and that there would be no diffusion of settlement beyond its limits. Hobson then gazetted a notice prohibiting the sale of lands at Wanganui until entitlement could be legally established. Yet, by early February 1841, there were some 30 to 40 settlers living there awaiting allotments.⁶¹

Occupation taken

The site chosen for the town named Petre was four miles from the river mouth and could be easily navigated by vessels of 14 tonnes. The survey of town, port, and country allotments on both sides of the river was soon under way, and the first 80 selections were made in September. Maori seemed to be agreeable to the settlers occupying and using the area where they were establishing a town but objected to their occupation of any lands beyond.

In 1841, after the survey work began, some Taupo Maori who were present objected, saying that they had not received any payment for the land that was theirs, an illustration of the complex nature of Maori land interests.⁶²

Maori protest

As the survey and selection of land proceeded, Maori increasingly protested that they had not agreed. The local missionaries, Mason and Matthews, advised a party of settlers arriving overland from Wellington that Wakefield's purchase had been 'a farce from beginning to end'. When they cross-examined Colonel Wakefield at a public meeting, he merely conceded that his nephew's failure to purchase Putiki was 'not unlikely'. He authorised settlers to offer a reasonable payment to the Maori, but according to John Miller, 'when a deputation went to the pa the Maori firmly reiterated their refusal to sell'.⁶³

After the September selection of land, Maori obstructed settlers from taking possession of their country allotments and refused further offers of payment. In *Old Whanganui*, T W Downes quotes a settler's account of 'sectionists' attempting to take their farm allotments but being driven back to town and a letter from a settler whose home was occupied by Maori and a pa was built close by.⁶⁴ According to Dawson, the police magistrate and sub-protector, Maori 'were positive that land had been sold for twenty-three miles to the north of the river', but 'they had not, and would never, sell land on the south or east side'. Yet, as an irate settler pointed out, 'the greater number, and the best' of the company's sections were on this side.⁶⁵

61. Document A40, p 200

62. Document E2, p 12

63. Miller, pp 56–57

64. Document A40, pp 208, 211

65. Wards, pp 305, 306

Maori objections were not to the settlers themselves, but to their taking possession of places not specifically allotted to them by the hapu. In fact, Maori had quickly learned to value the trading opportunities that the settlers brought. Ian Wards records that, for the first six years of the settlement, ‘canoes laden with pork, kumara, potatoes, and before long, fruit, vegetables, and poultry, paddled down to the town and returned with the colourful, and coveted, articles of trade’.⁶⁶ Downes considered that the settlers had no fear for their safety during the early stages of settlement. Apart from tense situations over the survey and occupation of land, relationships with local Maori were cordial. Indeed, the settlers found ‘living very cheap, owing to the abundance of food brought in by the natives’.⁶⁷

Waiver of
pre-emption

News of the November 1840 agreement did not reach Hobson until April 1841. During his first visit to Wellington in September 1841, he tried to reconcile Treaty promises and company colonisation.⁶⁸ In a letter to Colonel Wakefield of 6 September 1841, he agreed that the Crown would forgo its right of pre-emption to all land claimed by the company in an accompanying schedule, and that the company would receive a grant ‘of all such Lands as may by any one have been *validly* purchased from the Natives’ (emphasis added).⁶⁹ The schedule referred to up to 110,000 acres in the Port Nicholson and Porirua districts, and up to 50,000 acres in New Plymouth. But, by this time, there were some 150 settlers in Wanganui waiting to select land being surveyed.

As Wards puts it, ‘because his hand was forced both by the shrewd Wakefield and by instructions to accommodate the Company’, Hobson extended this arrangement to Wanganui.⁷⁰ The amount listed in the schedule was 50,000 acres, more or less, to be surveyed and allotted by the company. The boundaries were described as follows:

The sea coast, commencing one mile westward from the mouth of the river Wanganui, and extending from that point 10 miles eastward along the coast; from thence, a line bearing north by compass, eight miles; then, by a line bearing west, 10 miles; and from thence by a line bearing south to the coast.⁷¹

The Governor’s letter must be seen to have proposed no more than that the company might purchase, direct from Whanganui Maori, up to 50,000 acres in the future. It predicated that the initial transaction might not be valid or allowed, in which case, a further purchase would be necessary.

Spain’s instructions

When Commissioner Spain arrived in Auckland on 24 December 1841, Hobson decided to confine his work to investigating the New Zealand Company’s claims and any non-company counterclaims to the same land. He instructed Spain to give effect to the current land commission ordinance and the November 1840 and

66. Wards, p 308

67. Document A40, p 200

68. Wards, p 219

69. Ibid, p 220

70. Ibid, p 305

71. ‘Schedule of Lands Referred to in Despatch No 41/30’, 1 September 1841, BPP, vol 3, pp 523–525

September 1841 agreements. Colonel Wakefield protested against the investigation of the company's claims on the ground that it was exempt under the November 1840 agreement. Clearly, that was not so, and Wakefield had eventually to accede to the legal position. He then assumed that, in his case, the inquiry would be a mere formality, though there was no legal basis for that assumption either.⁷²

4.6.2 Spain's recommendations

In investigating the company's Wanganui claim, Spain was to act more as an agent of the Crown than as an impartial investigator, taking special steps to secure for the company the land that it had come to expect from the agreements with Russell and Hobson and appearing anxious to meet the objective of European settlement. No doubt he was influenced by the situation on the ground, where settlers were confined to the area where they were establishing a township but could not take up the promised country allotments.

Spain's approach

The same situation had applied in Wellington, where, three months after he had opened his investigations on 15 May 1842, he had discovered how weak the company's claim really was. To circumvent 'further complications' and 'unintended and undesirable results for those most immediately concerned with the outcome', he 'radically change[d] the focus of the commission's work' by adopting a compensation scheme proposed by Colonel Wakefield.⁷³ This was simply to compensate those who had not participated in the 1839 transaction earlier.

Spain in Wellington

The compensation scheme was not written into law and neither was there a common law principle to support it. The legal position was that no Maori were bound to sell if they did not agree to do so, nor could they be made to sell land by accepting compensation. Furthermore, under the Land Claims Ordinance the commissioner had to determine the propriety of transactions, not take steps to complete them himself. Yet, Spain did that, and even where the sellers were in a minority, he tried to persuade all those concerned to accept compensation. In the result, his investigations were aimed at deciding where compensation was due, not the validity of the transaction, or, if valid, which land was company land and which was Maori.⁷⁴

Compensation scheme

On his first visit to Wanganui in April 1843, Spain opened his court with a three-day examination of Maori witnesses, then closed it because Colonel Wakefield did not attend. After E J Wakefield's late arrival, he reconvened it for two days, but Wakefield called only one witness.

Spain's court

Spain announced that, in his view, a sale had been made and that compensation should be paid to those who had not been party to it. He invited the assembled Maori to make some proposition through George Clarke junior, their protector, as to the amount. The Government, he assured them, had never intended that they

72. Tonk, pp 36–39

73. Ibid, p 57. Tonk gives a full account of Spain's investigation: pp 47–58.

74. Ibid, pp 57–58

would be disturbed in the possession of their pa, burial places, and cultivations, and would see they were paid such compensation as he should award them.⁷⁵

Spain's views on
Wakefield
transaction

Spain did not consider the evidence he heard in terms of equity and good conscience. In his final report of 31 March 1845, he noted that the deed covered land from Manawatu and Patea to Tongariro, and observed that the boundaries were uncertain and the deed difficult to comprehend. He recorded how Maori witnesses claimed that they had not agreed to the transaction; that it had not been seen as a land conveyance by those who did; that only some of those who assembled were willing to sign the deed; that the leaders of Putiki had not been involved; and that there was widespread dissatisfaction. He observed how, after three days of trying, E J Wakefield could produce only one 'very infirm man, with faculties somewhat impaired' to support the claim, and he lamented how Kuru, or Kurukanga, the Maori most involved in the transaction, assiduously avoided the court.⁷⁶

Further, Spain criticised Colonel Wakefield's employment of his youthful and inexperienced nephew to conduct the purchase, and his private speculation for the exchange of blankets and tobacco for pigs and potatoes: 'This intermixture of payments for land, and barter . . . has necessarily been the source of immense confusion in the minds of the natives.'⁷⁷

A sale declared

Nevertheless, he declared that there had been a sale. The following passage from his report reveals his thinking:

The whole of the evidence, I think, goes to show that the people who were assembled at [the] meeting, and particularly those who took the most active part in its proceedings, were utterly regardless of what land they proposed to sell, whether it belonged to them or not, and evinced a determination to get possession of the goods landed from the schooner upon any terms; nor does it appear that those who at this time, according to the statement of some of the native witnesses, dissented from the sale took any steps to oppose it, or to make Mr Wakefield acquainted with their unwillingness to alienate their land; on the contrary, they seem to have joined with the others in appropriating to their own use whatever part of the merchandize they could lay their hands upon.⁷⁸

This is not indication of a sale, the more so since he also reported that:

the majority at least of those who consented to the sale were people brought down from several miles up the river by Kurukanga to receive the goods, and could have had little, if any, claim to or interest in the land near the mouth of the Wanganui, comprised within the limits of the Company's survey.⁷⁹

Here, it may be noted that, if Maori were 'utterly regardless of what land they proposed to sell', that was consistent with their habits when making gifts of goods,

75. Spain's report, 31 March 1845, BPP, vol 5, p 91

76. Ibid, pp 86, 87

77. Ibid, p 87

78. Ibid, p 90

79. Ibid, p 87

though it was expected that the receiver would respond with equal generosity over time.

Before Spain revisited Wanganui in May 1844, he received the Reverend Richard Taylor in Wellington, who told him that 'he had been deputed by the Wanganui chiefs to convey their desire that they should be paid compensation for the land claimed by the Company'. According to Ian Wards, Taylor 'had been quietly working to this end for some time'. He gave Spain a list of chiefs entitled to payment, with the amount of money and goods required by each, which he attributed to 'his own conversations'. It was this payment, totalling about £1300, he explained, that the chiefs were 'most anxious to receive'.⁸⁰

Taylor's
intervention

Spain, it seems, accepted Taylor's alleged arrangements with the chiefs.⁸¹ Immediately after his arrival at Wanganui with George Clarke on 3 May 1844, he 'despatched a circular letter to the chiefs of all parts of the district, requesting their attendance at a general meeting, to receive the payment [he] had brought them at their own request'. Taylor then informed him that on his return he had found the Maori 'much altered in their notions of this subject'.⁸²

Spain's attempted
settlement

George Clarke must have found this too, for on 15 May, he informed Colonel Wakefield that he had been 'unable to procure a satisfactory termination to [his] negotiations with the chiefs'. Wards relates how:

Te Mawai, and others not parties to the 1840 agreement, positively refused to accept any payment regardless of the amount. . . . He therefore suggested . . . that the fixed sum of £1000, together with four sections from the Company block, plus sundry eel cuts, three small lakes and a lagoon, should be offered the tribes . . .⁸³

The colonel then agreed to place £1000 at Clarke's disposal to settle the company's claim.

On 16 May, Spain and Clarke met the chiefs at Putiki, in company with the colonel, who had brought £1000 in gold and silver from Wellington.⁸⁴ Spain read his decision affirming his earlier announcement that a sale had been entered into with E J Wakefield and adding that the company:

had done all that was further necessary to the extinguishment of the native title to the district of Wanganui in offering the sum of money which had been demanded for that purpose, on behalf of the aborigines, by the Protector.⁸⁵

He 'desired Mr Clarke to tender them the 1,000*l* which he had agreed upon with Colonel Wakefield as the amount they were to receive'.⁸⁶ In return, the company was to be entitled to a Crown grant of 40,000 acres of coastlands, less all pa, burial

80. Wards, p 309

81. Ibid, p 311

82. Spain's report, 31 March 1845, BPP, vol 5, p 88

83. Wards, p 311

84. Ibid, p 311. Wards states that the meeting took place on 17 May, but this appears to be an error.

85. Spain's report, 31 March 1845, BPP, vol 5, p 90

86. Ibid, p 89

grounds, cultivations, eel cuts, a tenth of the block in natives reserves, three small lakes, and a lagoon.⁸⁷ Spain referred to the reserves as being marked on an accompanying plan, but this plan was not published with his report.⁸⁸

In keeping with a stance that they had taken at a previous meeting with Spain on 9 May, the assembled Maori positively refused to accept the compensation money. At that time, they had denied that they had ever agreed with Taylor to accept the compensation money, and Spain had berated them:

I am much surprised at your conduct. I had always entertained a very different opinion of you; you have deceived Mr Taylor, and deceived me. I came here on the strength of your own request, and am prepared to accede to all your reasonable wishes, and the reserves you mentioned to Mr Taylor shall be made; but understand me distinctly, that you cannot hold back the land; I shall award it to the Europeans whether you take the payment or not.⁸⁹

All he could do, Spain said at the 16 May meeting, was to represent their refusal to the Governor, who would determine how the £1000 should be laid out for their benefit.⁹⁰

Maori acquiescence
a mistaken
presumption

In making his determination that the company was entitled to a Crown block of 40,000 acres less reserves, Spain was acting on the mistaken presumption that those chiefs who were absent at the time of the sale would acquiesce 'in the proposition to accept payment for their claims to the land which some of their countrymen ... had conveyed to the Company'.⁹¹ He believed what Taylor conveyed to him in Wellington, and left Clarke in Wanganui to negotiate with the chiefs over reserves and compensation rather than ascertain their own wishes. Like Taylor and Clarke, he regarded their refusal of compensation and desire to keep their land as a 'temporary aberration'.⁹²

In the circumstances of this case, we consider that Maori acquiescence could only have been established if consent had been given in court or could be verified in writing, and in this case there were no written consents and in appearing before the court they had objected. Clearly, the requirements of the Land Claims Ordinance were not followed; indeed, the case proceeded on a basis for which there was no provision in law. Spain was influenced not only by the Governor's instructions but by the company's plans and the settlers' prior possession.

Spain referred to his decision as an 'award', and many others have done so since. In terms of the ordinance, however, it was plainly a recommendation. Only the Governor could make an award, and he deferred action on account of Maori opposition and his inability to enforce an award at that time.

87. Spain's report, 31 March 1845, BPP, vol 5, pp 90–91

88. Spain's reserves are shown on Turton's map: see Turton, *Provinces of Taranaki, Wellington, and Hawke's Bay*, map deed 77, 'Map of the Settlement of Wanganui'.

89. Minutes of Spain's proceedings, 9 May 1844, BPP, vol 5, p 96

90. Wards, p 312; see also BPP, vol 5, p 99, for a copy of the original letter

91. Spain's report, 31 March 1845, BPP, vol 5, p 90

92. Wards, p 309

In September 1844, four chiefs, including Te Anaua and Te Mawai, wrote to Governor FitzRoy asking him to come to Wanganui to settle the dispute.⁹³ Precisely what had to be resolved is not clear. It could have related to the acceptance of compensation or it could equally have related to who had the mana over the town, the upriver or lower-river Maori. Te Peehi declared that he alone had consented to the deed and that he had pointed out the places where Pakeha were to settle.⁹⁴ He may have meant that he alone had the authority over the town side of the river, while Putiki Maori had the other side, where they were left with a reserve.

Subsequent
developments

In December 1844, Governor FitzRoy sent J J Symonds, his private secretary, to treat with local Maori, but to no avail. Soon afterwards, a large taua of Ngati Tuwharetoa arrived seeking local support for an attack on Ngati Ruanui and living off the land. FitzRoy could offer little protection; indeed, at one stage he contemplated abandoning the settlement. HMS *Hazard* was dispatched from Wellington for a show of force, but military intervention was averted when the weather blew the ship south before the troops on board could disembark. Moreover, with the growth of trade and the spread of Christianity, Maori were more accepting of Europeans and increasingly reluctant to continue tribal feuding and warfare. In the end, the conciliatory and mediating influence of Taylor, Bishop Selwyn, and Donald McLean, the Taranaki protector, prevailed, and the taua returned to Taupo without loss of face.⁹⁵ When Governor Grey took office in November 1845, he had the troops and financial support that FitzRoy had lacked to renew attempts to resolve the land question, but not before Whanganui Maori became involved in military engagements in the Wellington district.

No final conclusion

4.6.3 Military action

Military action in Whanganui followed similar events in the south, where tension over disputed land purchases and the question of authority had been high since 1842.⁹⁶ Nevertheless, as Wards has pointed out: 'It had little to do with European settlement in Wanganui itself, and perhaps even less with the local land purchases'. On the one side was Te Mamaku, who was then in alliance with Te Rangihaeata (but Te Rauparaha was not involved). On the other side were the Government and its military forces.

Te Mamaku and
hostilities to the
south

In the Cook Strait area, there were two outbreaks of fighting: the Wairau affray in 1843 and the Hutt Valley skirmishes in 1846. These events aroused a sense of panic among the Wanganui settlers, for the same could happen to them. In response, Governor Grey took it upon himself to visit Wanganui to settle the land question, which he saw as the means of removing Maori opposition to the Government. Grey

Proposals to resolve
the Whanganui land
question

93. Ibid, p 312

94. Spain report, BPP, vol 5, p 85

95. Wards, pp 313–315

96. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Auckland University Press, 1986, p 73; Wards, p 324

claimed to have persuaded the Putiki rangatira to accept the £1000. He then sent the money with Symonds to conclude matters.⁹⁷

Symonds found the need to apply more persuasion. With Donald McLean as interpreter, he told an assembly of lower Whanganui Maori that ‘the tribes could expect friendship and increasing benefits from the Europeans, if only they met their wishes’.⁹⁸ Such talk may have affirmed Maori customary expectations of continuing obligations, though Maori may have suspected more and more that Pakeha might not act as honour required.

Symonds agreed to larger, more compact reserves coinciding with existing cultivations rather than the scattered blocks offered by Spain, and he permitted the survey of several additional reserves, much to the concern of the settlers, who thought Maori would ‘end up with the best parts of the block’.⁹⁹ The friction between Maori and surveyors recurred.

Proposals
abandoned

Matters then took a turn for the worse when, in the Hutt Valley, Te Mamaku led an attack by 200 warriors on Boulcott’s farm. Requests from him asking Whanganui hapu for reinforcements were brought north by a messenger. Symonds abruptly decided that the Wanganui land question could not be finally settled in what he saw as an atmosphere of distrust. He had the £1000 secretly shipped back to Wellington and departed abruptly. Te Mawai likened him to ‘a wild pig when you thought you had got hold of him he ran away’.¹⁰⁰

Grey’s Wellington
campaign

Grey directed his increased resources to settling the question of authority in Wellington, but he was unable to secure any decisive victory. On 23 July 1846, the neutral Te Rauparaha was captured in his home, breaking the spell of influence that Ngati Toa had wielded over Maori and Pakeha alike. After several clashes with Grey’s troops, Te Rangihaeata and his followers dispersed and escaped north in August, eventually taking up a defensible position in the Poroutawhao Swamp south of the Manawatu River mouth.¹⁰¹

Te Mamaku returns
in peace

After Symonds had left for Wellington, three Putiki chiefs wrote to Grey assuring him that the majority of local Maori wanted the sale to proceed. Major Richmond suggested that Donald McLean return to Wanganui to settle the deal,

97. Wards, pp 316–317. The fighting followed the attempt of Te Rauparaha and Te Rangihaeata to turn back surveyors in the Wairau Valley by burning their huts and the arrival of an armed party to arrest the chiefs for arson. A stray shot killed Te Rangihaeata’s wife, and he executed utu by clubbing nine European prisoners. Twenty-two Europeans and at least four Maori were killed. The Acting-Governor, Willoughby Shortland, and his officials were too weak to risk more conflict with Maori and refused to embark on the more vengeful course that the panic-stricken colonists demanded. The new Governor, Robert FitzRoy, after hearing both parties, rebuked them and declared that, because the Europeans were first in the wrong, he would not avenge the prisoners’ deaths: see A D McIntosh, *Marlborough: A Provincial History*, Christchurch, Capper Press, 1977, pp 6–83; Angela Ballara, ‘Te Rangihaeata’, DNZB, T63, p 488. For a brief account of the fighting in the Hutt Valley, see Belich, *The New Zealand Wars*, pp 73–74.

98. Wards, p 318

99. Ibid

100. Ibid, p 321; Te Mamaku’s hapu, Ngati Rangatahi, who were originally from the upper Whanganui, had been granted rights of occupation in the Hutt Valley in return for gifts of tribute by Te Rangihaeata: DNZB, T63, p 490; reference to Te Mamaku’s request for reinforcements is in Wards, p 319.

101. Wards, pp 278–288

and Colonel Wakefield agreed to make the £1000 available again. Te Mamaku and his followers returned to Wanganui, in September 1846, and went quietly upriver. At the opening of a new church at Hikurangi on 4 October, he and the assembled chiefs 'expressed a determination to live in peace both with other tribes and with Europeans'.¹⁰²

Nevertheless, continuing military operations in the Wellington district and the news of Te Rauparaha's capture were followed by the arrival of a large taua from up the river on 19 October 1846, with the avowed intention of travelling south to assist Te Rangihaeata. That caused great alarm amongst the townspeople, who asked Grey to provide military assistance or to remove the settlement. Taylor, who was in Otaki at the time, immediately wrote to Richmond requesting the dispatch of troops. On 13 December, 180 men disembarked from HMS *Calliope* with instructions to construct a stockade to defend the township.¹⁰³

In the opinion of historian Ian Wards, the military intervention was 'but the end-run of military operations in Wellington, with no local reason for its outbreak'.¹⁰⁴ Maori were peaceably disposed. Reliance was placed on Taylor's view, which may have depended on exaggerated rumours, for he was not in Whanganui at the time. It was known that Te Mamaku sought settlers, but he could not accept soldiers, whom he regarded as a challenge to his authority. Peace depended not on the presence of military forces but on their absence. When the soldiers arrived, they found no enemy and, instead, Putiki Maori helped them cut wood for a stockade.¹⁰⁵

Issue of authority

Eventually, incidents occurred, culminating in the murder of several members of an out-settler family, the Gilfillans, occupying a country allotment, though no agreement had been reached and no grant made for the transfer of the land. Rightly or wrongly, Te Mamaku was thought to be implicated. Putiki Maori assisted the capture of five young Maori escaping upriver, which would not have endeared them to the upper river hapu. These five were said to be the culprits, and after a civil inquest and court martial, four were hanged immediately and the fifth, on account of his youth, was transported for life, thereafter commuted.¹⁰⁶

Descent to war

In May 1847, Te Mamaku, Te Pehi Pakaro, Maketu, and Ngapara responded with a taua from the upper river to challenge the Governor's presumptive control. Their plan was to entice the soldiers out of the stockade and upstream so that they could fortify an area and fight on their own ground. Governor Grey arrived with reinforcements, taking the number of troops in the town to 750, and attempted an advance upriver. Progress was so slow, however, that Te Mamaku came south to meet them. The result of this and a subsequent engagement was inconclusive, with only a few casualties on each side. Te Mamaku then announced it was time to go home to plant crops.

102. Ibid, p 322

103. Ibid, pp 323, 327

104. Ibid, p 350

105. Ibid, pp 325–327

106. Ibid, pp 330–332; Young, *Woven by Water*, p 35

Thereafter, Te Mamaku was not pursued and many of the troops were withdrawn. When Taylor met him and a large assembly of Maori upriver just beyond Mataongaonga on 30 December 1847, he considered that Te Mamaku and many other rangatira desired peace.¹⁰⁷

Putiki Maori were not involved, but one settler opined:

all our river natives are so intimately connected and related, that it would be folly to believe that mere interested friendship, and such is the basis of their love for us, would, on emergency, supersede or dis sever the firmer ties of consanguinity.¹⁰⁸

Maintenance of
Maori authority and
peace

Te Mamaku had made it clear throughout the campaign that his quarrel was with the military and the Governor, not the settlers. From a Maori perspective, Te Mamaku had challenged the Governor's authority and had withstood an attempted response, thus showing he and his hapu had kept their authority over the land, river, and township, and therefore matters should still be regulated on customary terms.

The purpose of the peacemaking that followed was twofold: to reconcile Te Mamaku, Te Pehi, and their allies with the Governor; and to restore peace among the Whanganui River hapu. Both aims were finally achieved at a meeting of reconciliation at Putiki-wharanui on 17 February 1848. Te Anaua said that he wanted all bad feelings superseded by peace and love, though he emphasised that his cause had 'been one with the Europeans' and would remain so. Others spoke, and Te Mamaku is reported to have said: 'It is right for one to make peace and shake hands with his enemy: there is one pa, but many families; one tribe but many minds: now I make peace with the Pakeha for ever'. His image of one pa captured the relationship of the hapu to each other, as did Pakaru, a chief from Waikato, who said, 'Wanganui is but one river but has many branches'.¹⁰⁹

4.6.4 McLean's transaction

McLean's operations

Soon after the peace, Donald McLean was called in to complete the land transaction. McLean had been sub-protector of aborigines in Taranaki until the Protectorate Department was abolished in 1846. Having acted as the interpreter for Symonds in his attempt to complete the purchase of the Wanganui block during April and May of that year, he was already familiar with the situation on the ground.¹¹⁰ This, together with his good working knowledge of Maori language and protocol, his respect for chiefly rank, and his own imposing presence, stood him in good stead in negotiating land purchases with the Maori claimants.

107. For a fuller account of the foregoing, see Wards, pp 334–340; Young, *Woven by Water*, pp 35–38.

108. Document A40, p 298 (citing Dr Wilson's diary)

109. 'Evidence from the Journals and Writing of Two Missionaries (Reverend Richard Taylor and Father Jean-Marie Vibaud)', Taylor journal typescript, QMS TAY 1989 vol 5, ATL (doc D15), pp 179–180; compare with doc A40, pp 317–318, – both sources are reproductions of the contents of Taylor's journals, but differ slightly in their wording.

110. Wards, pp 317–318

A shrewd observer of Maori manners and customs, McLean none the less assumed that Maori would rapidly adopt European ideas and institutions. Rather than seeking to give effect to Maori preferences concerning the disposal of their land, he sought to buy large blocks outright and to minimise native reserves, so that Maori would be encouraged to buy back land from the Crown and farm it as individuals. Faced with objections from Maori claimants to parting with their lands, he endeavoured to convince them that they would benefit in the long run from European settlement through the establishment of peace and security, the growth of trade and agriculture, and the provision of roads, hospitals, and schools – all of which would add to the value of the land and reserves they retained.¹¹¹ This gave his transactions the flavour more of ongoing reciprocity than of final settlements.

On the day McLean left New Plymouth for Wanganui, he took up his new appointment as inspector of police. On his return to New Plymouth, he was to choose and enrol 10 constables and a sergeant for an armed police force detachment. According to Richard Hill, Governor Grey envisaged this extension of the armed police system as ‘integral to his wider strategy of control of both Pakeha and Maori society’. As Hill has put it, these arrangements were to provide McLean with ‘coercive backing’ for his land transactions.¹¹²

Between 1 and 29 May, McLean, assisted by the company’s assistant surveyor, Alfred Wills, who had been a member of Symonds’s party in 1846, obtained consents not only from the hapu with whom Wakefield and Spain had dealt (from the upper river and the lower river, respectively) but also from others outside the Atihaunui allegiance who claimed interests in Whanganui lands, such as Ngati Ruanui. A letter from Wills to William Wakefield of 23 June 1848 gives a detailed account of their proceedings up to 27 May, when he was compelled to return to Wellington on account of this mother’s dangerous illness.¹¹³ McLean’s report to the Colonial Secretary of New Munster of September 1848 was much more considered and general, having been written after his return to New Plymouth from Wanganui, where he had been laid up with a rheumatic attack for several weeks after the final execution of the deed of sale.¹¹⁴

According to Wills, immediately after his arrival, McLean communicated with all the chiefs near the town. He ‘quietly but firmly’ informed them that ‘they must all meet together for the purpose of calmly and fully agreeing amongst themselves as to the claims for compensation of those who had not been previously paid’ and lay the same before him.¹¹⁵ He then prepared and widely distributed a circular letter from Lieutenant-Governor Eyre to a large number of named chiefs describing the

Proceedings for
consents

Determining bona
fide claimants

111. For a fuller account of McLean’s approach to land purchases, see Waitangi Tribunal, *Tē Whanganui-a-Orotu Report 1995*, Wellington, Brooker’s Ltd, 1995, sec 3.4.1; brief of evidence of Keith Sinclair, Wai 119 ROD, doc A56; Alan Ward, ‘Donald McLean’, DNZB, M11, p 255; Wards, pp 317–318

112. Richard Hill, *Policing the Colonial Frontier*, Wellington, Department of Internal Affairs, 1986, pt 1, p 246

113. NZCA3/8, NA Wellington, pp 384–414

114. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 248–251

115. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 402–403

outside boundaries of the block required by the Europeans and calling on those who were ‘bona fide Claimants’ to communicate with him. He told them that:

the payment was not to be made to one or a few great Chiefs but was to be divided amongst all, that it was a last payment and intended for those whose claims had not previously been extinguished, and that the amount of compensation money was £1,000.¹¹⁶

Symonds’s reserves
and the eastern
boundary settled

McLean then lost no time in obtaining consents to Symonds’s reserves and to the eastern outside boundary, which he had observed being carefully marked out by Wills in the presence of ‘delegates from the natives of Wanganui and Wangaehu’. In settling the reserves, McLean ‘firmly and consistently opposed’ initial Maori insistence on retaining valuable pieces of bush land, and stressed ‘the propriety of their abandoning their numerous small cultivations’, which ‘they could not possibly stand in need of’ in addition to Symonds’s ‘ample reserves’.¹¹⁷

Ngati Ruanui
‘troublesome’

On 17 May 1848, McLean ‘found it necessary to direct immediate attention to the Ngatiruanui and Waitotara claimants, who were assembled in considerable numbers at Kai Iwi’ and had sent for him to inform him that:

they were not bound as a distinct tribe, possessing a distinct claim to confirm the sale by Whanganui natives, or recognise imaginary boundaries on maps which in any way interfered with their rights without their knowledge or sanction.¹¹⁸

In a hasty note to Lieutenant-Governor Eyre on 27 May, McLean observed that they had ‘been most troublesome’; indeed, ‘in running the northern boundary line they gave a deal of trouble and endeavoured to reduce the block by several thousand acres’.¹¹⁹ He related their resistance to Spain, who, in his award, had ‘considered no other claims than those of the people of Wanganui’, whereas there was:

a powerful body of other claimants who had a title to a large portion of the district awarded by him without the natives knowing what the boundaries of the land awarded by him were.

The Whanganui people, however, ‘considered that they were alone entitled to receive the [amount] publicly and [expressly] awarded to them’. Those not recognised were ‘fully determined not to part with any portion of their land at any hazard unless it was fairly and openly purchased from them’.¹²⁰ In his September 1848 report to the Colonial Secretary, McLean added that the Kai Iwi Maori were ‘evidently actuated by strong feelings of jealousy towards the Whanganui tribes’, which he had endeavoured to remove.¹²¹

116. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 357

117. Ibid, pp 358–359

118. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 248

119. McLean to Lieutenant-Governor Eyre, 27 May 1848, Donald McLean papers, qms 1208, ATL (cited in doc A49(a), p 67)

120. Ibid, p 68

121. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 248

On 18 May, McLean had a long korero with them at Kai Iwi, which in his opinion convinced them that:

Ngati Ruanui
acknowledged

a settlement of their claims and disputed boundaries . . . would be the surest means of extinguishing their long-pending animosities, and of ultimately introducing Europeans to live on the land they were desired to part with, who would promote peace and harmony, and confer lasting benefits on themselves and their posterity.¹²²

Thereafter, 'having succeeded in bringing those Natives to an understanding respecting their claims', he requested that the most influential accompany him to witness the cutting of the northeast boundary line, while the others should go on to Wanganui to await his return there.

The Kai Iwi korero was a propitious event for the Government because a question of mana was involved. Who would have mana with settlers and the Governor if the Governor recognised Ngati Ruanui but no other? At first, while McLean was engaged with the northeastern boundary, Maori arrived 'from different parts of the coast, some of whom had travelled day and night to oppose the boundary'. However, McLean wrote that he overcame this opposition, 'and the opposing Natives [were] induced to form an accession to our working party'.¹²³

A matter of mana

Where Wakefield had appeared to acknowledge the Atihaunui hapu upriver, and Spain had seemingly preferred those at Putiki, McLean was to involve them all in one open hui after his return to Wanganui. One effect, it seems, was that the Putiki position was subordinated to the opinion of the tribal majority, and the majority were able to assert that their mana in the coastal area – and not just that of Putiki – should be recognised by the Government and the settlers as well.

At 'Tunuhaere (the boundary of the Block on the river)', McLean's party was 'met in the most friendly manner by "Takarangi" – "Te Ropiha" and several chiefs of that place' and ascended the cliff to the pa where 'a great "Korero" was held; every chief in the place declaring and reiterating his desire that the purchase should be completed and Europeans settled in the District'.¹²⁴

Tunuhaere chiefs
satisfied with
boundary

From Tunuhaere, McLean took a canoe down the river, calling on the way at Waipakura reserve, where he found Pehi Turoa, Ngapara, and Hamarama, 'the principal Chiefs (excepting Te Mamaku) who were engaged in the hostilities against the Europeans, and whose claims I had been instructed to take into consideration'.¹²⁵ According to Wills, they had 'hastened down the river' and 'appeared to be much gratified that their claims to land within the Block were recognised'. They said that Mamaku was 'so very far up the river . . . that they did not expect he would be down for many weeks, but . . . that [he] would be perfectly satisfied if Hamarama acted for him'. They all expressed themselves as being fully satisfied with their 480-acre reserve at Waipakura and the small reserve at Purua opposite the town where they had a cultivation.¹²⁶

Upriver claimants
acknowledged

122. Ibid

123. Ibid

124. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 360–361

125. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 248

126. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 361–362

These upriver chiefs appeared to McLean 'less decided about parting with their land than those of Tunuhaere', but they did agree to have a conference with him on the subject. They objected, however, to entering 'into negotiation in concert with the Putiki tribes, as a feeling of enmity existed between them, and no reconciliation had taken place since the late war'. McLean informed them that all the other tribes with whom he had been negotiating 'promised to make up their difficulty, and unite in a friendly spirit to dispose of their claims' and that he 'did not expect that they, as Chiefs, would allow petty animosities to influence them against doing the same'.¹²⁷

McLean brings them
all in

In visiting the different tribes, McLean later reported, he had taken 'every pains in instructing them as to the binding nature, on themselves and posterity, of the engagements they were entering into respecting the transfer of their land'. By intimating that he would have 'a minute and public investigation' of the claims of every tribe, he believed that he had 'induced many of the principal Chiefs to moderate their exclusive ideas . . . and to admit the equitable right of others'. Furthermore, to afford the different tribes 'every opportunity of adducing their claims, and fully reflecting on the engagements they were entering into', he had given 'timely notice' that he would hold three public meetings in Wanganui on 26, 27, and 29 May.¹²⁸

For three days before the deed signing, according to Wills, Wanganui:

was full of Natives from Kai-Iwi, the Waitotara river, from Tunuhaere and other places up the Wanganui. The different tribes held daily meetings at which the respective claims of the members of the tribe were fully discussed, and lists of the names of the parties really entitled to payment agreed upon and sent in to Mr McLean, to whom they were very useful in apportioning the payment equitably.¹²⁹

On 26 May:

the whole of the Natives in Wanganui assembled before the Commercial Hotel at Petre – Preliminary speeches were made by the different Chiefs, Mawae and George King leading off, followed by Pehi Turoa and Ngapara . . . and all expressed their pleasure that the purchase was at length to be completed and their gratification at the ample opportunities Mr McLean had offered them of fully discussing their claims and at his patience in having at all times listened to their representations.¹³⁰

McLean gave a more colourful and rather different account of the event:

On the 26th, the several tribes and claimants, to the number of about six hundred (600), assembled. The Natives appeared fully impressed with the importance of this meeting, which was attended with more than usual Native pomp and ceremony. The elder men were dressed in their best dog-skin and kaitaka mats . . . The younger

127. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 248–249

128. Ibid, p 249

129. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 365

130. Ibid, p 366

Chiefs and members of tribes were generally dressed in the best European garments they could procure for the occasion.

The preliminaries of recognizing the Natives being over, I requested them to give unreserved expression to their sentiments respecting the definitive sale of their land. To this they successively responded by several animated speeches to the effect that they had, in accordance with their own customs, cried, lamented, and wept over their land, which they now wished for ever to be given up to the Government.¹³¹

McLean had drawn up the deed of sale ‘in the most simple and perspicuous, yet binding, terms that the Native language would admit of’.¹³² In reading it to them, he ‘repeatedly inquired if they thoroughly understood its purport and was invariably answered by 1 or 200 voices’.¹³³ As ‘each Reserve was described, the Chiefs examined the plan which with Mr McLean’s assistance’ Wills fully explained.¹³⁴ When preparing the deed, McLean had requested him ‘to write the description of the external boundaries of the Block and also those of the reserves’ and:

Signing the deed of sale

to make a skeleton Map only for the Deed so that both the Deed and the Map should be easily and thoroughly understood by the Natives:— to this end greater pains could not have been taken.¹³⁵

The deed was signed ‘in the presence of most of the settlers, the resident clergyman and Missionary and many Military Officers stationed in Wanganui’.¹³⁶ On 26 May, 83 came forward and signed; on 27 May, 114; and, on the following Monday, 29 May, the day the payment money was to be distributed, 10 more. A total of 207 persons signed.¹³⁷

The deed contained this clause:

‘Tangi clause’

131. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

132. Ibid, p 249

133. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 366

134. Ibid

135. Ibid, p 365

136. Ibid, p 366

137. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249. The original deed (deed 286) and deed map (map 221) are now held by Land Information New Zealand (previously the Department of Survey and Land Information) at its head office in Wellington. The English translation with the deed was made by McLean several days after the signing: see doc A49(a), p 30. A note on the map states that it is the ‘Map made for the Natives in explanation of the boundaries of the Block and of the Native Reserves (coloured yellow) as described in the final Deed of Sale’: see doc B2. The note is signed ‘Donald McLean Inspector of Police’ but is not dated. Matching folds and a faint pencil line on both the deed and the map, as well as the top left-hand corner piece of the map (still attached to the deed), are proof that this map is the one that McLean annexed to the deed before dispatching it to Lieutenant-Governor Eyre on 19 July 1848: see McLean to Eyre, 19 July 1848, NZCA3/8, NA Wellington, p 384. According to information obtained from the Department of Survey and Land Information, when early land deeds with maps annexed to them first came under its control, they were kept folded together in envelopes. Then, in the late 1980s, they were removed, flattened, and separated for conservation and filming purposes and stored in plan drawers: see *Tē Whanganui-a-Orotu Report 1995*, sec 4.1.2. A ‘True Copy of the original Deed, Translation, and Endorsement, Wellington, August 6th, 1875’ was published in Turton, *Provinces of Taranaki, Wellington, and Hawke’s Bay*, pp 238–244, but the map Turton published was different from the original plan: see doc B1; H H Turton, *Plans of Land Purchases in the North Island of New Zealand*, vol 2, map deed 77.

A ko te wenua katoa e takoto ana i roto i enei rohe haunga ano nga wahi i wakatapua i te tuhinga i roto i tenei pukapuka mo matou kua oti nei i a matou te tangi te mihi te poroporoake te tuku tonu atu ma te Pakeha me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua.

An English translation was later provided:

Now all the land contained within these boundaries excepting the places mentioned in this paper as reserved for ourselves we have wept and sighed over bidden farewell to and delivered up for ever to the Europeans; together with the rivers streams trees and all and everything connected with the said land.¹³⁸

McLean's tangi clause became standard in later deeds for Crown purchases, and its origins and significance have already been examined by the Waitangi Tribunal in its *Mohaka River Report 1992* and *Te Whanganui-a-Orotu Report 1995*. In the former report, it is described as 'an attempt by McLean to create an absolute transfer of title to land that would be explicable to Maori in cultural terms using metaphors of the tangi'.¹³⁹

In a research report entitled 'Maori Land Boundaries' commissioned by the Waitangi Tribunal, Lyndsay Head noted that more often than not early land deeds contained what she calls a 'landscape clause', which described the resources on the land in question. The Maori versions have different emphases from the English, 'apparently to highlight matters important to Maori'. The majority of pre-Treaty deeds purported to 'buy the landscape, with everything in it, in an area defined by boundaries'.¹⁴⁰ Probably, the tangi clause in the deed of sale for the Wanganui block was McLean's adaptation of this model, incorporating a form of words that the chiefs customarily used in expressing their sentiments before parting with their land.

In regard to land deeds in which rivers were part of the landscape, Head further noted that while:

it appears that the alienation of inland waterways was accepted by Maori . . . it is more likely that a proper study would show that the answers lie in how Maori differentiated rivers and resources taken from them. . . . In the Wanganui case, what was reserved from sale were resources such as eel pa, which utilised the river. Research might find that 'resources' were not defined by Maori in terms of (for example) the fish or the river, but of human input.¹⁴¹

138. Turton, *Provinces of Taranaki, Wellington, and Hawke's Bay*, pp 238, 242 (doc A49(a), pp 70, 74). Claimant researcher Tom Bennion observed that the concluding words of the tangi clause – 'me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua' – were inserted on the Maori text of the deed: 'suggesting that it may have been a late addition to, or even after, the discussions'. The insert was not apparent on the English translation: doc A49, pp 29–30. Our inspection of the deed and translation confirmed this. Whether or not Maori heard or saw the insertion before they signed the deed is an open question.

139. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 3.5. This is reiterated in the *Te Whanganui-a-Orotu Report 1995*, sec 4.4.6.

140. Document A23, pp 33–37

141. *Ibid*, p 43

When Maori offer to sell land, Head continued:

they do not offer to sell rivers too. . . . nevertheless, rivers feature prominently in boundary descriptions and are treated very specifically. Boundaries cross rivers, go along their banks, flow in the waters and go along the river bed.¹⁴²

A few days before the sale, McLean had a long conversation with Wills about the distribution of the £1000 payment. A memorandum was prepared of the different tribes to be paid and the amount to be paid to each, according to which 12 tribes were to have received sums varying from £20 to £140. Afterwards, McLean told Wills that he intended to make some alteration to the particulars of the payments.¹⁴³

Distribution of the
payment

On 29 May, the £1000 compensation money, divided into bags each containing £10 of silver, was distributed by McLean, assisted, at the request of the Maori, by Hori Kingi (Te Anaua), the chief and assessor at Putiki.¹⁴⁴ A list showing the order in which it was handed over to the tribes receiving payment and the chiefs to whom it was paid was sent by McLean to Lieutenant-Governor Eyre on 19 July 1848, along with the signed deed. Annexed to the deed was a map, and the deed's translation.¹⁴⁵ Also listed were the number of bags and the amounts that each chief received. 'After receiving their money,' McLean later reported, 'the tribes quietly dispersed to their residences and encampments, evincing perfect satisfaction with the compensation received.'¹⁴⁶ In all, there were 22 separate payments to 23 individual chiefs (one five-bag payment being shared by two chiefs), representing 16 different tribal or hapu groupings.

The largest single payment of nine bags was received by Mawae for Ngati Ruaka, who altogether received a total of 15 bags. The smallest single payment of one bag was received by three individual chiefs: Hori Kingi (Te Anaua), in trust for Te Keepa Rangihwinui of Ngati Ruaka, who was absent; Hamarama, who had offered to represent the interests of his brother-in-law, Te Mamaku of Ngatihau, who was absent in the interior bird-snaring; and Rangitaurira for Ngapairangi.¹⁴⁷ Other separate payments ranged from two to seven bags, with 13 of them being for five bags.

Hapu from outside appeared to have done almost as well as Ngati Ruaka: Whangaehu Maori receiving eight bags and Kai Iwi Maori seven. Te Mamaku later expressed his gratification at his claim being recognised and made it his wish that his amount be taken upriver and presented to him.¹⁴⁸ In his September 1848 report to the Colonial Secretary, McLean maintained that, by prior investigation, he had

142. Ibid, p 44

143. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 413–414

144. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, pp 249–250

145. McLean to Lieutenant-Governor Eyre, 19 July 1848, NZCA3/8, NA Wellington, pp 384–386. This list also appears in McLean's report to the Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249.

146. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

147. Ibid; McLean to Civil Secretary, New Ulster, 4 December 1848, AJHR, 1861, C-1, p 251

148. McLean to Civil Secretary, New Ulster, 4 December 1848, AJHR, 1861, C-1, p 251

been able to ‘obtain a more accurate knowledge of the several claimants, and of the extent of land owned by them both individually and collectively’.¹⁴⁹

Wills was not present at the distribution of payments. For an account of it, he referred William Wakefield to a letter from Dr Rees, a purchaser of land from the company and one of the oldest settlers in Wanganui, published in the *Wellington Independent* on 10 June 1848. In the letter, Rees stated that, ‘although the prospect of an arrangement at first appeared to him (as it did to most of the Settlers) very remote’, he now considered ‘the Wanganui Land question to be finally settled and in such a manner as scarcely to leave room for any future dispute’.¹⁵⁰ Yet, like the earlier transactions, there are problems with that associated with McLean.

Dependence on the
validity of prior
transactions

Was it a new ‘sale’ or a continuation of the old one? McLean referred to it as ‘the final Settlement of the Land Question’, Wills as ‘the completion of the purchase of [the] Block’.¹⁵¹ Yet, in some respects it was new. The reserves were altered and the deed words, about Maori farewelling the land, implied that it had not been parted with before. As a new transaction, any invalidity accruing to those before would not matter; if it was a continuation of transactions that went before, it may have been contingent on their validity.

In so far as it was a new transaction, the adequacy of consideration was in question. If criteria in the Land Claims Ordinance 1841 were used, the £1000 would have given an entitlement of only 2560 acres, whereas McLean’s transaction enclosed 86,200 acres. If, however, it is viewed in an historical perspective, the payment of trade goods estimated at £700 and compensation of £1000 appears to be more in line with payments made by McLean for Crown land purchases in Rangitikei, Hawke’s Bay, and Wairarapa. In completing the purchase of the Wanganui block, McLean was in effect implementing Grey’s new policy of using the Crown’s pre-emptive right to acquire large blocks ahead of the needs of settlers as cheaply and quickly as possible, and before settlement had enhanced the land’s value and the sellers fully realised the advantages of leasing rather than selling.¹⁵²

Yet, in the Wanganui case, the purchase payment was determined by the Wakefield transaction and Spain’s ‘award’, not hard bargaining between McLean and the vendors. In his report, McLean talked not of buying the land or of paying the ‘purchase price’ but of distributing the ‘compensation money’, which was precisely the amount earlier offered and refused.¹⁵³ The primary issue does not appear to have been whether the land should be sold, but to whom the ‘compensation money’ should be allocated and in what shares. In other words, who should be recognised by being paid.

149. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

150. Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, p 403

151. McLean to Eyre, 19 July 1848, NZCA3/8, NA Wellington, p 385; Wills to Wakefield, 23 June 1848, NZCA3/8, NA Wellington, pp 412–413

152. *The Mohaka River Report* 1992, pp 23–24. The amounts McLean paid for the three Hawke’s Bay blocks in 1851 were £4800 for 279,000 acres (Waipukurau), £1500 for 265,000 acres (Ahuriri), and £1000 for 85,000 acres (Mohaka); J G Wilson, *History of Hawke’s Bay*, Dunedin, AH and AW Reed, 1939, p 205.

153. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 249

McLean's transaction marked not just the resolution of that issue but the cessation of prior hostilities over it. To what extent, then, were Maori free agents? Were they not to agree among themselves and with McLean, and if the Governor forced the issue, they faced the prospect of more coercion, if not renewed war. Grey had shown that he was a force to be reckoned with, much stronger in that respect than his predecessor. To date, Maori had maintained their mana, from their own point of view, but their chances of continuing to do so had also to be weighed.

Prior hostilities

McLean's transaction more than doubled the area of 40,000 surveyed acres (less reserves) that Spain had recommended should be awarded to the New Zealand Company. Yet, neither the deed nor the deed map gave any reference to the total acreage; they simply defined the boundaries of the land being given up and the native reserves. As seen, no addition was made to the £1000 offered by Spain and refused by Whanganui Maori. Presumably, McLean either failed or declined to see that Spain's decision was based not on survey but on acreage, in accordance with the maximum of 50,000 acres specified in Hobson's September 1841 schedule.

Alteration of
acreage

In his general report, McLean stated that the boundaries of the Wanganui purchase contained, including native reserves, 86,200 acres, as shown on the accompanying map.¹⁵⁴ We have identified this map on the basis of construction to be the original of the map published by H H Turton.¹⁵⁵ It is entitled 'Map of the Settlement of Wanganui New Zealand shewing The Land purchased from the Wanganui and other Tribes, as finally completed by Mr McLean – May 1848'. It is signed 'Donald McLean Inspector of Police New Plymouth' but not dated.

McLean brushed off the discrepancy in acreage between Spain's recommendation and his own transaction by implying that it was an error by Spain. From an official return furnished by Mr Sheppard, one of the New Zealand Company surveyors, to the police magistrate at Wanganui, he reported, it would be perceived that the company's plan of the district, signed by Spain, was estimated to contain 89,600 acres, whereas 'the award' that Spain had made in favour of the company was only for the surveyed part of 40,000 acres. 'It is not improbable,' he added, 'that this difference arose from the marginal line on the map being considered the boundary.'¹⁵⁶ This glib explanation does not disguise the fact that the total acreage of McLean's transaction largely conformed to that on the company's plan, whereas Spain's was within the upper limit proposed by Hobson.

As to the reduction in the total acreage of Symonds's native reserves by 600 to 700 acres, or approximately 10 percent, McLean acknowledged that this was considerably less than that to which Maori would have been entitled under the arrangements of the New Zealand Company.¹⁵⁷ Nevertheless, he submitted that the advantages to the Maori of their selections might be held equivalent to the decrease in amount, particularly since they included a valuable block at Putiki Pa near the

154. Ibid, p 250

155. Document B1

156. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

157. Alan Ward, Robyn Anderson, Suzanne Cross, and Michael Harman, 'Historical Report on Whanganui Land', Crown Congress Joint Working Party draft report, 1993, p 14

river mouth and other favourite localities.¹⁵⁸ This seems more a reflection of his belief in the principle of assimilation than of concern to protect Maori rights, interests, and entitlements.

No protective structure

At no stage in the chequered history of the Wanganui purchase was any protective structure in place to ensure that fairness and equity prevailed and customary and Treaty rights were respected. Spain was not an independent investigator. The early governors and Protectorate Department were too weak to be effective watchdogs. Governor Grey stood between Maori and settler and provided 'coercive backing' for Crown land purchases. The Reverend Richard Taylor preached obedience to the governors and 'used his great influence to smooth the path for the Europeans'.¹⁵⁹

Mutuality

It cannot be assumed that Maori and Pakeha saw the 1848 transaction the same way. For example, the tangi clause may have more significance for Pakeha than for Maori. A Maori tangi, for many reasons, is not limited to farewelling. Though in the deed it is connected to farewelling the land, that is McLean's perception, not theirs.

'Forever'

Likewise, there is no tradition that something may be 'forever'. It may be earnestly hoped that a relationship will last, and commitments of undying loyalty may be made, but it is known that a relationship is continued only for so long as it is in fact maintained. No Maori word could be found for 'forever', but, as in the Lord's prayer, the missionaries used 'ake, ake, ake'. This denotes 'ongoing', which is less absolute than 'forever'. Here, 'tonu atu' was used to the same effect. It would be consistent with Maori thinking were it said in a positive way, that an arrangement would last, and were it thought that lasting arrangements depended on keeping good relations.

In any event, past experience did not suggest that European deeds were 'forever'. Williams' land deed had come to nought. Wakefield had disregarded the Crown's right of pre-emption under the Treaty with impunity only days after the Treaty was executed in Whanganui. Wakefield's transaction for land from Tongariro to Manawatu and Patea was turned into 40,000 acres by Spain. Spain's assertion to Maori that the land was gone forever, whether or not compensation was accepted, had not proven to be true, else why was McLean seeking a new deed? Why then should McLean's deed be treated differently? There is sense in the Maori view that nothing is 'forever' unless those affected continue to agree.

Maori perspectives

Maori may have lamented the loss of the possession, which is not in itself the loss of land. They may still have been operating in traditional mode, expecting a handsome return for the magnitude of that given and over which they had shed tears. Old beliefs may have endured that ancestral interests remain with latent rights of control, or that they still had mana over the area, as evidenced in the recognition given to them by paying further money. 'Future benefits' may have been seen not as a pious hope but as a contractual undertaking.

158. McLean to Colonial Secretary, September 1848, AJHR, 1861, C-1, p 250

159. Wards, p 309

4.7 WAS THE RIVER ‘SOLD’?

Since land claim hearings are pending, the question of the validity of the various transactions is not answered. Instead, for the purpose of determining whether the lower river was sold too, the deeds will be looked at as though they were valid.

Question of contractual validity deferred

The first deed, that of Wakefield, can be set aside. By law, any award arising from that deed could be only such as Spain allowed in terms of acres. The question there would be whether the riverbed was included as part of the 40,000 acres that was recommended. That was clearly not the intent, and had the Governor acted on Spain’s recommendation, the riverbed would not have been part of the deal, because of the presumption under English common law that it was an arm of the sea and belonged to the Crown.

Wakefield’s deed

To the extent that McLean’s transaction was to finalise what Spain had allowed, it too can be set aside. If the company’s entitlement could lawfully have been changed to 86,200 acres, though it is unlikely that it could, in terms of the current Land Claims Ordinance and the November 1840 and September 1841 agreements, the question is whether the area of the riverbed was part of the 86,200 acres. Again, it was not, and the riverbed could not have been conveyed, because again the arm of the sea presumption would have applied.

McLean’s deed did not lead to a river transfer unless a separate purchase

Were it determined, however, that McLean’s transaction was a new deal unrelated to Spain’s decision, and were it considered that the land conveyed was not referable to the number of acres but to whatever area was encompassed in the description of the land, then, and only then – and if the deed was otherwise valid – would the question arise of whether the river was part of the deal.

Nothing in the surrounding evidence establishes that Maori intended to convey the river on the execution of the deed. Maori minds do not appear to have been directed to the river at all. There were other major issues to consider, not least whether Pakeha should be admitted to land beyond the town, whether compensation should be accepted and, if accepted, whose mana should be recognised. There is no evidence that river rights formed part of the discussion, save to the extent that the deed referred to rivers and was read out by McLean and fully explained with Wills’s assistance to the assembled tribes before the signing.

River in negotiations

There is no specific reference to the river in the record of discussions, even though the river was vitally important to both sides. For Maori, it provided access to the new town and European shipping and trade, as well as being a traditional waterway and a seasonal fishing ground at the nearby mouth. For settlers, it provided a safe harbour essential for the survival and development of the town and hinterland. The omission may have been due to no more than weightier considerations or to assumptions that were simply taken for granted. Maori assumed that the river owned them, whereas officials and settlers assumed that it was owned by the Crown.

The available evidence of any discussion of the future ‘ownership’ of the river is slender, even for the whole of the events from 1839. In evidence to Commissioner Spain in 1843, John Brook, a Wakefield employee, described how he read the

‘Wakefield Deed’ to the assembled Maori in 1840, in the Maori language. A record survives only of the protector’s translation. This reads, with reference to Maori reserves:

And know ye, do not ye speak; hearken ye! you have given the land (to us), do not be jealous (do not suppose) that we, the Europeans, shall take all the land; one side will be saved for you and your children in all the rivers, trees as far as inside at Tongariro; all the lands, islands, all the trees, the large streams, the anchoring places, the little streams, Manawatu, Rangitikei, Wanganui, Patea, till it reaches the interior at Tongariro.¹⁶⁰

While the sense to be made of this is debatable, and it may have been meaningless to Maori at the time, it could not have conveyed any thought that Maori were to lose all interests in the rivers, and may have implied that they were to keep them.

There is then an entry in Taylor’s diary in 1847, before the McLean transaction, that Te Mamaku:

gave the natives a long account of what he thought was European policy, saying that we had taken the harbour of Wellington so that no native could go in or out without permission, that we were doing the same at Waikanae, Porirua, Otaki, Ohau, Manawatu and Wanganui.

Taylor had replied that at Wanganui ‘one side of the river at least’ belonged to the natives and that they possessed the entrance ‘as much as the Europeans’.¹⁶¹ This could have meant to Te Mamaku that, were the land transaction settled, the river would at least be shared and only the township side would pass to the Europeans. More likely, however, Te Mamaku did not relate the matter to the completion of a deed. He thought that restrictions on river use arose from ‘European policy’.

Subsequent conduct

We found no evidence of subsequent Maori conduct to show that Maori knew that the ‘ownership’ of the river had changed. Matters just carried on as before. Though it was much later, Te Keepa’s letter of 1876 (see sec 3.2.1) shows that at that time Maori interests in the lower river reaches were presumed to have remained.

In addition, we found no instance where, prior to our hearings, the Crown claimed this part of the river on the basis of the 1848 deed.¹⁶²

The deed

Authority for any transfer of the river therefore depends on McLean’s deed itself, its words, and the map annexed to it. There were competing arguments from counsel on that matter, though it is unnecessary to set them out in detail, for they were based on issues of fact with respect to the deed, which additional research has enabled us to resolve.

Only a general reference in deed

Though the wide-flowing Whanganui River severed the block into two parts, the deed made no specific reference to its conveyance. There is only the general

160. Spain’s report, 31 March 1845, BPP, vol 5, p 83

161. Document A49, pp 24–25. Taylor was obviously referring to the Putiki side of the river.

162. This point was made also by claimant researcher Tom Bennion in cross-examination by the Tribunal on 22 April 1994 on his report: see doc C11, p 56.

wording of the tangi clause conveying, with the land, ‘the rivers streams trees and all and everything connected with [it]’ or, in the Maori text, ‘me nga awa me nga wai me nga rakau me nga aha noa iho o taua wenua’; literally, ‘and the rivers and the waters and the trees and all else of that land’.

Such reference as the deed makes to the Whanganui River itself is only to delineate the outside boundary of the lands conveyed where it goes: ‘in a straight line to the river of Wanganui a little distance below the Pa of Tunuhaere and crosses from thence to the first or upper stake of the Native Reserve marked out by Mr White at Kaiwaiki’.¹⁶³ Some small fishing lakes and eel cuts on the lands transferred are named in the deed, but only to reserve them to Maori.

Crown counsel submitted that:

Argument

the tidal reaches were sold along with other water bodies as part of the 1848 deed of purchase, because of the clear words of the deed (*‘me nga awa me nga wai’*; the English version refers to the boundary *‘crossing’* the River) and because that was intended to be and was the effect of the sale of the land. [Emphasis in original.]¹⁶⁴

Claimant counsel responded that:

the text of the Deed clearly does not import any intention to sell the River. In the English version, the boundary simply *‘crosses’* the River. . . . The general inclusion of streams and waters within the boundaries of the blocks sold is not apt to include the Whanganui River.

The words purporting to include the River *‘nga awa me nga wai’* . . . [were] extremely general. One might have expected even such a phrase as *‘awa nui’*, but there is none.¹⁶⁵

Looking to the words alone, and deferring for the moment a question concerning the deed map, we incline to claimant counsel’s view. Other rivers and streams, and the various small lakes, may be seen as waters ‘on’ the two blocks concerned, ‘connected’ to the land or part of ‘that land’. A major river that divides the land into two blocks is not the same. In the case of a major waterway like the Whanganui River, it is reasonable to expect that a specific reference would be made.

Conclusion on the deed’s words

Similarly, it is not enough to say that the text refers to the boundary as *‘crossing’* the river. To make the matter certain, it would be necessary to say that the river was *‘included’*.

At best, there is an ambiguity, and following settled canons of construction, the ambiguity is to be construed against the drafter.

There is a further question, however, of whether the map annexed to the deed ‘in explanation of the boundaries of the New Zealand Company’s block and the

Cartographic record

163. Turton, *Provinces of Taranaki, Wellington, and Hawke’s Bay*, p 242; Turton, *Plans of Land Purchases in the North Island of New Zealand*, map deed 77

164. Document C21, p 7

165. Document D18, p 22

Reserves therein made for the natives as arranged by Mr Symonds in 1846¹⁶⁶ indicated an intent that the river was included in the area ‘sold’.¹⁶⁶ As already seen, this is map 221, currently held by the head office of Land Information New Zealand in Wellington and stored separately from the deed in a plan drawer. It is clear from the description of certain reserves in the deed that McLean had a map that was shown to certain Maori before the deed was signed; also, that certain Maori were given a map by McLean. It is clear, too, that McLean ‘furnished the several tribes with plans similar to that annexed to the Deed’.¹⁶⁷ We find on the basis of construction that the map shown to Maori and the map annexed to the deed were the same map; that is, map 221.

On this map, the outside boundary line is hatched red and follows the northern boundaries of native reserves 11 and 12, which are separated by the Whanganui River but stop at the river’s edge on both sides. The red hatched line is not continued across the river. Nor is the black line along the sea coast, which served as the southern boundary of the block, continued across the river mouth. This map indicates that the Whanganui River did not form part of McLean’s transaction.

This conclusion fits with standard practice. A scheme plan, like the Land Information map, was prepared to accompany purchase proposals, and only if the deed was signed was a full survey done, as was required for titles to issue.

Cultural
presumptions

Why is there no specific mention of the Whanganui River in the record of the discussions or in the deed? Crown counsel thought it hard to believe that the river ownership would not have been canvassed by McLean, given its strategic importance as a harbour for the town.¹⁶⁸ The answer is in the different assumptions made.

The river was important for Maori too, but it appears that they also did not raise the matter. This is not surprising. It was incomprehensible to Maori law that something like a river could be divided into parts and that one part could be owned separately.

The situation on the ground was that the settlers were in the town on one side of the river while Maori occupied the area around Putiki on the opposite bank. The only Maori concern, in accordance with their customs, was with who could use the river and who had control. It appears to have been satisfactory to Maori at the time that both Maori and Pakeha were using the river. There was no dispute over use. If settlers were occupying abutting river land, it was naturally assumed that they would use the river.

For his part, McLean may have equally assumed that this part of the river passed to the Crown as a matter of English law. There was no need to buy it, because the tidal river reaches – and the whole of the affected river was within the tidal regime – was *prima facie* the Crown’s as an arm of the sea.¹⁶⁹

166. McLean to Lieutenant-Governor, 19 July 1848, NZCA3/8, NA Wellington, p 384

167. Ibid, p 385

168. Document D19(c), p 51

169. This proposition was canvassed by Tom Bennion (doc C11, pp 50–51)

Alternatively, McLean may have thought that raising the river could open a can of worms to queer the land transaction. The omission of any reference to Te Whanganui-a-Orotu in the Ahuriri purchase of 1851 supports this view. In that case, McLean thought it ‘essentially necessary’ to command the harbour for the settlement of Napier to advance. There is no evidence that McLean negotiated its purchase, however, or that the chiefs agreed to sell.¹⁷⁰ In that case, as in this, he remained silent.

An intentional omission?

The Te Whanganui-a-Orotu Tribunal concluded that McLean was deliberately silent so as not to prejudice the pending land purchase.¹⁷¹ The harbour and lagoon were a major waterway and a valuable taonga and resource, and it was thought that McLean would have known that Maori would not knowingly or willingly surrender it.

4.8 CONCLUSIONS

On the evidence, it appears to us that McLean’s deed, if otherwise valid, was insufficiently particular to effect a conveyance of the river’s lower reaches.

In Treaty terms, the legal effect of the deed is not the issue. While English law can accommodate cultural difference by setting aside contracts where the parties are not of one mind, even to decide matters in terms of English law is to assume that that law applies. For the Tribunal to reach a conclusion based on this assumption would be tantamount to a failure on its part to comprehend correctly the cultural thinking and practices conveyed in the iwi oral history submissions or to acknowledge that there is a Maori history based on Maori knowledge different from, and a challenge to, a European discourse based on European documentary records. Viewed historically, the substantive question was: Which would prevail – the Maori law of relationships or the ‘Governor’s law’, where the Governor had control? Considered in Treaty terms, the question is how Maori and the Crown should relate, both constitutionally and in terms of such matters as access to, and control over, rivers. That points to the need for a New Zealand law that accommodates or reconciles the norms of its two founding peoples.

Were Maori precepts followed, there would be no difficulty in accepting settlers on the land, if that were agreed and the mana of the hapu were acknowledged. The settlers would have the use of the river and most of the seaboard lands but an underlying hapu interest would remain. The question would not be whether the river was sold but whether Maori contracted with Maori notions in mind, and whether they knowingly relinquished their authority in that regard.

We have not reached final conclusions on these matters because they cut into the land claim, but at the same time we acknowledge their relevance. At heart was a question of whose law applied or whether the two could be merged. The Governor assumed that English law must prevail, and that depended on the assertion of

170. *Te Whanganui-a-Orotu Report 1995*, sec 3.8

171. *Ibid*

British power. Maori remained intent on upholding their own authority, while seeking a bond with the settlers at the same time. For the one, it was a question of control, and, for the other, a question of relationships and mana. The immediate question for Maori, however, was whether their authority could in fact be maintained. That became the burning issue over the succeeding years, as is considered in the next chapter.