The Muriwhenua lands case

Legal and historical issues

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Introduction

Although this was not my first involvement in a Waitangi Tribunal case, it was the first time I have appeared as a witness rather than as counsel and in that sense it was a novel experience for me. In this short paper I would like to address some of the legal and historical issues that have arisen in this remarkably complex and interesting claim, and also to raise some more general points about the role of historians and historical evidence in an enquiry of this kind. Before proceeding to deal with either, some background on the claim is necessary.

I first became involved in late 1990 when counsel for the claimants invited me to prepare and present a paper on the 'surplus lands' question. My brief was subsequently expanded to include a report on the legal history of Te Wharo Oneroa a Tohe (Ninety Mile Beach), which was presented in evidence at a sitting of the Tribunal at Kaitaia in March 1991, and another on two large Crown purchases, Muriwhenua South (1858) and Ahipara (1859) which was read at a hearing in July 1991 at the Ngai Takoto marae at Awanui.[1] The surplus lands question has turned out to be more intractable than anyone ever supposed, and my report on this - one of many dealing with aspects of this rather involved subject - has only recently been completed (May 1992).

The Muriwhenua claim

Muriwhenua, the end of the land, is the furthest north of the North Island, the rohe (territory) of the five northern most tribes - Ngati Kuri, Te Aupouri, Ngai Takoto, Te Rarawa and Ngati Kahu. The area stretches from Herekino to Mangonui and includes the whole of the Aupouri and Karikari peninsulas. The five Muriwhenua tribes are closely linked, which is not to say that relationships always were, or indeed are, harmonious. The region has a rich and very complicated tribal history, recorded in oral tradition and in thousands of pages of written evidence in the Northern Minute Book sequence of the Tai Tokerau Maori Land Court, mostly in the late nineteenth century.[2]

Although one of the most densely-populated and thriving centres of pre-European Maori society, after the Treaty of Waitangi they swiftly became marginalised, isolated and relatively impoverished. Muriwhenua has a distinctive nineteenth- and twentieth-century history, typified by a heavy reliance on extractive industries: kauri timber felling and then the kauri gum trade. Maori communities of the far north became almost totally dependent on the gum trade after having lost nearly all of their land by the mid-1860s. It was not until the 1930s when, largely due to the work of an outstanding Maori Land Court judge, Frank Acheson, remaining Maori land titles - which had fallen into horrendous confusion - were consolidated and dairy farming established. The region, for all its isolation and poverty, has produced many Maori leaders of national stature, including Matiu Rata, who is in fact the principal claimant in the Muriwhenua case. Muriwhenua is also remarkable for a long history of European settlement, going back to the mid-1830s at Mangonui.

The current claim, Wai 45, is the Muriwhenua *Lands* claim. Sea fisheries were separated out quite early in the history of the case and were fully reported on by the Waitangi Tribunal in the Muriwhenua Fishing Report of 1988.[3] The case under review is concerned mainly with land alienation. But, of course, land and sea cannot be separated easily, especially in Muriwhenua. A key issue in the present case is Ninety Mile Beach, and one of the reasons why it is so important is its shellfish and coastal fisheries.

A large volume of evidence has now been prepared and presented. This has come from three sources - the claimants, the Crown and from the Tribunal's own expert staff. Dr Barry Rigby of the Waitangi Tribunal Division has written a sequence of key reports.[4] For the Crown Mr Tony Walzl has so far prepared two substantial papers[5] and a number of others are in progress. The claimant evidence has been quite diverse. It has included oral statements from kaumatua

and kuia, reports from scholars in the disciplines of anthropology and Maori studies (Dame Joan Metge, Dr Anne Salmond, Waerete Norman, Dr. Margaret Mutu, the last two-named being of Muriwhenua extraction themselves) and from historians. A number of important and remarkably interesting issues have now emerged.

Before exploring these, some aspects of the Tribunal's powers and procedure require comment. The Waitangi Tribunal is, like any other, purely a creature of statute. It has no inherent powers, and it can do no more and no less than what its empowering statutes allow. The relevant statutory background, however, once quite easy to describe, has become increasingly complicated. The initial act, the Treaty of Waitangi Act 1975, set up the tribunal as a purely recommendatory body, its task being to report on whether acts or omissions of the Crown were contrary to the 'principles' of the Treaty of Waitangi. The original act did not - and nor have any since - make any attempt to define what the 'principles' of the Treaty might be, and the Tribunal has in consequence been obliged to work them out for itself. In 1985 the parent act was amended, giving the Tribunal jurisdiction to deal with any claim which had arisen since 1840 (as opposed to post-1975). In 1988 and 1989 it was given a number of binding powers relating to land vested in state-owned enterprises and in regard to Crown-owned exotic forests. These last-mentioned changes happen to be quite important in Muriwhenua as there is some state-owned enterprise land and a large Crown exotic forest (Aupouri forest) within the claimant area.

The Tribunal's procedure is essentially a modified form of ordinary tribunal practice. Sometimes enquiries are held on marae, but the obvious desirability of this has to be balanced against the logistical problems involved in running a major hearing and also avoiding causing stress to local Maori. Marae in the far North tend to be relatively small and spartan compared with the more lavish facilities of wealthier communities in, say, Tauranga or Rotorua. In this claim the opening hearing was on a marae, and some, but not all, of the later ones have been on local marae. 'Pakeha' venues, such as the far north community centre in Kaitaia, have been used as well. Evidence can be given in Maori, or English, or - as some witnesses like to do - both.

It is often said that cross-examination is not permitted in Waitangi Tribunal proceedings - but this is only true in a very formal sense. Questions can be asked for 'clarification', which seems to mean, in practice, about anything at all. Expert witnesses are in fact interrogated thoroughly by members of the tribunal and by counsel, sometimes for hours on end. Kaumatua and kuia giving evidence tend not to be questioned too much - the Crown is, I think, often at something of a loss to know what to ask them. The tribunal's Maori members can, however, pick up on points of traditional history, and some very interesting, not to say entertaining exchanges do occur. From the perspective of a Pakeha expert witness, the process is anything but casual or relaxed: it is in fact fairly stressful and exhausting.

Surplus lands/Pre-Treaty transactions

In Muriwhenua, as at the Hokianga, the Bay of Islands and some other places there were a substantial number of pre-Treaty land transactions between Maori and Pakeha, occurring at a time when Maori sovereignty over these islands had been formally recognised by the British Government.There were three main categories in Muriwhenua during the 1830s. Firstly there were the official, and at least some of the private, missionary arrangements, an example being the the CMS Kerekere transaction at Kaitaia in 1834. These were entered into for the purposes of acquiring land for churches and mission buildings and for the homes of individual missionaries and their families. Secondly there were commercial timber-milling dealings, mostly clustered around the port of Mangonui, such as Thomas Ryan's Whakaangi transaction of 4 June 1836, and related ones whereby these fairly unsophisticated, sometimes illiterate men arranged some land for their families. (Unlike the missionaries, these rough sawyers often married into local Maori communities.)

Lastly there are a group of later (1838-40) transactions which can only be described as speculations. Some were made by professional men from New South Wales such as Clement Partridge; in other instances some of those involved with the missions themselves began to dabble in land speculation after it had become reasonably obvious that Great Britain was going to intervene in New Zealand. The largest, and in many ways the most problematic, of all these deals was the missionary Richard Taylor's acquisition of Muriwhenua North (the far northern end of the Aupouri peninsula), an area of 65,000 acres (20 January 1840).

These activities on the imperial frontier began to cause some concern to the Colonial Office by the late 1830s. In 1838 a select committee of the House of Lords recorded large quantities of evidence concerning land transfers in New Zealand.[6] That of Captain Robert Fitzroy, commander of the *Beagle* and later governor of New Zealand (1843-45) reveals a remarkably acute and sophisticated grasp of the conflicting assumptions of Maori and Pakeha participants in land dealings in northern New Zealand. Later, when Hobson's first set of instructions was prepared in 1839 he was informed that all future land transac-

tions between private purchasers and Maori were prohibited. All existing claimants were required to notify the New South Wales government of their claims, which was instructed in turn to set up a commission of inquiry. Proclamations to this effect were issued by Governor Gipps at Sydney in January 1840 and by Hobson in turn on his arrival on these shores.

Gipps pushed an act through the New South Wales legislative council in mid-1840 which prohibited private trafficking in land and which established the land claims commission. The act made Gipps very unpopular with certain commercial and landed interests in New South Wales. It contained a limit on the amount of land which could be granted by the Crown to any one whose land claim had received the blessing of the commission of inquiry - four square miles (2560 acres). Where Gipps plucked this number from is something of a mystery.[7] When in 1841 the Gipps act was replaced by a New Zealand ordinance the 2560-acre limit was retained. Herein lies the source of the 'surplus' lands.

The land claimants, a group which included such well-known personalities as James Busby and Charles de Thierry, became a very noisy pressure group whose activities plagued the government of the colony for decades. Many of them asserted rights to 'purchases' considerably in excess of 2560 acres. But that was the maximum they could have. Most did not receive anything like that. For various reasons some of them had to be satisfied with scrip to areas of Crown land elsewhere in the colony. Governor Fitzroy was later to muddy the waters terribly by approving many grants in excess of the 2560-acre limit, but his successor, Governor Grey, refused to ratify them. At all events a differential emerged between areas claimants said they had purchased and the amount of land they could legally receive. Over the whole country this differential added up to hundreds of thousands of acres. This is the 'surplus' land. The Crown claimed it as Crown land, and some areas of 'surplus' land in Muriwhenua are still Crown land today. But Maori argue that the 'surplus' should have gone back to them. By definition it was land which the claimants were not entitled to as they had not paid a 'fair' price for it - in which case (the claimants contend) there is little justification for the Crown taking it.

The process by which the crown enforced its claim was both complicated and protracted. Most of the transactions, including Muriwhenua, were investigated in 1842-43 by Commissioners Godfrey and Richmond. By 1856 the intractable chaos of the old land claims had reached such a level that it was necessary to remodel the whole process and re-investigate nearly all of them. In Muriwhenua this was conducted by Francis Dillon Bell in 1857. It was not until this time that proper surveys were done and the Crown was in a position to enforce its claim to the surplus, which it then proceeded to do. This in turn caused much Maori bewilderment and resentment.

It has become apparent through the course of the Muriwhenua hearings that it is very difficult to determine the justice of the Crown's claim to these lands without first enquiring into the nature of the original transactions. What, for instance, did the respective parties suppose they were doing when in 1840 Ngati Kuri and Aupouri chiefs 'sold' the Muriwhenua North block to the Reverend Richard Taylor? Did they intend to alienate it to him permanently and trek away somewhere else to live? It is at the point of interpreting these pre-Treaty transactions that the battle lines between the Crown and the claimants have suddenly become quite sharply defined.

Mr. Walzl's report for the Crown read at the July hearing at Awanui in 1991 was the opening salvo in this battle. Walzl argued that unless the written deeds had specifically provided for joint rights of occupancy it was reasonable to assume that the intention of both parties was to alienate the land fully and permanently. Walzl maintains:[8]

'The only evidence which is certain is that the European buyer believed that they were purchasing the complete title to land. Their deeds say this. Their claims say this. Having lived among Maori for upwards of eight years, the vendors and purchaser were not strangers. There were relationships. It is unlikely they as a group would set out to deceive their hosts. The amount of time spent in the area would have meant Europeans would have understood the basis of Maori land tenure. This would suggest that the European interpretation as reflected in the deeds of purchase would be the correct one.'

This bold thesis is rejected by the claimants, who are convinced that it simply is not possible that Maori could have grasped the concept of permanent alienation as early as the 1830s. Walzl's evidence is, however, well-documented and comprehensive, and has to be taken seriously. The claimant counterattack is on a number of fronts. The principal one to date has been linguistic. Dr Anne Salmond has presented evidence on the texts of the pre-1840 deeds. She has noticed that the Maori word usually rendered as 'sale' in the English versions of the deeds is 'tuku'. Based on a close analysis of Maori texts of the same date, principally the translations of the New Testament, she has argued that 'tuku' means not sell but implies an idea of reciprocal gift exchange. When Maori meant 'sale' the word used was 'hoko'; when later in the century the Crown took to using standard-form deeds printed in Maori they used the word 'hoko' for 'sell' although not invariably.[9] Whether linguistic evidence

of this kind is able to resolve the point definitively remains to be seen.

Crown purchases

There have been four major devices by which Maori land was alienated: pre-Treaty private purchase; Crown purchase; private purchase following investigation of title by the Native Land Court after 1865, and raupatu (confiscation). Although there were pre-Treaty deals in Muriwhenua before 1840 and although the Land Court sat there often after 1865 it was actually the Crown which was responsible by far for the bulk of alienated Maori land in the region. These Crown acquisitions included the Muriwhenua South purchase of 3 February 1858 (86,885 acres for £1,100), the Kohumaru one of 13 December 1859 (11,062 acres for £400) and the Ahipara of 13 December 1859 (9,470 acres for £700). These Crown purchases were concentrated in the years 1856-1865. By the time the Native Land Court got underway in 1865 there was not much customary Maori land left to investigate, nearly all of it in the most inaccessible parts of the region.

This process, by which Muriwhenua Maori managed to divest themselves of nearly all of the land in the region, needs to be explained. Just what is happening here? Significantly, the claimants have not particularly tried to insist that by 1860 Maori did not grasp the concept of permanent alienation. The issues revolve more around the adequacy of price and the provision for reserves. There has also been some discussion as to whether alienation of the coastal blocks meant that the Maori sellers intended to alienate their interest in the adjoining foreshore: a very important point in the case of Ninety Mile Beach.[10] Certainly with the Crown purchases there is a range of issues rather different from those connected with the pre-Treaty ones of earlier years and the Crown's claim to surplus lands.

The most obvious question, and the one which defies answering, is why Maori sold so much land to begin with. This problem is linked to one of the few historiographical debates of real substance in New Zealand historical writing. There are in fact two competing explanations which have been advanced to elucidate why Maori parted apparently so readily with so much of their land to the government's land purchase commissioners. The first is Anne Parsonson's well-known essay on 'The Pursuit of Mana' published in *The Oxford History of New Zealand* in 1981.[11] Here Parsonson argues that land was a buyer's and not a seller's market. She emphasises the conservatism and resilience of Maori society, and the continuation of traditional politics in new forms. One reason for land being sold was to prove mana over it. But Dr. Angela Ballara has criticised Parsonson's essay in a long paper published in the *Journal of the Polynesian Society*.[12] In what amounts to a sophisticated reworking of the 'fatal impact' theory Ballara emphasises other factors such as the way in which colonial institutions facilitated land alienation and the introduction of a cash-based economy. She also pays close attention to regional variations. Without wishing to caricature the approaches, it is fair to say that while Parsonson emphasises the continuity of Maori culture, Ballara stresses external changes.

How do these competing models fit the new evidence from Muriwhenua? There does appear to be some cause to support a 'pursuit of mana' explanation. Some chiefs do in fact seem to have become involved in selling land as a means of exerting their mana over land or people beyond their central or 'core' zones of authority, although not in their 'home' areas. But the main reality at least as far as the later rather than pre-Treaty alienations are concerned, is the humdrum and unsurprising one that Maori sold land because they needed the money. This is not as easy to document as might be supposed. We do not in fact know very much about how the money from land sales was distributed or what it was spent on. But there is much circumstantial evidence which indicates the rapid advance and dislocating effect of the cash economy into Muriwhenua. From as early as the 1850s, Maori were digging for kauri gum for sale. It seems also that the Ororu war, a major dispute which broke out amongst Muriwhenua Maori in 1843, was connected in some way with government meddling with the kauri timber trade at Mangonui. In any event, it is sobering to reflect that even after such intensive and prolonged study of this region the evidence does not readily allow either hypothesis to be fully tested.

It may be that the Crown can be faulted for keeping up a continuous pressure to sell with no thought being given to how Maori were supposed to sustain themselves once their land base had been alienated. This, however, is a contention which the Crown may be expected to dispute and which may not be regarded as persuasive by the Tribunal. It is certainly noticeable that getting title to contiguous blocks was very important to the Crown. In particular, the boundaries between Crown purchases and areas of 'surplus' often dovetail suspiciously neatly. The era of maximum Crown effort at land purchasing and that of surveying off the surpluses in the pre-Treaty purchase blocks coincided - circa 1857-62. During this time the Crown acquired a continuous swathe of Muriwhenua land stretching across the region from Ahipara to Mangonui. Why the emphasis on contiguous blocks? One hypothesis is that this is linked with the chaotic state of the nation's surveys at this time. Government officials in the 1860s complained on occasion that the absence

of a system of national triangulation could mean that boundaries on the maps could vary from the reality on the ground by distances measured in miles. Surveying, then as now, was horrendously expensive, particularly when lines had to be cut and pegged on the ground, often through dense bush and up and down steep mountains and gorges. It was therefore often cheaper to buy a block of Maori land in between Crown blocks than to survey the boundaries. Also the risk of numerous mistakes if one link in the chain was found to be seriously in error meant that from the Crown's perspective it was best to play safe by purchasing large connected blocks acquired from a number of directions. Reserves, by the same token, were a nuisance: they had to be surveyed off, and there was an incentive to keep them to the minimum.

Research issues

The Waitangi Tribunal process is leading to the accumulation of a huge amount of data on the history of Maori land alienation. It has been my experience that the existing literature on the subject is disappointingly scanty and what there is - with some well-known exceptions[13] - tends to be of limited usefulness. There is no good biography of even such a critical figure as Donald McLean. No really detailed and sophisticated history of an institution of such importance as the Native Land Court exists. We know little about the evolution of the Court, or about its judges, assessors, and procedure.

The Waitangi Tribunal turns an intense spotlight on certain areas - on Muriwhenua, for example, or the Ngai Tahu zone of the South Island. It is unlikely that an equivalent research effort into Muriwhenua history will ever be seen again. But much of this labour will be wasted if the commissioned research reports do not become generally accessible and are not routinely used by other historians, especially by those who prefer not to demean themselves by becoming involved in the grubby world of 'public history'. Scholars in the disciplines of New Zealand history, anthropology and Maori studies need to keep themselves well-informed about the Waitangi Tribunal process, and especially about the research reports now being produced at an accelerating rate.

To what extent does the Waitangi Tribunal compromise the objectivity and quality of the research? I would like to think that the answer is not much, or not at all. But the fact is that the Waitangi Tribunal process, for all the real cooperation between claimants and the Crown which undoubtedly does occur, is essentially adversarial. It is quite impossible to avoid this reality when researching and writing a report. One is acutely conscious that the study is being done in order to document the claimant's case against the Crown - or vice versa. One would hope that no witness would consciously suppress or ignore inconvenient evidence, but the process cannot but affect the selection of data for investigation and presentation, and more particularly what gets emphasised in the reports. There is a real risk of distortion; to pretend that this is non-existent is in my opinion foolish.

On the other hand, it should not be over-emphasised. Much of the research simply goes into unravelling the story. At this level there is ample room for cooperation between those working for the claimants, the Crown and the Tribunal itself. After a two-year effort involving the contributions of many people we are now beginning to get a detailed understanding of the history of Maori land alienation in just one small region. But of course it is at the level of interpretation and explanation of the material that the pressures caused by the process of litigation really begin to tell, and the risk of distortion and even politicisation of the evidence increases correspondingly.

A number of answers to the dilemma suggest themselves. One is that the adversarial process as a whole is likely to lead to a reliable understanding of what occurred even if individual reports may not. The Tribunal hears competing interpretations set against one another. It can then issue its findings after having been exposed to a thorough and well-tested range of evidence. On this view individual writers need not feel too perturbed about the leanings of their own conclusions, as they form only one small part of the comprehensive group of reports which the Tribunal ultimately gets to hear. Few historians, I suspect, would find such an approach congenial. No-one wants consciously to accept that their own work is in some sense 'slanted'.

Another way out of the dilemma is to argue that since all historical study is about the testing and falsification of hypotheses it does not particularly matter that these happen to derive from the exigencies of litigation. Another is to argue that even if there were no Waitangi Tribunal in existence, the current politicisation of the subject makes wholly detached analysis - supposing this to be a realistic aspiration - impossible in any case. Somewhat in this vein, a distinguished historian of North American government-Indian relations has written an essay on the 'curse of relevance': current political agendas cannot be ignored.[14] Thus writers of Waitangi Tribunal reports would not be in a very different situation should they be preparing a paper on the same material for some purpose unconnected with litigation. I think that this certainly is the case, but I am not sure that this resolves the problems faced by scholars who become involved in the Waitangi Tribunal's work. Somehow the tensions created by the demands of litigation and the obligations of one's own scholarly craft have

to be reconciled. The reality is that not always will this be possible, although usually it will be. There will always be occasions when a clear choice will have to be made.

To return to some of the other themes of this paper: certainly those involved in the process need the stimulus of on-going historiographical debate. This is not, however, something with which we are richly endowed. There is certainly a proliferation of new data which needs to be integrated into theoretical analysis. One can in the end plead for closer links between historians inside and outside the Waitangi Tribunal process.

From a Stout Research Centre seminar presented on 6 May 1992.

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FOOTNOTES

[1] *Evidence of R.P. Boast in Respect of Claim to Wharo Oneroa a Tohe/Ninety Mile Beach*, Feb 1991, (Wai-45 Doc # C3); R.P. Boast, *The Muriwhenua South and Ahipara Purchases: A report to the Waitangi Tribunal*, June 1991; rev. ed., March 1992.

[2] My involvement in this case was as a legal historian. I certainly do not profess expertise in Muriwhenua traditional history. For an excellent discussion of this see Waerete Norman, "The Muriwhenua Claim" in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press: Auckland: 1989), 180-210.

[3] Waitangi Tribunal, *Muriwhenua Fishing Report*, Wai 22, June 1988.

[4] These include: Barry Rigby and John Koning, *Toitu Te Whenua E: Only the land remains, constant and enduring: Muriwhenua Land Claim: A Preliminary Report on the Historical Evidence*, 4 December 1989; *Barry Rigby, The Muriwhenua North Area and the Muriwhenua Claim*, 7 November 1990; *The Oruru Area and Muriwhenua Claim*, 4 Feb 1991; *Empire on the Cheap: Crown Policies and Purchases in Muriwhenua 1840-1850*, 6 March 1992.

[5] See T. Walzl, *Pre-Treaty Muriwhenua*, June 1991 (text plus 6 vols. of supporting papers); T. Walzl, *Report on the Historical Issues Relating to the Taemaro Mediation* 1992.

[6] *Report from the Select Committee of the House of Lords appointed to inquire into the present state of the islands of New Zealand*, Great Britain Parliamentary Paper 1838/680.

[7] A likely source is the New South Wales land regulations of 1840.

[8] Walzl, *Pre-Treaty Muriwhenua*, 233.

[9] For a full discussion of these points see now Dr Margaret Mutu, *Tuku Whenua or Land Sale? - The Pre-Treaty Transactions of Muriwhenua*, a report to the Waitangi Tribunal, 1992.

[10] See R.P. Boast, *Evidence in respect of a claim to Wharo Oneroa a Tohe (Ninety-Mile Beach)* (Wai-45, Doc # C3), March 1991.

[11] Ann Parsonson, 'The Pursuit of Mana'. W.H. Oliver with B.R. Williams (eds): *The Oxford History of New Zealand:* Clarendon Press and Oxford University Press: Oxford and Auckland : 1981: pp 140-167.

[12] Angela Ballara, 'The Pursuit of Mana? A Re-Evaluation of the process of land alienation by Maoris, 1840-1860', *Journal of the Polynesian Society*, vol. 91, 1982, 519.

[13] Especially the Parsonson and Ballara articles already discussed: also Alan Ward, *A Show of Justice*, Auckland, 1974; M.P.K. Sorrenson, 'The Purchase of Maori lands, 1865-1892', M.A. thesis, University of Auckland, 1955; also his 'Land purchase methods and their effect on Maori population 1865-1901', *Journal of the Polynesian Society*, vol LXV, no. 3, September 1956.

[14] See Robert Clinton, 'The Curse of Relevance: An essay on the relationship of historical research to federal Indian litigation', *Arizona Law Review*, vol. 28, 1986, 29.